NATURAL RIGHTS AND THE CONSTITUTION: THE ORIGINAL "ORIGINAL INTENT"

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The idea that natural rights, which have been denied and disparaged for two centuries, were protected by the original intent of the ratifiers of the Constitution may seem remarkable. Given the historical record, however, it is more remarkable that modern originalists are now the most exuberant critics of those natural rights.

Commentators usually link unenumerated rights to the Ninth Amendment's laconic reference to *other* rights retained by the people,[1] but the resulting works are often inconclusive or even contradictory. Compare Robert Bork's successive attempts to reconcile unenumerated rights and the text of the Ninth Amendment:

> The construction of new rights can start from existing constitutional guarantees . . . which may properly be taken as specific examples of the general set of natural rights contemplated by . . . the Ninth Amendment . . . . [T]here is some evidence that this is substantially what Madison intended . . . .
>
> —Robert Bork (1968)[2]

> [N]ot even a scintilla of evidence supports the argument that the framers and the ratifiers . . . intended the judiciary to

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1. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). *See generally* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989); BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); O. John Rogge, *Unenumerated Rights*, 47 CAL. L. REV. 787 (1959); Thomas E. Towe, *Natural Law and the Ninth Amendment*, 2 PEPP. L. REV. 270 (1975); Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1 (1968). For studies of natural law during the founding era, see generally EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME L. REV. 258 (1950); Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211 (1988); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

2. Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 138, 170.

> develop new individual rights, which correspondingly create new disabilities for democratic government.
>
> —Robert Bork (1979)[3]

> I do not know [what the Ninth Amendment means]. I know of only one historical piece. There may be more. You know, this is not a subject I have researched at great length, but most people say they do not know what it means.
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> —Robert Bork (1987)[4]

Judge Bork is correct, of course—at least when he concludes that enumerated rights are specific examples of the larger array of natural rights. For true originalists, the Ninth Amendment may be sufficient to protect these other rights retained by the people, but it is not necessary. In fact, it is not even relevant: The intent of the ratifiers of the Constitution fixed the status of natural rights, and no subsequent amendment has replaced or altered this understanding.

I. INTRODUCTION: ORIGINAL INTENT[5]

Modern originalists propose basing constitutional interpretation on the text of the Constitution as understood by some relevant group of enactors. Although the supposed

3. Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 697.

4. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 248 (1989) [hereinafter *Nomination Hearings*] (testimony of Robert Bork). Two books and over forty articles on the Ninth Amendment were available in 1987. Following his confirmation hearings, Judge Bork again concluded that unenumerated rights "depart[] from the historical meaning of the Constitution," ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 209 (1990), and that judicial derivation of such rights is "obviously inconsistent with the historical record." *Id.* at 184. Although Judge Bork often alludes to the historical record, there are no citations to any state ratifying convention in *The Tempting of America*.

5. Constitutional interpretation justified by certain preferences of its enactors is variously labeled "interpretivism," "original intent," "original understanding," or "original meaning," depending in part on the optimism, credulity, or political preference of the observer. *See, e.g.*, Antonin Scalia, Address at the Attorney General's Conference on Economic Liberties (June 14, 1986), *in* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987) [hereinafter SOURCEBOOK] (asserting that the designation of originalism should be changed from original intent to original meaning, "[i]n the interest of precision").

understanding of society[6] or the ratifying society[7] or the ratifiers[8] is often summoned, there is no direct and reliable method for evaluating any of these criteria.[9] Originalists must therefore present evidence of the understanding of smaller groups or even individual Framers, and then synthesize a more universal understanding through more or less controversial inferences.[10]

All supposed recreations of original intent require inferences, but the indicator that requires the least Promethean inference is consensus, which is evidenced in representations

6. For assertions that constitutional interpretation should be based on the original intent of society, see BORK, *supra* note 4, at 144 (quoting Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988)); SOURCEBOOK, *supra* note 5, at 17 (executive summary 1); Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 211 (1900); Scalia, *supra* note 5, at 106.

7. For assertions that constitutional interpretation should be based on the original intent of ratifying society, see SOURCEBOOK, *supra* note 5, at 20; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 208 (1980) (proposing original intent *arguendo*); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 412 (1978).

8. For assertions that constitutional interpretation should be based on the original intent of the ratifiers, see McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 403 (1819); BORK, *supra* note 4, at 144 (1990); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 235 n.46, 262 (1988); Gary C. Leedes, *A Critique of Illegitimate Noninterpretivism*, 8 U. DAYTON L. REV. 533, 546 (1983); Earl M. Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 802; Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981).

9. With the exception of the 1788 referendum in the Rhode Island and Providence Plantations, no state submitted the proposed constitution to a direct vote of the people. *See* 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION xxvii (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter 16 DOCUMENTARY HISTORY]. The Rhode Island voters overwhelmingly rejected the proposed constitution. There are no records of votes on any specific constitutional provision from any of the state conventions.

10. Originalists occasionally conflate "the Framers" of the Philadelphia convention and "the ratifiers" or "ratifying society." *See, e.g.*, SOURCEBOOK, *supra* note 5, at 17; Maltz, *supra* note 8, at 790; Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 24 (1985); Monaghan, *supra* note 8, at 375 n.130. Originalist commentators may arrive at the supposed understanding of some broader group through questionable inferences. Robert Bork concedes that the understanding of the Eighteenth-Century public is not accessible, and concludes that the understanding of the ratifiers must serve as "a shorthand formulation." BORK, *supra* note 4, at 144. Henry Monaghan makes the same concession regarding the understanding of the ratifiers and concludes that the intent of the Framers must be accepted as "a fair reflection of it." Monaghan, *supra* note 8, at 375 n.130. The Justice Department claims that researchers are "certainly entitled" to make such assumptions. SOURCEBOOK, *supra* note 5, at 17. The assumptions, however, are sometimes accompanied by vaguely circular justifications. The Justice Department's *Sourcebook* proposes that the intent of the Framers is significant because the Framers were "a significant part of the ratifying society," *Id.* at 15, and that the views of individual Framers are admissible at least to the extent those views can be "shown to be representative of the understanding of the ratifying society." *Id.* at 15, 20. If the understanding of the ratifying society had already been known, inquiry into the understanding of individual Framers would be unnecessary.

made by and to ratifiers that a particular point was beyond dispute and accepted by all participants.[11] There are indications that state ratifying conventions explicitly sought—and the friends of the Constitution eagerly provided—such "explanations."[12] Interpretation based on these representations is endorsed by modern originalists,[13] although these representations may not have been uniform, accurate, or even candid.[14] For purposes of originalist inquiry, however, it must

11. Consensus is of course strongly suggested when the available evidence shows that Federalists and Anti-Federalists shared a particular understanding. Consensus is also suggested by assertions that a point was beyond dispute and contested by none. *See infra* text accompanying notes 48-50; note 96. Uniformity in Federalist assurances is strongly suggested by Anti-Federalist observations that a certain doctrine was "orthodox," and "daily and confidently advanced" by the friends of the Constitution. *See infra* note 121.

12. For evidence that state ratifying conventions sought explanations from prominent friends of the Constitution, see 2 THE COMPLETE ANTI-FEDERALIST 8 n.1 (Herbert J. Storing ed., 1981) (Massachusetts convention); "Unitas," PA. MERCURY, Jan. 5, 1788, *reprinted in* 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES, DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT 194, 195 (Merrill Jensen ed., 1978) [hereinafter 3 DOCUMENTARY HISTORY] (New Jersey and Virginia conventions); *Editor's Note*, 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 278, 279 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DOCUMENTARY HISTORY] ("Constitutional Convention speeches by Benjamin Franklin . . . were read to the Maryland House of Delegates."). For evidence that prominent Federalists provided explanations that went beyond a simple reiteration of the text, see THEODORE FOSTER, THE MINUTES OF THE RHODE ISLAND CONVENTION OF MARCH 1790, at 68 (1929) (recording that Henry Marchant "explain[ed] the Nature of the Constitu[tion]"); "An American" (Tench Coxe), *To the Honorable Members of the Convention of Virginia*, PA. GAZETTE, May 21, 1788, *reprinted in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, VIRGINIA 833, 834 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 DOCUMENTARY HISTORY]; Letter from James Madison to Ambrose Madison (Nov. 8, 1787), *in* 9 DOCUMENTARY HISTORY, *supra*, at 597; Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 86, 97; Letter from George Washington to David Humphreys (Oct. 10, 1787), *in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, VIRGINIA 48 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter 8 DOCUMENTARY HISTORY].

13. For contemporary support of interpretation based on representations made to the ratifiers, see Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 23 (1986) [hereinafter Berger, *New Theories*] ("[T]he explanations of the text to the Ratifiers were designed to garner votes for adoption of the Constitution . . . and the Ratifiers acted on the basis of those representations."); *see also* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 10 (1987); Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 315, 317, 322, 329-30 (1986); Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 351-52 (1988).

14. For example, Philadelphia delegate Luther Martin's professed reaction to the "Aristides" essays of Judge Alexander Contee Hanson: "["Aristides" provided] an explanation so inconsistent with the intention of its framers, and so different from its true construction and from the effect which it will have . . . that I could scarce restrain my astonishment at the error . . . ." Luther Martin, MD. J., Mar. 28, 1788, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 372, 373 (Paul L. Ford ed., Brooklyn,

be presumed that the ratifiers acted on the basis of the general tenor of these representations.

The inscrutability of the Ninth Amendment provides a textual foundation for doubts about the original status of natural rights, but the understanding of natural rights shared by the ratifiers of the Constitution was rarely so equivocal. In their view, "other" unenumerated natural rights had already been retained before the debate on amendments began. The Founders believed that natural rights were superior to positive law and the Constitution, and the ratifiers were assured that the proposed plan of government would not disparage such rights. Retained rights could not be defined by enumeration because—if for no other reason—the natural rights of mankind[15] had never been fully enumerated. Textual recognition therefore could only provide security for some of those rights. Finally, although power to disparage rights was limited, power to vindicate them was not; interposition to defend or regain natural rights was contemplated by the ratifiers.

The question whether a jurisprudence based on recreations of original intent is desirable or even practicable will not be addressed in this article.[16] Rather, this is an empirical study:

Historical Printing Club 1892) [hereinafter FORD's ESSAYS]. Even if such representations were reliable, not all Federalists chose to honor their representations following ratification. During debate on the proposed Bank of the United States, Edmund Randolph declared that "observations were uttered by the advocates of the constitution, before its adoption, to which they will not, and, in many cases, ought not to adhere." Edmund Randolph, *Attorney General's Opinion No. 2* (1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 90 (M. St. Clair Clark & D.A. Hall eds., Washington, Gales & Seaton 1832). Records show that Randolph followed his own advice with a vengeance, notably with regard to the Necessary and Proper Clause. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194, 206-07 (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES] (statement of Edmund Randolph in Virginia convention, June 10, 1788); Randolph, *Attorney General's Opinion No. 2*, *supra*, at 89.

15. The original spelling, grammar, and style have been retained in all documentary material—occasionally at the expense of gender-neutral language. Even Mercy Warren, the supposed author of the "Columbian Patriot" letters and easily the most influential female participant in the ratification debates, wrote that the unamended Constitution threatened "the rights of man." Charles Warren, *Elbridge Gerry, James Warren, Mercy Warren and the Ratification of the Federal Constitution in Massachusetts*, 64 PROC. MASS. HIST. SOC'Y 143, 162 (1931) (quoting Letter from Mercy Warren to Catherine Macaulay (Sept. 28, 1787)).

16. For critical discussion of the normative value of originalism, see Arthur S. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973); Laurence H. Tribe, *The Holy Grail of Original Intent*, HUMANITIES, Feb. 1986, at 23. For critical discussions of the quality of the historical record and the practicability of originalism, see Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); Brest, *supra* note 7; James H. Hutson, *The Creation of the Constitution:*

Modern objections to the assertion of unenumerated natural rights will be scrutinized in light of relevant evidence from the ratification debates. It will be shown that if constitutional interpretation were ever truly informed by the original understanding of the ratifiers, these modern objections would be refuted by the original "original intent."

II. Objection: "The Founders Did Not Believe in Natural Law"

The claim that natural law and natural rights were not widely accepted by the founding generation has become commonplace. According to modern commentators, it was simply "the fashion" to invoke natural law,[17] and such references were nothing more than flourishes and literary garniture, "even as in our own day."[18] John Hart Ely states that natural law and natural rights philosophies were not broadly accepted during the ratification era,[19] and in *Democracy and Distrust*, he adds that belief in these doctrines "probably was not even the majority view among those 'framers' we would be likely to think of first."[20]

Non-originalist efforts to establish an historical basis for respecting unenumerated rights are regularly discounted. Originalist Joseph Grano writes that modern commentators have "strained diligently to find proof . . . that the Framers believed in natural law," but for Professor Grano at least, the ensuing works have been "disappointing."[21]

The Integrity of the Documentary Record, 65 Tex. L. Rev. 1 (1986); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 156-57; John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi. L. Rev. 502 (1964).

17. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 50 (1980) (quoting Benjamin Wright, American Interpretations of Natural Law 332-33 (1931)). Although Ely quotes Wright with approval, Wright actually concluded that "[i]n a period of political thought in which all of the basic principles can be assumed without explicit consideration *because they are so generally agreed with*, there is, of course, no need for the discussion of natural law." Wright, *supra*, at 343 (emphasis added).

18. Felix F. Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 225 (1955); *see also* Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 274 n.54 (1975) (arguing that James Wilson's references to natural law were "often simply flourishes"). Professor Cover's disclaimer suggests that other references to natural law may have had merit, but he provides no further explanation.

19. *See* John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 25 (1978); *see also* Ely, *supra* note 17, at 39 (concluding that the doctrine of natural law was "far from universally accepted").

20. Ely, *supra* note 17, at 39.

21. Joseph Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 Wayne L. Rev. 1, 16 (1981). Michael Perry describes these efforts as "quixotic."

A. *Natural Rights Consensus*

Virtually every one of those Framers we would be likely to think of first—including George Washington,[22] John Adams,[23] Thomas Jefferson,[24] James Madison,[25] Alexander Hamilton,[26] John Jay,[27] James Wilson,[28] James Iredell,[29] Oliver Ellsworth,[30] Benjamin Rush,[31] Gouverneur Morris,[32] Roger Sherman,[33] John Quincy Adams,[34] John Dickinson,[35] George Nicholas,[36] James Monroe,[37] Edmund Randolph,[38] George Mason,[39] Pat-

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Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 267 (1981).

22. *See* Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), *in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 355, 356.

23. *See* John Adams, *Diary*, *in* 2 THE WORKS OF JOHN ADAMS 3, 370, 374 (Charles F. Adams ed., Boston, Little, Brown 1850).

24. *See* THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776).

25. *See* 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1834) (statement of James Madison).

26. *See* ALEXANDER HAMILTON, THE FARMER REFUTED, &C. (New York, James Rivington 1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 136 (Harold C. Syrett ed., 1961).

27. *See* Adams, *supra* note 23, at 370 (quoting statement of John Jay in Committee for stating rights, grievances, and means of redress).

28. *See* 2 ELLIOT'S DEBATES, *supra* note 14, at 454 (statement of James Wilson in Pennsylvania convention).

29. *See* 4 ELLIOT'S DEBATES, *supra* note 14, at 166-67 (statement of James Iredell in First North Carolina convention).

30. *See* "A Landholder" (Oliver Ellsworth), CONN. COURANT, Nov. 19, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 12, at 462, 463 [hereinafter "A Landholder" III].

31. *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 434, 440 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY] (statement of Benjamin Rush in Pennsylvania convention, Nov. 30, 1787).

32. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 411 (1966) [hereinafter MADISON'S NOTES] (describing statement of Gouverneur Morris).

33. *See* 1 ANNALS OF CONG. 719 (Joseph Gales ed., 1834) (statement of Roger Sherman).

34. *See* John Quincy Adams, *Letters of Publicola*, *reprinted in* THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS 231 (Adrienne Koch & William Peden eds., 1946).

35. *See* John Dickinson, *An Address to the Committee of Correspondence in Barbadoes*, *in* 1 THE POLITICAL WRITINGS OF JOHN DICKINSON 107, 111-12 (Wilmington, Bonsal & Niles 1801).

36. *See* 3 ELLIOT'S DEBATES, *supra* note 14, at 451 (statement of George Nicholas in Virginia convention).

37. *See* 9 DOCUMENTARY HISTORY, *supra* note 12, at 1112 (statement of James Monroe in Virginia convention, June 10, 1788).

38. *See* MONCURE D. CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 74 (New York, G.P. Putnam's Sons 1888).

39. *See* VA. CONST. of 1776, declaration of rights, arts. 1, 3, *in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49 (William F. Swindler ed., 1979) [hereinafter UNITED STATES CONSTITUTIONS].

rick Henry,[40] Richard Henry Lee,[41] George Clinton,[42] Elbridge Gerry,[43] Sam Adams,[44] and John Hancock[45]—acknowledged the principles of natural law and natural rights.[46] Despite sharp disagreement over every article of the proposed constitution, scores of commentators—including "Centinel," "The Federal Farmer," and "Brutus"—agreed that no plan of government would be acceptable unless the natural rights of the people were secure.[47]

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40. *See* 3 ELLIOT'S DEBATES, *supra* note 14, at 653 (resolution sponsored by Patrick Henry in Virginia convention, June 25, 1788).

41. *See* Adams, *supra* note 23, at 370 (quoting statement of Richard Henry Lee).

42. *See* Letter from George Clinton to John Lamb (June 28, 1788), *in* CLARENCE E. MINER, THE RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK 113 (1921).

43. *See* GEORGE A. BILLIAS, ELBRIDGE GERRY 7 (1976).

44. *See* SAMUEL ADAMS, THE RIGHTS OF THE COLONISTS (1772), *reprinted in* 2 THE WRITINGS OF SAMUEL ADAMS 350, 351-55 (Harry A. Cushing ed., 1906).

45. *See* JOHN HANCOCK, AN ORATION 19 (Boston, Edes & Gill 1774), *reprinted in* PAMPHLETS AND THE AMERICAN REVOLUTION (G. Jack Gravlee & James R. Irvine eds., 1976).

46. *See also* 2 DOCUMENTARY HISTORY, *supra* note 31, at 384 (statement of John Smilie in Pennsylvania convention); 2 ELLIOT'S DEBATES, *supra* note 14, at 93 (statement of Theophilus Parsons in Massachusetts convention); *id.* at 134 (statement of Samuel Nasson in Massachusetts convention); *id.* at 204 (statement of Joshua Atherton in New Hampshire convention); *id.* at 241 (statement of John Williams in New York convention); *id.* at 311 (statement of Melancton Smith in New York convention); *id.* at 362 (statement of Alexander Hamilton in New York convention); *id.* at 430 (statement of Thomas Hartley in Pennsylvania convention); 3 *id.* at 657 (George Wythe reporting Virginia convention committee's proposed amendments, June 27, 1788); 4 *id.* at 137 (statement of Samuel Spencer in first North Carolina convention); *id.* at 161 (statement of Archibald Maclaine in first North Carolina convention); *id.* at 166-67 (statement of James Iredell in first North Carolina convention); *id.* at 168 (statement of Timothy Bloodworth in first North Carolina convention); *id.* at 210 (statement of Joseph McDowell in first North Carolina convention); *id.* at 320 (statement of Charles Pinckney in South Carolina convention); *id.* at 337 (statement of Patrick Dollard in South Carolina convention); Oliver Ellsworth & William Johnson, *Speeches in the Connecticut Convention*, CONN. COURANT, Jan. 4, 1788, *reprinted in* 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 243, 248 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter 15 DOCUMENTARY HISTORY]; Samuel Huntington et al., *Speeches in the Connecticut Convention*, CONN. COURANT, Jan. 9, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra*, at 312, 313; *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, PA. PACKET, Dec. 18, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 31, at 617, 630; "Hum-Strum," THE INDEPENDENT GAZETTEER, OR, THE CHRONICLE OF FREEDOM, Jan. 10, 1788, at 3 (describing statements of William Findley and Robert Whitehill); THE DAILY ADVERTISER, July 11, 1788, at 2 (amendment proposal of John Lansing); DANIEL UPDIKE, JOURNAL OF PROCEEDINGS, *reprinted in* WILLIAM R. STAPLES, RHODE ISLAND IN THE CONTINENTAL CONGRESS 640, 646 (Providence, Providence Press 1870) (statement of Job Comstock in South Kingston convention of Rhode Island and Providence Plantations).

