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Thomas B. McAfee

University of Nevada, Las Vegas – William S. Boyd School of Law

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DOES THE FEDERAL CONSTITUTION INCORPORATE THE DECLARATION OF INDEPENDENCE?

Thomas B. McAfee*

I. INTRODUCTION

In their text *The American Constitutional Order: History, Cases, and Philosophy*¹, Professors Douglas W. Kmiec and Stephen B. Presser make it reasonably clear that, historically, they see the American Constitution as an attempt to implement directly natural law² through the mechanism of fundamental law.³ Kmiec and Presser suggest that if one reads Thomas Jeffer-

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. Portions of this review are based on *State Constitutions in the Early American Republic: The Experiment with Republican Government*, which is the second chapter of THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY* (2000). The author would like to thank Emily Chamberlain and Marsha Adams for looking at an early draft of this paper and offering encouragement and support. He also thanks Karen Casady for encouraging the process of considering such basic questions and seeking to teach others.

¹ DOUGLAS W. KmieC & STEPHEN B. PRESSER, *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* (1998).

² For those who framed the American Constitution, natural law was the law imposed by the science of biology, properly understood. One careful student of their thought concluded:

From the natural rights doctrine of the Declaration emerge two conclusions: that all men have rights that governments must help them to secure; and that governments must be instituted (and operated) with the consent of the governed. Consent follows from the equality of mankind; majority rule is the principle most faithful to that equality. The natural law doctrine of the Declaration turns these desiderata into commandments, that must to the extent possible be satisfied together. Somehow the governed, i.e., the majority, must strive to secure individual rights at the same time it seeks to achieve the common good.

Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 CAL. INTERDISC. L.J. 549, 553 (1995).

³ These casebook authors follow others who have seen a connection between the natural rights political philosophy of Jefferson and the individual rights philosophy of the federal Bill of Rights. See, e.g., John P. Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *THE BILL OF RIGHTS* 141 (Jon. Kukla ed., 1987); Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WISC. L. REV. 1305.

son and/or John Locke carefully enough and concludes that Americans have (or should have) a natural and inalienable right, it should follow that one also has an argument strongly favoring recognition of a fundamental constitutional right.⁴ At least as fundamental to Kmiec and Presser is that this basic feature of our constitutional order has largely been lost on “modern” law professors and Supreme Court justices, who regularly say things that reflect another, incorrect way of viewing the historical grounding of our constitutional order.⁵

⁴ KMI EC & PRESSER, *supra* note 1, at 136 (contrasting unfavored view of the Constitution “as a self-contained positive enactment” with more favorable characterization as “a document to be construed in light of the Declaration [of Independence] and the natural law principles it summarized”; suggesting that “[m]uch modern commentary” supports only the narrower view); *id.* at 137 (pointing to “considerable evidence that the framers had no intention of displacing the fundamental natural law principles in the Declaration or the common law tradition that preceded its ratification”; Philadelphia Convention notes “suggest that judges were expected to make reference to principles of natural justice in assaying constitutionality”); *id.* at 139 (claiming that, for the framers, “the concept of unconstitutionality is not limited to constitutional text”; the text was viewed as “a separate source of authoritative, declared, positive law,” but this did not imply that they were “repealing the inherent or undeclared natural law”); *id.* at 141 (referring to “[t]he continuing significance of the natural law to constitutional interpretation” as reflected, for example, in the natural rights provision of the Pennsylvania Declaration of Rights); *id.* at 145 (Federalists had reservations about “putting it in writing” because no list of rights “could capture all the natural rights of man, and those not mentioned would then be argued to be conceded to the government”); *id.* at 147 (in promising to draft a Bill of Rights, “Madison did not give up his fear that putting rights down on paper might disparage unenumerated rights”); *id.* at 152 (suggesting that under the language of the Ninth Amendment, “the vast body of unenumerated common or natural law rights become judicially enforceable against the Congress”); *id.* at 153 (“Coincident with the founders’ understanding of the Constitution as drawn from multiple sources, written text as well as universal principles of justice, early opinions often relied upon both.”).

