The Westward Expansion of the Bill of Rights

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THE WESTWARD EXPANSION OF THE BILL OF RIGHTS

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TABLE OF CONTENTS

CHAPTER I. A Bill of Rights.
CHAPTER II. The Bill of Rights Before 1787.
CHAPTER III. Articles of Doubtful Significance.
CHAPTER IV. The Union and Slavery.
CHAPTER V. Modern Trends.
CHAPTER VI. Conclusions.
CHAPTER I.

A BILL OF RIGHTS

One of the best descriptions of a bill of rights is given in a book published over fifty years ago. The author says, "They are for the departments of government what prudential maxims resulting from individual experience are for men in the ordinary concerns of life." Experience has taught us in the twenty centuries since the Christian religion has been a force in the world that prudential maxims resulting from individual experience are most important in this nation of ours and even more so in others. Too often the bill of rights is ignored by those we elect to represent us at our capital, both state and national, until something arises that interferes with their own private concerns just as the ten commandments are too often ignored by the citizen until something arises where he can use them to clinch one of his own arguments.

1. John A. Jameson, Constitutional Conventions, (The page giving the publisher's name is missing from this work.) Chicago, 1887.
As an outstanding example of how one man who professes no religion at all criticizes another who is an atheist for his sarcastic remarks about a third who was doing his best for humanity, I have found no equal. Both Wells and Clemenceau could quote the maxims taught by Christianity when they wanted to prove their point.
A bill of rights has not always been a maxim to govern the legislative and administrative actions of would-be statesmen. Originally it was something different. It was not to be taken as a matter of course and referred to only at election time and forgotten between campaigns. Before the United States emerged from thirteen separate colonies the theory of the divine right of kings was a very real idea in the minds of many men. It was the maxim that controlled the law-makers in many nations. With the exception of a few small places the law-maker was the king or men appointed by him. Under such circumstances the divine right theory would dominate the laws. All men were subjects in those nations where this theory was practiced. The ruler was all powerful and anything that the common man had in the way of rights were granted him by his superior. At times some men dared oppose the power

3. Encyclopedia Britannica, 14th Edition, Encyclopedia Britannica, Inc., Vol. XIII, p. 394, New York, 1930. "The theory of the Divine Right of Kings was due to Oriental influence brought to bear on Christianity. The idea of anointing kings was borrowed from the Old Testament by the Eastern Roman Empire. It was the main issue to be decided by the Civil War in the reign of Charles I in England."


Ibid. Vol. II, Chapter XXXI, p. 273. In France, "The essential characteristics of royalty as explained by Bosseut are first, that it is sacred; second, paternal; third, absolute; fourth, subject to reason." The statement of Louis XIV is also given: "I am the state."
over them but the opposition did not last where the ruler had a strong military force. The only time the common man gained was when the ruling class was divided into two contesting factions and resorted to force. At such a time, certain groups of people who were subservient to the nobility took sides in these contests. They had leaders who were shrewd enough to bargain for advantage before throwing their weight on one side or the other so that something in the way of concessions might be gained in the end.

The predecessors of the bill of rights were the charters that the towns received from the lords in return for financial aid at the time of the Crusades. In return for money to outfit an expedition to take part in a Crusade the lord gave the town a charter. A merchant class had grown up in the towns and were accumulating money by trading. The lord needed money and so he traded a charter


for cash. The charter idea expanded and in 1215 we have the first great example of a bill of rights where the people were considered as well as the lords. The Magna Charta was not a charter for a town or a limited group; it was more than that; it was a charter for the people of a nation and as such is called the Great Charter.

From the Great Charter as a precedent many of the provisions that were to form the most important parts of the bill of rights were developed. In many cases these provisions have continued right up to the present time in almost the same wording as they were expressed in 1215. But we should note that while the wording is almost identical the meaning of the words has become more liberal.

It has been stated that a source of revenue once discovered and used as a temporary means to raise funds is never abandoned. Whether true or not this plan of selling a charter as a means of securing ready cash, once started during the Crusades, continued. The lord received a sum of money that he needed at the time and the town received certain rights for those who had contributed the

7. The Great Charter, 40th Provision. To no one will we sell, to no one will we deny or delay, right or justice. Constitution of Louisiana, 1921. Art. I, Sec. 6. All courts shall be open, and every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay.
cash.

With the increase in trade the merchants and traders increased in importance and power. Another source of wealth in addition to the ownership of land came into being. The rulers recognized the fact that money or the tangible things that money could buy was becoming an important factor. The time came when the merchant was a power in the nation because of his command of ships and money. This was especially true in England. Later in the United States it was the railroad owners that were the powerful men. Those that controlled the most efficient means of transporting goods gained power. Until the development of the railroad, transportation on land was slow and expensive. On the other hand transportation by water was the quickest and cheapest. The merchant who owned the ships became the wealthy man and the king leaned toward him rather than toward the baron who had only land.


9. *Encyclopedia Britannica*, XV, p. 262. Explanation of the mercantile system and its effects on taxation. A national army instead of a feudal army increased the expenditures and the old land taxes were no longer sufficient. The kings turned to the merchants and trade for more money and encouraged trade so that the merchants would be better able to pay higher taxes.
As England became more united thru trade and transportation it was not the individual cities that demanded charter rights but the people as a whole. And not entirely all the people but those outstanding individuals in each community that had accumulated property thru trading. Thus we have the beginning of that term, a "bill of rights". The king needed money. The people would buy his agreement either as a cash sale or an agreement as to his right to levy taxes. The concessions they wanted were listed. According to definitions today a bill is a request for payment of a list of goods purchased. A bill of rights was a list of items that the people wanted. A merchant has a bill of goods for sale; a people has a bill of rights to be purchased. 10

By the time of the settlements in America many of these rights had become so common that they were known as "the natural rights of British subjects". 11 They were repeated in charters and in plans of government and altho not so many nor as varied as at present they were prized

10. *Encyclopedia Brittanica*, III, p. 578. Specifically a bill of rights refers to that one in England of 1689. Vol. III, p. 562. A bill. (1) Originally it meant a sealed document. (2) Later it referred to a proposed statute. (3) Still later it refers to a document and the word has been further extended as a bill of sale; bill of lading, etc. (4) In reference to government a formal list of statements.

and respected every time a question arose.  

Until 1763 constant wars in Europe and troubles at home kept the English sovereigns and the English government busy. But with the treaty of peace that ended the last French War in America they had time to fix their attention on their colonies on the other side of the Atlantic. We have often read of the English expression of "muddling thru". It is not a modern expression. The controversy with the American Colonies was not an important problem at first. A considerable number of Englishmen believed that they could adopt the "muddling thru" procedure and if the matter was let alone for a sufficient length of time it would right itself. But in this case they were dealing with a different type of Englishmen. People who have been sufficiently stirred to break all ties of one continent and emigrate to a savage wilderness are not the type of quiet individuals that will sit quietly under real or fancied impositions. They were a more impatient type and wanted quicker action. They had the inherited right of Englishmen as expressed in their charters when they landed in America and they intended to maintain them.  

13. Ibid., p. 6 and p. 214.  
In the colonies the people had legislatures that made the laws for the colony. The bill of rights had become a very real thing to them especially when the executive was a governor appointed by the King of England. This governor had the power to veto laws and in case his veto was objected to he could refer the law to his superiors in England. The bill of rights served to bolster up their opposition to the governor's power. As it took a long time to send to England and get a decision a strong stand on their rights often won their point. When the colonies broke away from England they retained their reverence for the bill of rights that had served them so well in the past.

When a state reaches the point where the people elect their legislative and executive powers it seems slightly incongruous to put a bill of rights into a constitution. It seems like guaranteeing the rights of the people against usurpation by the elected representatives of the people. But legislatures were not always trusted in those days.

A republican government in the early days of the United States did not mean the same as it does today. Under Thomas Jefferson who posed as a great believer in the rights of the common man only three percent of the population could vote. Mr. Jefferson said, "The ignorant mobs of the city could not be trusted with the ballot." But these same ignorant mobs were people and had rights to be protected so there was reason for a bill of rights. If Jefferson's convictions as to who should be permitted to vote had continued, the sixty percent of our people that compose those same "mobs" in the cities would be legally governed by the minority in the same manner as fifty-five percent of the people are governed and taxed today even with our own bill of rights in the Federal Constitution and the Constitution of Illinois.  

18. In 1828 after Jackson was elected and the suffrage had been greatly extended 9% of the population voted. This figure was arrived at by dividing the recorded vote given in the Chicago Daily News Almanac (1938) by the population for the same year. The population for Illinois in 1930 was 7,630,654 according to the United States census. The Constitution of the state provides that the population shall be divided by 51 to find the ratio of representation. This would give 149,620. The population of Cook County for the same year divided by the above ratio would be just about 26.5. As the constitution of the state commands the General Assembly to redistrict after each census, (which it has not done for years) Cook County has a representation of 19. Thus the agricultural minority governs the city majority. This is as Jefferson would have had it legally instead of unconstitutionally as it is in Illinois today.
The bill of rights was a part of the democratic plan in 1787. The men who drew up the Constitution believed that they had covered the subject in the Constitution itself and with the reference to the "blessings of Liberty" in the preamble. Jefferson and his followers believed that there should be more specific limitations on the power of the legislative government. Jefferson expressed his approval provided that the omission of a bill of rights should be corrected. His influence was such that the result was the first ten amendments.19

Nearly every year has seen another state constitution added to the list of American constitutions. Few states have had less than three and some have had six or seven. Some, like Vermont, has its original constitution with a series of amendments providing for changing ideas and conditions. On the other hand we have the prize for inflexibility in that of Illinois which is almost impossible to amend. Where such is the case the only recourse to keep up with the times is to draw up an entirely new instrument.20

20. The Illinois Constitution provides that an amendment shall be proposed by a two-thirds vote of the General Assembly and placed on the ballot at the next general
As time goes on and conditions change some items are dropped from the bill of rights. Some items become so common-place to the people that they no longer regard it as necessary that they be mentioned. It becomes such an item as an axiom is in geometry, a truth that is so plain and simple that it requires no proof. But other items come to the front and appear in the new constitutions and are copied in others as they appear. A fact that strikes one who studies these instruments is that the longest documents with the most involved paragraphs seem to have the

20. (continued) election. At the general election if it receives a majority of all votes cast it becomes a part of the constitution. The difficulty is in the words, "a majority of all votes cast". The vast majority of voters at a general election are interested in the candidates for office and not in the small ballot attached. They are in too much of a hurry or too lazy to read the small ballot and as a result the majority make no mark on the small ballot. When the votes are counted usually the number of those who voted "yes" on the amendment far exceeds the number who voted "no". But as the affirmative must have a majority of all votes cast the unmarked ballots are counted as "no".

Attempts have been made to call a constitutional convention to draw up an up-to-date instrument. When Len Small was governor an attempt was made but the Democrats blocked the proposition in the House of Representatives. When asked the reason they stated that they "wouldn't trust that gang of Small's to draw up a new constitution". In 1938 the Democrats tried to vote on calling a convention and the Republicans blocked the plan. When asked why they answered, they "would not trust that gang in power to draw up a new constitution".
shortest lives. One of the briefest of the many constitutions is that of Vermont which dates from 1787. The very shortest and the one with the fewest changes, considering its age is that of the United States. On the other hand the longest and most complicated were those drawn up by the "carpet-bag" governments in the South right after the Civil War. Most of these lasted for less than ten years.

The lawyers that usually compose a high percentage of conventions go in for long complicated paragraphs but the people are impatient when it comes to accepting them. Years ago Elihu Root was the prime mover in a constitution for New York. When it was completed it was rather a bulky volume and the voters turned it down.