47. *See* "Brutus" (Robert Yates), N.Y. J., Nov. 1, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 372, 372-73; "Centinel" (Samuel Bryan), Apr. 5, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 202, 203; "The Federal Farmer" (Richard Henry Lee), Oct. 12, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 245, 247 [hereinafter "The Federal Farmer" IV]; "The Federal Farmer," Dec. 25, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST,

Federalists and Anti-Federalists agreed that American society widely understood and respected the premises of natural law. In the words of one Anti-Federalist, "[n]o people under Heaven are so well acquainted with the natural rights of mankind, with the rights that ever ought to be reserved in all civil compacts, as are the people of America."[48] Another observed that the fundamental principles underlying society and civil government had become "accurately known and universally diffused."[49] Indeed, the principles underlying natural rights had been so thoroughly illustrated by the ratification era that a prominent Federalist even felt compelled to preface his defense of the Constitution with an apology for broaching the

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supra note 12, at 256, 261 [hereinafter "The Federal Farmer" VI]; *see also*, "A Citizen," *To the People of Pennsylvania*, CARLISLE GAZETTE, Oct. 24, 1787, *microformed on* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MICROFORM SUPPLEMENT, Pa. no. 152, at 808, 809 (John P. Kaminski & Gaspare J. Saladino eds., 1976) [hereinafter DOCUMENTARY HISTORY MICROFORM]; "A Citizen of Pennsylvania," *To the People of America*, PA. PACKET, Oct. 12, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra*, Pa. no. 127, at 610; "Agrippa," *To the People*, MASS. GAZETTE, Nov. 30, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 73, 75; "A Landholder" III, *supra* note 30, at 463; "Cincinnatus," N.Y. J., Nov. 8, 1787, *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 10, 13; "Denatus," *To the Members of the Virginia Federal Convention, collectively, and individually*, VA. INDEPENDENT CHRON., June 11, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 260, 263; "Harrington" (Benjamin Rush), *To the Freemen of the United States*, PA. GAZETTE, May 30, 1787, *reprinted in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 116 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY]; "Mentor," PETERSBURG VA. GAZETTE, Apr. 3, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 578, 579; "One of the Common People," BOSTON GAZETTE, Dec. 3, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 120, 122; "One of the Late Army," FREEMAN'S J., Nov. 14, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra*, Pa. no. 225, at 1095, 1096; "Publicola" (Archibald Maclaine), *An Address to the Freemen of North Carolina*, STATE GAZETTE OF N.C., Mar. 20, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 435, 437; "Republicus," KY. GAZETTE, Feb. 16, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 375; "The Impartial Examiner," VA. INDEPENDENT CHRONICLE, Mar. 5, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 459, 462; "The State Soldier" (George Nicholas), VA. INDEPENDENT CHRON., Feb. 6, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 345, 353 [hereinafter "The State Soldier" II]; "The State Soldier," VA. INDEPENDENT CHRON., Mar. 19, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 509, 510 [hereinafter "The State Soldier" IV]; "Thoughts at the Plough," CARLISLE GAZETTE, Apr. 9, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra*, Pa. no. 615, at 2361, 2364.

48. Letter from Thomas Wait to George Thatcher (Aug. 15, 1788), *quoted in* John P. Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, *in* THE BILL OF RIGHTS: A LIVELY HERITAGE 141, 143-44 (Jon Kukla ed., 1987); *see also The Address and Petition of the Religious Society called Quakers*, DAILY ADVERTISER, Mar. 7, 1788, at 2 ("The natural rights and civil liberties of men have been so fully investigated and declared, and are so generally acknowledged to be unalienable, we conceive it unnecessary to attempt to illustrate" those blessings further.).

49. "John DeWitt," *To the Free Citizens of the Commonwealth of Massachusetts*, AM. HERALD (1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 20, 22.

"old hackneyed and well known principle" of natural law.[50]

Official texts from the founding era also suggest a consensus. Both the Declaration and Resolves of the First Continental Congress[51] and the more renowned Declaration of Independence resorted to the law of nature,[52] and within months of independence, several state constitutions had already recognized certain "unalienable" rights. Of the thirteen states that drafted constitutions or proposed amendments to the federal Constitution before the ratification debates, twelve expressly cited natural rights,[53] and such rights were later recognized in the organic acts of over forty states.[54] This is something more

50. Letter from William Pierce to St. George Tucker (Sept. 28, 1787), *in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 442, 443.

51. Statement of Violations of Rights, *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 63, 67 (Worthington C. Ford ed., 1904). *Declaration and Resolves* is the conventional title of the document, although it was identified as *The Bill of Rights* in an earlier printing. *See* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 63 (1977).

52. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

53. For recognition of natural rights in pre-1787 state constitutions or bills of rights, see DEL. CONST. of 1776, declaration of rights, § 2, *in* 2 UNITED STATES CONSTITUTIONS, *supra* note 39, at 197; GA. CONST. of 1777 pmbl., para. 1, *in* 2 UNITED STATES CONSTITUTIONS, *supra* note 39, at 443, 444; MD. DECLARATION OF RIGHTS of 1776, art. XXXIII, *in* 4 UNITED STATES CONSTITUTIONS, *supra* note 39, at 372, 374; MASS. CONST. pmbl., pt. 1, arts. I, VII; N.H. CONST., pt. 1, arts. II-V; N.Y. CONST. of 1777 pmbl., *in* 7 UNITED STATES CONSTITUTIONS, *supra* note 39, at 168, 170 (quoting *The Declaration of Independence*); N.C. CONST. of 1776, declaration of rights, art. XIX, *in* 7 UNITED STATES CONSTITUTIONS, *supra* note 39, at 402, 403; PA. CONST. of 1776 pmbl., declaration of rights, §§ I, II, V, XV, *in* 8 UNITED STATES CONSTITUTIONS, *supra* note 39, at 277, 277-79; VA. CONST. of 1776, declaration of rights, §§ 1, 3, *in* 10 UNITED STATES CONSTITUTIONS, *supra* note 39, at 48, 49; VT. CONST. of 1786 pmbl., ch. 1, arts. I, III, VII, XXI, *in* 9 UNITED STATES CONSTITUTIONS, *supra* note 39, at 496, 496-99.

For recognition of natural rights in declarations and amendment proposals of the various state conventions, see EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 180 (1957) (amendments proposed by South Carolina convention, May 23, 1788); *id.* at 182 (amendments proposed by Virginia convention, June 27, 1788); *id.* at 189 (amendments proposed by New York convention, July 26, 1788); RATIFICATION OF THE CONSTITUTION BY THE CONVENTION OF THE STATE OF RHODE ISLAND AND THE PROVIDENCE PLANTATIONS (1790), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 14, at 334 [hereinafter RHODE ISLAND RATIFICATION]; 4 ELLIOT'S DEBATES, *supra* note 14, at 242-43 (amendments proposed by First North Carolina convention). Virginia and New York also cited natural rights in calling for a second constitutional convention. *See* 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: HOUSE OF REPRESENTATIVES JOURNAL 47-50 (Linda G. De Pauw ed., 1977).

54. Rights described by such terms as "natural," "unalienable," or "indefeasible" have been recognized by most State constitutions since 1787. ALA. CONST. art. I, §§ 1, 2; ALASKA CONST. art. I, § 1; ARK. CONST. art. 2, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; CONN. CONST. art. I, § 2; DEL. CONST. pmbl.; FLA. CONST. art. I, § 2; GA. CONST. art. I, § 1, para. III; HAW. CONST. art. I, § 2; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; IND. CONST. art. I, §§ 1, 2; IOWA CONST. art. I, § 1; KAN. CONST. bill of rights, § 1; KY. CONST. §§ 1, 4; LA. CONST. of 1898, art. 4, *in* 4A UNITED STATES CONSTITUTIONS, *supra* note 39, at 216; ME. CONST. art. I, § 1; MD. CONST., declaration of rights, art. I; MASS. CONST. pmbl., pt. 1, arts. I, VII; MISS. CONST. of 1817, art. I, § 2, *in* 5 UNITED STATES CONSTITUTIONS, *supra* note 39, at 347, 348; MO. CONST. art. I, §§ 2, 5;

than literary garniture: The texts and debates of the ratification era show that the founding generation almost universally accepted natural law,[55] and the most fundamental question for modern interpreters is not *whether* the Founders believed in some "higher" law, but *how* they sought to reconcile natural law with the constraints of positive law and a written constitution.

III. Objection: "The Founders Believed Positive Law Was Superior to Natural Law"

Such an apparent consensus would have little meaning if the Founders believed that positive law could overrule the principles of natural law. In *Democracy and Distrust*, however, Dean Ely suggests that the values of the ratifiers' society originated in "applicable statutes and well-settled precedent as well as . . . constitutional provisions," and that the Framers did not generally believe natural law could upset this positive law.[56] Their concept of natural justice was not entirely without legal significance: The Framers would invoke it "interstitially" whenever "no aspect of positive law provided an applicable rule."[57] Dean Ely identifies no specific Framer, but his conclusions are "cor-

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Mont. Const. art. II, § 3; Neb. Const. art. I, § 1; Nev. Const. art. I, § 1; N.H. Const. pt. 1, arts. II-V; N.J. Const. art. I, ¶ 1; N.M. Const. art. II, § 4; N.C. Const. art. I, § 1; N.D. Const. art. I, § 1; Ohio Const. art. I, §§ 1, 7; Okla. Const. art. II, § 2; Or. Const. art. I, §§ 1, 2; Pa. Const. art. I, §§ 1-3; R.I. Const. of 1841, art. I, §§ 2, 3, *in* 8 United States Constitutions, *supra* note 39, at 370, 371; S.C. Const. of 1868, art. I, § 1, *in* 8 United States Constitutions, *supra* note 39, at 494; S.D. Const. art. VI, § 1; Tenn. Const. art. I, §§ 1, 3; Tex. Const. art. I, §§ 2, 6; Utah Const. art. 1, § 1; Vt. Const. Ch. 1, arts. 1, 3, 7; Va. Const. art. I, §§ 1, 3; W. Va. Const. art. III, §§ 1, 3; Wyo. Const., art. I, §§ 1, 3.

Of the remaining States, three have provisions protecting other unenumerated rights. Ariz. Const. art. II, § 33; Wash. Const. art. I, § 30; Wis. Const. art. I, § 1.

55. Few Founders questioned the status of natural rights. John Adams recalled that during debate in the First Continental Congress, "Mr. Galloway and Mr. Duane were for excluding the law of nature" from the justifications for separation from England, but that Adams himself was "very strenuous for retaining and insisting on it." Adams, *supra* note 23, at 374. Although Galloway and Duane both sought to base claims of independence on British laws and the British constitution, Adams's account does not necessarily show that they rejected either the existence or the transcendent status of natural rights. *See id.* at 371-72.

During the ratification debates, Patrick Henry also lamented the assertion of maxims of "a different, but more refined nature," 3 Elliot's Debates, *supra* note 14, at 137 (statement in Virginia convention), and Fisher Ames expressed reservations about the common perception of "the liberty of nature." 2 *id.* at 9 (statement in Massachusetts convention). Nevertheless, such anecdotes are outweighed by overwhelming evidence to the contrary.

56. Ely, *supra* note 17, at 50.

57. *Id.*

roborate[d]"[58] by citations to Robert Cover's *Justice Accused: Antislavery and the Judicial Process*.[59]

The authors of a Justice Department monograph prepared by the Office of Legal Policy also discount the relevance of "higher law principles" and contend that "the Framers, for the most part, were not particularly enamored of natural law theory as a substitute for positive law."[60] Again, no particular Framer is identified, but the reader is directed to page twenty-seven of *Justice Accused*.[61]

A. *J'accuse Justice Accused*

It is worth considering the passage usually quoted from *Justice Accused*, inasmuch as this single sentence has become a shorthand formulation for more elaborate originalist conclusions.[62] After contending that constitutional positivism dominated Eighteenth-Century America, Professor Cover wrote that

> those giants who managed the awesome transition from revolutionaries to "constitutionaries"—men like Adams and Jefferson; Dickinson and Wilson; Jay, Madison, Hamilton, and, in a sense, Mason and Henry—were seldom, if ever, guilty of confusing law with natural right . . . after the Revolution they either supported or opposed constitutions on the assumption that it was the will of men—"the people," but in actual convention, not as an abstraction—that would determine explicit, precise, and articulated allocations of delegated power and its corresponding limits.[63]

In sum, the "human law" resulting from an explicit delegation of power was seen as superior to any prior claim of natural law, and Professor Cover inferred that the founding generation shared the understanding of these particular Founders.

The evidence used to support that argument is equivocal at best. Of over 1600 ratifiers of the Constitution,[64] Professor

58. *Id.*; *see also id.* at 208 n.31, 209 n.39.

59. COVER, *supra* note 18.

60. OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, WRONG TURNS ON THE ROAD TO JUDICIAL ACTIVISM: THE NINTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE 25 (1987) [hereinafter WRONG TURNS].

61. *Id.* at 26 n.94.

62. This same sentence from *Justice Accused* is also quoted with approval in Ely, *supra* note 19, at 23 n.84, and in Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 807 n.104 (1982).

63. COVER, *supra* note 18, at 27 (footnote omitted).

64. Records suggest that 1648 delegates voted on the proposed Constitution in the thirteen original states (this total does not include the first North Carolina convention,

Cover cites only nine, and those citations are questionable.[65] John Dickinson once wrote that natural rights "cannot be taken from us by any human power."[66] John Adams was included on the basis of an opinion on the appointment of British judges, despite his belief that natural rights had undoubtedly existed "antecedent to all earthly government," and "cannot be repealed or restrained by human law."[67] Alexander Hamilton's inclusion was premised on the supposed tenor of *The Federalist*, although he believed that "when human laws contradict . . . the essential rights of any society, they defeat the proper end of all laws, and so become null and void."[68] Patrick Henry was included because of a warning that the Constitution might usurp natural rights, despite his accompanying assertion that these were, in the words of the Virginia Declaration of Rights, "inherent rights [that citizens] cannot by any compact deprive or divest their posterity."[69] George Mason, the author of the Virginia Declaration, was included as well.[70] Finally, Professor Cover asserts that James Wilson's frequent references to natural law were "often simply flourishes,"[71] in spite of Wilson's reassurance—delivered *after* the Constitution had been ratified—that if civil government failed to protect natural rights, the people were entitled to recover and defend those rights themselves.[72] *Justice Accused* addresses only the relationship between natural law and slavery; it did not investigate the Founders' understanding of natural law in depth, and no single sentence quoted from it can support a broad originalist thesis.

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nor does it include either the 1788 referendum or the South Kingston convention of the Rhode Island and Providence Plantations). *See* 16 DOCUMENTARY HISTORY, *supra* note 9, at xxvii-xxviii.

65. *See* COVER, *supra* note 18, at 273 n.54.

66. Dickinson, *supra* note 35, at 111.

67. John Adams, A Dissertation on the Canon and the Feudal Law, *in* 3 THE WORKS OF JOHN ADAMS, *supra* note 23, at 445, 449.

68. HAMILTON, *supra* note 26, at 136. During the New York convention, Hamilton also declared that in the formation of government, "all unalienable rights are reserved." 2 ELLIOT'S DEBATES, *supra* note 14, at 362.

69. 3 ELLIOT'S DEBATES, *supra* note 14, at 137 (statement in Virginia convention quoting VA. CONST. of 1776, declaration of rights, art. 1).

70. For an account of Mason's role in drafting the Virginia Declaration of Rights, see Robert A. Rutland, *Editorial Note*, *in* 1 THE PAPERS OF GEORGE MASON: 1725-1792, at 274-76 (Robert A. Rutland ed., 1970).

71. COVER, *supra* note 18, at 273 n.54. Again, no basis is given for determining which natural law passages—or which positive law passages—are flourishes.

72. *See* James Wilson, *Of the Natural Rights of Individuals*, *in* 2 THE WORKS OF JAMES WILSON 609 (Robert G. McCloskey ed., 1967).

B. *Natural Rights and Positive Law*

For John Hart Ely, the resort to natural rights and natural law signalled that "the law was not as one felt it should be."[73] Not only is this correct, it is the whole point. By the decade of the Revolution, it was almost universally agreed that human law was not as it should be when it encroached on the sacred, indefeasible, and unalienable rights of nature. For Americans, natural justice decreed that individuals were endowed with certain unalienable rights,[74] and civil government was instituted to protect those rights "which no human creature hath a right" to infringe.[75]

Positive law may declare and affirm these rights, but it cannot confer them.[76] Members of society surrender control of a portion of their alienable rights[77] to enjoy the remainder in greater safety.[78] Control is surrendered only when required for the good of the whole,[79] and all rights "not expressly given up [or necessarily ceded] from the nature of a social compact" remain.[80] As a result, the people retain every unalienable right—and many alienable rights.[81] Individuals cannot voluntarily divest themselves "nor give controul of [unalienable rights] to any power under heaven"[82] because no equivalent can be re-

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73. ELY, *supra* note 17, at 50.

74. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

75. "A SON OF LIBERTY" (Silas Downer), A DISCOURSE AT THE DEDICATION OF THE TREE OF LIBERTY (1768), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 97, 100 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter AMERICAN POLITICAL WRITING].

76. *See id.* ("The great charters of liberty . . . doth not give the privileges therein mentioned . . . but must be considered as only declaratory of our rights . . . .") (emphasis omitted).

77. *See* THEOPHILUS PARSONS, ESSEX RESULT (1778), *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 75, at 480, 488 ("[E]ach individual parts with the power of controuling his natural alienable rights . . . .").

78. *See* SIMEON HOWARD, A SERMON PREACHED TO THE ANCIENT AND HONORABLE ARTILLERY COMPANY IN BOSTON (1773), *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 75, at 185, 188 ("[I]ndividuals . . . give up a part of their natural liberty for the sake of enjoying the remainder in greater safety . . . .").

79. *See id.* ("[T]he liberty which men have is all that natural liberty . . . excepting what they have *expressly* given up for the good of the whole society . . . .") (emphasis in original).

80. SAMUEL ADAMS, *supra* note 44, at 352.

81. *See* PARSONS, *supra* note 77, at 488 ("[E]ach individual . . . has remaining, after entering into political society, all his unalienable natural rights, and a part also of his alienable natural rights . . . .").

82. WILLIAM WHITING, AN ADDRESS TO THE INHABITANTS OF BERKSHIRE COUNTY (1778), *in* 1 AMERICAN POLITICAL WRITING, *supra* note 75, at 461, 474; *see also* VA. CONST. of 1776, declaration of rights, art. 3, *in* 10 UNITED STATES CONSTITUTIONS, *supra* note 39, at 48, 49 (stating that men cannot "by any compact, deprive or divest their

ceived for them.[83] If any essential natural right should be given up through fear, fraud, or mistake, "the eternal law of reason and the great end of society, would absolutely vacate such renunciation."[84] Further, if society fails to protect essential rights, the people have a right to withdraw from that society or to dissolve the social compact.[85] The right to resist oppression can never be alienated,[86] and as a result, doctrines of nonresistance are "absurd, slavish, and destructive of the good and happiness of mankind."[87]

The ratifiers of the Constitution were never given any reason to believe that there had been any transition since the Revolution from these established principles of natural law. Federalists and Anti-Federalists agreed that rights existed that were beyond the reach of human law; their defense of transcendent principles closely mirrors the language of the Revolution.[88] For

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posterity" of certain inherent rights). In a sermon delivered to the Connecticut General Assembly and Governor Samuel Huntington, Elizur Goodrich contended that rights were founded on the original principles of equity and justice rather than positive law, and he admonished the titular lawmakers: "Remember, Gentlemen, that while you are examining the rights of individuals, and their claims on one another . . . you have no sovereign discretion." ELIZUR GOODRICH, THE PRINCIPLES OF CIVIL UNION AND HAPPINESS CONSIDERED AND RECOMMENDED 41-42 (1787), *microformed on* Early American Imprints: First Series No. 20393 (Readex Microprint).

83. *See* N.H. CONST., pt. 1, art. IV ("Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them."). The New Hampshire constitution was adopted in 1784.

84. SAMUEL ADAMS, *supra* note 44, at 355.

85. *See id.* at 351 ("All Men have a Right to remain in a State of Nature as long as they please: And in case of intollerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another."); RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS 71 (1970) (citing BOSTON COMMITTEE OF CORRESPONDENCE, THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, IN TOWN MEETING ASSEMBLED, ACCORDING TO LAW 2 (Boston, Edes & Gill 1882)).

86. *See* HOWARD, *supra* note 78, at 189 n.* (quoting 2 FRANCIS HUTCHESON, SYSTEM OF MORAL PHILOSOPHY 271 (1755)) ("All conveyance of absolute power, whether to prince or a senate, with a preclusion of all rights of resistance, must be a deed originally invalid, as founded in an error.").

87. *See* N.H. CONST., pt. 1, art. X (establishing a right of resistance against "arbitrary power and oppression"). One author observed that when authority oppresses the people and overturns their liberties, "people must not, in such cases . . . suspend or delay their resistance, waiting for the concurrence of men of authority." "A MODERATE WHIG," DEFENSIVE ARMS VINDICATED AND THE LAWFULNESS OF THE AMERICAN WAR MADE MANIFEST (1783), *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at 715, 724 (Ellis Sandoz ed., 1991) [hereinafter POLITICAL SERMONS].

88. By identifying the relevant Founders as those who managed "the awesome transition" from revolutionaries to constitutionaries, Professor Cover seems to suggest that the doctrines of natural law had been discarded in the decade before 1787. *See supra* note 63 and accompanying text. John Hart Ely also concludes that "intellectual fashions had changed somewhat over that eventful decade and a half," although the evidence cited is again *Justice Accused*. Ely, *supra* note 19, at 23-24.

A similar suggestion is found in Michael Perry's response to an earlier work by

"A citizen of the united states," "good laws" were those consistent with the known rights of mankind,[89] and acts of government were justified "only in proportion as these are consistent with the laws and views of nature."[90] Writing to Philadelphia delegate Richard Dobbs Spaight shortly before the close of deliberations, James Iredell concluded that natural justice would remain beyond the reach of conflicting textual authority: "Without an express Constitution the powers of the Legislature would undoubtedly have been absolute . . . and any act passed, *not inconsistent with natural justice* (for that curb is avowed by the judges even in England), would have been binding on the people."[91] For Justice Iredell, the resort to a written constitution could not affect higher law.[92]

Similarly, in one of the "Federal Farmer" letters, Richard Henry Lee agreed that the sovereign power of the people was not unlimited. Although some rights could be altered or abolished by constitutional authority, others were "natural and unalienable, of which even the people cannot deprive individu-

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Thomas Grey: "[Professor Grey] wisely leaves open the crucial [question of] whether the notion [of natural law], even *if* accepted to a significant extent in the prerevolutionary period, was widespread in 1787-91 . . . ." Perry, *supra* note 21, at 266-67 (responding to Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 893 (1978)). Professor Grey's leaving the question open is neither a positive nor a negative statement on the vitality of natural law at the time of ratification. *See infra* text accompanying notes 124-45 (discussing the conclusion that the Constitution would not infringe upon natural rights) and text accompanying notes 155-67 (concluding that natural rights do not require textual recognition). *Cf.* Letter from Richard Henry Lee to Samuel Adams (Aug. 8, 1789), *in* 2 THE LETTERS OF RICHARD HENRY LEE 495, 496 (James C. Ballagh ed., 1914) ("so wonderfully are men's minds now changed upon the subject of liberty, that it would seem as if the sentiments [which] universally prevailed in 1774 were antidiluvian visions, and not the solid reason of fifteen years ago!"). For the purposes of originalist inquiry, Lee was writing after the ratifiers had been assured that unenumerated natural rights were retained, and after this original understanding had been fixed by ratification.

