

Texas Law Review

See Also

Response

Some Corrections and Pushbacks on Grand Jury Rights: A Response to Professor Wildenthal

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Given the breadth of our article,¹ which tallies and discusses over 100 individual rights found in thirty-seven state constitutions in 1868, we had hoped that one consequence of our work would be that experts on particular rights would use our data and respond with insights and challenges. Professor Wildenthal, a scholar of the right to a grand jury, has done just that. We respond to his comments here and hope to encourage similar responses about the other 100 rights that we have touched upon.

First, we must address what Professor Wildenthal identified as a flaw in our count of grand jury rights.² We counted “grand jury” and “prosecution by information” clauses separately, but Professor Wildenthal points out that they should have been counted together because the alternative to prosecution by information *is* a grand jury. In fact, we acknowledged this relationship in our article but nonetheless counted the rights separately. Our tally found 19 grand jury clauses and 7 by information clauses, leading us to conclude that a bare majority of 51% of states had grand jury rights and a minority of 19% had by information clauses. Combining the two, as we agree could have been done, results in a stronger majority of 65% of the states guaranteeing the right to a grand jury in criminal prosecutions.

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1. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS L. REV. 7 (2008).

2. Professor Bryan H. Wildenthal’s arguments can be found in his forthcoming article, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–73*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming 2009), available at <http://ssrn.com/abstract=1354404>.

Nonetheless, it is interesting to note that states guaranteed the right to a grand jury in two different ways and to ponder why that might be the case.

Professor Wildenthal also pointed out that Tennessee and North Carolina had almost identical constitutional clauses allowing prosecution by “indictment, presentment, or impeachment” only.³ Neither clause mentions prosecution “by information” specifically. These clauses are accurately recorded in our database, but we labeled them differently in the text of our article. Specifically, we mentioned, but did not count, North Carolina’s clause under “grand jury” and we counted Tennessee’s clause under “by information.” In hindsight, both of these clauses should have been counted under the umbrella category of grand jury clauses,⁴ which brings the total up to 28 states out of 37, or 76%—a supermajority.

In two articles published in 2000, Professor Wildenthal did his own tally of grand jury rights within state constitutions in 1868.⁵ There are four discrepancies between his work and ours:

1. *Connecticut*.—Connecticut’s constitution does have a right to a grand jury; we counted it, Professor Wildenthal missed it.⁶

2. *Massachusetts*.—There is no textual right to a grand jury, either explicitly or through a “by information” clause, in the Massachusetts constitution. However, Professor Wildenthal argues that Massachusetts case law counts “law of the land” clauses—which the constitution does have—as grand jury rights. Although our analysis was intended to be a purely textual endeavor, his claim raises an interesting point about our approach, which will be discussed below.

3. *North Carolina & Tennessee*.—As discussed above, neither of these state constitutions have either “by information” or “grand jury” clauses, but Wildenthal claims that the state case law indicates that both states did require grand juries in serious criminal cases.

4. *Texas*.—We used the 1868 constitution, which was completed by December 1868 and ratified in 1869. Professor Wildenthal used the 1866 constitution, and argues that this was a better choice. This raises an interesting question about which constitution was more appropriate for our purposes. We believe that we made the right choice in coding the 1868

3. N.C. CONST. of 1868, art. I, § 12; TENN. CONST. of 1834, art. I, § 14.

4. There is also case law evidence for this claim, as discussed below.

5. Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000); Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000).

6. See CONN. CONST. of 1818, art. I, § 9.

constitution. First of all, the 1866 constitution was never technically in effect because Congress did not approve it due to its secession clauses. More generally, all of the Southern pre-secession constitutions were null and void after the states seceded. Therefore for two other southern states—Louisiana and Mississippi—we used the 1868 constitutions even though they were technically ratified *after* the Fourteenth Amendment was ratified in July 1868 because they are the closest to being representative of individual rights trends at that time.⁷

Substantively, however, both constitutions had two seemingly contradictory clauses—an explicit right to a grand jury, and then another clause allowing prosecution by indictment *or* information. Professor Wildenthal says that Texas did guarantee the right to a grand jury statutorily. He argues that these are not really contradictory because the “by information” circumstances could have been reserved for minor crimes, which was true in other states. He says the case law shows this to be the case. We did not discuss this either way; we merely listed Texas under “grand jury” but not under “by information.”

Many of Professor Wildenthal’s comments highlight some interesting research avenues that we unfortunately have not yet had the time to explore in our project. Although we plan to address a number of issues in our ongoing project—eventually to be combined in book form—to tally state constitution rights in 1787, 1868, and the current day, there are some that we simply cannot tackle alone. The most interesting, we think, would be to enrich our textual findings with a portrait of the state case law that developed alongside the constitutional rights. In the context of grand jury rights, Professor Wildenthal demonstrated how case law can often be used to interpret unclear or unspoken constitutional questions in a particular era. Similarly, analyzing related statutory law throughout history would be fascinating. One thing that we hope our book, in particular, will illuminate is the trend in rights development over time. Ideally, each right would be mapped across time to illustrate its birth, evolution, and, in some cases, demise. We aim to at least begin that depiction by identifying the constitutional rights in at least three critical points in history: the ratification of the Constitution, the ratification of the Fourteenth Amendment, and the current day.

7. The Louisiana constitution that we used for coding was completed in March 2, 1868 and ratified on August 18, 1868. The Mississippi constitution was adopted on May 16, 1868 and ratified on November 30, 1868.