Whether the constitution is for a long period or a short one; whether it is a short and concise document or a bulky affair like those of Louisiana and Oklahoma today; whether it is drawn up by a boss-ridden state as Louisiana was when its latest was revised in 1935, or a democratic group like Idaho in 1889, a bill of rights always appears.

21. The Constitution of the United States had ten amendments added by the first Congress. That left eleven changes between 1790 and 1940, a hundred and fifty years. Two of these eleven cancelled one another so we really have nine changes in a period of one hundred and fifty years.
The people seem to insist that their law makers have their list of maxims to follow just as the religious scoffer sends his children to Sunday School.

Possibly when public and private maxims of conduct disappear and are no longer considered important, we, too, may have a Hitler or a Stalin to tell us what we should believe and what we must do.
CHAPTER II.
THE BILL OF RIGHTS BEFORE 1787

The Bill of Rights, as expressed in the Constitution of the United States, is the first ten amendments of the Constitution. Of these ten amendments eight can be traced to English origins with additions and improvements under colonial charters and early state constitutions.

Before July 4, 1776, the people of the United States were subjects of His Majesty, King George III. Between the date of the Declaration of Independence and the drawing up of the Federal instrument of government we get away from the idea of subjects of a British King and find the constitutions mentioning the people of the Commonwealth of Massachusetts or the people of New Hampshire and so on.

During that period we had an orgy of constitution making. Charters had to be changed and were changed and everybody seemed to think that anyone had the ability and the necessary background to draw up a constitution.1 When the time came to draw up the Federal document we had the best

men in the nation to do the job. They did the best job of constitution making that has been done at any time in the history of the world. But they left out the bill of rights and it was left to the states to demand this addition.

Because several states ratified the Constitution only upon condition that it be amended to include those rights that they deemed more important than anything else, the first Congress proposed twelve amendments of which ten were quickly ratified by all but two of the states.

The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting

Quotation from Gladstone, "as the British constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man".
the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

In order to trace the origin of this amendment it must be broken up into several parts. It is composed of a number of rights that had been developed in England and in the colonies and then gathered into one statement here. In the state constitutions to follow 1787 it is divided into numerous separate articles.

One fact should be mentioned at this time. A bill of rights protects the rights of the people against unjust laws on the part of the law-making body. This amendment as well as the others do not give any power to Congress. They are limitations on the power of Congress.5 We should remember that the first Congress was a new departure in the experience of the American people. It was a body representing what had been, up to that date, thirteen independent states who were more or less hostile to one another. Each one was jealous of any power that one might have over the other and all tended to regard the government with some

degree of suspicion if not actual hostility. The first work carried on by the new Congress was to propose to the states these amendments to limit its own power.

The first part specifies that Congress shall make no law respecting the establishment of religion or prohibiting the free practice of religion. Nothing is said about this power extending beyond the power of Congress. Nothing is mentioned that will limit the power of the states to pass laws on this subject. The people are simply protected from interference by Congress with their religious practices.

The subject of the free practice of religion had been a subject for argument in England for a long period before the settlement of America. The lack of religious toleration had been one of the motives that had brought about some of those very settlements. On the other hand some of these very people who had left Europe for religious


7. In some works they mention the fact that Congress interfered with the Mormon religion in Utah. There was no interference with the religion but prosecution was threatened because the practice of polygamy was contrary to the laws of the United States. The state constitutions usually add another paragraph to the bill of rights to avoid argument.

reasons turned around and made laws on this same subject. In some cases they were just as intolerant of others as the authorities in England.\(^9\)

There had been controversies on the subject of religion in England ever since William the Conqueror had established himself there.\(^10\) Under King John the question of religion was a very serious problem to the people when they considered their allegiance to the sovereign.\(^11\) From time to time questions arose until we come to the time of Henry VIII and his break with the Roman Catholic Church.\(^12\) If the sovereign could break with the established church and establish another more to his liking there was further room for argument. If the King of England could establish a church in defiance of the highest power known to Christendom why couldn't some other individual be right and Henry be wrong as well as the Pope? And it wasn't long before there were others to object to religious affairs as directed by the crown.

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The first step in religious freedom occurred in 1648 when we find that it is stated that those who believe in Jesus Christ and who are not Roman Catholics may worship as they please. This is not much toward toleration but it is something; it goes from an established state church to one that permits freedom for all Protestants.\textsuperscript{13} Even tho religion entered into the quarrels that resulted in the Civil War, there was not freedom of religion under Cromwell any more than there had been under the kings before him.\textsuperscript{14}

Under Charles II the Declaration of Indulgence was promulgated but the Test Act by Parliament prevented any great advance. While Roman Catholics were granted freedom, the Test Act prevented their holding office and even to this day neither the Prime Minister nor the King can be a Roman Catholic.\textsuperscript{15}

In 1689, under the Toleration Act, Quakers were excused from taking oaths in a court and were permitted to affirm.\textsuperscript{16} Later more liberty was granted but at this point some of


\textsuperscript{14} Ibid. p. 83.


the colonies in America went farther than the government of England and our interest in the subject crossed the Atlantic.

Maryland was the first to allow religious toleration in 1649. Rhode Island followed in 1663. Pennsylvania guaranteed freedom of conscience in 1701. But in all of these cases the freedom was limited to Christians. Massachusetts permitted freedom to all Christians except Roman Catholics in 1691. New York granted freedom to all Christians in 1665. Carolina, under the charter from Charles II, granted freedom to all non-conformists as long as they did not disturb the peace. With the best record, as far as its history is concerned, Georgia ranks first. Religious freedom was a part of its charter in 1732. Georgia had a hundred percent of its colonial period under a charter that granted religious freedom but it was settled at a late date and its history began when the others were making advances.

None of these laws were complete in their granting of freedom. There were various limits set to the freedom permitted. In some cases an established church was supported by taxation to which believers and non-conformists alike contributed. But this first amendment to the Constitution set at rest the fears of each state as to any restriction it might have on religion. Whether the state permitted religious freedom to all, to some, or to none, yet Congress could not interfere.

The first complete permit as far as religion is concerned goes to that much abused body, the Congress, under the Articles of Confederation. The laws might be ignored by the states and the members regarded with amusement but it was this body that drew up the Ordinance of 1787. In this document religious freedom is guaranteed with no exceptions or strings attached. This is the only case where the national government not only permitted but guaranteed religious freedom in any of the territories that nor compose the forty-eight states.¹⁹

Article I. "No person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship or religious sentiments, in said territory."
Since 1787 state constitutions have grown more liberal and enlarged on religious freedom. Where the Federal Bill of Rights contents itself with a part of a sentence the states go farther. In many cases there are five distinct provisions on this subject. They promise that there shall be no interference with the practice of religion and prohibit the establishment of a state religion. A second sentence and in some cases another article adds the condition that such practices must not be used to excuse acts that are contrary to the criminal law. The third point usually states that no religious test shall be required for public office. The earlier constitutions usually have this item but later documents omit it. The fourth point is sometimes combined with the second and states that the freedom granted does not excuse one from taking oaths or affirmations. The last and the one that persists in the bill of rights even when the others are left out is the one that provides that no money shall ever be appropriated in support of any institution that is in any way connected with any

20. Illinois Constitution. (1870) Art. II, Sec. 5. "--but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state."

New Hampshire Constitution. (1783) Art. 6. "--provided he does not disturb the public peace or disturb others in their religious worship."
religious organization. In the constitution of Oklahoma ratified in 1907 this is the only reference to freedom of religion in the bill of rights.\textsuperscript{21}

There are a few differences that should be noted here. In Texas, Pennsylvania, and Maryland an office-holder must believe in a Supreme Being.\textsuperscript{22}

Missouri has a provision that all clergymen and all persons interested in church finances of any denomination should appreciate. It states that even tho there can be no interference with any religion yet if any individual promises financial support to any religious denomination

\begin{itemize}
\item \textsuperscript{21} Oklahoma Constitution. (1907) Art. II, Sec. 5. "No public money shall ever be appropriated, applied, donated, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious dignitary, or sectarian institution as such."
\item \textsuperscript{22} Texas Constitution. (1876) Art. I, Sec. 4. "No religious test shall ever be required as a qualification to any office or public trust in this state; nor shall anyone be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being."
\item Pennsylvania Constitution. (1873) Art. I, Sec. 4. "No person who acknowledges the being of a God, and a future state of rewards and punishments shall on account of his religious sentiments be disqualified to hold office or place of trust or profit under this Commonwealth."
\item Maryland Constitution. (1867) Art. 37. "That no religious test ought ever to be required as a qualification for any office of profit or trust in this state, other than a belief in the existence of God."
\end{itemize}
he shall be held to that promise. 23

Mississippi puts in a condition that the promise of freedom of religion must not be taken as prohibiting the reading of the Bible in schools. 24 Maryland restricts the amount of land to be held by religious organizations without the consent of the government. 25

It is interesting to note that, except for Pennsylvania, all deviations from the regular order in the states happen to be in those states that have been considered for years as a part of the "solid south". One might conclude that there is no accounting for some of them when one considers the electoral map of 1928. They would even let religious prejudice overcome the habits of two generations.

The next part of the first amendment, "--or abridging the freedom of speech or of the press", is usually copied in state constitutions with the addition of a provision

23. Missouri. Constitution of 1875. Art. I, Sec. 5."--but if any person shall voluntarily make a contract for any such object he shall be held to the performance of the same. (Referring to the support of religion.)

24. Mississippi. Constitution of 1890. Art. 3, Sec. 18. "The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school in this state.

25. Maryland. Art. 38. (Edition of 1867.) "Every gift -- to any religious organization except any quantity of land not to exceed five acres without the consent of the legislature shall be void."
that one is responsible for the truth of what he states or publishes.

This is the earliest restriction on interference with the press without conditions of any kind. There was an act of censorship passed in England under Charles II and James II. It was renewed under William and Mary in 1692. It was later allowed to expire and there was no question of censorship except the laws concerning libel and sedition. The exceptions look innocent to us today but that word "sedition" was the flaw in the perfect freedom. In a later chapter we will have something to say of sedition and treason. Treason is defined in the United States but in England there was no definition and the judges interpreted it according to their lights.

Eight of the thirteen states confirmed the freedom of the press as expressed in the Bill of Rights under William and Mary. The national constitution prohibited Congress from any interference at all and later the states, one by one, removed all conditions.

Freedom of speech and especially of the press has

reached the point where it is often abused. The problem is where to draw the line in order to correct abuses. A check on indiscriminate statements about political figures was imposed by Theodore Roosevelt in 1913 when he sued the editor of the Iron Ore in Ishpeming, Michigan. But there is still room for improvement.29 The truth can be told in such a way that it may be more damaging than outright libel, yet human nature being what it is, we do not know whom to trust to say this is permissible and this is not. In 1918 a young man was threatened with jail because he said he enjoyed German music. All of the states today have included in the bill of rights the provision for freedom of the press and of speech and in almost the same words.30

The next part of this amendment has a longer history than that about the freedom of speech. Congress has no right to interfere with freedom of assembly or the right to petition for a redress of grievances. The meeting to force King John to sign the Great Charter was an assembly to pre-

29. Wm. R. Thayer, Theodore Roosevelt, Houghton, Mifflin Co., New York, 1919, p. 397. Mr. Thayer's account is correct even tho it disagrees with other published accounts. The writer of this paper was a student of U. S. History in Marquette, Michigan, in 1913 and attended the trial even tho getting in a couple of times meant slipping in thru the coal bin.

30. Maryland, New Hampshire and North Carolina used the word "ought" in stating this right. The other states say "Every person may freely speak." North Carolina states that the right "ought not to be restrained".
sent a petition for a redress of grievances. Whenever there was a contest with the king there was an assembly of some kind and a petition of some sort to be presented. Our provisions on this point insert the word "orderly". The early assemblies in England might not have fitted into our plan of an orderly assembly but their idea of orderly might have differed from ours. We let Congress interfere with assemblies that are not orderly.