89. "A citizen of the united states" (William Vans Murray), *Political Sketches*, AM. MUSEUM, Sept. 1787, at 236.

90. *Id.* at 247.

91. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 172 (photo. reprint 1949) (n.p., D. Appleton & Co. 1857) (emphasis added).

92. Helen Michael concludes that Justice Iredell's later opinions in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and other cases are more representative: "[I]n attempting to divine Iredell's position concerning noninterpretivist review of legislation, one ought to accord his reasoned opinions as a jurist greater weight than an isolated remark made in the course of a single letter." Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?* 69 N.C. L. REV. 421, 452 (1991). Even if this conclusion is justified, only a truly speculative jurist could have had access to Justice Iredell's opinion eleven years before it was rendered.

als."[93] Joining the call for an explicit bill of rights, "Thoughts at the Plough" noted that the people had a sovereign right to adopt any rights-limiting amendments, "provided they are not contrary to the law of nature."[94] One correspondent argued that fundamental rights could never be in jeopardy, because common law and the law of nature had been laid down as established rules in all civilized nations, and there was no danger that a free people would ever trample on such "antient usages."[95] Another Federalist agreed that positive law could pose no threat to "those natural rights, the relinquishment of which to aggrandise any power on earth, would only be an insult on that divine authority from whence they sprung."[96] This, then, was a recurring theme throughout the ratification debates: All Americans respected natural law, and could hardly be unaware of its transcendent principles.

C. *The Activists' Constitution*

Not only did the Founders acknowledge that natural law was superior to positive law, but leading Federalists defended the activism of the Philadelphia delegates and the Constitution itself by citing transcendent rights and principles. Even though the Annapolis convention only commissioned amendments to

93. "The Federal Farmer" VI, *supra* note 47, at 261.

94. "Thoughts at the Plough," *supra* note 47, at 2364.

95. Letter from Jeremiah Hill to George Thatcher (Jan. 9, 1788), *in The Thatcher Papers*, 16 HIST. MAG. 257, 264 (1869).

96. "The State Soldier" II, *supra* note 47, at 353. For recognition that men cannot "by any compact" deprive or divest their posterity of inherent rights, see DUMBAULD, *supra* note 53, at 182 (citing Virginia convention); *id.* at 198 (citing first North Carolina convention); RHODE ISLAND RATIFICATION, *supra* note 53, at 334.

Not satisfied with offering simple reassurances, some friends of the Constitution displayed incredulity when natural rights were questioned. After "Centinel" protested that rights could be in jeopardy, the Federalist "Uncus" worried that even addressing "Centinel"'s egregious error would be "an insult to the . . . community." "Uncus," MD. J., Nov. 9, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 76, 78. Because it was almost impossible for any American—or indeed, for any person educated in a liberal country—to be ignorant of natural rights, "Centinel" therefore must have "just made his escape from a Turkish Haram [or] been bouyed from the gloomy regions of a Spanish mine." *Id.*; *see also* "Aristides," COUNTRY J. & POUGHKEEPSIE ADVERTISER, Oct. 10, 1787, at 1 (arguing that natural law existed before any positive law, that it was superior to any other obligation, that "[n]o human laws are of any validity if contrary" to it, and that "such of them as are valid, derive all their force and all their authority mediately or immediately from this original"). "Sydney" was unimpressed by "Aristides" and his keen grasp of the obvious: "[W]hat man is there in existence . . . that knows not that the will of his creator is the law of nature?" "Sydney," COUNTRY J. & POUGHKEEPSIE ADVERTISER, Oct. 17, 1787, at 2. For "Sydney," yet another publication of these principles could not inform any reader, but at least "these may be of use to children." *Id.*

the Articles of Confederation that would then have to be ratified by every state legislature,[97] those "perpetual" and "inviolably observed" Articles proved to be little more than a temporary embarrassment to the friends of the Constitution.[98]

Edmund Randolph admitted that the drafters had exceeded their authority, but he defended their actions by heralding the dawn of a "great season[] when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk" such extraordinary measures.[99] Only weeks after the Philadelphia convention had adjourned, a committee of Pennsylvania Federalists enthusiastically agreed that, although bound by positive laws and rules "in most cases," they had discerned "an extraordinary change in circumstances [by which] it may become our duty to act in a very different manner, and such singular cases are to be deemed excepted in those laws."[100] A perpetual and inviolable text had been rendered transient and violable by the discovery of such a singular case—the Articles were an unauthorized compact that had forced the drafters to discard positive law and "ascend to a

97. The Annapolis delegates called for a convention to draft "further provisions" that were to be "confirmed by the Legislatures of every State." 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, at 184, 185 (Merrill Jensen ed., 1976) [hereinafter 1 DOCUMENTARY HISTORY]. By contrast, the Constitution decreed that "[t]he Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." U.S. CONST. art. VII. For subsequent Anti-Federalist protest, see LUTHER MARTIN, THE GENUINE INFORMATION DELIVERED TO THE LEGISLATURE OF THE STATE OF MARYLAND RELATIVE TO THE PROCEEDINGS OF THE GENERAL CONVENTION LATELY HELD AT PHILADELPHIA (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 19, 76; "A Republican Federalist," *To the Members of the Convention of Massachusetts*, MASS. CENTINEL, Jan. 12, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 173, 174; "Cato," *To the Citizens of the State of New York*, N.Y. J., [n.d.], *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 106, 108; "Cornelius," N.H. CHRONICLE, Dec. 11, 1787, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 139, 140; "The Federal Farmer" (Richard Henry Lee), Jan. 25, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 339, 349 [hereinafter "Federal Farmer" XVIII].

98. *See* ARTICLES OF CONFEDERATION art. XIII (U.S. 1781) ("[T]he Articles of this Confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration . . . be made in any of them; unless such alteration shall be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.").

99. ROBERT YATES, SECRET PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 136-37 (Richmond, W. Curtiss 1839). In James Madison's account of Randolph's rationalization, the Governor declared that "[t]here are certainly seasons of a peculiar nature where the ordinary cautions must be dispensed with; and this is certainly one of them." MADISON'S NOTES, *supra* note 32, at 128.

100. *Letter from a select committee from the different districts of Cumberland County*, CARLISLE GAZETTE, Mar. 5, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 484, at 1919, 1921.

higher source."[101] No authority inferior to the people in their sovereign capacity could pretend to bind them, and "the necessity discovered by the people" was sufficient justification for their agents.[102]

Writing as "Caesar," Alexander Hamilton described this right of the people to form a new government as inherent,[103] and fellow *Federalist* author James Madison added that the Articles and "all such institutions must be sacrificed" to the transcendent law of nature.[104] Federalists displayed little contrition: The Framers would not be encumbered by an excessive "zeal for ordinary forms" or "ill-timed scruples."[105] Again, the unmistakable lesson of the Founders was that positive law, at least before ratification, existed at the mercy of transcendent principles.[106]

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101. 2 DOCUMENTARY HISTORY, *supra* note 31, at 556 (statement of James Wilson in Pennsylvania convention).

102. *Id.* at 274 (statement of William Robinson in Pennsylvania assembly).

103. *See* "Caesar," DAILY ADVERTISER, Oct. 17, 1787, *reprinted in* FORD'S ESSAYS, *supra* note 14, at 286, 288. "Caesar" also described the proposed union as "indissolubly connected," even though this seems to conflict with his recognition of the people's inherent right to form a new government. *Id.* at 290. Authorship of the "Caesar" essays is disputed; although Paul Leicester Ford attributed the essays to Hamilton, *see* FORD'S ESSAYS, *supra* note 14, at 281, Jacob Cooke later questioned the authenticity, and possibly the existence, of Ford's evidence. Jacob Cooke, *Alexander Hamilton's Authorship of the "Caesar" Letters*, 17 WM. & MARY Q. 78 (1960).

104. THE FEDERALIST No. 43, at 271, 279 (Clinton Rossiter ed., 1961) (James Madison). Madison also referred to "the transcendent and precious right of the people to 'abolish or alter their governments.' " THE FEDERALIST No. 40, at 247, 253 (Clinton Rossiter ed., 1961) (James Madison) (paraphrasing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)). Other Federalists contended that the United States had been effectively reduced to a "state of nature." *See, e.g., Assembly Debates*, PA. HERALD, Nov. 14, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 210-A, at 1011, 1021-22 (quoting William Robinson in Pennsylvania Assembly); "Candid," PA. PACKET, Nov. 27, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 246, at 1147. In Maryland, "Solon" concluded that, as a result of being reduced to the state of nature, that state's legislature no longer had a right to dictate the method of electing convention delegates, and voters should therefore be allowed to vote at any place they happened to find themselves on election day. *See* Bernard C. Steiner, *Maryland's Adoption of the Federal Constitution*, 5 AM. HIST. REV. 22, 41 (1899) (citing "Solon," BALTIMORE GAZETTE, Apr. 15, 1788).

105. THE FEDERALIST No. 40, at 247, 253 (Clinton Rossiter ed., 1961) (James Madison). Madison also claimed that continued adherence to the Articles would amount to "sacrificing substance to forms." *Id.* at 254.

106. Luther Martin noted that "[t]he same reasons which you now urge for destroying our present government, may be urged for abolishing the system you now propose to adopt." MARTIN, *supra* note 97, at 42 (emphasis omitted); *see also* "Cornelius," *supra* note 97, at 140 (remarking that "if nations may set the example, may not particular States, citizens, and subjects, follow?").

IV. Objection: "The Constitution Superseded Natural Law"

It is often suggested that natural law as understood by the Founders necessarily led to a government of positive laws: The intent and effect of constitutional government was to protect—and ultimately to supersede—natural rights and transcendent law.[107] Regardless of the prior relationship between positive and natural law, ratification "distract[ed] man's attention from a concern for abstract justice and natural rights to a more pragmatic concern for . . . the security of civil rights."[108] Once certain rights had been "merged" into the institutions of government,[109] recurrence to other supposed limitations was no longer appropriate.[110] In his *Handbook of American Constitutional Law*, Henry Campbell Black acknowledged that the principles of natural justice and republican government were supposed to be adequately granted by the express provisions of the Constitution, but he added that if they were not, "that is no limitation upon the legislative power."[111] With ratification, speculative theories were supposed to have been replaced by pragmatic government and, as a result, other unenumerated rights and theories could not encroach upon the Constitution.

A. *Natural Rights and the Proposed Constitution*

Rather than contend that unenumerated rights could not

107. *See, e.g.*, Walter Berns, *The Constitution as a Bill of Rights*, *in* How Does The Constitution Secure Rights? 50, 54 (Robert Goldwin & Simon Schambra eds., 1985) ("Natural rights point or lead to government . . . [and] rights, which are possessed by all men equally by nature . . . require a well-governed civil society for their security.").

108. Gary McDowell, Curbing The Courts: The Constitution And The Limits Of Judicial Power 66 (1988) (emphasis omitted). Thomas McAffee contends that there was "virtually no discussion" of natural rights standing alone, and adds that "it seems strange" to assume the Founders shared any such assumption. Thomas McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215, 1275-76 (1990). Professor McAffee's argument is presented in the text accompanying notes 281-89 *infra*.

109. *See* Ely, *supra* note 19, at 24 n.89 ("[M]any persons at the time . . . would have held that our natural rights had been 'merged in,' and therefore superseded by, the written guarantees of the Bill of Rights.").

110. *See, e.g.*, McDowell, *supra* note 108, at 96 ("Although natural law might demand the creation of institutions of government, those institutions were not necessarily to be guided in the conduct of day-to-day business by recurrence to those natural law principles . . . .").

111. Henry Campbell Black, Handbook on American Constitutional Law 72 (1910); *see also* 1 Westel Willoughby, The Constitutional Law of the United States 66 (1929) ("The so-called 'natural' or unwritten laws defining the natural, inalienable, inherent rights of the citizen . . . have no force either to restrict or to extend the written provisions of the Constitution.").

trench on delegated powers, Federalists understood that the Constitution would not trench on natural rights. Despite the opprobrium offered in the early numbers of *The Federalist*,[112] friends of the Constitution often resorted to favorable analogies between the Articles of Confederation and the new plan of government.[113] Congress, under the Articles, had been vested with powers as extensive as those proposed in Philadelphia,[114] and the Confederation had often moved beyond those powers expressly delegated to act "according to the implicit sense."[115] Ratifiers were assured that the people had already yielded enough power to form "a perfect government,"[116] and that any additional powers would be drawn from the states.[117] Under the new plan, power would be clearly defined for particular

112. *See generally* THE FEDERALIST Nos. 1-21 (Clinton Rossiter ed., 1961).

113. *See* ARTICLES OF CONFEDERATION (U.S. 1781). For assertions that individual liberty would not be disparaged by the change of government, see THE FEDERALIST No. 38, at 247 (Clinton Rossiter ed., 1961) (James Madison); "An American Citizen," *On the Federal Government, in* ADDRESSES TO THE CITIZENS OF PENNSYLVANIA (1787), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 47, at 431, 434; "Conciliator" (James Wilson), INDEPENDENT GAZETTEER, Feb. 12, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 424, at 1701, 1704-05.

114. For claims that the Confederation had been vested with powers as extensive as those delegated by the proposed Constitution, see 2 DOCUMENTARY HISTORY, *supra* note 31, at 496 (statement of James Wilson in Pennsylvania convention); 2 ELLIOT'S DEBATES, *supra* note 14, at 89 (statement of Theophilus Parsons in Massachusetts convention); *id.* at 210 (statement of Robert Livingston in New York convention); 3 *id.* at 259 (statement of James Madison in Virginia convention); THE FEDERALIST No. 45, at 288, 293 (Clinton Rossiter ed., 1961) (James Madison).

115. Letter from Antoine de la Forest to Comte de la Luzerne (Feb. 18, 1788), *in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 137 (emphasis omitted); *see also* 3 ELLIOT'S DEBATES, *supra* note 14, at 259 (statement of James Madison in Virginia convention) (stating that powers conferred by the Constitution existed "in theory" in the Confederation); Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), *in* 11 THE PAPERS OF THOMAS JEFFERSON 678 (Julian Boyd ed., 1955) (stating that the power to enforce Confederation measures is conferred by the law of nature); *cf.* Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 86, 88 (observing that, although implied powers were "evidently deducible" from the spirit of the Articles, the exercise of such powers would be "a violation of the second article").

116. YATES, *supra* note 99, at 111 (quoting statement of James Wilson) ("[T]he people had already parted with as much of their power as was necessary, to form on its basis a perfect government . . . ."). Compare James Madison's account of Wilson's remarks: "[O]pposition was to be expected, he said, from the Governments, not from the citizens of the States. The latter had parted . . . with all the necessary powers . . . ." MADISON'S NOTES, *supra* note 32, at 74 (emphasis and footnote omitted). For a similar assertion, see "A," *The Triumphs of Reason: Being a Dialogue on the New Constitution*, COUNTRY J. & POUGHKEEPSIE ADVERTISER, Mar. 11, 1788, at 1.

117. For cautious Federalist assertions that additional powers would be exclusively drawn from the States, see, for example, 2 DOCUMENTARY HISTORY, *supra* note 31, at 475 (statement of James Wilson in Pennsylvania convention); 2 ELLIOT'S DEBATES, *supra* note 14, at 93 (statement of Theophilus Parsons in Massachusetts convention); George Nicholas, unpublished letter, Feb. 16, 1778, *in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 369, 373; "The State Soldier" IV, *supra* note 47, at 511.

purposes,[118] and the national government would be limited to the exercise of those powers that were expressly delegated.[119]

118. For Federalist assurances that national power was clearly defined for particular purposes, see Hugh Henry Brackenridge, *Cursory Remarks on the Federal Constitution*, PITTSBURGH GAZETTE, Mar. 1, 1788, *in* A HUGH HENRY BRACKENRIDGE READER 126, 127 (Daniel Marder ed., 1970); "A CITIZEN OF AMERICA" (Noah Webster), EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 31-32 (1787), *microformed on* DOCUMENTARY HISTORY MICROFORM, Pa. no. 142, at 762; "A Citizen of New Haven" (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 46, at 280, 281; "A CITIZEN OF PHILADELPHIA," THE WEAKNESS OF BRUTUS EXPOSED (1788), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 63, 66; "Atticus," INDEPENDENT CHRON., Nov. 22, 1787, *quoted in* Herbert Storing, *The "Other" Federalist Papers: A Preliminary Sketch*, 6 POL. SCI. REV. 215, 230 (1976); "Brutus" (Tobias Lear), VA. J., Dec. 6, 1787, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 212, 213; "Curtius," N.Y. DAILY ADVERTISER, Sept. 29, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 47, at 268, 268; 13 DOCUMENTARY HISTORY, *supra* note 47, at 339 (statement of James Wilson); 3 ELLIOT'S DEBATES, *supra* note 14, at 110 (statement of Frances Corbin in Virginia convention); 4 *id.* at 166 (statement of James Iredell in First North Carolina convention); Rufus King and Nathaniel Gorham, Response to Elbridge Gerry's Objections (unpublished), *in* 13 DOCUMENTARY HISTORY, *supra* note 47, at 550, 554; Letter from Roger Sherman and Oliver Ellsworth to Connecticut Governor Samuel Huntington (Sept. 26, 1787), *in* 1 ELLIOT'S DEBATES, *supra* note 14, at 491, 492; Letter of Roger Sherman (Dec. 8, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 387, 387; "Reflection," CARLISLE GAZETTE, Apr. 16, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no.624, at 2380, 2384 [hereinafter "Reflection" IV].

119. The Articles of Confederation provided that "[e]ach State retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and Right, which is not by this confederation *expressly delegated* to the United States, in Congress assembled." ARTICLES OF CONFEDERATION, art. II (U.S. 1781) (emphasis added). Anti-Federalists pointedly noted that this language was not included in the proposed Constitution. *See, e.g.*, "A Democratic Federalist," PA. HERALD, Oct. 12, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 58, 59; "A FEDERAL REPUBLICAN," A REVIEW OF THE CONSTITUTION PROPOSED BY THE LATE CONVENTION (1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 65, 85; "Centinel," *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 143, 149; "The Old Whig," INDEPENDENT GAZETTEER, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 22, 22-23. For assurances that the national government would only be vested with those powers that were expressly delegated, see 2 DOCUMENTARY HISTORY, *supra* note 31, at 384 (statement of James Wilson in Pennsylvania convention); *id.* at 435, 437 (statements of Jasper Yates in Pennsylvania convention); 2 ELLIOT'S DEBATES, *supra* note 14, at 153 (statement of Charles Jarvis in Massachusetts convention); 3 *id.* at 464, 467, 598 (statement of Edmund Randolph in Virginia convention); 4 *id.* at 140-42 (statement of James Iredell in First North Carolina convention); *id.* at 148-49 (statement of Gov. Samuel Johnston in First North Carolina convention); *id.* at 166 (statement of Archibald MacLaine in First North Carolina convention); *see also* "A NATIVE OF VIRGINIA," OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (1787), *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 12, at 655, 691; "An Independent Freeholder," WINCHESTER, VA. GAZETTE, Jan. 18, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 310, 311; "Avenging Justice," PA. GAZETTE, Oct. 7, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 31, at 192, 192; "Brutus," *supra* note 118, at 212; "Cassius," *To Richard Henry Lee, Esquire*, VA. INDEPENDENT CHRON., *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 12, at 713, 715; "De Witt," *supra* note 49, at 20; (Editorial), N.J.J. Dec. 19, 1787 *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 12, at 154; "Marcus" (James Iredell), NORFOLK & PORTSMOUTH J., Feb. 20, 1787, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 161, 164; Nicholas, *supra* note 117, at 369; "One of the Middle Interest," MASS. CENTINEL, Nov. 28, 1787, *cited in* 4 THE COMPLETE

This limitation was characterized as a fundamental maxim of government[120] and it was widely understood that this *expressly delegated* restriction was respected by leading Federalists.[121] Those powers delegated to the national government were absolutely and indispensably necessary to address national concerns.[122] Thus, by unavoidable implication, the Necessary and

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ANTI-FEDERALIST, *supra* note 12, at 122 n.2; "Publicola," *supra* note 47, at 436-37; Letter from George Washington to the Marquis de Lafayette (Apr. 28, 1788), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297, 298 (Max Farrand ed., 1937) [hereinafter FARRAND]; Hugh Williamson, *Speech at Edenton, North Carolina*, N.Y. DAILY ADVERTISER, Feb. 25-27, 1788, *in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 201, 202. But compare James Madison's conclusion that national government would have been impracticable if the drafters had attempted to limit it to expressly delegated powers. THE FEDERALIST No. 44, at 280, 284 (Clinton Rossiter ed., 1961). Madison later noted, however, that the Necessary and Proper Clause simply recognized powers arising by unavoidable implication. *See id.* at 285.

120. The Federalist "Conciliator" wrote that the truth of the "expressly delegated" maxim had been acknowledged by everyone and denied by "no liberal man in any country . . . ." "Conciliator," INDEPENDENT GAZETTEER, Jan. 9, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 312, at 1448, 1448. "Conciliator" also claimed that the "expressly delegated" restriction of Article II had been unnecessary because it was "from the nature of the thing implied . . . ." *Id.* at 1572. The claims are significant, because contemporaries suspected that James Wilson was "Conciliator"; *see also Editorial*, N.J.J., Dec. 19, 1787 *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 12, at 154 (the national government is limited to expressly delegated powers by "the interposing providence of GOD!").

