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## Educational materials for Founding Era Constitution-Making

In this essay, John Dinan describes the role of natural law in the drafting of founding-era state constitutions. Fifteen state constitutions were written before the U.S. Constitution, and as many as half of the delegates to the Constitutional Convention of 1787 participated in the drafting of these state constitutions. Because of this, state constitutions heavily influenced the content of the U.S. Constitution, whose drafters presumed the continued vitality of their pre-existing state constitutions. Founding-era state constitutions characteristically employed the natural law language of the [Declaration of Independence](#) and drew on the long tradition of natural law and natural rights political thought to argue for the right to republican government and such inalienable rights as life, liberty, property, happiness, and safety. It is also in the state constitutions that we find claims to the right to emigrate and the right to religious freedom. Although the drafters of the state and federal constitutions were also influenced by the English common law tradition and documents such as the [Magna Carta](#) and the [English Bill of Rights](#), there is no mistaking the strong presence of natural law principles in the founding-era state constitutions.



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### JOHN ADAMS

John Adams was born in Braintree, Massachusetts in 1735. After graduating from Harvard University at the age of 20, he was admitted to the bar in 1761. He quickly became a prominent leader in the Patriot movement. He spoke out against the Writs of Assistance and responded to the Stamp Act by publishing his *Essay on the Canon and Feudal Law*.

In 1770, Adams was elected to the Massachusetts Assembly and represented his colony at the First Continental Congress in 1774. In 1775, he nominated George Washington as commander-in-chief of the colonial armies. In the crucial year of 1776, Adams submitted a resolution in May that effectively called for independence from Great Britain. Soon afterward, he threw his full support behind [Thomas Jefferson's](#) proposed [Declaration of Independence](#).

Adams served as ambassador to France during the Revolutionary War. In 1781, he helped author the Treaty of Peace with Great Britain, which he signed in 1783. He was elected Vice President of the United States under George Washington in 1789, and elected President in 1796. His federalism put him at odds with Jefferson during both his own and Jefferson's later presidency. Adams died within hours of Jefferson on the nation's birthday in 1826.



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### Adams, John:

(1735 - 1826) a Founding Father and the second president of the United States, Adams valued the rule of law and praised Aristotle for his support of it and of other republican principles.

### [Bill of Rights:](#)

(1689) an English document guaranteeing free parliamentary elections and the right to petition for grievances, and forbidding cruel and unusual punishment

### charter:

a written grant from a sovereign power conferring certain rights and privileges; the colonial charters established the legal rights of existence by the King of England and laid forth the political and commercial powers of the states. Click [here](#) to read some of the colonial charters, grants, and other related documents.

### [Declaration of Independence:](#)

the document recording the proclamation of the second Continental Congress (4 July 1776) asserting the independence of the Colonies from Great Britain. The Declaration justified the independence of the United States by listing colonial grievances against King George III and by asserting certain natural rights, which drew on a long natural law and natural rights tradition in political thought.

### **emigrate:**

to leave one place or country, especially one's native country, in order to settle in another. The Pennsylvania Constitution of 1776 grounded the right to emigrate in natural law principles.

### [Magna Carta:](#)

the "great" English charter issued in 1215 to limit the powers of King John and to protect certain privileges of some of his subjects (namely, the English feudal barons). The document, with the civil and political liberties granted therein, is recognized as an important part of the unwritten common law tradition.

### **Federal Convention:**

also called the U.S. Constitutional Convention or the Philadelphia Convention; a gathering of 55 delegates from 12 of the 13 states in 1787 to address problems in the governance of the United States, which had hitherto operated under the Articles of Confederation. The result of the Convention was the drafting, signing, and ratification of the [United States Constitution](#).

### **inalienable:**

incapable of being alienated, transferred, surrendered, or repudiated

### **natural rights:**

pre-political rights to which all individuals are entitled

### **popular authority:**

also called popular sovereignty; the belief that the legitimacy of the state is conferred through the will or consent of the people for whom that government is established.