In the Bill of Rights as recognized by William and Mary in 1689 the right of assembly and petition is an important item. When the controversy between the colonies and the British Government began, petitions were the first evidence to reach England, and the First Continental Congress was an assembly to present a petition for the redress of grievances. The right was mentioned in numerous state instruments of government before 1781. It appears in every state constitution except that of New Mexico. In Maryland only the right of petition is mentioned but this

32. Precedents for freedom of speech and of the press in state constitutions:
Penn. 1776 XII Mass. 1780 XVI N.C. 1776 XV
Virginia 1776 12 Vermont 1784 1-15 Georgia 1777 LXI
Vermont 1777 1-14 Md. 1776 XXXVIII N.H. 1782 1-24
Amendments by ratifying conventions:
Maryland Pennsylvania
Virginia North Carolina
Also proposed by Pinckney in the convention in 1787.
is the only one that omits the first half of the provision.

There have been examples of interference with one or another of these rights. The one that created the greatest stir occurred during the slavery controversy in Congress around 1840 when John Quincy Adams insisted in upholding the right of petition. Even tho feeling ran high Mr. Adams stood on his constitutional rights and stated that the law suppressing certain petitions violated the Constitution. Thru his efforts the obnoxious rule was allowed to lapse. 33

The second amendment states, "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The common idea of militia, in the minds of the majority of people, is the National Guard. This inaccurate definition is further encouraged by the public press when they spread head-lines across the paper whenever there is trouble as, "Governor calls out the militia to keep order". The truth is the governor calls out the National Guard which is the organized state militia. The militia itself means every able-bodied male between the ages of 18 and 45. In the

states it usually means every able-bodied male between those ages. Calling forth the militia would be a frightful mess. It was tried once in the War of 1812 to defend Washington and according to one writer the only casualty was the one man who broke his leg in getting away. The rest got away safely.

This provision concerning the right to bear arms ties up with the other items in the state constitution. Where the Federal Constitution contents itself with prohibiting Congress from passing any law to prohibit the bearing of arms, the states, in the majority of cases, add two further provisions. They prohibit the keeping of a standing army in time of peace and the further requirement that the military shall always be subservient to the civil power.

The right to bear arms dates from the days of the Teutonic tribes. In 1181 every freeman was required to have arms.34 Until the invention of gunpowder the army was composed of the knights and lords and their followers. When the power of the nobles decreased as the rulers began to draw increased revenue from the merchants and traders it became more difficult for the average man to own arms because

of the increased cost. At the same time the ruler had a powerful standing army to enforce his will on the nation.

The Bill of Rights of 1689 affirmed the right to bear arms and limited the power of the King over the army. We have a connection here with the imposition of martial law. Also there is a bearing on the privilege of the writ of habeas corpus.

Under martial law there is a quick trial by a board of army officers and there is no reason given for the detention of prisoners. The usual punishment is death. Later there may be other evidence found that the person was innocent but the punishment has already been meted out and there is no way of correcting a death sentence. Injustice and unfair trials are frequent under such circumstances. Because the tendency of the military forces to take over everything where they are in control, the power of the army is limited by the provision in the bill of rights or in the constitution itself by making certain that the executive, who is a

35. I have tried to find material regarding the cost of a gun as compared with income in 1600-1700. Definite information is difficult to find but from scattered sources I gather that a reliable musket compared with the average man's earnings in 1620 about as one of the higher priced cars does today. And there were no finance companies to arrange for deferred payments. It had to be cash on the line.

civilian, is made commander-in-chief of the armed forces.

The right to bear arms was more important to the people of the colonies than it was to the people of England. With the average Englishman there was little or no danger of attack from a foreign foe. In America every settlement, at one time or another, had been in danger of an Indian attack. There were, in addition, four wars with the French, one with the Dutch, and numerous alarms because of Spanish threats. There was no regular army and none was needed; the militia meant something at that time.

On the frontier every boy, as soon as he was big enough to stand at a loop-hole, was called upon to do his part in repelling Indian attacks. Militia, as defined today, was the same thing then but with the additional factor that every able-bodied male over the age of fourteen to the end of his life had been under fire. Today the militia is a vast army of inexperienced men. In colonial days the militia, away from the coast, was composed of men and boys who had had experience and in almost every case was a veteran. And a veteran did not mean a man who had worn a uniform for sixty days in a training camp or behind a desk, but it meant a man who had survived one or more engagements with

the Indians. The right to bear arms meant the difference between survival and massacre.

The battles of Lexington and Concord were typically American engagements where the citizens rose and drove the trained soldiers of England back to their fortifications. Bunker Hill furnishes an example of untrained citizens facing trained regulars and standing until they ran out of ammunition. No inexperienced men with inexperienced officers could have done this. The battle of Oriskany is a marvel to military men throughout the world. According to many authorities if your force loses ten percent in casualties it is hard to hold the men unless artillery fire makes the rear more unsafe than to go forward. At Oriskany the American force was ambushed, the leader wounded, and yet the army held and drove back their opponents. The casualty list exceeded fifty percent killed and wounded. One may say that there have been cases where men have fought until the last one was destroyed as at the Alamo and various other famous engagements, but in those cases there was no retreat and to surrender meant death. They were cornered and had keyed themselves up to the emotional pitch where retreat was not to be thought of even if it had been possible. At

Oriskany retreat was possible and yet they fought on and won. The answer is that these men were not militia in the sense of today but were veterans of Indian warfare. 39

A century of facing sudden Indian attacks and fighting the French in repeated wars had made the right to bear arms a very real thing to the colonists. Without arms they would not survive. The trained regulars did not impress the colonists, especially after Braddock's disastrous expedition. 40

Congress is forbidden to interfere with the bearing of arms but nothing is said in the bill of rights about the military being subservient to the civil power. That appears in the Constitution itself under the powers of the President. 41 Naturally there would be no prohibition on the power of the nation to maintain a standing army in time of peace as protection against foreign aggression was one of the reasons

War Department courses for reserve officers stress the fact that the officer's task in holding his men to an attack becomes more difficult when the casualty list reaches ten percent before actual contact with the enemy has been established.


41. Constitution of the United States. Art. II, Sec. 2. "The President shall be Commander-in-Chief of the Army and Navy and of the Militia of the several states when called into actual service of the United States." Thus a civilian is provided as the supreme commander of the armed forces.
for forming the Union and the drawing up of the Constitution. But the military establishment was under the control of Congress.

In the states this amendment is copied word for word in the earlier constitutions. In nineteen constitutions they add another paragraph prohibiting the keeping of standing armies in time of peace even tho this is also forbidden to the states by the Constitution of the United States. All but four of the states provide that the military must be subservient to the civil power and this is repeated in another form by all of them by the words, "The governor shall be commander-in-chief of the military and naval forces in the state."

Since 1870 the new constitutions have been adding another article to these provisions. Oftener and oftener this sentence appears, "But nothing in this article shall be construed to prohibit the making of laws to regulate

43. Preamble of the Constitution. "--to provide for the common defense."
44. Constitution of the United States. Art. I, Sec. 10. "No state shall without the consent of Congress---keep troops or ships of war in time of peace---."
the carrying of concealed weapons."45

"No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law."

Quartering had been used as a means of coercing a rebellious province. Louis XIV used this system on the Huguenots.46 Charles I had used this plan to bring his people to time.47 A law in the reign of Charles II had forbidden the system. Under George II it was complained of and was one of the grievances in the Declaration of Rights and the Declaration of Independence.48

Prohibitions against quartering appeared in early

45. Louisiana Constitution. (Revised 1934) Art. I, Sec. 8. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry concealed weapons.


48. Precedents in State Constitutions to prohibit quartering.

Maryland 1776 XXVIII
New York 1777 Preamble
Massachusetts 1780 Declaration of Rights, XXVII
New Hampshire 1784 1-27

In the amendments proposed by ratifying conventions in 1787-1788 Pennsylvania, Maryland, New Hampshire, Virginia, and North Carolina all proposed a prohibition on the quartering of soldiers in time of peace.
documents in the colonies.\(^{49}\) When the amendments to the Constitution went into effect it was the subject of the third and has been copied in every bill of rights up to the last few years. Some of the latter bills have left it out.

In justice to those nations where the practice is followed it must be observed that quartering was not considered particularly necessary in the United States. Our early settlers were able to make themselves comfortable in the open. At the present day even in settled areas around Chicago it is possible to take a troop of Boy Scouts out and camp in the open. Less than ten years ago the writer took twenty-eight boys ranging in age from 8 to 14 on a three day trip with no tents or buildings available and had an enjoyable trip and brought them all back without an accident of any kind. In other parts of the country notably in the Northern Peninsula of Michigan I have seen a group of 14 year old boys go out in the winter with five days provisions and three blankets each and camp in the woods with the temperature down to zero.

When our soldiers went to France in 1917-1918 they were

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quartered in French homes. Rather the officers were quartered in the homes and the enlisted men in the barns and it is agreed by most of them that the enlisted men had the best of the assignment. I have seen cases where enlisted men were quartered in barns and sheds and complained until they were allowed to set up their pup-tents in the field.

Quartering is an obnoxious idea to the average American. It is one of the hardest points to explain to a class in civics. Once they have understood the matter they express surprise that anyone should permit such a practice and further surprise that the soldier himself should want to be imposed on the privacy of strangers. 50

That additional portion that mentions quartering according to law in time of war is just so much padding. In time of war all bets are off and the soldier is a law unto himself as long as he doesn't get caught in minor depreda-

Several years ago the Illinois National Guard was taken across Lake Michigan for summer maneuvers. They landed near St. Joseph and spent ten days marching and camping in the open. Several boys from the Farragut High School in Chicago were with the infantry. When they returned they could hardly wait until they could tell us of their experiences and the various schemes they had learned so that they might be comfortable away from barracks or tents. This was the first experience of this kind for them.
tions. Even in time of peace a farmer's hay-stack will suffer near a line of march unless the officers put a guard over it. Ordinary precepts of honesty are not applied. With the soldier anything is right as long as he doesn't get caught and reported to his superiors.51

The fourth part of the Bill of Rights prohibits the searching of homes or property without a search-warrant. This is essentially an American addition to the Bill of Rights.

At times we read of interference with the property and persons of citizens of England. The historian simply states that the search or seizure is an abuse of power and nothing is said of any steps taken to correct the practice. During the reign of Richard II an attempted seizure by a tax-collector was responsible for an uprising.52 The pressing of men for the British Navy has been given considerable attention especially in fiction.53

51. Lloyd Lewis, Sherman, Fighting Prophet, Harcourt, Brace and Co., New York, 1932, Chapters 40 and 41. Read these chapters and then get the civilian's narrow attitude when war strikes home from "Gone With the Wind". To get the European idea of how shelter is necessary and the soldier's attitude toward private property consult Erich M. Remarque's All Quiet On The Western Front, Grosset and Dunlap, New York, 1930.
53. The fourteenth edition of the Encyclopedia Brittanica, under impressment states that aside from the impressment of sailors it was never legal in England. The practice was
The greatest protest against unwarranted searches came in Massachusetts where the "writs of assistance" were permitted in order that smuggling should be stopped. The practice was further aggravated in as much as the writs were used by the King's officers sent out from England and backed by the army quartered in Massachusetts. The abuse is mentioned in the Declaration of Rights and in the Declaration of Independence.

The precept taken from the English common law that an Englishman's home is his castle was given voice and strengthened by the Federal Constitution. The three states that omit this article have had their constitutions revised in the last twenty-five years. New York insists on a revision every ten years. The present constitution of Michigan was ratified in 1908. The amending of Michigan's constitution is a simple matter so that this omission has been corrected. In 1928 at the general election no less than five separate small ballots for amendments to the state constitution were handed the voter. This makes it simple for the state to rectify the omission in the bill of rights.