121. *See, e.g.*, "An Honest American," INDEPENDENT GAZETTEER, Jan. 19, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 347, at 1524, 1529 (complaining that he had heard these assurances "a hundred times before"); 2 ELLIOT'S DEBATES, *supra* note 14, at 398 (statement of Thomas Tredwell in New York convention) (noting that the "expressly delegated" limitation had been "daily and confidently advanced by the favorers of the present Constitution"); George Thatcher, *quoted in* Letter from Thomas Wait to George Thatcher (Jan. 8, 1788), *in* 15 DOCUMENTARY HISTORY, *supra* note 46, at 284, 285 (declaring that the "expressly delegated" limitation was "orthodox"). Amendment proposals in at least eight states cited the "expressly delegated" standard. *See* DUMBAULD, *supra* note 53, at 175 (citing Pennsylvania minority); *id.* at 175 (citing Massachusetts); *id.* at 177 (citing Maryland majority); *id.* at 180 (citing South Carolina); *id.* at 181 (citing New Hampshire); First Amendment Proposal, Rhode Island and Providence Plantations conventions, *in* 1 ELLIOT'S DEBATES, *supra* note 14, at 336; 2 ELLIOT'S DEBATES, *supra* note 14, at 406 (citing amendment proposal of John Lansing in New York); 9 DOCUMENTARY HISTORY, *supra* note 12, at 821 (citing amendment proposal of George Mason in Virginia); Steiner, *supra* note 104, at 33, 37 (citing amendment proposal of William Paca in Maryland). The Massachusetts and New Hampshire amendments advised that the "expressly delegated" limitation should be "explicitly declared." After ratification, other observers made it clear that such an amendment would only reiterate this earlier understanding: "A Friend to Good Government" dismissed the Massachusetts amendment as "trivial" because its spirit was "already contained in the Constitution." *See* "A Friend to Good Government," COUNTRY J. & POUGHKEEPSIE ADVERTISER, Apr. 15, 1787, *cited in* 16 DOCUMENTARY HISTORY, *supra* note 9, at 65. Henry Gibbs also wrote that the "expressly delegated" limitation was "tho't [sic] by most to be the spirit of the Constitution . . . ." Letter from Henry Gibbs to Roger Sherman (July 16, 1789), *in* CREATING THE BILL OF RIGHTS 263, 263 (Helen Veit et al. eds., 1991).

122. For assurances that the national government would be limited to the exercise of those powers that were absolutely or indispensably necessary, see 2 DOCUMENTARY HISTORY, *supra* note 23, at 421 (statement of Thomas McKean in Pennsylvania convention);

Proper Clause could only secure powers already possessed.[123]

According to the friends of the Constitution, this national government informed by strictly limited and defined powers would pose no threat to the retained rights of the people.[124] Rather than being merged into this scheme of limited powers, natural rights remained independent of both the Constitution and its enactors. Federalist Judge Thomas McKean declared that fundamental rights were never within the discretion of the drafters,[125] and, in the words of one correspondent, "the sacred immutability" of these rights was never questioned by the

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2 ELLIOT'S DEBATES, *supra* note 14, at 96 (statement of Theodore Sedgwick in Massachusetts convention); *see also* JOHN JAY, AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (1788), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 303 (Henry Johnston ed., 1906); Letter from Nathaniel Bedford to Benjamin Rush (May 19, 1788), *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 682, at 2614, 2614; "Candid," *supra* note 104, at 1148; "Cassius," *supra* note 119, at 714; "Cassius," MASS. GAZETTE, Dec. 18, 1787, *reprinted in* FORD'S ESSAYS, *supra* note 14, at 32, 35; Letter from William Cranch to John Quincy Adams (Nov. 26, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 14, at 224, 226; Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 14, at 193, 201; THE FEDERALIST Nos. 44-46 (Clinton Rossiter ed., 1961) (James Madison); "Uncus," *supra* note 96, at 81; Washington, *supra* note 22, at 355; PELETIAH WEBSTER, THE WEAKNESS OF BRUTUS EXPOSED (1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 121-22 (Paul Ford ed., Brooklyn, n.pub. 1888) [hereinafter FORD'S PAMPHLETS]; Hugh Williamson, *Remarks on the New Plan of Government*, N.C. STATE GAZETTE, 1788, *reprinted in* FORD'S ESSAYS, *supra* note 14, at 397, 400; "A Friend to Union," WORCESTER MAG., March 1788, at 327.

123. *See* U.S. CONST. art. I, § 8, cl. 18 (stating that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States, or in any Department or Office thereof."). For Federalist assurances that the Necessary and Proper Clause was redundant and did not confer any new power, see sources cited *supra* notes 118-121. *But see* Alexander Hamilton's contention, only three years after ratification, that restricting the scope of the clause to absolute or indispensible necessity was "an idea never before entertained." *Opinion on the Constitutionality of an Act to Establish a Bank*, *in* 8 THE PAPERS OF ALEXANDER HAMILTON 63, 103 (Harold Syrett ed., 1961).

124. *See* "Atticus," *supra* note 118, at 230; 3 DOCUMENTARY HISTORY, *supra* note 12, at 558 (statement of Oliver Wolcott in Connecticut convention); *Editorial*, PA. GAZETTE, Sept. 26, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 14, at 252-54; JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION, RECOMMENDED BY THE LATE CONVENTION (1787), *reprinted in* FORD'S PAMPHLETS, *supra* note 122, at 357 [hereinafter MARCUS]; Letter from Thomas Johnson to George Washington (Dec. 11, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 14, at 404, 404; "One of the Middling-Interest," MASS. CENTINEL, Nov. 28, 1787, *cited in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 149; "Philanthrop," *To the People*, AM. MERCURY, Nov. 19, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 12, at 467, 468; "The State Soldier," VA. INDEPENDENT CHRON., Jan. 16, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 303, 308.

125. Samuel Chase included the arguments of Thomas McKean in his notes for a speech apparently delivered to the Maryland ratifying convention. According to Chase's abbreviated records, McKean defended the proposed plan of government and the actions of the Philadelphia delegates by asking, "Could convention lessen the rights of the people? The right to lessen never surrendered to Convention[,]" Samuel Chase,

Philadelphia delegates.[126] Friends of the Constitution again resorted to Confederation analogies to show that natural rights would remain secure. Virginia ratifier George Nicholas noted that because existing powers were simply being redistributed under the new plan, the people would not give up "any greater share of their natural rights and privileges."[127] Fellow delegate Alexander White also equated ratification with continuity: "[H]ere is neither a total or partial dissolution of Government; our social compacts and all our ancient rights remain entire, except such as are expressly granted to Congress."[128] Pennsylvania's Benjamin Rush reminded Americans that they were in full possession and enjoyment of all their natural rights, that such rights could only be lost "from their own consent, or from tyranny," and that the proposed constitution "neither implies the former, nor creates an avenue to the latter."[129] In Massachusetts, "Cassius" declared that Congress could not infringe on unalienable rights,[130] and Theophilus Parsons delivered a similar assurance to the ratifying convention:

> Is there a single natural right we enjoy, uncontrolled by our own legislature, that Congress can infringe? Not one. Is there a single political right secured to us by our constitution, against the attempts of our own legislature, which we are deprived of by this Constitution? Not one . . . .[131]

Maryland delegate Alexander Contee Hanson also claimed that Congress—particularly in the exercise of powers deemed to be necessary and proper—could not violate natural rights.[132]

Notes of Speeches Delivered to the Maryland Ratifying Convention (April 1788) (emphasis omitted), *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 81.

126. Letter from James White to Richard Caswell (Nov. 13, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 96, 96.

127. Nicholas, *supra* note 117, at 373-74.

128. "An Independent Freeholder" (Alexander White), *supra* note 119, at 311.

129. Benjamin Rush, *quoted in* 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 68; *see also* 2 DOCUMENTARY HISTORY, *supra* note 31, at 430 (statement of Thomas Hartley in Pennsylvania convention) (stating that "no evidence can possibly be produced" of the resignation of natural rights).

130. *See* "Cassius," *supra* note 122, at 45-46; *see also* "Valerius," MASS. CENTINEL, Nov. 28, 1787, at 2.

131. 3 ELLIOT'S DEBATES, *supra* note 14, at 93. Professor McAffee discounts this assurance because it allegedly failed to address Anti-Federalist objections regarding the Necessary and Proper Clause. *See* McAffee, *supra* note 108, at 1271 n.216. If, as Parsons believed, Congress did not possess the power to infringe on natural rights, then the Necessary and Proper Clause could not have conferred any such power.

132. *See* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 69 n.3 (citing "Aristides" (Alexander Contee Hanson), REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT (1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 46, at 517). Professor McAffee describes this as a "rather isolated argument" from a "relatively

Although Judge Hanson conceded that it was impossible to predict the sorts of powers that Congress might exercise in the name of necessity and propriety, he was confident nevertheless that fundamental rights would remain secure: "[T]his we may say,—that, in exercising those powers, the Congress cannot legally violate the natural rights of an individual."[133] As a Federalist ratifier, it is almost certain that Judge Hanson delivered similar assurances to the Maryland convention six weeks later,[134] and there is reason to believe that the arguments of "Aristides" were a particular target of Anti-Federalist delegate Samuel Chase as well.[135]

After Patrick Henry introduced amendments explicitly protecting natural rights to the Virginia convention,[136] Edmund Randolph objected that the measures were not warranted by any clause of the Constitution. In a parenthetical account of Governor Randolph's response, it was reported that "[h]is excellency then went over all the articles of Mr. Henry's proposed declaration of rights, and endeavored to prove that the rights . . . could not be infringed by . . . any of the powers which were delegated . . . ." to the general government.[137] An explicit natural rights amendment and dozens of other declarations were also approved by both Rhode Island conventions,[138] but Federalists dismissed the provisions as superfluous. For delegate Henry Marchant, approval by the convention signified nothing, because "there is not a Single Right but what was safe by the Constitution . . . ."[139] Debate in the First Congress reiterated the earlier understanding that explicit protection of rights was unnecessary because neither the Constitution nor any law

obscure Federalist." McAffee, *supra* note 108, at 1271 n.216. Judge Hanson, however, was probably the most influential delegate in the Maryland ratifying convention. *See, e.g.*, Steiner, *supra* note 104.

133. "Aristides," *supra* note 132, at 69 n.3.

134. *See* Steiner, *supra* note 104.

135. For repeated references to "Aristides," see Chase, *supra* note 125, at 80-87.

136. It was reported that "Mr. Henry informed the committee that he had a resolution prepared, to refer a declaration of rights" to the delegates, and that these rights were "nearly the same as those ultimately proposed by the Convention . . . ." 3 ELLIOT'S DEBATES, *supra* note 12, at 593. The Virginia declarations are reprinted in *id.* at 657-59.

137. *Id.* at 600. Students of the ratification debates are well aware that Governor Randolph is a reliable source of quotes to support virtually any position. His steadfast equivocation notwithstanding, the ratifiers acted on the basis of these and similar Federalist representations.

138. *See* FOSTER, *supra* note 12, at 93-98.

139. *Id.* at 82.

made pursuant to it could trench on natural rights.[140]

In contending for the honor of defending these natural rights, the two factions ultimately created a consensus. After John Smilie and other Anti-Federalists pressed their concern for rights under the new plan,[141] James Wilson took issue with the implication that only the opponents of the Constitution respected natural rights. Given that the minority sought to protect the rights of mankind, Wilson asked: "[W]hat, then are the majority contending for?"[142] In a characteristic moment of exasperation, Wilson demanded to know "[o]n what fancied distinction shall the minority assume to themselves the merit of contending for the rights of mankind?"[143]

Massachusetts Anti-Federalist James Winthrop, writing as "Agrippa," also detected consensus:

> All the defenders of this system undertake to prove that the rights of the states and of the citizens are kept safe. The opposers of it agree that they will receive the least burdensome system which shall defend those rights. Both parties therefore found their arguments on the idea that these rights ought to be held sacred.[144]

Anti-Federalists protested that the powers of the national government should not encroach upon fundamental rights, and advocates of ratification dismissed these apprehensions as literally incredible. For Federalists, the protests of opponents were, as Luther Martin later recalled, nothing more than "dream[s] of distempered jealousy."[145]

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140. See, for example, the complaint of Congressman Samuel Livermore that the amendments "went to secure rights never in danger." 1 ANNALS OF CONG. 775 (Joseph Gales ed., 1834). *See generally* Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUB. 223 (1988).

141. *See, e.g.*, 2 DOCUMENTARY HISTORY, *supra* note 31, at 384-86 (stating objections of John Smilie); *id.* at 337 (stating objections of Robert Whitehill).

142. 3 ELLIOT'S DEBATES, *supra* note 14, at 495.

143. *Id.* at 496.

144. "Agrippa," *supra* note 47, at 75.

145. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 372 (1819) (quoting Maryland Att'y Gen. Luther Martin). Some founders did at least acknowledge that control of certain rights must be yielded upon entering society. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 14, at 311 (statement of Melancton Smith in New York convention); THE FEDERALIST No. 2, at 37, 37 (Clinton Rossiter ed., 1961) (John Jay). It is not clear whether these Founders believed that control of additional rights was to be sacrificed. In the Massachusetts convention, former Governor James Bowdoin assured ratifiers that "[t]he rights of particular states, or private citizens, not being the object or subject of the Constitution, they are only incidentally mentioned," although he added that "as all governments are founded on the relinquishment of personal rights in a certain degree, there was a clear impropriety in being very particular about them." 3 ELLIOT'S DEBATES, *supra* note 14, at 87.

V. OBJECTION: "NATURAL RIGHTS WERE NOT INCORPORATED INTO THE TEXT"

Neither the text of the Constitution nor its amendments explicitly refer to natural rights.[146] From this, both originalists and non-originalists have concluded that unenumerated natural rights were expressly denied constitutional status. Michael Perry cites John Hart Ely's claim that "a broadly accepted natural law philosophy surely would have found a place within [the Constitution], presumably in the Bill of Rights."[147] Dean Ely himself concludes that the very adoption of a written bill of rights is evidence of the Framers' "less than wholehearted commitment" to natural rights.[148] Such a wholehearted commitment to natural rights would presumably have manifested itself in textual recognition: As enactors of the Constitution, we might have introduced appropriate provisions and they might have survived the ratification process, but, according to Richard Morgan, "either we didn't or they didn't."[149]

Modern originalists also reject the notion that various "open-ended" provisions of the Constitution were intended to

146. Following ratification, attempts to explicitly recognize natural rights apparently failed. Several states proposed amendments recognizing natural rights, *see supra* note 53, and a similar measure was apparently submitted to the House select committee considering amendments by Roger Sherman. Roger Sherman, Proposed Committee Report, July 21-28, 1789, *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 121, at 266, 267. For an account of the recent discovery of Sherman's draft of a bill of rights, see Herbert Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, at A1.

A proposal to explicitly recognize natural rights was also introduced in the Senate on September 8, 1789. It was reported that on the motion "[t]o add the following clause to the Articles of Amendment to the Constitution of the United States, proposed by the House of Representatives, to wit: 'that there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety'—It passed in the Negative." 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-MARCH 3, 1791: SENATE LEGISLATIVE JOURNAL 160 (Linda De Pauw ed., 1972); *cf.* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 107 (1989) ("Rejection of proposed language does not necessarily imply an intent to reject its substance."). The authors also note that rejecting language and enacting language to the contrary are two distinct legislative acts. *See id.*

147. ELY, *supra* note 17, at 49, *quoted in* Perry, *supra* note 21, at 267 n.26 (1981).

148. Ely, *supra* note 19, at 25 n.89; *see also* Herbert J. Storing, *The Constitution and the Bill of Rights*, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 44 (M. Judd Harmon ed., 1978) ("[B]ills of rights, *as we know them today*, do not protect natural rights. And there seems to be something empty in the declarations of natural rights in a Constitution.") (emphasis added).

149. RICHARD E. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME 173 (1984).

protect unenumerated natural rights.[150] In the words of Raoul Berger, those who seek textual justification in such clauses are simply trying to "smuggle 'natural law' and 'natural rights' concepts into the Constitution . . . ."[151] Despite its reference to "other" rights, natural law interpretations of the Ninth Amendment have been explicitly rejected,[152] and, in *The Tempting of America*, Robert Bork went so far as to create an alternative amendment that could recognize other natural rights. According to Judge Bork, such rights might have been retained if the text decreed that "[t]he American people, believing in a law of nature and a law of nature's God, delegate to their courts the task of determining what rights, other than those enumerated here, are retained by the people."[153] He adds that "Madison wrote none of these things," and that if such was the intent of the Framers, "they were remarkably adroit in avoiding saying so."[154]

Textual Recognition

The Founders were less adroit than Judge Bork imagines. Natural rights were not incorporated in the text of the Constitution because, as Federalist friends of the Constitution repeatedly observed, natural rights did not require textual

150. *See, e.g.*, Adamson v. California, 332 U. S. 46, 75 (1947) (Black, J., dissenting); Donald J. Farage, Book Review, 60 DICK. L. REV. 288, 290 (1956) (reviewing BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955)). The occasional nonoriginalist also questions natural law interpretations of these open-ended clauses. *See* MORGAN, *supra* note 149, at 174 ("[E]vidence that open-ended provisions of natural law were incorporated . . . is unpersuasive even to other noninterpretivists."); Perry, *supra* note 21, at 267 ("The historical record simply does not support the proposition that the Framers constitutionalized natural law.").

151. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 257 n.38 (1977), *quoted with approval in* MCDOWELL, *supra* note 108, at 27.

152. *See, e.g.*, Morris S. Arnold, *Doing More Than Remembering the Ninth Amendment*, 64 CHI.-KENT L. REV. 265, 267 (1988) ("[I]t would be wrong to attempt to reconstruct what natural law meant in the eighteenth century and pretend that version of natural law is enshrined in the ninth amendment."); Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, *in* ASSESSING THE REAGAN YEARS 399 (David Boaz ed., 1988) ("[T]he Ninth Amendment will likely become an additional weapon for the enemies of freedom.").

153. BORK, supra note 4, at 183.

154. *Id.* Judge Bork dismisses the possibility that unenumerated natural rights may have been retained in part because he is unable to find written evidence to the contrary, *see* text accompanying *supra* note 4, but he previously used just such a supposed lack of written evidence to defend originalism. Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383, 385 (1985) ("To quote extensively from the writers of the older tradition in defense of [originalism] is impossible for the simple reason that they took the theory for granted and had no opposing school to rebut.").

recognition.[155] Far from being accepted by the Founders, the notion that a national government could somehow confer the rights of nature by annexing amendments was condemned as a "glaring absurdity."[156] The Federalist "Uncus" adamantly rejected textual recognition of liberty of the press because it was among those rights conferred by "Nature and Nature's God," and therefore it was "too sacred to require being mentioned in the national transactions of these states. Had it been reserved by a particular article, posterity might imagine we thought it wanted written laws for security; an idea we would not choose should disgrace the legislature of the United States."[157] "Fabius" agreed that trial by jury and the other "corner stones of liberty" were not obtained by a bill of rights or by any other written record,[158] while "Valerius" added that natural rights were as firmly secured "as if they were formally prefixed" to the proposed Constitution.[159]

Writing as "Aristides," Maryland ratifier Alexander Contee Hanson predicted that presuming to incorporate natural rights into the text would provide a pretext for indignation among the Anti-Federalists, and he suggested the tenor of such an outburst: " 'What! (might they say) did these exalted spirits imagine, that the natural rights of mankind depend on their gracious concessions'[?]"[160] According to Judge Hanson, this was not the case.[161] Even though virtually every natural right remained unenumerated, Judge Hanson added that Congress could not legally violate the natural rights of any individual,

155. Such Federalist assurances were intended to counter assertions that, in the words of "Thoughts at the Plough," "for a people to demand of the legislature laws for the protection of their rights, and at the same time neglect or refuse to declare what those rights are" would be both absurd and foolish. "Thoughts at the Plough," *supra* note 47, at 2363; *see also* "The Impartial Examiner," *supra* note 47, at 462 (claiming that without textual recognition, "there will be no standard to resort to—no criterion to ascertain the breach, or even to find whether there has been any violation at all"). However implausible it may seem today, friends of the Constitution rejected textual recognition of natural rights because the underlying rights were both transcendent and universally understood.

156. "Mariot," MASS. CENTINEL, Jan. 2, 1788, at 124 ("[S]uppose a Congressional act to run thus 'We the Congress of the United States, of our own free will grant to our subjects the rights of trial by jury - freedom of the press, &c.' and we shall then see the glaring absurdity" of demands for a bill of rights.).

157. "Uncus," *supra* note 96, at 78 (emphasis omitted).

158. "Fabius" (John Dickinson), THE LETTERS OF FABIUS (1797), *reprinted in* FORD'S PAMPHLETS, *supra* note 122, at 163, 186.

159. "Valerius," *supra* note 130, at 2.

160. "Aristides," *supra* note 132, at 537.

161. *See id.*

"[a]nd this again is all you could say, were there an express constitutional avowal of those rights."[162] Another correspondent reassured Massachusetts Federalist George Thatcher that textual recognition was simply unnecessary: Fundamental rights had been collected and compiled from former ages, and consequently, such rights were secure even without a "particular Bill of rights."[163]

Prominent Federalists delivered similar assurances to their respective state conventions. In Pennsylvania, James Wilson reminded ratifiers that they possessed their natural rights "neither by grant nor contract,"[164] and Benjamin Rush ridiculed the idea of depending on organic acts to recognize rights that had been conferred before any social state.[165] "Would it not be absurd," Rush asked, "to frame a formal declaration that our natural rights are acquired from ourselves, and would it not be a more ridiculous solecism to say, that they are the gift of those rulers whom we have created?"[166] In North Carolina, James Iredell and Archibald Maclaine also assured ratifiers that inalienable rights would be retained without enumeration,[167] while George Nicholas assured the Virginia convention that textual recognition of rights could only acknowledge preexisting claims that were as inviolable "*as if* they had been inserted in the Constitution."[168]

These and other Federalist representations were issued with

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162. "Aristides," MD. J. & BALTIMORE ADVERTISER, Mar. 4, 1788, *quoted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 69 n.3.