⁵ These authors, for example, are clearly sympathetic to the view that “the prevailing scholarly consensus misconceives the relevance of the Declaration [of Independence].” Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 187 (1990). See KMI EC & PRESSER, *supra* note 1, at 134. In fairness to Himmelfarb, however, he freely acknowledges, as these casebook authors do not, that “the proposition that the Constitution must be understood in light of the Declaration has no necessary implications for the question of judicial review.” See Himmelfarb, *supra*, at 186 n.102 (citing Barnett and Berns as competing examples of conclusions about the judicial role that might be based on the Declaration). See also KMI EC & PRESSER, *supra* note 1, at 153 (contending that Judge Bork “may misperceive the judicial role envisioned by Madison”; summing up uses made by early Supreme Court of natural law principles in constitutional adjudication); *id.* at 166, 167-68 (noting Justice Scalia’s disclaiming of “the use of natural law as a basis for evaluating whether legislative action is in accord with fundamental principle”; finding his common law methodology, however, closer in spirit to the framers than many would acknowledge); *id.* at 167 (summing up Justice Kennedy’s position as being slightly more open-minded than Scalia to “finding” binding unwritten “principle”).

It is noteworthy, however, that the Declaration’s author did not draw the same conclusions about the judicial role that these casebook authors would base on his writing. See, e.g., GERALD GUNTER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW, 11-13 (13th ed. 1997) (treating Jefferson’s role in the early dispute over judicial review); *id.* at 20-21 (excerpting a Jefferson letter giving the Executive an important role in constitutional decision-making). It is, of course, impossible to know the views Jefferson would have held about the judicial role in the world we have occupied since the Civil War; but the immediate controversies that

The authors find that the project of our Constitution is rooted in the framers' commitment to natural law as reflected in founding-era works, and they find this same conclusion supported by modern scholars who are more sensitive to these historical themes.⁶ Without question, however, the Declaration of Independence is the key exhibit of the founding era's commitment to constitutional law based on natural law and rights.⁷ For it is there that we assert that those public officials "we consent to be governed by, are bound, as we all are, to observe the 'unalienable rights of life, liberty, and the pursuit of happiness.'"⁸

Though initially posed as a question, these authors clearly believe that "the Declaration and the vast body of common and natural law tradition" have "governing significance today."⁹ In their minds it is clear, even though the matter is again initially posed as a question, that the "participants at the federal convention" did not seek to displace "the fundamental principles of the Declaration with a written Constitution."¹⁰ A closely-related, potentially powerful

sparked his interest reflect that even the judicial role implementing fundamental rights did not yield unwavering support for the judiciary.

⁶ See, e.g., KMEC & PRESSER, *supra* note 1, at 128, (*excerpting*, Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers*, in 1 NAT. L. INST. PROC. 3, 16 (1949) (finding that the English had not been true to "the great traditions of the natural law and common law"; concluding that Americans adopted the alternative declared in the Declaration of Independence); *id.* at 127, (*excerpting*, Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME L. REV. 347, 367 (1945) (concluding that Dean Pound found that "America rejected legislative supremacy, and, thus, deliberately linked its written Constitution to the fundamental natural law").

⁷ Beyond the Declaration itself, these authors cite statements at various points by Jefferson, James Madison, Abraham Lincoln, Martin Luther King, Jr., *The Federalist Papers*, various anti-Federalists, Dr. Harry V. Jaffa, and Dan Himmelfarb in support of their view that the Declaration played a central role in generating (and reflecting) the ideas found in the Constitution. See, e.g., KMEC & PRESSER, *supra* note 1, at 130-31. Calvin Coolidge is quoted, as an example, for the claim that if we go back to before the Declaration, there are "no rights of the individual, no rule of the people." *Id.* at 130, (*quoting*, CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC, SPEECHES & ADDRESSES 452-52 (1928)). See also *id.* at 130 (*citing*, CHARLES E. RICE, FIFTY QUESTIONS ON THE NATURAL LAW (1993)).

⁸ KMEC & PRESSER, *supra* note 1, at 129. It is for this reason, we assume, that the Declaration is included in the United States Code "as one of the Organic Laws upon which all statutory law rests." *Id.* at 130.