The omission of this important item became important. In Gogebic County, Michigan, in 1921 the state constabulary abolished in 1640 but the impressment of sailors was legalized by statute. Even at the present time impressment of vehicles and maritime supplies are permitted by law in England in time of emergency.
entered homes to look for stills without a warrant. There was considerable discussion in the country at the time as to the right of search and the people had the mistaken idea that this right was protected by the Federal Constitution. A study of the problem soon showed that this applied to United States officers only and not to the state police. The omission of this article combined with certain laws passed to enforce the eighteenth amendment gave the police more power than they enjoyed in other states. Certain other laws intended to enforce the game and fishing restrictions together with laws to protect the forest areas of the state have been rigorously carried out because there was no law restraining the right to enter and search. As late as 1939 the state conservation officers exhibited authorization to inspect summer cottages for fire hazards and then looked in the ice-boxes for game shot out of season. Michigan seems to be the one state that has left out this early colonial right with the intent to protect the game and enforce the fire laws in the woods. In 1936 the constitution was amended leaving only two states without this protection. 54

54. In 1939 in Marquette County, Michigan officers went thru every building in a summer camp and no protest was made by the owner. In 1938 in Alger County, Michigan, the owner of a cottage warned visitors not to leave undersized trout in the ice-box as the game warden would look there. The inference was that he had a right to enter and search. The paragraph as written in 1936 has a condition attached to it. It is the only one of the 46 states that has a condition.
Articles V and VI of the bill of rights are taken together. In the state constitutions they are divided into numerous paragraphs sometimes in the same order as given in the United States Constitution and at other times in different form but, together with the provisions regarding the writ of habeas corpus and the Bill of Attainder and the Ex Post Facto laws, the majority of the provisions are mentioned in every bill of rights. 55

The earliest attempt at putting these rights into form so that the average man would know and understand what his

55. Constitution of the United States. Article V.
No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be put in jeapordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VI. In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall previously have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article I. Sec. 9. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may demand it. No Bill of Attainder or ex post facto law shall be passed.
rights were occurred when the Great Charter was signed. In that document it said, "No freeman shall be taken or imprisoned or disseized, or outlawed, or banished, or any way destroyed nor shall we pass upon him, unless by the lawful judgment of his peers, or by the law of the land." This quotation gives rise to the question as to just what is meant by "lawful judgment of his peers". In order to arrive at this meaning we must go back to the Assize of Clarendon in 1166. Here it was decided that there should be twelve freemen selected to bring an accusation and they should decide on the guilt or innocence of the accused person. This body combined the functions of both the grand jury and the trial jury. The procedure was imperfect but it was a beginning whereby the right of judgment was taken from the lord and placed upon the shoulders of a group of citizens.

At the same time as this reform was begun in removing some of the abuses of false accusations we have a start on the use of the writ of habeas corpus and the other rights enumerated in Articles V and VI. Between the years 1154 and 1216 we have general improvements along these lines. Among these were laws that provided for the punishment of

57. Ibid., p. 39.
of those on the jury who brought false accusations. 58

The privilege of the writ of habeas corpus continued to grow in importance and the rights of an accused person kept pace with it but three abuses continued until 1679 when they were corrected. 59

Ex Post Facto laws were always frowned upon by the people of England and did not attain the height of abuse there that they did in nations on the continent of Europe. The Bill of Attainder was used especially in punishments for treason. It is not mentioned in the first ten amendments of the Constitution but is included in the body of the document instead. 60

In order to trace the development of these provisions one would have to prepare an outline of English history from the time of William the Conqueror to 1776. The matter was a gradual and continuous growth culminating in the provisions quoted and with numerous instances of their repetition in the state constitutions before 1787. 61

61. Precedents for Article V. Magna Charta (1215) 39. Laws of Rhode Island (1663) North Carolina (1792) in which the earlier confirmations are cited. State Constitutions of Pennsylvania (1776) VIII; Vermont (1777) 1-10 and (1786) 1-11; New Hampshire
The protection of the accused person has been repeated in every state constitution. In nearly all cases they are in the bill of rights. Where they are omitted from the bill of rights they appear in that part of the constitution devoted to the judicial department. The two paragraphs concerning the bill of attainder and the ex post facto law are mentioned in some and left out of others. Whether mentioned or not they are not important in a state constitution as this abuse has been forbidden the states by the United States Constitution. 62

Criticism has been directed against this part of the bill of rights especially in the cities. This is not due to any defect in the provisions themselves but in the manner in which they protect a criminal from punishment. The specific portion is that part that guarantees the accused

61. (continued) (1784) 1-15, 16; Maryland (1776) XVI; Massachusetts (1780) XII, XV: Amendments by ratifying conventions in 1788, Maryland and North Carolina. Precedents for Article VI. Magna Charta (1215) 40; Petition of Rights (1628) Sec. 10; Declaration of Rights, (Oct. 19, 1765); Declaration of Independence (July 4, 1776). State Constitutions, Pennsylvania (1776) IX; Virginia (1776) 8; Vermont (1777) 10, and (1786) 1-11; Massachusetts (1780) X-XIV; Maryland (1776) XIX; North Carolina (1776) VII-XIV; New York (1777) Preamble; New Hampshire (1784) I. In the conventions ratifying the Constitution Pennsylvania, Massachusetts, Maryland, North Carolina, and Virginia added this article as an amendment.

62. Article II, Sec. 10. "---pass any bill of attainder, ex post facto law."
person a speedy trial but neglects to state that the state is also entitled to a speedy end of the case wherever possible. By delays an obviously guilty person may be acquitted by delaying trial until witnesses die or disappear.

In Chicago justice is slow and expensive and often fails to be justice at all. The Illinois constitution contains all of the provisions protecting the person accused of crime. A comparison with English court procedure shows that we have leaned over backwards on this point. A suggested correction would be an increased interest on the part of the public in making selections of those who are to administer the law.

The next article mentions excessive bail, excessive fines, and cruel and unusual punishments. These points were the objections to the proper use of the writ of habeas corpus corrected in the reign of William and Mary. In 1681 some of the arbitrary fines were abolished in England. In 1689 all three abuses were corrected. The objection is sometimes made that there should be some definition as to what is meant by "excessive", "cruel", and "unusual". The

answer is that the definition depends on public opinion at any given time. At one time or another in the history of a nation punishment that will be regarded as cruel in one place will be considered as the usual thing in another. Washington protested the prohibition of flogging as a punishment in the army. Today such a punishment would be regarded with horror except by the Ku Klux Klan. The statement as made permits the necessary latitude for changing times and opinions.

With the exception of Utah, Vermont, and California this provision occurs in all of the state constitutions. In some cases the part about excessive bail is left out but this is taken care of in another section by the words, "All cases shall be bailable by sufficient sureties." Where any portion is omitted it is in a recent constitution except in the case of Vermont. But Vermont has been an exception in many cases. It was the first state to allow complete freedom of religion and also the first to prohibit slavery in the bill of rights.

66. In 1911 Warden Russell of the branch prison in Marquette, Michigan, was investigated by various organizations because it was generally known that the men were flogged as a punishment. The practice was allowed to continue and the people in the vicinity who had had experience with paroled convicts protested that he needed that power to punish prisoners. Today the same state has built a prison in another part of the state where no punishment of this kind is tolerated and even solitary confinement is frowned upon.
Article VII needs little comment and only serves to show how the definitions mentioned on the previous page might hamper the interpretation of the article itself. This article provides for jury trials in civil suits where the amount in controversy is in excess of $20.00. In 1789 $20.00 was a considerable sum in purchasing power. Today the amount is not apt to figure in a suit in a Federal court. This item has lapsed because of the value expressed. There are few repetitions of this provision in state constitutions and none copy the article as here stated. The right is taken care of in that part of the constitution devoted to the establishment and work of the state courts. Later documents go farther and mention that a jury may be omitted by agreement of the two parties to the suit. It isn't so much that the right itself has lapsed as that the dollar as a measure of value has changed.

The last two articles in the bill of rights do not involve any specific right on the part of the individual. They are there merely to guard rights that have not been mentioned. They are applicable to the national government alone and not to the states. They apply to the circumstances involved when the Constitution was made to unite the thirteen states into a "more perfect union". It is with the first seven that we are particularly concerned and their extension to the state bills.
CHAPTER III
ARTICLES OF DOUBTFUL SIGNIFICANCE

In every state constitution we find an article or two and sometimes more included in the bill of rights that seems to have little reason to be there. Either these paragraphs are similar to provisions that could be just as well included in the duties and powers of the judicial department; they are repetitions of articles that forbid the same power to the state in the United States Constitution, or their wording is such that they have no force.

Before taking up those rights that have been affected or developed by changing social and political changes we will devote a few pages to the more numerous of these seemingly decorative and almost useless items.

The right of the citizens to keep and bear arms is protected from interference by Congress and by nearly all of the states but the Federal Government is given power to levy taxes to provide for an army and navy. An army in time of peace is necessary as a nucleus around which to build the

1. Constitution of the United States. Art. I. Sec. 8. The Congress shall have power: to lay and collect taxes, imposts, duties and excises to pay the debts and provide for the common defense—-
larger army needed in time of war. On the other hand the Constitution prohibits the maintaining of an army or navy in time of peace by any state. For some reason or other the states seem to doubt the ability of the Federal Government to enforce this limitation because nineteen of them specifically mention that no standing army shall be kept in time of peace. This particular instance illustrates the uselessness of many of these paragraphs. The Constitution of the United States is the supreme law of the land and each state is bound by that rule and their officers as well. Yet nearly half of them for some reason or other have duplicated this provision in their own bill of rights. In some cases changing conditions will affect certain customs and a constitution drawn up at a given date may include some item

2. Constitution of the United States. Sec. 10. No state shall without the consent of Congress—keep troops, or ships of war in time of peace—.

3. Alabama (1868), Arkansas (1874), California (1862), Delaware (1897), Iowa (1857), Kansas (1859), Kentucky (1892), Maine (1819), Maryland (1867), Massachusetts (1879), New Hampshire (1783), Ohio (1851), Pennsylvania (1873), Rhode Island (1843), Tennessee (1870), Virginia (1928), Washington (1889), West Virginia (1872), Wisconsin (1848).

4. Constitution of the United States, Art. 4. This Constitution and the laws of the United States which shall be made in pursuance thereof; and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. and all executive and judicial officers, both of the United States and of the several states shall be bound by oath or affirmation to support this Constitution—.
important at that time. Climatic conditions or geography may influence the addition of others. But in this case as in many considered in this chapter neither time nor location seems to have any effect. The nineteen mentioned have constitutions dating from the earliest times to the latest and the states themselves are scattered all over the Union.\(^5\)

In thirty-six of the state constitutions in effect today the bill of rights provides that a person accused of a crime may be released on bail. There are two forms in which this statement is expressed. Part of them provide that all offenses except capital offenses are bailable by sufficient sureties. The others say nothing about capital offenses. The twelve states that do not include this condition in the bill of rights give more details on the same subject under the article providing for the powers and duties of the judicial department.\(^6\) Even those that copy the wording from the Federal Constitution give a longer exposition of the same matter in the constitution itself. In nearly all cases they remove the reason for its being included in the bill of rights

5. Connecticut (1783), Vermont (1793) omit this provision while New Hampshire (1783) includes it. The last three states admitted to the Union omit it but Virginia (1928) includes it. This item and part of the provisions on freedom of religion are about the only things that Oklahoma has skipped.

6. Oklahoma (1907); All persons shall be bailable by sufficient sureties, except for capital offenses. West Virginia (1872) Excessive bail shall not be required.
by providing for the same right in later provisions and remove many of the doubts that might arise as just what a "sufficient surety" was.