163. Hill, *supra* note 95, at 264. *See also* "Chatham," THE VERMONT GAZETTE, Dec. 13, 1790, at 1 (Bills of rights are like "a steeple on a meeting house, calculated more for show than firmness—more to flatter the vanity than secure the freedom of the people.").

164. 2 DOCUMENTARY HISTORY, *supra* note 31, at 391; *see also id.* at 527 (Robert Whitehill in Pennsylvania convention) (observing that it was "a solemn Mockery of Heaven" to say that rights are secured by the Constitution).

165. *See id.* at 434.

166. *Id.* Rush described the proposed bill of rights as an "idle and superfluous instrument," and concluded that it was "an honor to the late Convention that this system has not been disgraced with a bill of rights . . . ." *Id.* Further evidence that the Philadelphia delegates believed a bill of rights to be superfluous is found in the journal of the convention: Although a motion to prepare a bill of rights was unanimously rejected, *see* 2 FARRAND, *supra* note 119, at 582, George Washington nevertheless wrote that "there was not a member of the convention . . . who had the least objection to what is contended for by the Advocates for a Bill of Rights . . . ." Washington, *supra* note 119, at 297-98 (emphasis omitted).

167. *See* 4 ELLIOT'S DEBATES, *supra* note 14, at 161, 166.

168. 3 *id.* at 451 (emphasis added). The Virginia Federalist "Brutus" also claimed that "it was not only unnecessary, but would even have been absurd to have introduced [a bill of rights into] the proposed constitution." "Brutus," *supra* note 118, at 212.

such regularity that within weeks of the first state convention they had become the object of Anti-Federalist ridicule. In his "maxims which are the quintessence" of arguments in favor of the Constitution, "Argus" included the assurance that "bills or declarations of the rights of the people are always useless in a new constitution,"[169] while another critic claimed that it was a part of the "political creed of every federalist" that "it is totally unnecessary to secure the rights of mankind in the formation of a constitution."[170]

Given this "non-essentiality" of recognizing natural rights in the text, the amendment process could only have extended additional protection to rights already retained. In support of this proposition, one advocate noted that, "[a]ltho' fully sensible" that all rights not expressly delegated were retained, the people "chose at the same moment *to express in different language* those rights . . . which they never designed to part with . . . ."[171] James Madison described the existing rights clauses of the unamended Constitution as "additional fences"[172] and advised Thomas Jefferson that opponents of the plan simply required "a few additional guards,"[173] while Jefferson in turn endorsed the idea of adding declaratory amendments "by way of supplement."[174]

Following ratification, at least four state conventions declared that certain rights had been explicitly recognized in their respective texts "merely for greater caution,"[175] and Madison's own fourth resolution, which evolved into the Ninth and Tenth Amendments, also included this "greater caution" disclaimer.[176] In his opening remarks to the First Congress,

169. "Argus," INDEPENDENT GAZETTEER, Jan. 15, 1788, at 3.

170. "One of the Nobility," N.Y. J., Dec. 12, 1787, at 2.

171. "De Witt," *supra* note 49, at 22 (emphasis added). Although "De Witt" was an Anti-Federalist, his account of the limitation to expressly delegated powers mirrors Federalist assurances. *See supra* note 121 and accompanying text.

172. THE FEDERALIST No. 44, at 280, 282 (Clinton Rossiter ed., 1961) (James Madison).

173. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 408, 410 (Julian Boyd ed., 1955).

174. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 659, 660 (Julian Boyd ed., 1955).

175. DUMBAULD, *supra* note 53, at 188 (citing Virginia convention); *id.* at 189 (citing New York convention); *id.* at 204 (citing First North Carolina convention); RHODE ISLAND RATIFICATION, *supra* note 53, at 334 (citing Rhode Island and Providence Plantations convention).

176. The last clause of Madison's fourth proposed article of amendment provides that the "exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights

Madison again defended the enumeration of certain rights, and concluded that a bill of rights could at least be useful in "obtaining even a double security on these points . . . ."[177] Although intended to provide additional protection, these articles could not have enhanced the status of the underlying rights. As Roger Sherman and other Federalists declared, "the amendments are *a declaration* of rights; the people are secure in them, whether we declare them or not . . . ."[178] It is clear that for the Constitution's ratifiers, the original significance of textual recognition was strictly limited. The First Congress did not repeal this understanding, because these "additional guards" approved by Congress did not become the sole means of protecting retained rights until well after ratification.

VI. Objection: "Retained Rights Are Defined by Enumeration"

Positivism, which requires that rights must be expressly enumerated to be retained, needs no introduction. For modern originalists, the very concept of originalism "rests on a positivistic view of law itself."[179] For James Kelley, a roster of the Founders' rights claims can be found in the proceedings of the state ratifying conventions. We may infer that each of these claims was either constitutionalized or deliberately rejected by the First Congress, because "none of the states' suggested amendments relating to fundamental rights were omitted by Madison in his proposals for a national bill of rights."[180] By contrast, Alfred Kelly concludes that the roster of natural rights was effectively fixed long before the ratification debates. According to Kelly, the historical rights of Englishmen were

retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." 1 Annals of Cong. 435 (Joseph Gales ed., 1834).

177. *Id.* at 441.

178. *Id.* at 715 (emphasis added). Sherman observed that the people retain the right of self-government when they enter society. *See* Sherman, *supra* note 146, at 267. He later concluded that if a particular right "is indefeasible, and the people have recognized it in practice, the truth is better asserted than it can be by any words whatever." 1 Annals of Cong. 719 (Joseph Gales ed., 1834).

179. Earl Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 Chi.-Kent L. Rev. 981, 983 (1988); *see also* Berger, *supra* note 151, at 252, *quoted with approval in* McDowell, *supra* note 108, at 25 (stating that the Founders were deeply committed to positivism); McAffee, *supra* note 108, at 1320 n.388 (establishing that the records of the state ratification debates suggest positivism).

180. James Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 825 (1966).

"quite well defined and specific," and, by the time of the American Revolution, the once expansive array of natural rights "had long since been given a very positive and specific content."[181] Regardless of *when* rights were finally codified, it is agreed that the positive content of natural law is now limited to the enumeration of rights in the Constitution and its first eight amendments.

A. *Enumerated Rights*

During the ratifying debates, Federalists assured skeptical Anti-Federalists that retained rights were not defined by enumeration because natural rights could not be effectively enumerated. Writing as "State Soldier," George Nicholas concluded that those states that had declined to adopt written bills of rights had acted prudently, and that their respective citizens were "[w]ell aware of the impossibility of enumerating all those blessings to which by nature they were entitled . . . ."[182] In his influential remarks to the Pennsylvania convention, James Wilson also rejected further attempts to enumerate retained rights because "it was found to be impracticable."[183] He added that

> there are very few who understand the whole of these rights. All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people . . . .[184]

Responding to the complaint of Anti-Federalist John Smilie

181. Kelly, *supra* note 16, at 154-55. Most originalists believe that retained rights were codified after the onset of the Revolution. *See supra* note 63 (concluding that the Founders effected an "awesome transition" from natural to civil law).

182. "The State Soldier" II, *supra* note 47, at 352; *see also* "Reflection," CARLISLE GAZETTE, Mar. 12, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 509, at 2002, 2006 ("[W]ho would attempt to define the rights of one freeborn American? Who could enumerate [those] privileges[?]"); "A", *The Triumphs of Reason, Being a Dialogue on the New Constitution*, COUNTRY J. & POUGHKEEPSIE ADVERTISER, Mar. 11, 1788, at 2 ("[W]ho would undertake to enumerate all the rights which are vested in us by the laws of nature and of justice[?]"); "Atticus," THE INDEPENDENT CHRONICLE: AND THE UNIVERSAL ADVERTISER, Nov. 22, 1787, at 2 (Bills of rights are "only an extract" of the rights of the people.).

183. 2 DOCUMENTARY HISTORY, *supra* note 31, at 391. The account of Wilson's assurance is corroborated by the response of Robert Whitehill, who reminded the convention president that a previous speaker [Wilson] had claimed that a bill of rights "would be dangerous . . . because it is not practicable to enumerate all the rights of the people [and] therefore it would be hazardous to secure such of the rights as we can enumerate!" *Id.* at 397.

184. 2 ELLIOT'S DEBATES, *supra* note 14, at 454 (emphasis omitted).

that the Philadelphia drafters should have included a more comprehensive bill of rights,[185] Wilson was emphatic: "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing."[186] Federalist Theophilus Parsons delivered a similar warning to the Massachusetts convention, where he "demonstrated the impracticability" of forming a bill of rights.[187] Both Wilson's conclusion and his "celebrated speech" were endorsed by James Iredell in North Carolina.[188] Writing as "Marcus," Iredell asked, "who would undertake to recite all the state and individual rights not relinquished by the new Constitution?"[189] Leaving nothing to implication, he answered his own question during the subsequent convention: "No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution."[190] North Carolina Governor Samuel Johnston dismissed the task as "the highest absurdity,"[191] while another Federalist finally concluded that enumeration would be impossible because the rights of nature were "as numerous as sands upon the sea shore."[192]

Although Anti-Federalist demands for a comprehensive bill of rights seem to suggest that a literally complete enumeration of retained rights was possible, closer examination of these writings reveals a number of disclaimers such as *may*, *might*, *should*, or *ought*.[193] In this case, "ought" does not imply "can":

185. According to Wilson's own notes of the convention, Smilie evidently protested that "[t]here is no security for our rights in this Constitution. . . . Why did they omit a bill of rights?" 2 DOCUMENTARY HISTORY, *supra* note 31, at 386 (emphasis omitted); *see also id.* at 384, 385. *But cf.* "An Anti-Federalist," THE CARLISLE GAZETTE, AND THE WESTERN REPOSITORY OF KNOWLEDGE, May 21, 1788, at 1 ("the advocates for a bill of rights . . . do not insist on having a catalogue of [rights] drawn up . . . .).

186. 2 ELLIOT'S DEBATES, *supra* note 14, at 454; *see also id.* at 436 (containing Wilson's observation that "[i]n all societies, there are many powers and rights, which cannot be particularly enumerated.").

187. *Id.* at 161.

188. "Marcus" (James Iredell), *supra* note 119, at 168.

189. *Id.*

190. 4 ELLIOT'S DEBATES, *supra* note 14, at 149.

191. *Id.* at 142.

192. *Editorial,* THE NEWPORT MERCURY, Jan. 27, 1790, at 3. The author also proposed that thousands of rights were retained for each one enumerated in a bill of rights. *See id.* Other leading Federalists were equally skeptical of enumeration. *See, e.g.*, "A Friend to Equal Liberty," INDEPENDENT GAZETTEER, Mar. 28, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 578, at 2247, 2247; "Aristides," *supra* note 132, at 537; 3 ELLIOT'S DEBATES, *supra* note 14, at 587 (statement of George Wythe in Virginia convention); *id.* at 626-27 (statement of James Madison in Virginia convention).

193. *See, e.g.*, "A Delegate who has catched cold," VA. INDEPENDENT CHRON., June 25, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 268, 270; "A

There is no evidence to suggest that any Anti-Federalist—or indeed, any group of Founders—ever claimed to have successfully enumerated all retained rights.[194] Again, Federalists focused on this omission. In an address delivered after every state declaration and amendment had been forwarded to Congress, James Wilson noted that, even though there had been many attempts to enumerate the rights of man, "the most finished performances executed by human hands cannot be perfect. But most of them have been rude and imperfect to a very unnecessary [and] some, to a shameful degree."[195] In convention, Wilson asked: "[W]ho will be bold enough to undertake to enumerate all the rights of the people?"[196] It was only after ratification that positivists proposed to answer what was once a rhetorical question.[197]

The practicability of enumerating retained rights is also

True Friend," VA. INDEPENDENT CHRON., Dec. 12, 1787, *reprinted in* 14 DOCUMETARY HISTORY, *supra* note 12, at 373, 377; "Brutus," N.Y. J., Nov. 1, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 372, 376; 3 ELLIOT'S DEBATES, *supra* note 12, at 448 (statement of Patrick Henry in Virginia convention); "Sentiments of Many," VA. INDEPENDENT CHRON., June 18, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 275, 275; Letter from George Lee Turberville to Arthur Lee (Oct. 28, 1787), *in* 8 DOCUMENTARY HISTORY, *supra* note 12, at 127, 128.

194. Of all the Anti-Federalists, the most insistent challenge came from "A Farmer" in Maryland: "Are the fundamental rights of mankind at this day unknown? . . . . It did not require the wisdom of a national convention to have reduced them into order . . . . Nor yet can I believe, that the late convention were incompetent to a task that has never been undertaken in the separate States without success." "A Farmer" (John Francis Mercer), MD. GAZETTE, Feb. 15, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 9, 13. The claim of "A Farmer" that every attempt to enumerate fundamental rights had been successful seems more figurative than literal. There were thirty-eight articles in the New Hampshire bill of rights, including three that recognize unenumerated natural rights. *See* N.H. CONST., pt. 1, arts. II, III, IV. Only a few of these rights, however, are found in the four paragraphs of Connecticut's Constitutional Ordinance of 1776. *See* 2 UNITED STATES CONSTITUTIONS, *supra* note 39, at 143.

195. James Wilson, *The Law of Nature*, *in* 1 THE WORKS OF JAMES WILSON 126, 147 (Robert McCloskey ed., 1967). Wilson's pessimism was not unfounded. After the first Rhode Island convention had adopted thirty-six proposed declarations and amendments, including explicit recognition of natural rights, delegate Job Comstock still protested that "by adopting this Bill some Rights essential may be omitted." FOSTER, *supra* note 12, at 77 (statement of Job Comstock in South Kingston Convention of Rhode Island and Providence Plantations); *see also* "Pacificus" (Noah Webster), N.Y. DAILY ADVERTISER, Aug. 17, 1789, *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 121, at 275, 276 (concluding that James Madison's amendment proposals enumerated "a few particular rights which are dear to us" and describing the entire project of enumeration as "a farce in government as novel as it is ludicrous") (emphasis omitted).

196. 2 DOCUMENTARY HISTORY, *supra* note 31, at 391. For comment on Wilson's challenge, see "A Friend to the Republic," *Anti-Federalist, No. II*, FREEMAN'S CHRON., Feb. 8, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 243.

197. After ratification had been secured on the basis of these and other assurances, Richard Henry Lee complained of the new-found positivism of Federalist senators considering proposed articles of amendment: "I am grieved to see that too many look at the Rights of the people as a Miser examines a Security[,] to find a flaw in it!" Letter

questioned by some contemporary—and perhaps unexpected—authorities. Citing an earlier work by Alexander Bickel, Raoul Berger explains that, even though the roster of rights protected by the original intent of the Fourteenth Amendment is effectively limited to the express provisions of the earlier Civil Rights Act of 1866,[198] these provisions could not have been enumerated in the text of the amendment because "[c]onstitutional drafting calls for the utmost compression [and] avoidance of the prolixity of a code."[199] Berger adds that " 'the specific and exclusive enumeration of rights in the Act,' as Bickel remarked, presumably was considered 'inappropriate in a constitutional provision.' "[200] These accounts of Professors Bickel and Berger parallel Federalist assurances during the original ratification debate: Just as a specific and exclusive enumeration of rights was impracticable for the drafters of the Fourteenth Amendment, it was also impracticable for the drafters of the original Constitution. The Founders were neither willing nor able to enumerate retained rights, and therefore, as Robert Bork once observed, "the first eight amendments . . . may properly be taken as specific examples of the general set of natural rights."[201]

VII. Objection: "Activism Creates Rights Unknown to the Founders"

Some originalists propose that the roster of rights submitted to the First Congress literally exhausts the array of rights known to the founding generation because, in the words of James Kelley, "[t]here is no record in any of Madison's statements that he feared the difficulty of defining other individual rights."[202] By presuming to discover additional fundamental rights, an activist judiciary necessarily creates rights not contemplated by the Founders and "undreamed of" by Eighteenth-Century society.[203] Alfred Kelly claims that the notion of

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from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), *in* Creating the Bill of Rights, *supra* note 121, at 295, 295.

198. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-83 (1988)).

199. Berger, *supra* note 151, at 39.

200. *Id.* (quoting Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 61 (1955)).

201. Bork, *supra* note 2, at 170.

202. Kelley, *supra* note 180, at 825.

203. *See* Raoul Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 2 (1980) (arguing

a "dynamic" array of rights requires nothing less than "pulling new natural rights out of the air,"[204] while Walter Berns actually proposes that "[t]he [F]ramers would have regarded it as *contrary to natural right*" to endow judges with authority to "create" such rights.[205] Newly-discovered natural rights cannot be legitimate because there were never any other rights left to vindicate. Modern originalists warn that activism replaces this understanding of the ratifiers with the speculation of philosophers.[206]

A. *Vindicated Rights*

Before even reaching the question of whether rights created after ratification are entitled to recognition, fidelity to original understanding requires showing that such contested rights were not originally retained without enumeration. Because it was impracticable to the Founders to enumerate all retained rights[207] and the Constitution itself enumerated scarcely a half-dozen of these rights,[208] the task of proving that a particular right was unknown to the Founders is complicated by the huge array of unenumerated rights that *was* known to them. Several fundamental rights proposed by the state conventions—includ-

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that Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486-99, would create rights "undreamed of" by the Founders); Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L. J. 215, 223 & n.59 (1987) (arguing that activism creates rights never contemplated by the Founders); *see also* BORK, *supra* note 4, at 187; Monaghan, *supra* note 8, at 395; Perry, *supra* note 21, at 272 (1981); Charles E. Rice, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL'Y 13, 14 (1984).

204. Kelly, *supra* note 16, at 155. During his confirmation hearings, Judge Bork also concluded that "[t]here is no evidence that I know of that this was to be a dynamic category of rights . . . . [t]here is no evidence of that at all that I know of." *Hearings on the Nomination of Robert Bork*, *supra* note 4, at 249. *But cf.* Bork, *supra* note 2, at 170 (stating that judges can construct principles and extrapolate from them to define new natural rights and that "there is some historical evidence that this is substantially what Madison intended . . . ."); text accompanying *supra* note 4.

205. Berns, *supra* note 107, at 66 (emphasis added). *But cf.* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 64 (1989) ("Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.").

206. The Justice Department's Office of Legal Policy protested that non-originalism is based on abstract philosophical foundations. *See* SOURCEBOOK, *supra* note 5, at 66; *cf.* Edwin Meese III, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1, 5 (1986) (arguing that "the philosophical foundations" of the legal system support originalism).

207. *See* text accompanying *supra* notes 182-96.

208. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 2 (granting limited protection of habeas corpus); *id.* at art. I, § 9, cl. 3 (prohibiting bills of attainder and *ex post facto* laws), *id.* at art. I, § 9, cl. 8 (prohibiting titles of nobility); *id.* at art. III, § 2, cl. 3 (requiring trial by jury in criminal cases).

ing the right of self-government;[209] the right to resist[210] or abolish government;[211] the right of conscientious objection;[212] the right to fish, fowl, and game;[213] freedom of information and inquiry;[214] and prohibitions of certain privileges and monopolies[215]—were not expressly enumerated in the first eight amendments. Proposals to protect state constitutions and bills

209. *See* DUMBAULD, *supra* note 53, at 182 (citing Virginia convention); *id.* at 189 (citing New York convention); *see also supra* note 178 and text accompanying *supra* notes 100, 103-06 (explaining Federalist recognition of the transcendent right to self-government).

210. *See* DUMBAULD, *supra* note 53, at 180 (citing Maryland convention minority); *id.* at 183 (citing Virginia convention); *id.* at 199 (citing First North Carolina convention); *see also* text accompanying *supra* notes 86-87 and *infra* text accompanying notes 343-60 (recognizing the fundamental right of resistance).

211. *See* DUMBAULD, *supra* note 53, at 180 (citing Maryland convention minority); *id.* at 189 (citing New York convention); *see also* PA. CONST. of 1776, declaration of rights, art. V, *in* 8 UNITED STATES CONSTITUTIONS, *supra* note 39, at 278; VA. CONST. of 1778, declaration of rights, art. 3, *in* 10 UNITED STATES CONSTITUTIONS, *supra* note 39, at 48, 49; THE FEDERALIST No. 16, at 113 (Clinton Rossiter ed., 1961) (Alexander Hamilton); THE FEDERALIST No. 40, at 247, 252-53 (Clinton Rossiter ed., 1961) (James Madison); "West-Chester Farmer," *To the Citizens of America*, N.Y. DAILY ADVERTISER, June 8, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 47, at 128. Even Henry Campbell Black, who rejected those principles of natural justice not incorporated by the express provisions of the Constitution, described the right of revolution as "a fundamental, natural right of the whole people, not existing in virtue of the constitution, but in spite of it." BLACK, supra note 111, at 10.

212. *See* DUMBAULD, *supra* note 53, at 179 (citing Maryland convention minority); *id.* at 185 (citing Virginia convention); *id.* at 201 (citing first North Carolina convention).

213. *See id.* at 174 (citing Pennsylvania convention minority); *see also* "An Enquirer," PA. GAZETTE, Nov. 14, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 228, at 1103, 1103-04; *infra* note 271.

214. *See* DUMBAULD, *supra* note 53, at 186 (citing Virginia convention); *id.* at 195 (citing New York convention); LOUISE I. TRENHOLME, THE RATIFICATION OF THE FEDERAL CONSTITUTION IN NORTH CAROLINA 240 (1932) (citing second North Carolina convention); *see also* "A Landholder" (Oliver Ellsworth), CONN. COURANT, Dec. 17, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 448, 451 ("Civil government has no business to meddle with the private opinions of the people."); Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 546 (Julian P. Boyd ed., 1950) ("the opinions of men are not the object of civil government, nor under its jurisdiction . . . ."); Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON 194, 196 (Julian P. Boyd ed., 1955) (expressing Madison's belief that "the ambitious hope of making laws for the human mind" had been extinguished).