⁹ KMEC & PRESSER, *supra* note 1, at 135. The idea that the Declaration is to be viewed as among Jefferson's great and permanent contributions to the good of the nation is an idea that would have pleased Jefferson himself. See, e.g., PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 186 (1998). This conclusion seems indisputable, considering that Jefferson died on the fiftieth anniversary of the Declaration of Independence and that he apparently clung to life to achieve this very purpose. Paul D. Carrington, *Remembering Jefferson*, 2 WILLIAM & MARY BILL OF RTS. J. 455, 461 (1993).

¹⁰ *Id.* These casebook authors respond: "The short answer is no, or at least, not entirely. The delegates coming to the constitutional convention of 1787 understood a constitution not as a written document, but as the embodiment of long-established laws, traditions, and first principles consistent with natural law."

In adopting the view that America's constitutionalism as of 1787 consisted of more than what is contained in the written constitution, these casebook authors join what has become a substantial scholarly tradition. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Con-*

premise of their argument is that a purpose of the federal Bill of Rights was to enforce the “unenumerated natural rights”¹¹ referred to in the Declaration. Most especially, these authors endorse the modern wisdom that this is why the Ninth Amendment was included in the Bill of Rights—to prevent government from eviscerating rights discoverable through reason and rooted in natural law and common law.¹² The Ninth Amendment was inserted to clarify the continuing existence and constitutional status of unwritten natural and inalienable rights¹³, whether or not they have found their way to constitutional text or have even been previously recognized in any way as fundamental.¹⁴ For these au-

stitution? 27 STAN L. REV. 703 (1975); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987), *cited in*, KMEC & PRESSER, *supra* note 1, at 136. *But see* THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING* (2000). The question, however, may not be whether the Constitution's framers sought to “displace” the principles of the Declaration, but whether they viewed their construction and application of the Declaration's principles, apart from what is found in the written Constitution, as binding upon “the people,” then or now.

¹¹ KMEC & PRESSER, *supra* note 1, at 153. The authors point to the existence of the Ninth Amendment, which states: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage the other rights retained by the people.” U.S. Const. amend IX.

¹² The Ninth Amendment “reaffirmed that the origin of these rights are not the written Constitution itself,” but they were pre-existing rights that were retained by the people. KMEC & PRESSER, *supra* note 1, at 148. According to these authors, then, Madison saw federal judges as “a guardian of pre-existing common law or natural rights.” *Id.* at 153. In drafting the Ninth Amendment, Madison was seeking, we are told, to avoid the outcome “that putting rights down on paper might disparage unenumerated rights.” *Id.* at 147. *See also id.* at 1387 (acknowledging the existence of some academic support for Judge Bork's interpretation of the Ninth Amendment, but characterizing his view primarily by his confirmation-era analogy suggesting that it was an “inkblot” that cannot properly be addressed “unless you know something of what it means” and concluding, “I do not think the court can make up what might be under the inkblot”; stating authors' conclusion that, however the issue of the Ninth Amendment's use might be resolved, “the Amendment must have more significance than an inkblot” and quoting with approval Professor Barnett's conclusion that the Amendment ““stands ready to respond to a crabbed construction that limits the scope of [constitutional] protection to the enumerated rights”).

¹³ One of these authors has thus asserted that “the Constitution is best understood . . . as a means of implementing the rights outlined in the Declaration.” Stephen B. Presser, *Book Review*, 14 CONST. COMMENT, 229, 232-33 (1997). *See also id.* at 233 (finding that the author “demolishes” a “positivistic approach” to construing the Constitution and provides strong historical support for a “natural-rights based jurisprudence of the constitution”); *id.* at 235 (concurring in author's eschewing of “simple positivism”).

¹⁴ One concern that has been linked to the Ninth Amendment is Edmund Pendleton's objection to a bill of rights that “in the progress of things, [we may] discover some great and important [right], which we don't now think of.” Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788), *in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734-1803, 530, 532-33 (David John Mays ed., 1967). *See* Sherry, *supra* note 10, at 1164 (also quoting James Wilson on the idea that the law of nature is “immutable in its principles” but “progressive in its operations and effects”). But the Federalist concern was at its heart positivist in nature. They were concerned that, based on the politics facing any effort to define and adopt rights, “it might be impossible adequately to define those rights that would be enumerated,” and, moreover, “[a] definition that turned out to be too limited could become a road map to circumvent and thereby defeat the right.” Robert J. Reinstein, *Completing the*

thors, then, the Ninth Amendment presents “a uniquely central text in any attempt to take seriously the process of *construing* the Constitution.”¹⁵