Thirty of the states mention imprisonment for debt. In part of them it simply states that there shall be no imprisonment for debt. In others the article is so worded that there can be such imprisonment where the debtor has the funds but refuses to meet the obligation. Only three states that have had their constitutions revised in the last forty years retain this article. In one of these practically the entire bill of rights has been copied into the present document from the one that preceded it. In the other two, Oklahoma and New Mexico, they seem to have copied all the items included in an earlier Arkansas Constitution. In all cases any considerable change in the bill of rights this item tends to disappear. It will be noted from the list in the note that there are few of the New England states mentioned. Imprisonment for debt was legal at the time their first constitu-


8. Illinois (1870). "No person shall be imprisoned for debt unless upon refusal to give up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud". This is the usual wording of this article where there is any condition attached.
tions were drawn up and there was no tendency to prohibit such imprisonment. As the people came to realize that this punishment was futile and ridiculous laws were passed to prevent it but there was not sufficient incentive to cause it to be added to the bill of rights.

Another condition that is more often included under the powers of the judiciary is that which prohibits the exiling of anyone from the state as a punishment for crime. A few states whose constitutions date between 1857 and 1872 do include it in the bill of rights. The one later exception to this is Oklahoma. This might be one of those things that was influenced by some political question that roused the people during that period but was not sufficiently important to be remembered after 1872.

Since 1860 many states have added another item to those enumerated in imitation of the V and VI amendments to the Federal Constitution. As explained in a preceding chapter these rights protected an accused person. However, it is legal to detain an innocent person in jail as an important witness in a case to be brought up at the next term of

9. Alabama (1868), Arkansas (1874), Kansas (1859), Ohio (1851), Oklahoma (1907), Texas (1876), Vermont (1793), Washington (1889). A comparison of the bills seems to indicate that Oklahoma includes about everything that Arkansas has and has added one or two additional. Vermont will be noted in this group but it dated back to 1793.
court.10 Usually the public hears little of these cases as the person detained is one so untrustworthy that he can not provide bail to ensure his appearance when wanted and by the same token has not sufficient importance to attract attention. In nine states they have either added a sentence to the other provisions or have a separate statement as another article providing that witnesses shall not be detained beyond an unreasonable time.11

A point that attracts interest because of its omission is that providing for trial by jury. Somewhere in the bill of rights, in one form or another, a right to trial by jury is mentioned except in two states. Louisiana has left this out. That might be because Huey Long didn't want it included when he had his state government revise the constitution or it might be because the laws of Louisiana are based upon the Napoleonic code rather than the English Common Law. The other exception is New York. New York in its compulsory revision every ten years has left more items out of the bill of rights than any other state. But the trial by jury is

10. California 1862 Par. 6 Colorado 1889 Par. 17
Tennessee 1870 Par. 7 Michigan 1908 Par. 15
Montana 1889 Par. 17 Missouri 1875 Par. 6
New York 1894 Par. 5 North Dakota 1889 Par. 6
South Carolina Par. 38
Indiana states, "No person arrested or confined in jail shall be treated with unnecessary rigor."

11. The majority word it as does Michigan (1908) "---nor shall witnesses be unnecessarily detained."
amply protected by the constitution itself. On the other hand one gathers from the Louisiana constitution that there will be such trials because of the mention of juries but there is no definite order making it a hard and fast requirement.

Three-fourths of the states repeat that provision from the Federal Constitution that provides that no law shall be passed that will impair the obligation of contracts. Some of these same states also have another item which states that no law shall be passed that conflicts with the Constitution or the laws of the United States. It would seem that the first of these two things is unnecessary and especially so when the second is included. However the United States is subject to recurring depressions and whenever they occur there is the usual cry for a reduction in debts or something of that nature. The Constitution prohibits any state from passing laws that will impair the obligation of contracts.\textsuperscript{12}

In times of stress people tend to become unreasonable and such laws are apt to be tried. Numerous people cried for a cancelation of debts at the same time as these cases were being tried. A building contractor in Illinois talked for a general cancelation of debts and at the same time complained of a reduction of dividends on his life insurance policy.

\textsuperscript{12} Section 10. Article I. Constitution of the United States. No state shall pass any law impairing the obligation of contracts---.
What they usually mean is, "Cancel what I owe but let others pay me."

A peculiar paragraph in many of the bills is that which declares that the courts are to be open and free to all for the redress of grievances. In thirty states they have practically the same words saying that the courts "should be open". In seven they say that they "ought" to be open and free to all. Consulting five lawyers I have been told that if the wording is "shall be open" it is mandatory and the state government is to see that the order is obeyed. On the other hand where it says "should" or "ought" it means that it is a desirable state of affairs that may be brought about.

In four states whose constitutions date from around 1870 we find a provision abolishing feudal tenures. New York is one and there might be some reason for that but it is hard to single out a reason why Minnesota finds it necessary to do so. It sounds like the law passed by the Philippine Legislature regulating the installation of heating plants.  

13. In the early days of the Philippine legislature the representatives appeared in Manila and took their seats. In order to impress the voters in the provinces that knew little or nothing of politics it was necessary that each member have evidence to show that some bill that he had introduced had been passed. But there was a commission of practical Americans who acted as a senate and would not let any laws thru that might be detrimental. However if the law was harmless they would let it by in order to save the "face" of some provincial politician. Thus it came
Prohibitions on the permitting of the granting of special immunities or privileges by the legislature appear in about one-fourth of the state bills. There is no particular connection either in time or geography for these provisions. In other states they have the same idea expressed by saying that "private bills shall not be passed".

Seven other states have an article that springs from some of the limitations on freedom of religion. At one time in certain states and nations the estate of a suicide was forfeited. This was based on the Christian teaching forbidding suicide. It was always a pleasant occasion when a ruler could grab a piece of property under the guise of religion. These seven states insert an article providing that the estates of suicides shall be probated in the same manner as the estates of others.¹⁴

There are three other items that appear from time to time in the bill of rights that have no particular meaning but look nice in print. Some of them have only one, some have two and others repeat all three. The one that appears oftenest is copied from the Declaration of Independence and

¹³ (continued) about that one representative introduced a bill that copied word for word the statute of New Jersey regulating the installation of heating plants in office buildings. It was passed and he went home and proudly showed his constituents that his law was passed.¹⁴ Texas, Tennessee, Pennsylvania, Missouri, Kentucky, Delaware, Colorado and Alabama. Note that Oklahoma missed this one.
goes on to say that all men are created equal and have certain inalienable rights and so forth. It does not provide for any limitation of power nor does it grant any power. It is just there and sounds nice on the few occasions when the bill of rights is read.

The second states that the power of the government is derived from the consent of the governed. This is another maxim that no one would find fault with as expressed as a fundamental truth upon which the power of government is based. But there is no need to express it in a bill of rights. However it appears and is one of the three items that has appeared and reappeared and shows no tendency to disappear. It does no harm and it sounds good so it remains.

The third states that a frequent recurrence to the fundamental truths of government is desirable or some such variation of the same idea. Again we do not quarrel with the maxim but it doesn't order recurrence; it merely states that such a condition is to be desired. All three of these expressions are mentioned repeatedly. They are copied in constitution after constitution. While a constitution may be re-written and state that slavery is a good thing they repeat the statement that all men are created equal. When slavery is prohibited by the constitution of the same state men are still created equal. But as there is no order to
the legislature to make them equal or no limit placed on the legislature as to the laws it may pass limiting their equality the item does neither harm nor good. Probably it is just as well, for a legislature might be found to try and make all men equal by passing a law to try and regulate the inequalities imposed by nature at birth. Laws just as foolish have been passed.

There are a few other scattered items in the bills as written in the state constitutions. In order documents there are some that seem to have little meaning and have been allowed to disappear. Where such an item appears in only one constitution we pay little attention to it. Where it appears several times we give it mention in this chapter.
CHAPTER IV.
THE UNION AND SLAVERY

The effect of slavery on the bill of rights can be compared to a stream rising in the northeast, flowing slowly across the northern part of the nation, suddenly sweeping over the south and west, and then drying up from the source while the last pools remaining from the flood slowly dry up in the last places affected.

Slavery was mentioned in the Declaration of Independence. It was responsible for compromises in the writing of the Constitution of the United States. It was responsible for more additions and subtractions in the South than any other movement. Indirectly it caused the writing of one or more new constitutions in the majority of the states.

1. In the first draft of the Declaration of Independence Jefferson included a statement that George II had prevented the colonies from prohibiting the importation of slaves. There was some objection to this so in the final draft it was not included.

2. In the Convention in 1787 it was proposed to count everybody for representation. There was an objection to the counting of slaves and the compromise was reached by which "three-fifths of all other persons" were to be counted. Also a fugitive slave law was included in Sec. II, paragraph 3 of Article IV. Also mentioned in Art. I, Sec. 9.
where slavery existed up to 1863.3

It is a peculiar circumstance that a nation with the first written constitution put into the Declaration of Independence the words, "We hold these truths to be self evident, that all men are created equal---" should also include in its constitution provisions providing for human slavery and then engage in the greatest civil war in history in order to reach that point where men would no longer be held as property.4

Before 1860 the Supreme Court handed down a decision defining the first three words of the Constitution. "We, the people", meant "we, the citizens", and negroes, whether free or slave, were not citizens. Citizenship in the United States was reserved for the people of the white race.5 Since the fourteenth amendment this has been enlarged to permit those of another race born in the United States to be citi-

3. New constitutions were written by some of the seceding states. When re-admitted another was written and at the end of the reconstruction period a third appeared.
4. W. E. Woodward, A New American History, Farrar and Rinehart, Inc., New York, 1936, p. 394. Writing to a friend in 1833 after it was all over Jackson said that the tariff was a pretext for nullification. He predicted that the next secession agitation would continue and that the next pretext would be the negro, or slavery question.
5. Constitution of the United States, compiled by G. G. Payne, Government Printing Office, Washington, D. C., 1924. "Negroes whether free or slaves, were not included in the term, 'People of the United States'".
zens but foreigners of other races can not be naturalized. 6

The peculiar situation of the black man, born in the United States, when not a slave, was not even considered. There were free negroes at that time but no one seemed to be concerned as to their standing before the law. They were not citizens according to this decision. They had no constitutional rights. 7 At the same time they were not foreigners as they were not regular emigrants but were the decendents of slaves. 8 Neither could they be deported for they did not know their national origin nor did anyone know where their ancestors had come from except that it was from Africa. As their numbers were small and their influence even less no case ever came up in any court that attained the publicity

6. A Japanese resident was refused citizenship and brought suit in the courts. The decision of the Supreme Court stated that citizenship was a privilege conferred on the foreigner and could be granted to some and refused others by Congress. Those who were not of white ancestry have been denied the privilege by Acts of Congress and thus the Japanese alien could not become a citizen. Oxawa v U.S. 260 U.S. 178.

Judge Daggett of Connecticut in 1833 held that the free negro was a person and not a citizen.

necessary to attract public attention. The free negro, before the fourteenth amendment, was truly the sort of person described by Hale in his great classic. The Indian was also without rights as a citizen but he was regarded as a special ward of the government. The free negro had no paternal government to look after him and no foreign minister to appeal to. He just took up space without any rights at all.

Before the outbreak of hostilities in 1861 Kentucky was one of the states that copied the noble sentiments of the Declaration of Independence in its bill of rights. "All men are free and equal" in one article and then following on the same page in another article a statement to the effect that there should never be any question as to ownership of negroes as property. And this seeming inconsistency did not seem to bother the people at all.