215. For various prohibitions of hereditary privileges, monopolies, or exclusive advantages of commerce, *see* DUMBAULD, *supra* note 53, at 176 (citing Massachusetts convention); *id.* at 181 (citing New Hampshire convention); *id.* at 183 (citing Virginia convention); *id.* at 194 (citing New York convention); *id.* at 199 (citing first North Carolina convention); RHODE ISLAND RATIFICATION *supra* note 53, at 337 (citing Rhode Island and Providence Plantation conventions); Mitgang, *supra* note 146, at A1 (citing proposal of Roger Sherman).

Several state constitutions also included proscriptions of monopolies and other special privileges. *See* N.H. CONST. arts. IX, X; N.C. CONST. of 1776, declaration of rights, arts. III, XXIII, *in* 7 UNITED STATES CONSTITUTIONS, *supra* note 39, at 402, 403; PA. CONST. of 1776, declaration of rights, art. V, *in* 8 UNITED STATES CONSTITUTIONS, *supra* note 39, at 278; VA. CONST. of 1776, declaration of rights, art. 4, *in* 10 UNITED STATES

of rights explicitly were not even submitted to the First Congress.[216] Other fundamental rights identified in organic acts and other writings were left unenumerated, including the right to remain in or return to a state of nature,[217] the rights of navigation,[218] emigration and travel,[219] the right to a healthy environment,[220] and the right to privacy.[221]

CONSTITUTIONS, *supra* note 39, at 49; VT. CONST. of 1786 art. VII, *in* 9 UNITED STATES CONSTITUTIONS, *supra* note 39, at 498.

These sorts of provisions may amount to a pragmatic assertion of Jefferson's proclamation that "all Men are created equal . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

216. *See* DUMBAULD, *supra* note 53, at 175 (citing Pennsylvania convention minority); *id.* at 179 (citing Maryland convention minority); "Agrippa" (James Winthrop), *To the Massachusetts Convention*, MASS. GAZETTE, Feb. 5, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 109, 112-13 (making amendment proposals); Steiner, *supra* note 104, at 33, 37 (citing proposal of William Paca).

There was no consensus regarding the relationship between state-generated rights and the federal government. The Supremacy Clause suggests that state-based alienable rights cannot limit national powers, U.S. CONST. art. VI, cl. 2, yet many Federalists claimed that state bills of rights would remain in force. *See, e.g.*, MADISON'S NOTES, *supra* note 32, at 630 (citing Roger Sherman in the Philadelphia convention); "An American Citizen" (Tench Coxe), *supra* note 113, at 436; "A Citizen," NORWICH PACKET, Jan. 17, 1788, *microformed on* 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MICROFORM SUPPLEMENT, Conn. No. 73, at 305, 308 (John P. Kaminski & Gaspare J. Saladino eds., 1978); "A Citizen of America" (Noah Webster), *supra* note 118, at 739-40; "A Citizen of Pennsylvania," *supra* note 47, at 619-22; "A Friend to Good Government," *supra* note 121, at 65; "A Subscriber," INDEPENDENT GAZETTEER, Oct. 19, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 145, at 768, 775-76; "Civis Rusticus," VA. INDEPENDENT CHRON., Jan. 30, 1788, *reprinted in* 8 DOCUMENTARY HISTORY 331, 337-38; "Homespun," INDEPENDENT GAZETTEER, Oct. 31, 1787, *reprinted in* DOCUMENTARY HISTORY MICROFORM, Pa. no. 175, 905, 908; "[O]ne of the Four Thousand," INDEPENDENT GAZETTEER, Oct. 15, 1787, *reprinted in* 1 PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 116 (John B. McMaster & Frederick D. Stone eds.) (1888); "The State Soldier" (George Nicholas), *supra* note 124, at 306; "One of the Middling-Interest," *supra* note 124, at 149; "One of the Nobility," *supra* note 167, at 85; "Truth," MASS. CENTINEL, Nov. 24, 1787, at 77.

In his notes for a speech introducing his amendment proposals to the First Congress, James Madison wrote that opponents believed a bill of rights might "dispar[a]ge other rights or constructively enlarge" powers, and he then noted that the first possibility "goes vs. St[ate]: Bills." This suggests that the Ninth Amendment may have been intended, at least in part, to protect unenumerated rights recognized by the states. James Madison, *J. M.'s notes for speaking for amendts. by Congress 1789*, *in* 5 THE WRITINGS OF JAMES MADISON 389, 390 (Gaillard Hunt ed., 1973).

217. *See* SAMUEL ADAMS, *supra* note 44, at 351.

218. *See* Resolution, Nov. 12, 1787, *in* JOURNAL OF THE HOUSE OF DELEGATES 32, *microformed on* Early American Imprints: First Series No. 21556 (Readex Microprint) (Virginia House of Delegates stating that navigation "ought to be guaranteed . . . by the laws of God and nature, as well as compact.").

219. *See* ARTICLES OF CONFEDERATION art. IV (U. S. 1781) ("the people of each state shall have free ingress and regress to and from any other state"); PA. CONST. of 1776, art. XV, *in* 8 UNITED STATES CONSTITUTIONS, *supra* note 39, at 278, 279; VT. CONST. of 1786, art. XXI, *in* 9 UNITED STATES CONSTITUTIONS, *supra* note 39, at 497, 499.

220. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *130 (describing the "preservation of a man's health from such practices as may prejudice or annoy it" as an absolute right of Englishmen); James Wilson, *Of Crimes, Affecting Several of the Natural Rights of Individuals*, *in* 2 THE WORKS OF JAMES WILSON 670, 671 (Robert G. McCloskey ed., 1967) (iden-

Other rights purportedly "unknown to the Founders" have in fact been known for centuries. Adopted in 1641, the remarkable Massachusetts Body of Liberties recognized the rights of political and economic asylum;[222] extended limited protection to employees,[223] women,[224] children,[225] and the mentally incompetent;[226] and even prohibited "Crueltie towards any bruit Creature . . . ."[227] In addition, the friends of the Constitution stressed that many apparently insignificant rights were also retained.[228]

Even this roster of rights is not exhaustive. In the first North Carolina convention, James Iredell again explained that it was impossible to enumerate every right retained under the new Constitution, and he shifted the burden to the Anti-Federalists: "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."[229] Iredell had ready access to texts recognizing every right eventually enumerated by the Founders when he issued his challenge.[230] Rights originally retained cannot have been subsequently created, and each and every right retained without enumeration would more properly be described as *vindicated.*

Unenumerated rights would require vindication if they had been forgotten or disparaged by ensuing generations. According to Richard Henry Lee, even a partial enumeration of rights would "establish in the minds of people truths and principles

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tifying actions "offensive and injurious to the health of the neighborhood" as crimes affecting several natural rights).

221. *See infra* text accompanying notes 252-62.

222. *See A Coppie of the Liberties of the Massachusets Collonie in New England* § 89, *in* 5 UNITED STATES CONSTITUTIONS, *supra* note 39, at 46; *see also id.* § 52.

223. *See id.* §§ 85-88.

224. *See id.* §§ 79-80.

225. *See id.* §§ 81-84; *see also id.* § 52.

226. *See id.* § 52.

227. *Id.* §§ 92-93.

228. *See infra* text accompanying notes 263-78.

229. 4 ELLIOT'S DEBATES, *supra* note 14, at 167.

230. Every fundamental right enumerated in the Constitution and Bill of Rights had already been proposed before the First North Carolina convention. *See generally* DUMBAULD, *supra* note 14, at 173-91 (listing proposals of Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, and Virginia). Most of these rights were also recognized in the North Carolina Declaration of Rights. *See* N.C. CONST. of 1776, declaration of rights, *in* 7 UNITED STATES CONSTITUTIONS, *supra* note 39, at 402, 402-03 (prohibiting "hereditary emoluments, privileges or honors" and recognizing freedom of religion, freedom of the press, right to assemble and petition, right to bear arms, and right of privacy).

which they might [otherwise have] soon forgot."[231] Others agreed that unenumerated rights could increasingly be at risk, because, as one Anti-Federalist predicted, Americans may not be "so well acquainted at a future day with those rights as they now are. . . ."[232] Regardless of whether rights have been forgotten or disparaged by new threats to liberty, the possibility that retained rights have disappeared stands the complaint of activism on its head: Rather than asserting rights unknown to the Founders, modern originalists may be disparaging rights originally retained by those Founders.

B. *Created Rights*

Even if contemporary claims were literally unknown to the founding generation, it is not certain that such subsequently created rights must be illegitimate. The Founders themselves conceded that there really were rights unknown to them,[233] and there are indications that these nascent rights were to be identified and retained without the benefit of Article V or any other text.[234] Pennsylvania's "Thoughts at the Plough" observed that even though the rights of mankind were perhaps "as well known at this day as they ever were," the specific array of rights that should always be retained by the people was not yet known.[235] "William Penn" agreed that the full array of natural rights was "unfortunately not yet known" to Americans and added that it was by "slow, and often interrupted, steps that we have discovered those we now enjoy."[236] Along with other

231. "The Federal Farmer," Jan. 20, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 323, 324 [hereinafter "Federal Farmer"].

232. Wait, *supra* note 48, at 143-44; *see also* 1 ANNALS OF CONG. 737 (Joseph Gales ed., 1834) (statement of Elbridge Gerry) (stating that rights may "lie dormant and never be exercised"); "The Impartial Examiner," *supra* note 47, at 465 (warning that retained rights could be deliberately disparaged when "[t]he altar of liberty is no longer watched with such assiduity"). *But see* "Tullius," FREEMAN'S J., Mar. 26, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, at Pa. no. 69, 2208, 2209 (stating that enumerated rights would be remembered and "constantly impressed upon the mind").

233. *See* text accompanying *supra* notes 182-96 and 198-99 (explaining that natural rights cannot be enumerated).

234. *See* U.S. CONST. art. V (prescribing the amendment process).

235. "Thoughts at the Plough," *supra* note 47, at 2364.

236. "William Penn," INDEPENDENT GAZETTEER, Jan. 2, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 168, 170; *see also* "The Enthusiast in Trade," MD. J. & BALTIMORE ADVERTISER, Oct. 4, 1788, at 2 ("The British constitution has been some hundred years in forming, and yet it is admitted to be imperfect still . . . too much caution cannot be used, or too great care taken, to transmit the rights of nature untouched and unsullied to the latest generations.").

Anti-Federalists, publisher Thomas Wait called for the adoption of a more comprehensive bill of rights, but even he warned that mankind might not be privy to the full array of natural rights: "If not the whole truth, yet, many great truths have been discovered . . . ."[237]

Article V had played no role in the realization of these known truths, and some Federalists suggested that resorting to enumeration might actually impede the discovery of additional rights. Benjamin Rush again reminded ratifiers that "[o]ur rights are not yet all known," and asked: "Why should we attempt to enumerate them?"[238] The only point linking these two thoughts is Rush's apprehension that enumeration would not protect, and might even disparage, other "undiscovered" rights. Upon learning that fellow Virginian Richard Henry Lee had attempted just such an enumeration,[239] convention president Edmund Pendleton also warned of this possibility of foreclosure: "May we not in the progress of things, discover some great and Important [right], which we don't now think of?"[240]

In contrast, James Wilson gave no indication that the text would interfere with this accretion of fundamental rights. In his *Law Lectures*, delivered after ratification and after the twelve proposed articles of amendment had been submitted to the States, Wilson declared that the law of nature would continue to be "progressive in its operations and effects" and was "calculated to produce, in the future, a still higher degree of perfection."[241] For these Founders, new rights were not contrary to natural law, but rather were an essential part of it.

Modern originalists seldom celebrate the role of intuition and philosophy in discovering new rights, but this too was a part of Eighteenth-Century orthodoxy shared by members of both political factions. Benjamin Rush protested against the prospect of defining rights by enumeration because he felt that the rights of mankind were "better felt, than explained."[242] Ac-

237. Wait, *supra* note 48, at 144.

238. 2 DOCUMENTARY HISTORY, *supra* note 31, at 440 (statement of Benjamin Rush in Constitutional Convention at Philadelphia).

239. *See* Richard Henry Lee, Draft of Proposed Amendments, *in* 1 THE LETTERS OF RICHARD HENRY LEE, *supra* note 88, at 442-44. *But cf.* "The Federal Farmer" VI, *supra* note 47, at 262 (citing certain "unalienable or fundamental rights").

240. Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 530, 533 (David J. Mays ed., 1967).

241. Wilson, *supra* note 195, at 147.

242. "Harrington," *supra* note 47, at 116 (emphasis omitted).

cording to the Federalist "Mariot," these rights—both in England and in America—were derived from the general knowledge of the people and "the liberality of modern times" rather than from specific declarations.[243] Like Wilson, "Mariot" believed that progress would continue because this liberality was "extending itself still wider and wider . . . ."[244] "William Penn" went even further: Credit for discovering new natural rights belonged in large part to

> the philanthropic researches of those chosen few to whom the Almighty has in his mercy bestowed a larger portion of the ethereal fire than usually falls to the lot of the common race of men. Those men, whom we call *philosophers* or *lovers of wisdom*, have generally been persecuted . . . .[245]

Securing new rights through the agency of philosophers or the liberality of modern times would be implausible if the Founders' rights had been defined and retained solely by enumeration, for the Founders were not positivists. Natural rights could not be enumerated[246] and did not require textual recognition.[247] A dynamic array of rights, evolving and existing beyond the Constitution or any other text, is not incompatible with this understanding.

VIII. Objection: "The Right of Privacy Was Unknown to the Founders"

For modern originalists, privacy has become the most notorious of the "created" rights.[248] Michael Conant criticizes recent attempts to "rationalize the Supreme Court's creation of a civil right of privacy," and adds that Court decisions and their respective authors "ignore the fact that no such right existed in 1791."[249] Other commentators express similar opinions, albeit with less certitude. James Kelley complains that "if Mr. Justice Goldberg had attempted to dig back through history to dis-

243. "Mariot," *supra* note 156, at 124.
244. *Id.*
245. "William Penn," *supra* note 236, at 170 (emphasis in original).
246. *See supra* text accompanying notes 182-96.
247. *See supra* text accompanying notes 155-67.
248. *See, e.g.*, Roe v. Wade, 410 U. S. 113 (1973) (extending *Eisenstadt* sexual privacy right to encompass abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending *Griswold* marital sexual privacy right to unmarried persons); Griswold v. Connecticut, 381 U. S. 479 (1965) (recognizing fundamental right to marital sexual privacy). *But see* Bowers v. Hardwick, 478 U. S. 186 (1986) (refusing to extend fundamental privacy right to homosexual conduct).
249. Conant, *supra* note 62, at 829; *see also* Rice, *supra* note 203, at 14.

cover whether the right of marital privacy was 'inherent,' he probably would have been unsuccessful,"[250] while Judge Bork describes the right of privacy asserted in *Griswold* as "a new right for which there is not historical evidence."[251] Some originalists claim that such searches through history would fail to uncover any relevant evidence, but all deny that there was ever any underlying right.

A. *Privacy*

Professor Kelley's disclaimer, "probably," suggests that he may not have dug back through history. In fact, rather than being unknown to the Founders, there is evidence that the founding generation understood that the rights of privacy were among those natural rights retained without enumeration.[252] No less an authority than James Wilson addressed matters of privacy in a presentation bearing the unequivocal title *Of Crimes, Affecting Several of the Natural Rights of Individuals*.[253] Wilson included eavesdropping among the aforementioned crimes infringing upon natural rights,[254] and he added that because the law is "remarkable for its adroitness in accommodating itself to the successive manners of succeeding ages, a small alteration should be made in the description of this nuisance, in order to suit it to the present times . . . ."[255] It takes only a small alteration to accommodate the nuisance suffered by the appellants in *Griswold v. Connecticut*.[256] Even the specific language of *Griswold* is not without precedent. There is a striking

250. Kelley, *supra* note 180, at 832.

251. *Hearings on the Nomination of Robert Bork*, *supra* note 4, at 250; *see also* Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828-29 (1986) ("there is no constitutional text or history" to define the right of privacy); Robert H. Bork, *At Last, an End to Supreme Court Activism*, N.Y. TIMES, Aug. 29, 1990, at A21 ("The 'right of privacy'. . . was invented in *Griswold v. Connecticut*.").

252. Compare the law of the Iroquois Confederation that a leaning stick or pole on a house denotes absence, and that a person "seeing such a sign shall not approach . . . but will keep as far away as his business will permit." GREAT LAW OF PEACE, IX Emblematical Union Compact, § 92. The Founders' understanding of the rights of privacy may not have been derived wholly from common law or the *Magna Carta*.

253. *See* Wilson, *supra* note 220, at 670.

254. *See id.* at 671.

255. *Id.*; *cf.* Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) ("Clauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world."); Weems v. United States, 217 U.S. 349, 373 (1910) ("a principle to be vital must be capable of wider application than the mischief which gave it birth").

256. 381 U.S. 479 (1965).

similarity between the opinion of Justice William O. Douglas and an earlier warning by "A Son of Liberty":

> Justice Douglas:
> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[257]
>
> "A Son of Liberty":
> [O]ur bed chambers will be subjected to be searched by brutal tools of power, under pretence, that they contain contraband . . . and the most delicate part of our families [will be] liable to every species of rude or indecent treatment . . . .[258]

The Maryland Federalist "Honestus" included a similar apprehension in his list of "political lies, circulated by the myrmidons and yelpers of the antifederal party."[259] The author concluded that there could be no basis to Anti-Federalist warnings that government officials could "enter the house of any man, at the dead hour of midnight, and search any place with impunity, yea even the pockets and petticoats of his wife, or daughters."[260]

Even if it is supposed that the protection of "persons, houses, papers, and effects" reiterated by the Fourth Amendment did not define personal autonomy for Eighteenth-Century society,[261] evidence from the earlier ratification debates strongly suggests such a comprehensive right of privacy. This sort of evidence may not satisfy modern originalists, but it should certainly give direction to the search for other retained rights mandated by their commitment to original understanding.[262]

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257. *Id.* at 485-86.

258. "A Son of Liberty," N.Y. J., Nov. 8, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 9, at 480, 481-82; *see also* BOSTON COMMITTEE OF CORRESPONDENCE, *supra* note 85, at 75 ("Our Houses, and even our Bed-Chambers, are exposed to be ransacked . . . ravaged and plundered . . . ."); Wilson, *supra* note 220, at 643-44 ("Into this sanctuary, the law herself, unless upon the most urgent emergencies, presumes not to look or enter.").

259. "Honestus," MD. J. & BALTIMORE ADVERTISER, Oct. 21, 1788, at 2.

260. *Id.*

261. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

262. It is no small irony that many documents deemed barren of evidence supporting the rights of privacy were written under pseudonyms: The Federalist "Publius" demurred that "[m]y motives must remain in the depository of my own breast," THE FEDERALIST No. 1, at 33, 36 (Clinton Rossiter ed., 1961) (Alexander Hamilton), and a

IX. Objection: "Implausible Rights Do Not Merit Protection"

From the right to pure air and pure water[263] to the right to live with one's grandchildren,[264] originalists have become accustomed to greeting each new activist decision with shock and dismay. In addition to historical considerations, contemporary assertions of rights may also be evaluated, at least in part, on the basis of the apparent gravity of the claim. If an asserted right seems too trivial to have been retained or too incongruous to have been enumerated in the text, it is liable to be rejected. For many originalists, the rights of privacy fail to reach this "plausibility threshold,"[265] but there are other, perhaps more fundamental, claims that might seem implausible in an organic act. Addressing an earlier assertion that the "right to marry" is fundamental, Joseph Grano responds that "I am quite certain I do not agree."[266] Although he initially describes a legislative ban on marriage as "inconceivable," Professor Grano nevertheless proceeds to think the unthinkable: Constitutional protection did not and does not extend to any supposed right of marriage.[267] Amendments protecting certain aspects of personal autonomy may indeed seem as implausible as the prospect of laws encroaching upon that autonomy. From this, it is easy to conclude that certain claims must never have been recognized as fundamental by the Founders.

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prominent Anti-Federalist added that despite "great pains" taken to discover his identity, "the prying eye of party or curiosity, should never be gratified" with the author's real name. "Centinel" (Samuel Bryan), Independent Gazetteer, Apr. 9, 1788, *reprinted in* 2 The Complete Anti-Federalist, *supra* note 12, at 206-07. Some of the very correspondence of Madison and Jefferson and other Founders regularly cited in scholarly articles required decoding from their original cipher. The actions of these Founders speak as eloquently as their decrypted words.

263. Palmer v. Thompson, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting) ("rights, like the right to pure air and pure water, may well be rights 'retained by the people'. . . .").

264. Moore v. East Cleveland, 431 U.S. 494, 498 (1977).

265. *See* Sourcebook, *supra* note 5, at 64-65 (criticizing Kite v. Marshall, 494 F. Supp. 227, 231 (S.D. Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982), in which the trial court recognized a fundamental right to attend summer camp); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & Pol. 63, 65 (1987) (critiquing Justice Douglas's dissent in *Palmer*); Grano, *supra* note 21, at 10 (critiquing *Moore*).

266. Grano, *supra* note 21, at 59 n.267 (writing in reply to Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 667 (1980)).

267. *See* Grano, *supra* note 21, at 60 n.267.

Implausible Rights

The Founders' defense of certain rights that would eventually be enumerated in the first eight amendments shows that other apparently trivial rights were retained as well. As if anticipating Professor Grano's conclusion that the institution of marriage is subject to the will of constitutional majorities, "A Citizen" wrote that there was no reason to believe that other fundamental rights would be infringed "unless we suppose the institution of marriage will be abolished" as well.[268] Oliver Ellsworth also took issue with a similar set of apprehensions from Virginia delegate George Mason. Responding to Mason's complaint that the liberty of the press was not explicitly retained by the proposed constitution,[269] Ellsworth countered: "Nor is liberty of conscience, of matrimony, or of burial of the dead; it is enough that Congress have no power to prohibit either, and can have no temptation."[270] Pennsylvania's "[O]ne of the Four Thousand" showed that freedom of the press and other retained rights did not require enumeration by invoking another right that would become a favorite among Federalists: "The Convention have said nothing to secure the privilege of eating and drinking, and yet no man supposes that right of nature to be endangered by their silence . . . ."[271] Tench Coxe also resorted to this right to prove that the most trifling aspects of personal autonomy would be secure without enumeration.[272]

After dissenting members of the Pennsylvania convention drafted over a dozen amendments to the federal Constitution, including one recognizing the right to "fowl and hunt in seasonable times,"[273] another influential Federalist complained that even this enumeration was incomplete. Writing as "America," Noah Webster proposed that

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268. "A Citizen," *supra* note 216, at 310.