An obvious source of appeal to the authors’ position is the sense of departure from constitutionalism as it was originally conceived that many experience as they study modern Supreme Court decisions construing the federal Constitution.¹⁶ The question worth confronting, however, is whether this sense of departure derives from the failure of modern courts, and most especially the United States Supreme Court, to share the founders’ beliefs that there are fundamental natural rights and that these are constitutional rights.¹⁷

Almost a decade ago I suggested that some modern natural law constitutionalists write as though modern legal positivists “have simply forgotten that the framers of the Constitution and Bill of Rights were committed to the idea of natural rights in the context of social contract political theory.”¹⁸ But modern

Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment, 66 TEMPLE L. REV. 361, 366-67 (1993). These concerns were addressed in the course of drafting the federal Bill of Rights. *Id.* at 367-68. See also Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1276 n.232 (alternative reading of Pendleton’s argument).

¹⁵ Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 74 CORNELL L. REV. 1, 42 (1988), *quoted in*, KMIEC & PRESSER, *supra* note 1, at 1387. For a much more skeptical historical view that centers on the work of an individual, Harry A. Jaffa, who has been characterized as “the dean of American historians who have underscored the centrality of the connection between the Declaration of Independence and the Constitution.” Patrick M. O’Neil, *The Declaration as Un-constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa*, 28 AKRON L. REV. 237 (1995). See Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the Unwritten Constitution Thesis*, 61 U. CIN. L. REV. 107, 124 (1992).

¹⁶ See, e.g., Presser, *supra* note 13, at 233 (expressing sympathy with criticism of judges who “made constitutional law according to their particular political preferences rather than following any valid constitutional philosophy”).

¹⁷ It has been contended, for example, that a more positivistic version of our constitutionalism is demolished by a showing “that the only Justice to argue against a natural-rights based jurisprudence of the constitution,” Justice Iredell, not only contradicted the views of “his contemporaries,” but “abandoned his own clear views to the contrary voiced a scant few years before.” Presser, *supra* note 13, at 233, *citing to*, SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 111-112, 118-119 (1995). But Justice Iredell, the author of a well-known opinion limiting constitutional rights to those found in the written constitution, had justified judicial review in a private letter in which he contrasted America’s written constitutions, with their implication of a judicial enforcement power of the entire written constitution, with an extremely restricted natural justice limitation on what he described as the “absolute power” held by Parliament. Iredell had, moreover, held a consistent view as a Supreme Court justice, see 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, 451-52 (1991), and had stated his view that state constitutions did not include implicit rights in a 1788 speech before the North Carolina ratifying convention, just a year after writing the letter alluded to. See *infra* note 65 and accompanying text. See generally MCAFEE, *supra* note 10, at 63-65.

¹⁸ Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U.L.J. 267, 271 (1992). I quickly added, however, that “if

legal positivists¹⁹ have long since acknowledged the centrality of the natural rights views of the founding generation, and in fact the modern debate “is not over whether it was a central end of the Constitution to secure natural rights, but the relationship of such natural rights to the law of the Constitution.”²⁰

A standard view at the time of the adoption of the Constitution was that “a constitution does not in itself imply any more than a declaration of the relation which the different parts of the government have to each other, but does not imply security for the rights of individuals.”²¹ The drafters of the state constitutions had “assumed that government had all power except for specific prohibitions contained in a bill of rights.”²² When the federal Constitution was transmitted to the states by Congress, Nathaniel Gorham of Massachusetts defended the omission of a bill of rights based on the federal Constitution’s unique system of enumerated powers, explaining that “a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers.”²³ An alternative understanding of the framers’ design, then, is to understand the Ninth Amendment as a federalism-based provision designed to clarify that the people had “retained” as rights not only the limits on granted powers stated in the Bill of Rights, but also all they had not granted as powers to the federal government.²⁴

In Part II, I set out the principle, found within the Declaration of Independence itself, that is so hard to reconcile with the idea of enforceable inalienable rights - the power of the people to make decisions about their government, in-

any have forgotten this historical fact, their position is a straw man that need not detain us.” *Id.*