Of course there was another incongruous combination in the Federal Constitution and it took years for it to come out. There are two basic reasons for government; the protection of life and the protection of property. Or, putting it another way, the protection of human rights and the protection of property rights. The Bill of Rights is designed to protect

human rights first and property rights second. 11 But the two objects involve two separate codes of law. The Bill of Rights may state that private property cannot be taken or damaged without just compensation and that excessive fines cannot be imposed. But the very statement that property cannot be damaged without compensation involves the principle that property can be taken, damaged, or destroyed in the interest of the public welfare provided it is paid for. The Supreme Court has stated that those parts of the Constitution that are implied are as much a part of the instrument as those that are stated. Also in the first article where it is states that all legislative powers are vested in a Congress the Supreme Court holds that it is the same as saying that no legislative powers are vested in any other department or officer. In numerous other decisions the same conclusion is drawn. 12

The Bill of Rights protects the individual against imprisonment without just causes; against loss of property; and numerous other abuses mentioned in Chapter II. When the protection of human rights conflicts with property rights the property rights are paid for and the human rights are

11. "No person shall be deprived of life, liberty, or property without due process of law."
12. Constitution of the United States, Chapter I.
Now we come to the slave. Is he property or is he a human being? If he is property then he can be damaged or destroyed and paid for. But that would involve the deprivation of life which is prohibited by another article. If deprivation of the life of a piece of human property did not come under this article we are still faced with the uncomfortable fact that the majority of the people of the United States believed in a religion that made the taking of human life a violation of one of the maxims of that religion. As attention became centered on the condition of the negro one group claimed he was a human being and entitled to life, liberty, and the pursuit of happiness while another claimed that he was property and at the same time side-stepped the thought of the deliberate destruction of the life of the slave. It was impossible to reconcile the two views.

The climax of the controversy was reached when the Dred Scott decision was handed down. This decision carried out the earlier decision of Chief Justice Marshall about the rights of citizens. The negro had no right to sue in the courts. Dred Scott was a piece of property according to the

13. The right of eminent domain. A person's land may be taken against his will for the building of a public building or a road provided a fair price is paid for it.
decision. It wasn't that some one wanted Dred Scott. The case came into court because he was old and of no value as a worker but being a human being he had to be taken care of for the rest of his life. No one wanted to be saddled with that financial burden for an indefinite term of years. The heirs of the owner of Dred Scott would not take him and suit was brought to make them take care of him. Certain anti-slavery interests seized on the case to further their cause and the attending publicity combined with the state of the public mind at that time made it the center of interest. 15 Lincoln condemned the Supreme Court and the Dred Scott decision in far stronger terms than any other President has ever used when some of his pet legislation has been thrown out. 16 It was not the Supreme Court that was at fault; it was the Constitution itself that had to be changed and was changed after the Civil War had shown the truth of one of Lincoln's other statements. Lincoln was a politician and he was given to contradicting his own statements the same as other politicians but in this case the statement was a prophecy. 17

17. Lincoln said that he did not expect the Union to endure half slave and half free. In that he was right. But he also said in another speech that if he could save the Union by freeing some slaves and not freeing others he would do that. In this point he contradicted himself in the earlier speech.
The northern states had found that slavery was wrong. One doesn't like to accuse a nation, especially one's own nation, of being too mercenary but evidence points to the fact that the learning of the moral lesson that slavery was wrong was aided by the lesson in economics that the institution did not pay. The first states to prohibit slavery in their constitutions and make it a part of the bill of rights were New Hampshire and Vermont.18 These two states were the farthest north of the states at the time these constitutions were accepted by the people of their respective states. The Vermont people have always had the reputation of being a frugal and careful people and one would not expect them to be the kind that would support any number of people in idleness during the greater part of the year.19 By a strange coincidence these people who are so careful of their pennies were the first to draw the conclusion that slavery was wrong. Looking at it from the point of view of profit a slave was ignorant, an indifferent worker, and not to be trusted with anything but the rudest and most simple of tools. He must be warmly dressed in the north or the physical property would deteriorate. Better and more expensive food was re-

quired to keep him in good health. On the other hand the simple farm tasks on the land where he could be employed were impossible during the winter months. From the first of May thru October he could be employed and might show a return on the investment but during the rest of the year he must be fed, clothed, and sheltered while he lived in idleness. The free man had an incentive to work harder during the summer months but the slave did not. Therefore the institution did not pay and by 1787 the provision to put an end to slavery in Vermont appeared in the Vermont Constitution even before Vermont was admitted to the Union.\textsuperscript{20}

The slavery controversy had its effect on the constitution of the states extending westward and southward. The provision was added to one after another of the northern constitutions ending slavery. But before the controversy became prominent and even before the members of the Constitutional Convention had compromised on the subject the Ordinance of 1787 was passed. In this celebrated act it was definitely stated that there should be no slavery in the Northwest

\textsuperscript{20} Vermont. Article I. Therefore no person born in this country or brought from over sea ought to be holden by law, to serve any person as servant, slave, or apprentice, after he arrives at the age of twenty-one years, unless he is bound by law for the payment of debts, damages, fines, costs or the like. This constitution was drawn up and Vermont applied for admission to the Union even before any other state had ratified the Constitution of the United States.
Illinois and Indiana were settled by people who crossed the Ohio river from the southern states. The first legislature of Illinois was composed exclusively of slave holders. If it had not been for the Ordinance of 1787 the state that produced Lincoln and Grant in 1860 would have been a slave state. Four attempts were made before 1818 to get Congress to repeal that portion of the Ordinance that prohibited slavery but Congress refused to listen to the petition and all four attempts failed.

A fifth attempt was made in Illinois after it had been admitted to the Union. The proposition was referred to the people at a general election and it was confidently expected that it would pass. The first constitution of Illinois had


23. George W. Smith, A Student's History of Illinois, Pantograph Printing and Stationery Co., Bloomington, Ill., 1906, pp. 138-140. Petition sent to Congress from Kaskaskia on Jan. 12, 1796, asking that the sixth article of the Ordinance of 1787 be annulled. Petition of old soldiers in 1799 to same effect. Petition circulated in 1800 with same end in view. Convention called on Dec. 11, 1802. Petition prepared and presented to Congress asking for repeal of slavery clause in the Ordinance of 1787. Petition refused on Mar. 2, 1803. Opposition to accepting state constitution in 1818 because slavery was not permitted.
extended the suffrage to all males, twenty-one years of age and over. This permitted aliens to vote. A large number of German and English emigrants had come from Europe, traveled thru the Great Lakes, landed near Chicago and moved west and southwest from there and taken up land in Illinois. They had no use for slavery and when the time to vote arrived were solid in their opposition to opening the state to the admission of slaves. Their vote was sufficient to swing the election and Illinois remained a free state. 24 A glance at the map of the United States will show that Illinois was the farthest south of the free states.

With the slavery issue contributing more and bitterer arguments the southern states, whenever a constitution was revised, were sure to include a provision similar to that of Kentucky; that slavery was not to be questioned in the state. On the other hand the northern states repeated Jefferson's statement that all men are created equal and then proceeded to repeat the provision from the Ordinance of 1787 forbidding slavery.

The war between the states was finally an accomplished fact and constitutions went by the board for a few years.

23. (continued) 182. Governor Bond favored making Illinois a slave state.
California wrote into its constitution in 1862 that neither slavery nor involuntary servitude should exist except as a punishment for crime.\(^{25}\)

Nevada came into the Union in 1864 for the sole purpose of making the required three-fourths of the states necessary to ratify the thirteenth amendment to the Constitution.\(^{26}\) Naturally the constitution of the state would include an article in the bill of rights prohibiting slavery.

The turning point in the controversy was the admission of Nevada. From then on slavery was against the Constitution of the United States. There was no further need of statements in the state constitutions forbidding slavery. However, new states as they were admitted put in such articles and all of the constitutions written at the end of the Civil War included them. The first southern constitutions were written by the "carpet-bag" governments and they included everything possible in the bill of rights. When the white citizens of the South recovered control of their states they wrote new constitutions but they included the provision against slavery in the bill of rights. A few of the eastern and central states added a slavery article in the years following the war and in practically all of the states admitted between 1865

\(^{25}\) California, Constitution of 1862, Bill of Rights. Art. 18.
and 1900 some sort of article forbidding slavery was included.\textsuperscript{27} In at least one case where an anti-slavery article was included in the bill of rights it was left out of a revision in later years.\textsuperscript{28}

Closely bound up with the slavery question was the question as to whether the state had a right to leave the Union. New states that came into the Union immediately after the war included in the bill of rights an article stating that the Union between the states and the United States was perpetual.\textsuperscript{29} Other states included an article providing that no law could be passed by the state that contradicted the laws

\textsuperscript{27} Table at end of this chapter gives list of states and dates of constitutions having articles prohibiting slavery.
\textsuperscript{28} Illinois included a provision prohibiting slavery, in the constitution of 1848 but left it out of the one written in 1870.
\textsuperscript{29} State | Article stating that the Union can not be dissolved.
--- | ---
Alabama & 37
Arkansas & 1
Florida & 3
Georgia & 33
Louisiana & 2
Maryland & 2
Mississippi & 7
Nebraska & 15
New Mexico & 1
North Carolina & 2
South Carolina & 5
South Dakota & 16
Utah & 15
Washington & 1
All of these states are in the south or west. Not one is from the free states east of the Mississippi River.
passed by Congress of the Constitution of the United States. 30

Some of these states in later revisions have left these items out but it still stands in nine of the states that composed the Confederate States. New Mexico, with a constitution dating from 1912, stresses this point. 31

Another item that grew out of the war between the states is the one repudiating state debts. As soon as Congress removed the restrictions imposed by the war amendments on those who had engaged in war against the United States the revised constitutions began to appear and some of them added to the bill of rights articles repudiating the debts incurred in fighting the war and the outrageous debts run up by the reconstruction governments. 32 In this case they were taking advantage of the eleventh amendment to the Constitution and at the same time repeating a portion of the fourteenth amend-

30. The following named states have a provision providing that nothing in the laws or the state constitution can conflict with the laws of the United States. Alabama, Arkansas, Colorado, Florida, Georgia, Maryland, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, South Carolina, and Texas. With the exception of New Hampshire none of the free states east of the Mississippi have this article. On the other hand many of the former slave states have both this article and the one providing that the Union should never be dissolved.

31. New Mexico. (1912) Article I. In the first article of the constitution of New Mexico it is stated that New Mexico is an inseparable part of the Union and the Constitution of the United States is the supreme law of the land.

32. Arkansas and North Carolina.
Several scattered articles might also be mentioned as being an outgrowth of this period in the history of the United States. Arkansas provides in the constitution of 1874 as a part of the bill of rights that the constitution of 1860-61 is outlawed. Florida includes a statement in the bill of rights of its latest constitution that representation must be based on population. Mississippi provides that citizens of the United States are also citizens of Mississippi. North Carolina repudiates the constitutions of 1868 and 1870. South Carolina is careful to provide that there shall be no restrictions imposed on citizenship because of race, color, or previous condition of servitude.

The Civil War would naturally have a considerable effect on the life of the people and the slavery and states rights controversy affected the bill of rights in state constitutions.33

33. Constitution of the United States. Amendments. Article XI. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subject of any foreign state. By this amendment a state can repudiate debts and there is no recourse except by permission of the state itself. By including the repudiation in the constitution a complaisant legislature would be powerless to do anything. Amendment XIV. ---but neither the United States nor any State shall pay any debt or obligation incurred in aid of insurrection or rebellion against the United States---.
more than any other movement in the nation's history. Until 1870 it had a profound effect on all of the states. From that time on its importance slowly decreased and especially in the north and west there is a tendency to ignore the articles that seemed of the greatest importance from 1820 to 1870.