### **promulgate:**

to make (as a doctrine) known by open declaration; to proclaim; to put (as a law) into action or force

### **ratify:**

to approve and sanction formally

### **rights of conscience:**

rights, such as the right to freedom of religion, held to be natural and inalienable

### social compact:

an implicit or explicit agreement to which each individual must consent to give authority to the government. The purpose of the contract is to safeguard the rights of each citizen.



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#### I. Introduction

A. 15 state constitutions preceded the U.S. Constitution; many delegates to the Philadelphia convention of 1787 took part in the creation of the state constitutions and presumed the continued vitality of these documents in drafting the federal constitution

B. Many of these state constitutions explicitly recognized pre-political natural rights and enshrined or expanded upon the principles of the [Declaration of Independence](#)

#### II. Development of state constitutions

A. 55 delegates at the 1787 federal Constitutional Convention drew on a decade of experience with American constitution-making at the state level.

1. January 1776: New Hampshire adopted a temporary constitution (rather than a colonial charter); soon followed by South Carolina and New Jersey

2. June 1776: Virginia enacts a constitution designed to endure; all subsequent state constitutions similarly drafted

3. Virginia also adopts a separate declaration of rights; an earlier draft of which had circulated widely and influenced the Declaration of Independence, issued in the following month

4. June 1780: Massachusetts adopts a constitution drafted by delegated framers and ratified by the people; most subsequent state constitutions, as well as the [U.S. Constitution](#), followed this model

#### B. Types of state constitutions

1. Single constitution: New Jersey (1776), Virginia ([1776](#)), Delaware (1776), Pennsylvania ([1776](#)), Maryland (1776), North Carolina (1776), New York (1777), Georgia (1777), and Massachusetts (1780, only one to endure to the present day)

2. Multiple constitutions: South Carolina (1776, 1778), New Hampshire (1776, [1784](#)), and Vermont (1777, 1786) didn't enter the Union until 1791)

3. No founding-era constitution, retained colonial charters: Connecticut (until 1818) and Rhode Island (until 1842)

#### III. Reliance on natural law and natural rights in state constitutions

A. Founding-era state constitutions regularly relied specifically on natural law principles of the Declaration of Independence

1. Some, like South Carolina, Georgia, New Jersey, and New York, did not reference "natural," "inherent," or "inalienable" rights, but most did.

#### B. Common themes of the state constitutions:

1. Individuals are entitled by nature to enjoy certain rights including:
  - a. The right to live under a republican government
  - b. The inalienable right to reform or abolish governments that fail to secure these rights or to operate with the consent of the governed
2. natural rights of life, liberty, property, happiness, safety declared to exist prior to the social compact
3. some rights (e.g. freedom of speech and press, trial by jury, right to bear arms, protection against unreasonable searches and seizures) not grounded in natural law principles, but seen as fundamental marks of liberty and republican government
4. other rights (e.g. religious freedom, rights of conscience, right to emigrate, right to enjoy a republican form of government, and right to abolish governments that fail to secure such rights) seen as natural and inalienable

#### IV. Conclusion

- A. Founding-era state constitutions also drew on the rights of Englishmen set out in the [Magna Carta](#) and the [Bill of Rights of 1689](#); but natural law principles also played an undeniably strong role



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### I. Basic Interpretation

If you are interested, after reading John Dinan's essay, in learning more about America's constitution-making history, please go to the [Primary Source Documents](#) to read some of the texts mentioned in the essay. As you go back to the primary sources, keep in mind the following questions:

1. Describe the relationship between the founding-era state constitutions and the [United States Constitution](#). In what ways did the former influence the latter?
2. What principles and rights were the drafters of the founding-era constitutions concerned to enshrine in these important documents?
3. What sources of thought, or thinkers and documents, influenced the drafters of the state and federal constitutions?
4. What differences do you find in the language or content of the various state constitutions? Are they important?
5. What differences do you find in the language or content of the federal constitution compared to the state constitutions that preceded it? Do these differences shed any light on how we are to understand federal versus state power?