¹⁹ Legal Positivism “grounds the definition of law on the analytical separability of law and morality,” ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 7 (1998), but there is an unfortunate tendency to think “that positivism is somehow inherently conservative.” *Id.* This scholar agrees with the view that it is a mistake to think positivism “offers reliable shelter to any political camp.” *Id.*

²⁰ McAfee, *supra* note 18, at 271. Giving the Declaration such a central place is recognized as problematic even by a recent Jefferson biographer. Professor Maier notes that “the function of stating fundamental principles that established government had to respect was normally entrusted to declarations or bills of rights,” and, moreover, such provisions could “be enforced in the courts, which was not true of the Declaration of Independence.” MAIER, *supra* note 9, at 192.

²¹ *Letters of Agrippa* (Jan. 9, 1788), in *THE COMPLETE ANTI-FEDERALIST* 109 (Herbert Storring ed., 1981).

²² DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL* 60 (1980). *Accord*, Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions* 102 *YALE L.J.* 907, 930-55 (1993).

²³ NATHANIEL GORHAM, 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 335 (Sept. 27, 1787) (Merrill Jensen ed., 1976) [hereinafter *RATIFICATION OF THE CONSTITUTION*].

²⁴ Professor Akhil Reed Amar has accurately stated that “the federalism roots of the Ninth Amendment, and its links to the unique enumerated powers strategy of Article I, help explain why no previous state constitution featured language precisely like the Ninth’s--a fact conveniently ignored by most mainstream accounts.” AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 124 (1998).

cluding what rights are to be preserved in their written Constitution. Part III defends the alternative understanding of the Ninth Amendment as based on the rights “retained” by the system of enumerated powers. Part IV shows how a correct understanding of the Ninth Amendment fits in perfectly with the Constitution’s permissive treatment of the institution of human slavery. In Part V, I attempt to offer a balanced assessment of our constitutional order and of Thomas Jefferson’s role in bringing it about.

II. NATURAL RIGHTS AND POPULAR SOVEREIGNTY²⁵

As noted above, these casebook authors consider it a significant question whether the written Constitution in effect incorporates the Declaration.²⁶ But one does not have to leave the Declaration to find the principle--government by the “consent of the governed”-- that is difficult to reconcile perfectly and easily with the idea that there are unwritten inalienable natural rights that are constitutionally enforceable. A modern historian has claimed that “[t]he principle enunciated in the Declaration of Independence that governments derive their just powers from the ‘consent of the governed’ lies at the foundation of the American republic.”²⁷ Most centrally, the idea was that the people held the ultimate power to create, alter, or destroy (when appropriate) the form of government under which they lived.²⁸ An implication for the framers was that “[a]s our constitutions are superior to our legislatures,” the people “are superior to our constitutions” and hence may “change the constitutions whenever and however they please.”²⁹ The framers may have believed in inalienable rights, but one of those inalienable rights was the power of the people to make fundamental decisions about their government, including the limits that should be

²⁵ This section of this essay review is based on the second chapter of MCAFEE, *supra* note 10.

²⁶ KMEIC & PRESSER, *supra* note 1, at 135 (raising the question whether the written Constitution was intended to serve as a kind of “substitute for the Declaration”).

²⁷ Merrill Peterson, *Thomas Jefferson, the Founders, and Constitutional Change*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 275, 276 (J. Jackson Barlow, Leonard W. Levy & Ken Masugi eds., 1988). For a sense of the direction one might take this declaration, see Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

²⁸ See Peterson, *supra* note 27, at 276; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 306-10 (1969); Himmelfarb, *supra* note 5, at 175-77, 181, 184-85. There is a clear and obvious reason that this power of the people was viewed as being so fundamental by Americans; it was the basis of their claimed authority to declare their independence from England. MAIER, *supra* note 9, at 86-90. It was in that context that a county in Maryland asserted that “the People have the indubitable right to reform or abolish a Government which may appear to them insufficient for the exigency of their affairs.” *Id.* at 87, (quoting VI AMERICAN ARCHIVES, 4th Series, at 933 (Peter Force, ed., 1833-1846)). There is little question that Americans saw themselves as involved in this same process when they adopted the 1787 Constitution.