27. States that included an article in the bill of rights prohibiting slavery:

<table>
<thead>
<tr>
<th>State</th>
<th>Date of Constitution</th>
<th>No. of Article</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>1868</td>
<td>35</td>
</tr>
<tr>
<td>Arkansas</td>
<td>1874</td>
<td>27</td>
</tr>
<tr>
<td>California</td>
<td>1862</td>
<td>18 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Colorado</td>
<td>1876</td>
<td>26</td>
</tr>
<tr>
<td>Florida</td>
<td>1885</td>
<td>19</td>
</tr>
<tr>
<td>Georgia</td>
<td>1868</td>
<td>4</td>
</tr>
<tr>
<td>Indiana</td>
<td>1851</td>
<td>37 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Iowa</td>
<td>1857</td>
<td>23 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Illinois</td>
<td>1848</td>
<td>(Omitted from 1870)</td>
</tr>
<tr>
<td>Kansas</td>
<td>1859</td>
<td>6 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>1890</td>
<td>25</td>
</tr>
<tr>
<td>Maryland</td>
<td>1867</td>
<td>24</td>
</tr>
<tr>
<td>Michigan</td>
<td>1908</td>
<td>8</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1856</td>
<td>2 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>1890</td>
<td>15</td>
</tr>
<tr>
<td>Missouri</td>
<td>1875</td>
<td>11</td>
</tr>
<tr>
<td>Montana</td>
<td>1889</td>
<td>28</td>
</tr>
<tr>
<td>Nebraska</td>
<td>1875</td>
<td>2</td>
</tr>
<tr>
<td>Nevada</td>
<td>1875</td>
<td>17</td>
</tr>
<tr>
<td>North Carolina</td>
<td>1872</td>
<td>33</td>
</tr>
<tr>
<td>North Dakota</td>
<td>1889</td>
<td>17</td>
</tr>
<tr>
<td>Ohio</td>
<td>1851</td>
<td>6 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1907</td>
<td>16</td>
</tr>
<tr>
<td>Oregon</td>
<td>1851</td>
<td>24 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1843</td>
<td>4 (Before XIII Amend.)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>1878</td>
<td>2</td>
</tr>
<tr>
<td>Tennessee</td>
<td>1870</td>
<td>33</td>
</tr>
<tr>
<td>Utah</td>
<td>1895</td>
<td>21</td>
</tr>
<tr>
<td>Vermont</td>
<td>1793</td>
<td>1 (Before XIII Amend.)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1881</td>
<td>2</td>
</tr>
</tbody>
</table>

This list includes those constitutions in effect as of 1939. Also the list includes only those states that have
27. (continued) an anti-slavery article in the bill of rights. Other states abolished slavery by laws passed by the legislature but did not include an article in the state constitution. In some of the states not listed an anti-slavery article existed in earlier constitutions but was omitted after the XIII Amendment was ratified.
CHAPTER V.

MODERN TRENDS

Since the Civil War constitutions continue to be written and re-written the Bill of Rights is slow to change. Unless some movement arises that affects an overwhelming majority of the people no change appears in the Bill of Rights. After years of repitition some of the earlier provisions are dropped. In the majority of cases the idea seems to prevail that they might as well be included as there is no pressure to remove them.1

In many cases there will be an added phrase to better explain what is meant or to modify former items to conform to changing conditions of life.2 The freedom of the press

1. In recent years we have had numerous examples of old laws that remained on the statute books because there is no pressure for their removal. Several magazines have printed lists of these peculiar laws and two years ago there was a book on sale entitled "There Ought to be a Law" that attained quite a sale as a humorous work giving several hundred outstanding examples. Maryland (Constitution of 1915) retains in the bill of rights an article reserving all rights granted by the King of England to Lord Baltimore.

2. Tennessee (Constitution of 1870) changes the word "of" in Sec. 17 to "in". In earlier constitutions many states copy the provision about the right to bear arms but in later revisions add "nothing in this article shall be construed to prevent the passage of laws regulating the carrying of concealed weapons".
and the right of assembly and petition remains unchanged. That of the right of search is quietly modified in Michigan and the State Constabulary takes advantage of it but in the sparsely settled areas and not where too much attention will be directed. Freedom of religion changes where an earlier constitution mentions that a belief in God is necessary, a later one leaves this item out but all persist in providing that no public money can be appropriated for anything connected with any religious object whatever.

Fundamentally those things mentioned in the Bill of Rights of the Constitution of the United States remain the same except that one provision regarding jury trials in civil cases. In some cases there is a change of wording to make them fit state conditions. In the majority of cases there may be a change in the provisions concerning one of the three departments of government but the Bill of Rights is not tam-

3. The paragraph concerning unreasonable searches and seizures is missing from the 1907 Michigan Constitution. In the woods of the Northern Peninsula the Constabulary makes inspections that would be illegal in most other states and would rouse plenty of enmity around Grand Rapids or Detroit. By personal investigation I have found out that large numbers of citizens of Michigan do not know that their bill of rights no longer includes this article.

4. This section that prohibits the appropriation of money in support of any institution connected with any sect persists in every one of the 48 constitutions in force today. In Oklahoma this is the only provision in the bill of rights concerning religion.
pered with except for the possible addition of a new provision.

The tendency of suspecting the Federal Government of not being able to enforce such provisions as passing a Bill of Attainder or an Ex Post Facto law disappears and the state does not repeat this article in the bill of rights. 5

The subject of treason and its definition comes up frequently. In the past treason had been rather an elastic term in England and still is in many nations. In England at the time of Elizabeth it meant any kind of a rebellion or conspiracy against the government. It even went so far as to include the practice of a religion contrary to the state religion. Certain priests of the Roman Catholic faith were convicted simply on their own statement that they had refused to adjure their own religion. 6 In the reign of James I, Thomas Owen was found guilty of simply saying that the King having been excommunicated, if he should be excommunicated, could be deposed by anyone. Another individual was convicted and executed on a charge of treason because he had written a book predicting the King's death in 1621. 7

5. Only 23 constitutions retain the item about a Bill of Attainder but 34 have an Ex Post Facto Law mentioned. The omissions occur in the majority of cases in the latest constitutions.
It wasn't until 1681 that a person accused of treason might have a copy of the indictment delivered to him five days before the trial. But even then the definition was so general that even as late as 1794 it was difficult to ascertain the real reason for trial and it was possible for judges to go to almost any lengths in admitting evidence to bring about the conviction of the accused person.

One of the contributing causes of the American Revolution was the possibility of accusations of treason and the attempts of take some of the colonists to England for trial. When the Convention of 1787 met they included a very definite statement as to what treason should consist of and further provided that Congress should prescribe the punishment in such cases. The idea persisted up to the time of the Civil War that the United States was a federation of independent states and so many of the states used the same wording and included the definition of treason in their own

11. Constitution of the United States. Article III. Sec. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid or comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act in open court.
The Congress shall have power to declare the punishment of treason—.
There was a trial for treason after the Whisky Rebellion in Pennsylvania and two men were convicted but they were pardoned by Washington. Treason does not occur in the minds of most Americans. It was effectually ended by the trial of Aaron Burr and Marshall's decision in Jefferson's administration. Later it makes its appearance after the Civil War but there was a condition by which the stigma could be removed. In recent days we have had considerable agitation concerning espionage but the punishment for the offense of selling military or naval information to other nations is covered by statutory law and the individual is a criminal and not a traitor.

12. Twenty-six states now include the definition of treason in the bill of rights. Some that had it at one time have dropped it in later constitutions.
15. Constitution of the United States. Amendment XIV. Sec. 3. Anyone having engaged in rebellion is prohibited from any office in the state or nation until the disability is removed by a two-thirds vote of each house. Immediately after the ratification of this amendment the majority of southern white men were thus disqualified to hold office but by successive acts of Congress passed by a two-thirds vote increased numbers were rehabilitated and finally we have an ex-confederate soldier as Chief Justice of the Supreme Court from 1910 to 1921, Edward D. White of Louisiana.
When one considers the definition of treason it reduces to the fact that the offense may occur only in time of war. The abuses that come with indefinite explanations of what constitute treason are happily spared the people of the United States and except under the stress of war are seldom mentioned. The modern tendency is to leave all affairs dealing with treason to the Federal authorities. Later constitutions are omitting all references to this subject in the bill of rights and even in the paragraphs devoted to the duties of the judicial department.

Next let us consider some of the more modern innovations that have appeared in the Bill of Rights. As states before, the Bill of Rights is extremely conservative and slow to change. Unless a great catastrophe like the Civil War occurs no great number of constitutions are affected and new and different articles will appear occasionally in new constitutions. They will be few and may be dropped from later documents, or, if important, will be copied by still later conventions.

17. In time of peace there can be no levying of war against the United States and in time of peace the United States has no enemies so no one can give aid or comfort to an enemy as we have none.

18. In 1918 a young man in Marquette, Michigan, was threatened with imprisonment because he said he liked to play operas by German composers on his victrola. In June of that same year a man was thrown out of a restaurant in San Francisco because he brought a few slices of white bread with him to eat with his dinner. The other patrons did the evicting.
In 1875 Nebraska inserted an article in the bill of rights to provide for an official language. None of the other states have added such an article. It provides that the official language should be English but if the framers of that article had read the small volume written by the late Brander Mathews, "Our Living Language" they might have hesitated to settle on English as the official name of the language. There is a faint possibility that it was not the necessity of a state language that animated the framers of the article but rather the idea of putting a check on the German Lutherans who were establishing parochial schools and conducting them entirely in German. The article provides that the official language must be used in all schools.19

In recent years we come on an article that is mentioned in eight bills.20 "There shall be no restriction on the right of the individual to emigrate from the state." With the

19. Nebraska (1875) The English language is hereby declared to be the official language of the state and all official proceedings, records, and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools. The reason for this article is probably found in the words, "private, denominational, and parochial schools". I inquired of a former member of the Nebraska legislature and he informed me that several times there were outbursts against parochial schools where only German was taught.

exception of Pennsylvania these states are all in the west and the middle west. There probably was some sort of a movement on foot at one time concerning movements from the state and at the time these constitutions were drawn up it was thought desirable to keep the legislature from restricting the right of citizens to leave the state. Whatever the reason was it is not mentioned in any of the important works on state constitutions. A study of the records of the conventions that revised these constitutions might furnish a reason for this peculiar article.

In some of the later constitutions in the South we come across additional articles dealing with citizenship. Two states find it advisable to state that temporary absence from the state does not forfeit citizenship. Other states give this same provision and others as well under the article dealing with citizenship. Mississippi provides that all citizens of the United States are also citizens of Mississippi after a short residence period. New York provides that only the courts may deprive anyone of his rights as a citizen. North Carolina is very definite in stating that there shall be no property qualification for voting.

The eleventh amendment was added to the Federal Consti-

21. Alabama and South Carolina.
tution to prevent suits being brought against a state. However Alabama and Arkansas repeat the statement in the bill of rights. Other states have it in a different section with the condition that the state may be sued with its own permission.

In Arkansas and Iowa they add an extra article providing for the punishment of those who engage in duels. Maine and South Carolina have an article that prohibits the inflicting of corporal punishment.

A modern departure appears in the bills of four states. It states that the object of the penal code shall be the reformation rather than the punishment of convicted criminals. In the majority of states some part of the constitution disclaims all intention of imprisoning people and treating them with undue rigor and then permit the legislatures to establish the reformatories or prisons to become centers of political patronage. In these four they at least go a step in the right direction.