### II. Connections to Other Thinkers

In order to best understand the importance of American constitution-making, it is important to place it in its proper context. The drafting of constitutions marked a new trend politically, but bore an important relation to the unwritten, common law tradition of England, as well as to the long-standing traditions of political philosophy from classical political debates through the modern period. As you learn more about American Constitutions, consider how these documents reflect the ideas of earlier thinkers, and

influenced subsequent political debates.

1. [American Progressives](#) viewed the original constitutions and the natural law philosophy on which they are based as undesirable restrictions on future progress. Yet undoubtedly these constitutions represented progress towards liberty in their time. How might American Progressives have attempted to secure these same rights without using written constitutions grounded in the natural law?
2. One of the criticisms of codifying law in written constitutions is that by enumerating or listing certain rights, you implicitly state that other rights not listed are not actually had by the citizens. What might a proponent of the [common law](#) say about this criticism?
3. These early constitutions owe a great debt to [John Locke](#). Yet many explicitly replaced Locke's 'right to property' with a 'right to the pursuit of happiness', or at least added the latter to the list. Do America's early constitutions owe the idea of a 'right to the pursuit of happiness' to earlier natural law thinkers, or was it an innovation original to natural law thinking? Is there a connection in the natural law tradition between happiness and property?
4. What is the connection between early American constitutions and [modern constitutionalism](#)? Do they resemble each other closely, or have there been significant shifts in constitutional thought since the founding era?
5. If [Thomas Aquinas](#) had written the early American constitutions, how might they have looked different, if at all?

### III. Critical Interpretation

With a basic understanding of the background of the American constitutions from the founding era, let us now examine their content more critically. Are they successful documents? Do the values and principles found in them stand up over time? Did the principles of the state and federal constitutions fully express the political ideals of the people? Do these documents contain implications of which their drafters may have been unaware? Use the questions below as a guide:

1. The early constitutions simply state the natural rights held by the people, but rarely contain overt arguments for the reality of such a state of affairs. Can there be successful arguments offered for the idea of natural rights? If so, what are they?
2. Many of these constitutions made a distinction between natural rights and conventional ones. On what principles is this distinction grounded? How can we determine which rights are natural and which are not?
3. One criticism of rights talk is that it is inferior to the language of duty, because a person can give up his or her rights (i.e. not exercise them) whereas one cannot morally ignore a duty. Thus duty-based natural law would succeed more in guaranteeing the establishment of a state of affairs that respects the dignity of all persons (even ones who wish to give up their own dignity). Is this criticism sound? How might the founders respond to it?
4. Some of these early constitutions did not explicitly use natural law to ground their lists of rights. What, then, did they think the source of these rights was? If the source is merely conventional or political, could not the political power take the rights away?
5. Protection against unreasonable search and seizure seems like a very beneficial protection found in these constitutions. Yet it is often claimed that some procedures deriving from this protection limit the ability of police or security powers to prevent or capture dangerous criminals. Is this a valid criticism? How are the natural rights of liberty and safety made compatible?

### IV. Connections to Contemporary Concerns

The U.S. Constitution is a document of the greatest importance within American history, and remains the central source for ongoing executive, legislative, and judicial debates. Let us now turn to some contemporary issues that may shed light on the role of the U.S. Constitution, and the legacy of the state constitutions, in our society today:

1. The early constitutions enumerated a specific and relatively limited number of natural rights. Yet today many more privileges are claimed as natural rights. Should the founders have included more rights in their lists?
2. Many of these constitutions contained a right to bear arms. How ought we to understand the right to bear arms today, in the absence of militias that had substantial importance in the time of the founders? Do strong protections to arm bearers apply to us today?
3. Despite a clause in the federal constitution prohibiting the establishment of religion, many of the states in the founding period either had an established religion or recognized a place for special funding for religious institutions. In what ways does this fact, if at all, bear on our contemporary debates over the separation of church and state?
4. How might the right to abolish tyrannical governments be understood today? At what point could the contemporary American government become tyrannical enough to justify rebellion?
5. Over the course of American history, more and more power has been ceded to federal constitutional provisions than to state ones, giving states less scope to determine their own internal policies. Is this process desirable? What would the drafters of the early state constitution have to say?

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