269. *See* George Mason, *Objections to this Constitution of Government* (draft manuscript), *in* 13 DOCUMENTARY HISTORY, *supra* note 47, at 346, 350.

270. "A Landholder" (Oliver Ellsworth), CONN. COURANT, Dec. 10, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 398, 401.

271. "[O]ne of the Four Thousand," *supra* note 216, at 116; *see also* "A Federalist," INDEPENDENT GAZETTEER, Oct. 25, 1787, at 2; "M," N.H. SPY, Nov. 3, 1787, at 3.

272. *See* JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 137 (1978). Early comment on the Eighteenth Amendment, which may strike the modern reader as idiosyncratic, is faithful to the assurances of the Founders. *See, e.g.*, A.M. Holding, *Perils to be Apprehended from Amending the Constitution*, 57 AM. L. REV. 481, 486 (1923) (arguing that federal amendments prescribing what people should wear, eat, or drink exceed the original scope of national authority).

273. DUMBAULD, *supra* note 53, at 174; *see also supra* note 212 and accompanying text.

> [a]s a supplement to that article of your bill of rights, I would suggest the following restriction:-"That Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night, or even on his back, when he is fatigued by lying on his right."[274]

In a less sublime rendition of the same sentiment, Hugh Henry Brackenridge sardonically warned ratifiers that the Constitution did not include "the least provision for the privilege of shaving the beard," nor the correct mode for "tak[ing] the measure of a pair of breeches."[275] Even after the state conventions had ratified the Constitution and submitted their amendments and declarations to the First Congress, the Federalist *reductio* argument made at least one more appearance. During debate on James Madison's proposed articles of amendment, Massachusetts Federalist Theodore Sedgwick told fellow congressmen that attending to such minutiae as enumerating the already retained "right of assembling" would be derogatory to the dignity of the House.[276] If the Framers had attempted to identify every right retained by the people, "they might have gone into a very lengthy enumeration [and] . . . they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper."[277] The point, of course, is that the

274. "America" (Noah Webster), N.Y. DAILY ADVERTISER, Dec. 31, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 46, at 194, 199 (emphasis omitted); *cf.* BORK, *supra* note 4, at 206, 211 (replying to Professor David Richards, Bork rejects the contention of certain "revisionists of the Constitution" that basic choices such as dress and hair length are beyond the reach of the Constitution). *But see* the Anti-Federalist "No Conspirator," FEDERAL GAZETTE, Apr. 19, 1788, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, at Pa. no. 641, 2421, 2427 (predicting that under the unamended Constitution "a man will not be permitted either to eat, drink, or sleep [or] wear his clothes as he pleases . . . .")

275. Brackenridge, *supra* note 118, at 127; *cf.* Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir. 1972) (upholding regulation restricting hair length and rejecting any general "right to go public as one pleases").

276. 1 ANNALS OF CONG. 732 (Joseph Gales ed., 1834) (statement of Theodore Sedgwick).

277. *Id.* In response to Sedgwick's argument that "trifles" such as the right to wear a hat would not and could not be disparaged, Congressman John Page replied that "such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority . . . ." *Id.*

Ratifiers were given no reason to believe that certain retained rights were more trivial, or less entitled to protection, than others. In a popular analogy, friends of the Constitution compared the delegation of certain rights to a power of attorney authorizing the sale of a parcel of land: All rights not expressly delegated—or, in the case of the analogy, all acres not specified—would be retained, whether explicitly enumerated or not. *See, e.g.*, "Anti-Cincinnatus," NORTHAMPTON HAMPSHIRE GAZETTE, Dec. 19, 1787, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 46, at 36, 37; "Aristides," *supra* note

rights of personal autonomy, regardless of how trivial or implausible they may appear to sophisticated inquiry, were retained without enumeration. The Founders understood that a huge array of apparently trivial rights was beneath enumeration rather than beneath contempt.[278]

X. OBJECTION: " 'OTHER' RIGHTS ARE PROTECTED SOLELY BY LIMITATIONS OF POWER"

While conceding that rights beyond enumeration were retained by the Founders,[279] some commentators argue that constitutional limitations on the power of the national government protect unenumerated rights rather than any principle of enforceable unwritten law.[280] According to Thomas McAffee, friends of the Constitution opposed adoption of a bill of rights for one reason only: "The point" for Federalists was that an additional enumeration of rights would "jeopardize[ ] the basic theory of the federal Constitution, and not that a listing of rights might generate rigid positivism in construing the Constitution."[281] Evidence suggesting a concern for other disparaged rights is characterized as equivocal at best,[282] and is more prop-

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132, at 537-38; 2 DOCUMENTARY HISTORY, *supra* note 31, at 547 (statement of Thomas McKean in Pennsylvania convention); 3 ELLIOT'S DEBATES, *supra* note 14, at 444 (statement of George Nicholas in Virginia convention); 4 *id.* at 141 (statement of Archibald Maclaine in first North Carolina convention); *id.* at 166 (statement of James Iredell in first North Carolina convention); "Marcus," *supra* note 119, at 154; "Thoughts at the Plough," *supra* note 47, at 2362.

278. One of the earliest statements of American natural law made it clear that arbitrary rules, rather than unspecified rights, were suspect, and that the burden of proof would be on those seeking to justify such civil authority, rather than on those invoking higher law. In 1744, Elisha Williams asserted that

> [i]f the civil rulers should take it into their heads to make a law, that no man shall have Luther's Table-Talk in his house, that every man shall turn round upon his right heel at twelve of the clock every day (Sunday excepted), or any such like wise laws (thousands of which might be invented) . . . [it would be incorrect to assume that] these laws are to be strictly obeyed, a higher law to the contrary not being found.

Williams added that such a "pretended rule, as it holds not at all in matters of religion; so it does not hold true in all other cases." Elisha Williams, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), *in* POLITICAL SERMONS, *supra* note 87, at 55, 82 (emphasis omitted).

279. *See* McAffee, *supra* note 108, at 1253 n.150.

280. *See generally* WRONG TURNS, *supra* note 60, at 16, 27; Cooper, *supra* note 265, at 76; McAffee, *supra* note 108, at 1221.

281. McAffee, *supra* note 108, at 1276 n.232; *see also id.* at 1234 n.69 (rejecting the idea that "Federalists feared simply that enumerating some affirmative limitations on governmental power would be read as precluding the existence of additional, unwritten limitations of power").

282. *See id.* at 1276; *see also* Robert C. Palmer, *Liberties as Constitutional Provisions: 1776-1791*, *in* LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN

erly understood as proof of the Founders' abiding interest in constraining the powers of government.[283] Furthermore, commentators propose that the sole and original intent of the Ninth Amendment was to protect this theory of limited government against any adverse inferences that might be drawn from the addition of a bill of rights.[284] According to McAffee, " '[r]ights retained by the people' would have been a perfectly natural way of referring to withholdings of federal power" through the device of enumeration.[285] These "other" rights, retained and at least ostensibly protected by the Ninth Amendment, are not constitutional rights; they are "defined residually" and cannot become "affirmative limitations" on federal power.[286] This intent is supposed to have informed the Constitution proper, and it is for the critic to show that the enactors of the subsequent Ninth Amendment somehow "altered their vision[]" from this earlier understanding.[287]

Positivism as Activism

It is proposed—paradoxically—that unenumerated rights are "protected" by limitations on power, but that these rights cannot be considered as affirmative limitations on that power. This is back-door positivism, and its assertion is only made less implausible by blurring the distinction between the ratification of the Constitution and the later ratification of the Bill of Rights.[288] Distinguishing between the events of 1788 and 1791

REPUBLIC 55, 115 (William E. Nelson & Robert C. Palmer eds., 1987) (stating that the Founders' concern for individual rights "was not concern for rights as such . . . but for rights vis-a-vis the federal government").

283. *See* McAffee, *supra* note 108, at 1276 n.232 ("When Federalist statements that seem to lend the greatest force to the 'diminished rights' position are read in context, in each case they seem focused on preserving the structural protection of rights offered by the Constitution.").

284. *See id.* at 1219-20.

285. *Id.* at 1257 n.165. McAffee is apparently paraphrasing the Ninth Amendment's recognition of "others retained by the people." U.S. CONST. amend. IX.

286. McAffee, *supra* note 108, at 1220, 1221; *see also* WRONG TURNS, *supra* note 60, at executive summary, 1, 6, 9, 14, 22, 27 (retained rights by definition cannot override delegated powers); Maltz, *supra* note 179, at 984 (arguing that rights protected by the Ninth Amendment are "by definition" extra-constitutional).

287. McAffee, *supra* note 108, at 1277-78.

288. *See, e.g.*, Perry, *supra* note 21, at 266-67 (describing 1787-91 as "the formative constitutional period"). Compare the observation of Calvin R. Massey that "[t]he historical status of a claimed right (in 1791, 1868, or at any other time) is most relevant to claims that the right is a . . . civil or positive right and of little or no relevance to claims that it is a natural right." Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 340 n.194 (1987).

reveals an unavoidable and indefensible corollary: According to Professor McAffee's thesis, liberty of the press, the rights of conscience, and all other natural rights left unenumerated by the Constitution must have been "defined residually" as well. Consequently, none of these unalienable rights could have been affirmative limitations on national power.

Nothing in the historical record defends such a proposition. Whereas Professor McAffee contends that unenumerated natural rights were within the scope of federal power, Federalists shared the opposite understanding, and they challenged opponents to show how the national government could possibly trench on these rights. Edmund Randolph wondered aloud if "the most exalted genius" could prove a particular right was at risk, and demanded to know how anyone's "favorite rights" would be violated.[289] Other Federalists were equally insistent. James Iredell demanded: "[L]et it be shown" that rights were in jeopardy,[290] and George Nicholas added that critics must "prove them to be violated."[291] What was retained could not be violated, and no intimation was ever made that fundamental rights should be rendered insecure by the very measures taken to secure them.

Before adoption of the Bill of Rights, virtually every natural right was retained without enumeration. Originalists must show how any subsequent amendment could have reversed this earlier understanding. As Professor McAffee notes, leading Federalists did warn that enumeration might imply constructive powers, but the Founders also believed that the inevitably imperfect enumeration of fundamental rights would provide a pretext for future assertions of positivism.[292] After rejecting both the practicability and utility of bills of rights, one Federalist editor concluded that "[i]f freemen retain no rights but those specified in a bill, they divest themselves of *thousands*, whereby they retain *one*."[293] In North Carolina, convention

289. 3 ELLIOT'S DEBATES, *supra* note 14, at 467 (statement of Edmund Randolph in Virginia convention).

290. 4 *id.* at 167.

291. 3 *id.* at 444; *see also id.* at 450.

292. For examples of the Federalist "constructive powers" argument, see 2 ELLIOT'S DEBATES, *supra* note 14, at 436 (statement of James Wilson in Pennsylvania convention); THE FEDERALIST No. 84, at 510, 513-14 (Clinton Rossiter ed., 1961) (Alexander Hamilton).

293. *Editorial*, THE NEWPORT MERCURY, Jan. 27, 1790, at 3 (emphasis in original); *see also* "The State Soldier" II, *supra* note 47, at 352 (the people were "highly sensible of

president Samuel Johnston agreed that attempting to define the rights of the people "would be as much as to say they were entitled to nothing else."[294] Similarly, Governor Johnston reminded ratifiers that fundamental rights could not be enumerated, and that omitted rights might as a consequence be sacrificed.[295] In South Carolina, Philadelphia delegate Charles Cotesworth Pinckney warned that because the drafters might have "omitted the enumeration of some of our rights," future interpreters might assert that the national government was entitled to "take away such of our rights as we had not enumerated . . . ."[296] In the Pennsylvania convention, Jasper Yeates predicted that "it might be argued at a future day by the persons then in power—[']you undertook to enumerate the rights which you meant to reserve, the pretension which you now make is not comprised in that enumeration, and, consequently, our jurisdiction is not circumscribed.[']"[297] Each of these Founders issued both warnings: Enumeration might disparage retained rights as well as imply constructive powers.

Perhaps the most prophetic of these warnings was delivered in the North Carolina convention by James Iredell:

> Suppose . . . an enumeration of a great many, but an omission of some [individual rights], and that, long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion complained of; what would be the plausible answer of government to such a complaint?[298]

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the danger there was [in] intrusting to their recollection" the security of natural rights); "Brutus," *supra* note 118, at 213 (if the people asserted rights that had been forgotten during enumeration, "the rulers might with propriety dispute their right to exercises them, as they were not specified in the bill of rights . . . ."); Letter from Samuel Holden Parsons to William Cushing, Jan. 11, 1788, *in* 3 DOCUMENTARY HISTORY, *supra* note 12, at 569 (enumeration would imply that "nothing more was left with the people").

294. 4 ELLIOT'S DEBATES, *supra* note 14, at 142.

295. *See id.*

296. DEBATES WHICH AROSE IN THE HOUSE OF REPRESENTATIVES OF SOUTH CAROLINA, ON THE CONSTITUTION FRAMED FOR THE UNITED STATES BY A CONVENTION OF DELEGATES 44 (statement of Charles Cotesworth Pinckney), *microformed on* Early American Imprints: First Series No. 21470 (Readex Microprint) [hereinafter SOUTH CAROLINA DEBATES]. Pinckney concluded that "by delegating express powers, we certainly reserve to ourselves every power and right not mentioned in the Constitution." *Id.*

297. 2 DOCUMENTARY HISTORY, *supra* note 31, at 437 (statement of Jasper Yeates in Pennsylvania convention).

298. 4 ELLIOT'S DEBATES, *supra* note 14, at 149. Justice Iredell also anticipated the very words of future interpreters: "So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This [retained right] is not one of them." *Id.* Compare Justice Iredell's formulation with Judge Bork's actual language: "The various amendments to the Constitution specify what freedom is protected . . .

According to Justice Iredell, future interpreters might conclude, wrongly, that only enumerated rights had been retained.[299] Only his tattered straw man has survived the intervening centuries intact: The original understanding of the Constitution has long since been replaced by positivism.

Events attending the adoption of amendments also contradict McAffee's thesis by showing that the First Congress was unwilling to either disparage unenumerated rights or imply constructive powers. In his outline for a speech introducing proposed articles to Congress,[300] James Madison noted that both objections had been cited against the inclusion of a bill of rights: According to the tenor of the earlier ratification debates, enumeration might "dispar[a]ge other rights—*or* constructively enlarge [powers]."[301] Madison wrote that "*both* [would be] guarded vs. by amendments."[302] and, accordingly, his fourth proposal provided that enumeration should not be construed as to "diminish the just importance of other rights retained by the people, *or* as to enlarge the powers delegated" by the Constitution.[303]

The ensuing debate on Madison's proposals also shows that unenumerated rights had been—and would continue to be—affirmative limitations on national power. At a time when the right to assemble was, by McAffee's thesis, "defined residually," Massachusetts Federalist Theodore Sedgwick dismissed enumeration because this was "a self-evident, unalienable right" that would never be called into question.[304] Before liberty of the press became an affirmative limitation, James Jackson of Georgia described it as one of those "principles which will always prevail," and concluded that enumeration was un-

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[i]f a liberty you cherish does not fall within one of the specified categories . . . you will receive no protection . . . ." BORK, *supra* note 4, at 53; *see also* Griswold v. Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting); BORK, *supra* note 4, at 171; SOURCEBOOK, *supra* note 5, at 2; WRONG TURNS, *supra* note 60, at 1; Berger, *supra* note 203, at 17; Monaghan, *supra* note 8, at 394-95.

299. The representations of "Brutus," Parsons, Iredell, Pinckney, and Yeates, *see supra* notes 293, 296-98, suggest that future interpreters would be mistaken in assuming that unenumerated rights had been ceded.

300. *See* Madison, *J.M.'s notes*, *supra* note 216, at 390.

301. *Id.* (emphasis added).

302. *Id.* (emphasis added). Professor McAffee acknowledges the existence of these notes, but he contends that they do not merit great weight because they are "cryptic," "enigmatic," and do not adequately reveal Madison's thought processes. McAffee, *supra* note 108, at 1294 & n.301, 1295.

303. 1 ANNALS OF CONG. 435 (J. Gales ed., 1834) (emphasis added).

304. *Id.* at 731.

necessary because such principles could never be in danger.[305] Even those Federalists skeptical of certain proposed articles nevertheless respected the constraints of transcendent law. For example, Egbert Benson of New York argued that "religiously scrupulous" persons could be compelled to bear arms because, although such an indulgence "may be a religious persuasion . . . it is no natural right, and therefore ought to be left to the discretion of the Government."[306]

Following passage of the twelve surviving articles but before completion of the ratification process, Congress also began debate on the proposed Bank of the United States. Arguing in support of both the Bank and an expansive interpretation of the Necessary and Proper Clause, even arch-Federalist Fisher Ames concluded that "Congress may do what is necessary to the end for which the Constitution was adopted, provided it is not repugnant to the natural rights of man . . . ."[307] Again, what was *necessary* was not necessarily *proper*: In contrast with more modern formulations, the Founders understood that constitutional power was limited by retained and unenumerated rights.

XI. Objection: "Natural Rights are Not Judicially Enforceable"

It is generally believed that judicial review is necessary to protect fundamental rights, and that the sanction of Article III is in turn necessary to justify judicial review. Because Article III grants appellate jurisdiction over certain cases "arising under" the Constitution,[308] modern originalists conclude that cases involving rights not enumerated in the Constitution cannot be

305. *Id.* at 443.

306. *Id.* at 751. Benson anticipated that "the Legislature will always possess humanity enough" to respect this right, but that its existence should still remain within legislative discretion. *Id.*

307. 2 *id.* at 1906. This passage is significant because, of all the prominent Founders, Fisher Ames probably found the least utility in natural law unsecured by positive law. Ames told Massachusetts ratifiers that the people could enjoy more of their original rights in civil society than they could in a state of nature. *See* 2 Elliot's Debates, *supra* note 14, at 9.

308. *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and treaties made . . . ."); U.S. Const. art. III, § 2, cl. 2 ("In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have appellate jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.").

reviewed.[309] Joseph Grano writes that judicial review must be confined by the implicit scope of Article III, and that other noninterpretivist methodologies allow the federal judiciary to "constitutionalize moral values or principles of justice not fairly inferable from the written Constitution's text or structure."[310] For Larry Alexander, only the constraint of Article III can prevent enforcement of extra-constitutional—and therefore necessarily "contra-constitutional"—value judgments.[311] John Hart Ely even finds support for this doctrine in the ostensibly noninterpretivist opinion of Samuel Chase in *Calder v. Bull*.[312] Although Justice Chase wrote that laws contrary to the great first principles of the social compact are void,[313] Dean Ely concludes that all of those principles were already effectively embodied in the Constitution.[314] He adds that for Chase, "the point seems to have been that in the American context, there is no judicially enforceable notion of natural law other than what the terms of the Constitution provide."[315] For these and other commentators, the text cannot justify noninterpretive review, and there is little evidence from the ratification debates to suggest that the Founders countenanced such review. In sum,

309. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 5-6 (1962); BORK, *supra* note 4, at 66, 209; Berger, *New Theories*, *supra* note 13, at 15; Berger, *supra* note 203, at 9; Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 77; Stephen Markman, *The Amendment Process of Article V: A Microcosm of the Constitution*, 12 HARV. J.L. & PUB. POL'Y 113, 120 (1989).

310. Grano, *supra* note 21, at 7.

311. Larry A. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 458 (1983).

312. 3 U.S. (3 Dall.) 386 (1798), *construed in* Ely, *supra* note 19, at 5.

313. *See* Calder, 3 U.S. at 388. ("An ACT of the Legislature . . . contrary to the GREAT FIRST PRINCIPLES of the *social compact*, cannot be considered a *rightful exercise* of *legislative* authority"). Although Judge Bork believes that the opinion of Justice Chase is "supported less by legal reasoning than by frequent recourse to the typographic arts," BORK, *supra* note 4, at 19, those familiar with the Eighteenth-Century documentary record should not be surprised by either the conclusion or the use of italics.

314. *See* Ely, *supra* note 19, at 26 n.95. Several state constitutions decreed that a "frequent recurrence to fundamental principles" was necessary to preserve liberty, but it is not clear that the drafters believed such principles had been included in their respective texts. *See* MASS. CONST., pt. 1, art. XVIII, *in* 5 UNITED STATES CONSTITUTIONS, *supra* note 39, at 95; N.H. CONST., pt. 1, art. XXXVIII, *in* 6 UNITED STATES CONSTITUTIONS, *supra* note 39, at 347; N.C. CONST. of 1776, art. XXI, *in* 7 UNITED STATES CONSTITUTIONS, *supra* note 39, at 403; PA. CONST. of 1776, art. I, declaration of rights, art. XIV, *in* 8 UNITED STATES CONSTITUTIONS, *supra* note 39, at 278-79; VT. CONST. of 1786 pmbl., ch. I, art. XX, *in* 9 UNITED STATES CONSTITUTIONS, *supra* note 39, at 499; VA. CONST. of 1776, declaration of rights § 15, *in* 10 UNITED STATES CONSTITUTIONS, *supra* note 39, at 50.