In two states that re-wrote their constitutions after the reconstruction days and in two others that entered the union later they say, "Representation shall be based on population." This may be aimed at showing that the three-fifths clause in the Constitution of the United States is no longer

22. Maryland, Montana, Oregon, Tennessee.
to be considered.23

Three states had their constitutions promulgated or revised at the time when the railroads were dominant in state politics. Illinois, in its constitution of 1870, was the first state to attempt to regulate the railroads. Colorado put the same provision into its constitution and Oklahoma followed in 1907. About the same time as Oklahoma entered the Union the Federal Government took up the question of the regulation of railroads and the question was no longer of burning importance to the states. Later constitutions do not mention railroads in the bill of rights. This is one of the points where an agitation started a movement that added something to the bill of rights but the necessity was ended by other action.24

One would think that the agitation over the prohibition amendment would have some effect on the constitutions of the states. A careful study of the existing constitutions shows that only one provision can in any way be related to the subject. Oklahoma, among other things, provides that drunkenness shall be a sufficient cause for the impeachment and dismissal of any state officer.25

24. Illinois (1870) Sec. 13. "--the fee of land taken for railroad tracks without the consent of the owner thereof, shall remain in such owners subject to the use for which it is taken."
25. Oklahoma (1907) Article I. Sec. II.
Two states have provisions on navigation. Tennessee states that there shall be no restrictions on navigation of the Mississippi.\textsuperscript{26} Arkansas expresses the same idea but states that all navigable rivers shall be public highways. Rhode Island retains an article from her earliest charter in reserving certain fishing rights.\textsuperscript{27}

Oklahoma provides that the state may engage in business. This is in direct contradiction to many other states that provide in another portion of the constitution that the state shall never extend its credit to any corporation, public or private. North Dakota, which had such a disastrous experience with the Non-Partisan League some years ago, says nothing either way.

Seven states scattered all over the United States provide that only the state legislature may levy taxes.\textsuperscript{28} Eighteen states mention that laws may be suspended only by the legislature.\textsuperscript{29} We have only one recorded instance where any other body than the legislature tried to suspend the laws.\textsuperscript{30} In

\begin{itemize}
\item \textsuperscript{26} Appears in all three Constitutions of Tennessee.
\item \textsuperscript{27} Appears from earliest Constitution of Rhode Island to the present.
\item \textsuperscript{28} Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Oregon, and South Dakota.
\item \textsuperscript{29} Alabama, Arkansas, Delaware, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Virginia.
\item \textsuperscript{30} John A. Jameson, \textit{Constitutional Conventions}. Chicago, 1887.
\end{itemize}
1864 a convention was elected in Illinois to rewrite the constitution. This body declared that in as much as it had been elected to draw up a new constitution, whatever it drew up would be the legal instrument of government of the state. Court action was swift and the convention had to submit its work to the vote of the people who promptly refused to ratify it. Considering that this sort of an attempt has been made it is as well that this article should be a part of the bill of rights.

Twenty states state that elections shall be free and equal. This contrasts with the earlier provisions in the first constitution where a property qualification was required. Two states put a limit on the right to tax.

Sixteen states forbid the granting of special rights or immunities to anyone. The others that do not have this expressed in the bill of rights have it mentioned in another part of the constitution. The provision is not a part of the national Constitution and has given rise to the pernicious practice of the passage of private bills. This particular

32. Arkansas and Georgia.
33. In Congress private bills are introduced to appropriate money for individuals. The practice reached a great height in Cleveland's second administration and was used
provision prevents unscrupulous raids on the public treasury and the states have provided an improvement on the Constitution of the United States.

The most modern trend in legislation is reflected in three new articles. The state of Washington provides in the Bill of Rights for the recall of all officers except judges. Several other states have provisions for the recall of officers but not in the Bill of Rights. 34

The question of monopolies enters the Bill of Rights of ten states. 35 In these cases it states very shortly and in as few words as possible that monopolies are forbidden. Among these states we note Arkansas and Oklahoma. These two states

33. (continued) to grant pensions to Civil War veterans who had something shady in their military record that could not stand the scrutiny of the Pension Board. Cleveland was the only President to veto these bills. Every Congressman has one or two and the practice is to have a certain day set aside to pass them. I have kept a file of the actions of all Illinois Congressmen in the last four sessions of Congress. They are all equally guilty. The only information in the Record will be similar to this taken from the Congressional Record of Tuesday, October 31, 1939. By Mr. Norris. S 2996. A bill granting a pension to Affie W. McCandless; the Committee on Pensions. Such bills cannot be passed in the majority of the state legislatures.

34. When New Mexico was to be admitted to the Union President Taft vetoed the bill because the state had included in its constitution a provision providing for the recall of judges. New Mexico changed the constitution and the admission bill was passed. Immediately after it became a state New Mexico amended the constitution and put the part that Taft had objected to back in.

35. Arkansas, Connecticut, Maryland, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Tennessee and Texas.
have missed very few articles that are considered by any other state.

Recent events have changed the item of ownership of land. Eleven states have an article giving to foreigners the right to own land. These states are all west of the Mississippi river except Wisconsin. All of them are states that were settled largely by emigrants and have been subjected to land or mining boom. But when we reach the Pacific coast we note a condition attached. New Mexico provides that those foreigners who are eligible for citizenship may own land while Oregon inserts the word "white" in front of aliens. The agitation of late years against Asiatics has had its effect. The other two states with a Pacific coast line say nothing about ownership of land by aliens.
Interest in the Bill of Rights rises and falls with Presidential elections. Since Europe has developed a set of autocrats under a new classification we have had a renewed interest in freedom of speech, of the press, and the other popular items of the Bill of Rights. Europe has always had dictators under one name or another but our means of gathering information has improved and so we know more about them. We know little of the dictators in many of the so-called South American Republics. One of them carried out an outrage in October, 1938, that even Stalin and Hitler would hesitate to order. The world goes on in much the same way it has for years with new names for old things.

When, in spite of machine politicians, we get a strong character in the White House like Andrew Jackson or either of the Roosevelts we have innumerable speakers crying out against dictatorships and parallels being drawn between our nation and others. Then we hear of the Bill of Rights and the opposition tells us of the sacred rights guaranteed to us by the Constitution. They all go on the assumption that
the mention of these rights in the first ten amendments promises them to all of us. As a matter of correct thinking they are protected by the state constitution.

In the last two years we have had numerous people breaking into print telling us how lucky we are to be living in the United States. They tell us how our rights are protected but fail to tell us that they must be protected by the state. Very few point to the plight of Louisiana under the late Huey Long. They forget that liberty also implies responsibility and in many cases people prefer to sacrifice their liberty rather than assume responsibility. The danger to the Bill of Rights lies in the lack of interest on the part of the people in their responsibility for their state government.

During the past five years I have made it my business to bring up the subject of the state constitution whenever possible when talking to people anywhere at any time. A larger proportion of the citizens of Illinois seem to know that they have a state constitution than in any of the other states I have been in, but few have ever seen a copy. Probably the reason for this is that the Chicago papers occasionally run a column or so criticizing the General Assembly for nor reapportioning the state. We laugh at the reference to the official in Venezuela who explained that the constitution
was a yellow-backed pamphlet found in the archives, but he at least knew where a copy could be found. The average citizen of the United States probably wouldn't be able to tell where a copy of his own state constitution could be found.

I have on hand a copy of a letter addressed to the Secretary of State of a neighboring state, asking where a copy of the state constitution could be purchased. The answer to this letter informed me that his office did not know of any place where one could get a copy. Many states can supply copies. In reply to an inquiry sent to the Secretary of State of Rhode Island I received several very beautiful pamphlets telling of the wonders of Rhode Island as a vacation resort but nothing about the state constitution. Several other states made no reply even tho a stamped envelope was enclosed.

I interview a member of the Illinois General Assembly, one who is listed as among the best by the League of Women Voters. I mentioned the fact that redistricting of Senatorial Districts should be accomplished. That was agreed to

1. Letter written to the Secretary of State of Minnesota. Since beginning this paper I used some of this material in a class in Civics. One young lady who had friends in Minnesota got busy and managed to get a copy of the Legislative Manual for Minnesota. A copy of the constitution is published in it and also the note that only 275 copies have been printed for general distribution.
but when I pointed out that the Supreme Court Districts were a worse scandal the member replied, "Is that so? I never knew that."²

A year ago a representative from the 41st Senatorial District introduced a bill at Springfield to establish a lottery, the profits of which would be devoted to slum clearance in Chicago. In this state constitution it very plainly prohibits lotteries of any kind.³

Considering the woeful ignorance of the people as to their own state constitution the wonder is that the Bill of Rights has remained as unchanged and as complete as it is. Seldom is any part dropped unless there is a complete upset in political thought as we had in 1860.

Our state constitutions have been remarkable in retaining so many of the articles of the Bill of Rights. The thought occurs to one that they are retained because the delegates are equally ignorant in the convention and prefer to make the mistake of leaving everything in that was mention-

². The Constitution of Illinois divides the state into seven districts, each of which is to elect a judge of the state supreme court. These are to be of as near equal population as possible. They were equal in 1870 but since then population has shifted so that today 4,000,000 people in one district elect one judge and a trifle over 3,000,000 in the other six elect six judges.
³. Constitution of Illinois. Par. 27. The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose.
ed in a previous constitution rather than run a change of omitting an important item.

Yet a long period of controversy will bring changes as has been shown in the chapter devoted to the changes brought about by the slavery controversy. Also an item will gradually decrease in importance over a long period. The early constitutions of New England had from six to twelve paragraphs devoted to the question of religion while Oklahoma, in 1907, has only one.

The question of land ownership shows a slow increase especially since the question of ownership by Asiatics has arisen. This topic is by no means ended and we may see further developments in future constitutions.

At first glance one would expect the question of prohibition of the sale and manufacture of alcoholic beverages to have some effect. It was important enough to cause two of the twenty-one amendments to the Constitution of the United States. But the entire question covered only a period of twenty years or less and that is a short period to affect the Bill of Rights. The only reference to anything of this kind is in the Bill of Rights of Oklahoma which states that drunkenness is sufficient cause for impeachment of state officials.

New York shows the greatest change in the bill of rights.
New York requires a convention every ten years to revise the constitution. Many of the earlier provisions mentioned in other constitutions are missing but there is a very long article dealing with workmen's compensation. Workmen's compensation is a rather new thing and started out with laws on the statute books. Later it was mentioned in some state constitutions. At the present time New York has brought it forward to the bill of rights. This seems to point in the direction of the next great development in the bill of rights.

A possible development in the next constitutions may be the new ideas developed by the New Deal in the last seven years. While much legislation and many movements are forgotten in a short time yet much of this legislation has to do with the rights of the individual and his protection. There may be some additions to the bill of rights as a result.

4. In 1907 a man was killed in a mine in a neighboring state. The company paid the widow the full day's wages even tho he was killed in the morning. Twelve years later a man was killed in the same mine because of his own carelessness. He had no dependents, but his sister was awarded $1500.00 damages. Such was the progress in workmen's compensation in that one state. I knew the first man and was on the coroner's jury in the second case.

5. While New Deal legislation may be imperfect in many respects there will be certain parts that will endure and come to be considered necessary to protect the rights of the laboring man. Congressmen get their positions by votes and paid out of taxation. Time will separate the necessary from the foolish and a steady improvement should develop. One wonders where the line will be drawn in the present scramble for pensions.
Another possible development to come will be to make a more equitable distribution of representation as between city and country. At present the country has the edge on representation while the population has shifted to the cities. The present system of representation in the legislatures does not fit the problem. One or two states provide that representation is to be based on population but that does not solve the problem, for then the agricultural interests are neglected. So far this problem has not attracted the interest it deserves. There are 96 cities that are not fairly represented in their states at the present time. 6 With additional articles in the Bill of Rights to protect the worker there will have to be something to protect the farmer from possible injustices perpetrated by the city population.

With the completion of this survey of the westward expansion of the Bill of Rights one is amazed at the manner in which it could be expanded. I have tried to keep out all deviations that might occur if one were to consult the judicial and legislative articles of the various constitutions. A much longer but a far better survey could be made by taking in these two parts of the state constitutions and thus show how the standards of the average man has been improved.

in the states composing the United States of America.
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Paul Kiniery, Ph.D. 
March 5, 1940

John A. Zvetina, A.M. 
March 25, 1940