315. Ely, *supra* note 19, at 26 n.95. Even if Justice Chase rejected noninterpretive review in *Calder*, it is not certain that he categorically rejected such review.

without Article III, the courts are powerless, and without the courts, supposed rights "amount to nothing."[316]

A. *Judicial Intervention*

Evidence directly related to judicial review is limited and, for the most part, well-rehearsed.[317] For originalists, review of unenumerated rights must be justified by the Founders' understanding of natural rights. It has already been shown that laws trenching on these rights would be deemed to be both unnecessary and improper,[318] because such laws would not be authorized by the Constitution. Therefore, cases involving those laws and their conflicts with the Constitution must arise under the Constitution. None other than John Marshall made this abundantly clear during the Virginia convention:

> "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. *They would not consider such a law as coming under their jurisdiction. They would declare it void.*"[319]

George Nicholas also informed the state's ratifiers that the judiciary would declare any unjustified act of the legislature void,[320] and Federalists John Steele and William Davie rendered similar opinions in the North Carolina convention.[321] James Wilson assured Pennsylvania delegates that "judges, as a consequence of their independence," would declare any law not authorized by the Constitution null and void,[322] and in the Connecticut convention, Oliver Ellsworth repeated Wilson's assurance: Should the general legislature pass any unauthorized measure, "the national judges, who, to secure their impartiality, are to be made independent, will declare it to be

316. THE FEDERALIST No. 78, at 464, 466 (Clinton Rossiter ed., 1961) (Alexander Hamilton) *quoted in* MCDOWELL, *supra* note 108, at 201 ("Without courts, *it was widely agreed*, all the particular rights and privileges of the Constitution "would amount to nothing.") (emphasis added).

317. For recent comment on original intent and judicial review, see Sherry, *supra* note 1. For critical comment on Professor Sherry's article, see Michael, *supra* note 92.

318. *See* text accompanying *supra* notes 112-45 (concluding that the proposed Constitution would not trench on natural rights); text accompanying *supra* notes 74-87 (concluding that natural rights were superior to positive law).

319. 3 ELLIOT'S DEBATES, *supra* note 14, at 553 (emphasis added).

320. *See id.* at 443.

321. *See* 4 *id.* at 71, 155-56 (statements of John Steele and William Davie).

322. 2 *id.* at 489.

void."[323] One of the later installments of *The Federalist* supports judicial review of unenumerated rights as well. Although Alexander Hamilton's warning that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents" is cited against such review,[324] *The Federalist Number 78* also includes the broader assurance that "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[325] Perhaps the most emphatic endorsement of noninterpretive review came from Benjamin Rush writing as "Puff." Rush lauded "the power of our independent judges to shew their firmness in checking the law-makers," and he added that any attempt to enumerate rights in the proposed constitution might actually restrict the scope of this judicial power.[326] Again, Federalist assurances demonstrate that cases involving laws trenching on natural rights arise under the Constitution, and the national judiciary is obligated to declare those laws null and void.

Although judicial protection of unenumerated natural rights is consistent with Article III, such review was not absolutely necessary: Friends of the Constitution also declared that unauthorized acts would be void of themselves. During the Philadelphia convention, both James Wilson and Oliver Ellsworth opposed explicit prohibition of *ex post facto* laws, with Ellsworth observing that "there was no lawyer, no civilian who would not say that [such] laws were void of themselves. It can not then be necessary to prohibit them."[327] Wilson and Ellsworth delivered

323. *Id.* at 196.

324. THE FEDERALIST No. 78, at 464, 471 (Clinton Rossiter ed., 1961) (Alexander Hamilton), *cited with approval in* MCDOWELL, *supra* note 108, at 6, 121, 196, 200; *see also* Leedes, *supra* note 8, at 558; Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 457 (1986); Meese, *supra* note 206, at 7; Monaghan, *supra* note 6, at 770 n.267.

325. THE FEDERALIST No. 78, at 467 (Clinton Rossiter ed., 1961) (Alexander Hamilton). As understood by the ratifiers, the tenor of the commission was that the proposed Constitution would not trench on natural rights. A similar assurance appeared in a New York newspaper before publication of *The Federalist Number 78*. *See* N.Y. DAILY ADVERTISER, Jan. 21, 1788, at 2.

326. "Puff" (Benjamin Rush), *construed in* "One of the People," INDEPENDENT GAZETTEER, Dec. 11, 1787, *microformed on* DOCUMENTARY HISTORY MICROFORM, *supra* note 47, Pa. no. 266, at 1303, 1303-04. "One of the People" was a pseudonym of William Petrikin. 2 DOCUMENTARY HISTORY, *supra* note 31, at 674.

327. MADISON'S NOTES, *supra* note 32, at 510 (characterizing statement of Oliver Ellsworth); *see also id.* at 510-11 (characterizing statement of James Wilson that prohibiting *ex post facto* laws would imply that the drafters were "ignorant of the first principles of Legislation").

similar opinions to their respective state conventions,[328] and fellow Philadelphia delegate Roger Sherman agreed that acts of Congress not authorized by the Constitution would be void.[329] Writing as "Cassius," Massachusetts Federalist James Sullivan also questioned the utility of a bill of rights: "[I]n the name of common sense I would ask, of what use would be a bill of rights, in the present case? . . . It can only be to resort to when it is supposed that Congress have infringed the unalienable rights of the people . . . ."[330] According to Sullivan, any such law would be "a nullity, and the people will not be bound thereby."[331] Unauthorized acts could never be considered a part of the supreme law of the land, and would be "no more binding on the inhabitants of America, than the edicts of the grand signoir of Turkey."[332] Writing as "Marcus," James Iredell also observed that if Congress attempted to usurp fundamental rights, "the people will be exactly in the same situation as if there had been an express provision against such power . . . ."[333] Samuel Johnston repeated this assurance during the North Carolina convention floor debate: Although laws consistent with the Constitution would be supreme, "[e]very usurpation or law repugnant to [the Constitution] cannot have been made in pursuance of its powers. The latter will be nugatory and void."[334]

B. *Interposition*

After repeated assurances that powers were limited[335] and

328. *See* 2 ELLIOT'S DEBATES, *supra* note 14, at 489 (James Wilson in Pennsylvania convention); *id.* at 196 (Oliver Ellsworth in Connecticut convention).

329. Letter of Roger Sherman (Dec. 8, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 12, at 387.

330. "Cassius," *supra* note 122, at 45-46.

331. *Id.* at 46; *see also* 2 ELLIOT'S DEBATES, *supra* note 14, at 162 (statement of Theophilus Parsons in Massachusetts convention) (asserting the "inutility" of explicitly securing individual rights by declaring that if Congress should infringe on any of the natural rights of the people, the offending act "would be a nullity, and could not be enforced").

332. "Cassius," *supra* note 122, at 43 (emphasis omitted). The Supremacy Clause asserts that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

333. "Marcus," *supra* note 119, at 379.

334. 4 ELLIOT'S DEBATES, *supra* note 14, at 188. Helen Michael concludes that the conception of judicial review presented by "Samuel Johnson" [sic] was "naive." Michael, *supra* note 92, at 486 n.387.

335. *See supra* note 118 and accompanying text (stating that national powers were

rights were secure,[336] Federalists probably deemed it impolitic to dwell on the possibility of usurpation. Nevertheless, when forced by Anti-Federalists to think the unthinkable, friends of the Constitution conceded that other forms of redress were possible: Should the national government attempt to enforce laws that were "void of themselves," interposition by the people or the States was justified.[337] Connecticut Federalist Roger Sherman dismissed the possibility of state action if the national government acted within its proper bounds, "but when it over leaps those bounds and interferes with the rights of the State governments they will be powerful enough to check it."[338] During that state's convention, Oliver Ellsworth agreed that in the event of a contest between the States and the general government, "the measure which is opposed to the sense of the people will prove abortive."[339] In Virginia, delegate George Nicholas claimed that in the event of an unjustified act of the legislature, "the people will have a right to declare it void."[340] Later in the convention, Nicholas resorted to a more profound check on the national government. After reviewing the limitations cited by several friends of the Constitution, Nicholas concluded that "these expressions will become part of the contract,"[341] and that

> [i]f thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that . . . it is not to be construed so as to impose any supplementary con-

clearly defined for particular purposes); *supra* notes 119-21 and accompanying text (stating that national government was limited to expressly delegated powers); *supra* note 122 and accompanying text (stating that only those powers absolutely or indispensably necessary were delegated to national government).

336. *See* text accompanying *supra* notes 56-106 (stating that natural rights were superior to positive law); text accompanying *supra* notes 107-145 (stating that the proposed constitution would not trench on natural rights).

337. John Marshall in particular endorsed judicial redress—apparently because it was the most expedient mode of protection. *See* 3 ELLIOT'S DEBATES, *supra* note 14, at 554 ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection"). *But cf.* 4 *id.* at 155-56 (statement of William Davie in First North Carolina convention) ("Coercion by force . . . is so extremely repugnant to the principles of justice . . . that there is no rational way of enforcing the laws but by the instrumentality of the judiciary.").

338. Sherman, *supra* note 329, at 387.

339. 2 ELLIOT'S DEBATES, *supra* note 14, at 196; *see also* GOODRICH, *supra* note 82, at 25 (stating that when the rights of a free people are invaded by constitutional government, "there ought not be the least doubt but that a remedy . . . is provided in the laws of God and reason . . . nor ought resistance in such case to be called rebellion").

340. 3 ELLIOT'S DEBATES, *supra* note 14, at 443.

341. *Id.* at 626.

> dition upon him, and that *he is to be exonerated from it* whensoever any such imposition shall be attempted,—I ask whether . . . these conditions, on which he has assented to it, would not be binding on the other twelve.[342]

Resistance by state legislators and by the people was also cited by Alexander Hamilton in the New York convention[343] and by Charles Pinckney and John Julius Pringle in South Carolina.[344] In Massachusetts, Thomas Thacher claimed that resistance by state governments and the people was among those "other restraints, which, though not directly named in this Constitution, yet are evidently discernable by every man of common observation."[345] The Reverend Thacher added that opposition to tyrannical legislators "would bring them to the scaffold."[346] Theophilus Parsons agreed that there were other unspecified limits on national power "superior to all the parchment checks that can be invented."[347] According to Parsons, if usurpation should occur,

> it will be upon the thirteen legislatures, completely organized, possessing the confidence of the people, and having the means, as well as inclination, successfully to oppose it. Under these circumstances, none but madmen would attempt a usurpation. But, sir, the people themselves have it in their power effectually to resist usurpation, with out being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his own fellow citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him . . . .[348]

Alexander Hanson also approved of local resistance. Writing as "Aristides," Judge Hanson concluded that, in weighing the apparent necessity and propriety of the laws of Congress,

342. *Id.* (emphasis added). Many other Federalists concluded that the proposed constitution was a compact among sovereign states rather than an original contract among individuals. *See, e.g.*, "A Citizen," *supra* note 47, at 820; "A Citizen of Pennsylvania," *supra* note 47, at 621; "Uncus," *supra* note 96, at 78; "A Plebeian," MD. J. & BALTIMORE ADVERTISER, Mar. 4, 1788, at 1.

343. *See* 2 ELLIOT'S DEBATES, *supra* note 14, at 266-67.

344. *See* SOUTH CAROLINA DEBATES, *supra* note 296, at 7, 14.

345. 2 ELLIOT'S DEBATES, *supra* note 14, at 145. Helen Michael concludes that judicial review had no part in "Thatcher's [sic] scheme of limited, constitutional government." Michael, *supra* note 92, at 469.

346. 2 ELLIOT'S DEBATES, *supra* note 14, at 146.

347. *Id.* at 94.

348. *Id.* Helen Michael concludes that failure to specify judicial review proves that Parsons did not put his faith in professional judges. Michael, *supra* note 92, at 467.

"every judge in the union, whether of federal or state appointment, (and some persons would say every jury) will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the constitution."[349] Hanson later added that if a federal officer should exceed his commission, "the party injured [may] obtain redress in a state court."[350] Any opinion to the contrary was dismissed as a "ridiculous bugbear" that could only alarm minds "on which no science has ever dawned."[351]

Federalist endorsements of interposition became the most exuberant in the North Carolina convention. After reciting the standard roster of limitations in his "Marcus" essays,[352] James Iredell told convention delegates that the people would not obey unauthorized acts,[353] and that in judging whether Congress had claimed any power not delegated by the Constitution, "it must be presumed the instrument will be in the hands of every man in America."[354] Federalist John Steele also warned that the people would not obey laws inconsistent with the Constitution and that unauthorized acts would trigger "universal resistance."[355] Steele attempted to deflect challenges from the convention's Anti-Federalist majority by asking if violations of the Constitution would be passively permitted "in a country like this, where every man is his own master . . . ."[356]

For people seeking additional security for those natural rights they had "by the Revolution . . . regained,"[357] the idea of active resistance was certainly not unconscionable. In fact, a doctrine of non-resistance to arbitrary authority would be more

349. "Aristides," *supra* note 132, at 217, 234. Hanson later defended this conclusion in a letter to the *Maryland Journal* and *Baltimore Advertiser*. *See* Steiner, *supra* note 104, at 33 n.2.

350. 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 73 n.60.

351. *Id.*

352. *See generally* "MARCUS," *supra* note 119.

353. *See* 4 ELLIOT'S DEBATES, *supra* note 14, at 194.

354. *Id.* at 172.

355. *Id.* at 71.

356. *Id.* at 72. A more ominous warning may have been issued in Maryland. In a speech prepared for the Maryland ratifying convention, an unidentified delegate described an abuse of federal power as improbable, because it would be countered by "the exertions of thirteen governments . . . and the spirit of liberty amongst the citizens of thirteen different states, all of whom know the use of fire-arms . . . ." "A Private Citizen," *A speech intended to have been delivered to our convention*, MD. J. & BALTIMORE ADVERTISER, Aug. 1, 1788, at 2.

357. 2 DOCUMENTARY HISTORY, *supra* note 31, at 391 (statement of James Wilson in Pennsylvania Convention).

difficult to defend.[358] Just as the written Constitution did not trench on natural rights, it did not preclude the possibility of defending those rights. In his influential *Law Lectures*, James Wilson reminded the new nation that when "[natural] rights can receive neither protection nor reparation from civil government, [individuals] are, notwithstanding its institution, entitled still to that defence, and to those methods of recovery, which are justified and demanded in a state of nature."[359] Complete and effective protection of natural rights justified the choice of means: Because the Founders, in the words of "Agrippa," "agreed . . . on all sides" that fundamental rights should be protected, it was "among the inferiour questions in what manner it is done, provided it is absolutely and effectually done."[360]

XII. Objection: "The Founders Believed in Natural Rights, But We Do Not"

Even if it is granted that the Founders shared a particular understanding of natural law, contemporary scholars may—and often do—conclude that it is no longer desirable to share that understanding.[361] Michael Perry observes that even if the Framers had constitutionalized natural law, "it is not at all clear

358. Several state documents decreed that the doctrine of nonresistance against arbitrary power was absurd, slavish, and destructive of the good of mankind. *See* N.H. Const., pt. 1, art. X; Dumbauld, *supra* note 53, at 178, 180 (citing Maryland convention minority); *id.* at 182, 183 (citing Virginia convention); *id.* at 198, 199 (citing First North Carolina convention); Steiner, *supra* note 104, at 22, 223 (citing amendment proposal of William Paca).

359. Wilson, *supra* note 72, at 609; *see also* "Valerius," *supra* note 130, at 2 (encroachment on natural rights would annihilate the Constitution) ("Reflection," characterized by "an Anti-federalist"); The Carlisle Gazette, and the Western Repository of Knowledge, May 21, 1788, at 2 (unjustified assertions of power would break the Constitution).

360. "Agrippa," *supra* note 216, at 113. For later comment on the possibility of interposition, see Resolutions of the Kentucky Legislature, Nov. 10, 1798, *reprinted in* The Virginia Report of 1799-1800 (1850) (photo. reprint, Da Capo Press 1970) (Thomas Jefferson) (resolving that "the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself . . . ."); *see also* John C. Calhoun, *Report Prepared for . . . the Legislature of South Carolina, in* 6 Reports and Public Letters of John C. Calhoun 94, 113 (Richard K. Crallé ed., D. Appleton & Co., New York 1855) (arguing that acts of the national government beyond granted powers are "absolutely null and void"). Other conclusions presented by Calhoun outrun the evidence from the ratification era. *See, e.g., id.* at 107 (stating that the idea of America as a single political community "never, for a single moment, existed").

361. *See, e.g.*, Garry Wills, Inventing America: Jefferson's Declaration of Independence xiv (1978) (stating that provisions recognizing natural rights were "written in the lost language of the Enlightenment"); Ely, *supra* note 19, at 29 (arguing that the concept of natural law "is a discredited one in our society" and "no longer respectable"); Sanford Levinson, *Self-Evident Truths in the Declaration of Independence*, 57 Tex L. Rev. 847, 856 (1979) (reviewing Morton G. White, The Philosophy of the Ameri-

how [that] judgment could have any normative force today."[362] In *Democracy and Distrust*, Dean Ely also rejects justiciable natural law by conjuring a unique analogy: "Suppose there were in the Constitution one or more provisions providing for the protection of ghosts. Can there be any doubt, now that we no longer believe there is any such thing, that we would be behaving properly in ignoring the provisions?"[363] Untoward provisions are also liable to be exorcised by originalists—either by contending that the Founders did not appreciate the significance of their own original understanding,[364] or by resorting to contemporary doubts about the utility of originalism. In an article that persistently ignores evidence of natural law and natural rights, originalist Thomas McAffee finally demurs that "[i]f there were an area in which traditional skepticism about inquiry into original intent appears to make some sense, then the status of unwritten norms in our constitutional order may be it."[365] This "traditional"—or in other words, non-originalist—skepticism may now have become the last refuge of originalists.

XIII. Conclusion: The Original "Original Intent"

To use Dean Ely's analogy, if there are ghosts in the Consti-

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can Revolution (1978), and Wills, *supra*) (stating that concepts from the founding era cannot be shared by the "intellectually sophisticated modern thinker").

362. Perry, *supra* note 21, at 267. Professor Perry also writes that natural law is an "outmoded idea" that has "very limited currency" today. *Id.* at 267, 268.

363. Ely, *supra* note 17, at 39. Once conjured, the analogy is then exorcised: Dean Ely describes this as a moot argument because, according to the author, the Founders did not intend to protect natural rights when the Constitution's open-ended provisions were drafted and ratified. *See id.* Nonetheless, even if "we"—either as individuals or a collective society—no longer believe in the concept of natural law, it is not at all clear that those rights originally comprehended by the Founders' law must have since disappeared as well. We "no longer believe in" natural philosophy, but physics and chemistry are still with us.

364. It is proposed that if transcendent rights were retained by the Founders, we must in effect "forgive them, for they know not what they ratify." *See, e.g.*, Cover, *supra* note 18, at 36 n.* (stating that natural law was "a commonly accepted, hardly thought-about, background concept"); Gordon S. Wood, The Creation of the American Republic 1776-1787 294 (1969), *quoted with approval in* McAffee, *supra* note 108, at 1319 n.386 (stating that the Founders did not fully appreciate the significance of references to transcendent law and that their original "confusion" about natural law persisted after ratification). For non-originalist skepticism, see Ely, *supra* note 19, at 23 n.83 (stating that there was no clear understanding of natural law during the founding era).

365. McAffee, *supra* note 108, at 1320 n.388. For example, Professor McAffee discounts the possibility of unenumerated rights ever limiting national power, and he describes a refractory passage from "Aristides" as "the only exception to this general rule." *Id.* at 1271 n.216. *But cf.* text accompanying *supra* notes 56-106 (concluding that natural rights were superior to positive law); text accompanying *supra* notes 107-145 (concluding that natural rights were superior to the proposed constitution).

tution, only non-originalists can exorcise them.[366] Professors Perry and Ely may reject the original understanding of natural rights and natural law solely on the basis of contemporary non-originalist arguments, but originalists cannot.[367] The concept of modern originalism becomes an oxymoron if evidence of original intent may be rejected in favor of modern sensibilities. Originalists cannot be positivists: Unenumerated natural rights are protected by the original intent of the ratifiers of the Constitution, and this understanding has not been repealed or altered by any subsequent amendment. If constitutional interpretation is to be based on this intent, "[t]he judge need not ask whether [natural rights] are wise or universally valid . . . [h]e must accept them simply as the givens of the system he is commissioned to operate."[368] Fidelity to original intent requires that the interpreter identify and protect those other natural rights not enumerated in the Constitution.

366. *Cf.* Walter B. Michaels, *The Fate of the Constitution*, 61 TEX. L. REV. 765, 774 (1982) ("No one would even try to interpret the Constitution if everyone thought it had been put together by a tribe of monkeys with quills.").

367. Originalists *ought* not to rely on non-originalist arguments, but their defense of originalist interpretation often bears a striking resemblance to the explanations of non-originalist scholars. *Compare* Brest, *supra* note 7, at 226, *quoted with disapproval in* SOURCEBOOK, *supra* note 5, at 66 (calling for interpretation in the interest of "the well-being of our society") *with* Robert Cover, *quoted in* Henry P. Monaghan, *Commentary: The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 123 (1978) (claiming that originalism is justified because "we and our progeny will find it useful"). *Compare* LAURENCE M. TRIBE, AMERICAN CONSTITUTIONAL LAW iii (1978), *quoted with disapproval in* SOURCEBOOK, *supra* note 5, at 69 (proposing that the Supreme Court should play a role in "the living development of constitutional justice") *with* Maltz, *supra* note 8, at 800 (defending originalism on the basis of "modern political theory"). *Compare* Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 91 HARV. L. REV. 1, 11 (1979), *quoted with disapproval in* SOURCEBOOK, *supra* note 5, at 71 (calling for interpretation based on those values that give our society "its distinctive public morality") *with* Earl M. Maltz, *Some New Thought on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 837 (1983) (concluding that originalism emanates from a "generally-held moral premise").

368. Bork, *supra* note 2, at 170. Although this injunction appeared under the heading "Questions the judge need not ask," Judge Bork succumbed to temptation in his most recent book.