²⁹ 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 361-62 (Nov. 24, 1787).

imposed on it.³⁰

Natural law at best speaks to only one dimension of the difficulty confronted by constitutional designers.³¹ Even today constitutional framers must consider not only the possibility of a moral reality, but also the imperfection of the human beings that will implement their constitutional vision. It was Madison, after all, who suggested that “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable government to control the governed; and in the next place, oblige it to control itself.”³² It is, for example, easy to forget that in establishing natural law-based adjudication, we do not establish natural law as our fundamental law.³³ After all, the decisions will still be made by fallible human judges.³⁴ Though it is hardly a perfect solution, one traditional answer has been to rely on a written constitution, by which we specify important elements of the substance of our commitment and command government to act accordingly.³⁵ But we are virtually as wary of granting essentially unlimited power to the judiciary as we would be of granting such power to the other branches of government.

Political liberty during the early American period was thus associated, first and foremost, with representative government, and the states’ declarations of rights were accordingly filled with communal rights, including provisions for

³⁰ This is why Wilson could assert in the same speech that the right to make basic decisions about government “is a right, of which no positive institution can ever deprive them.” *Id.* at 362.

³¹ In the following section I lean on earlier analysis that can be found in Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501, 514-15 (1995).

³² THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

³³ The present casebook authors do not make this claim in as many words, but they come remarkably close when they suggest that the most relevant question is whether “the vast body of unenumerated common or natural law rights become judicially enforceable against the Congress,” and largely equate this issue with the question “whether the Constitution must be construed in accordance with fundamental principle.” KMIEC & PRESSER, *supra* note 1, at 152.

³⁴ See, e.g., Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2413 (1992). He concludes that, under a system in which judges feel free to implement natural law, “the system remains positivist in the most significant sense, with the judge simply serving as the sovereign in the place of the legislature.” *Id.* at 2415. Professor McConnell reminds us that our choice, after all, “is not between natural right and majoritarian rule. It is between one set of human institutions and another, none of which is infallible.” Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 96 (1988).

³⁵ As James Cannon, a framer of the Pennsylvania Constitution, articulated the reason for putting the Pennsylvania constitution in writing: “To deduce our rights from the principles of equity, and justice, and the Constitution, is very well; but equity and justice are no defense against power.” WOOD, *supra* note 28, at 293 n. 56. For a treatment of why the people who founded the American constitution relied upon the device of a written instrument, and perceived in it both the key to implementing the ideal of self-government and to securing the rights of individuals, see MCAFEE, *supra* note 10, at 10-12.

popular sovereignty,³⁶ officials' responsibility to the people,³⁷ and provision for the authority of the people to regulate the internal government and police of the State.³⁸ The underlying philosophy of the early state constitutions was summed up in the following provision in the Delaware constitution's declaration of rights: "That the right of the people to participate in the Legislature, is the best security of liberty."³⁹

In keeping with this philosophy, in 1776 the Massachusetts General Court proclaimed that: "It is a Maxim, that, in every Government, there must exist somewhere, a Supreme, Sovereign, absolute, and uncontrollable Power; But this Power resides, always in the body of the People, and it never was, or can be delegated, to one Man, or a few."⁴⁰ Similarly, a provision in the Pennsylvania Declaration of Rights asserted the community's "unalienable and inalienable" right to reform or alter government "in such a manner as shall be by that *community* judged most conducive to the public weal."⁴¹ It was the gen-

³⁶ The Virginia Declaration of Rights, which was drafted a month prior to adoption of the Declaration of Independence, asserted "That all power is vested in, and consequently derived from, the people." Va. Const. bill of rts., Sect. 2 (1776), *reprinted in* FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES, at 3082-83 (1909) [hereinafter STATE CONSTITUTIONS]; N.C. Const., decl of rts., art. I (1776), *id.* at 2787.

³⁷ *E.g.*, Va. Const. bill of rts., sect. 2 (1776), STATE CONSTITUTIONS, *supra* note 36, at 3813 (providing that "magistrates are [the people's] trustees and servants, and at all times amenable to them"); Pa. Const., decl. of rts., art. IV (1776), STATE CONSTITUTIONS, *supra* note 36, at 3082 (similar formulation).

³⁸ *E.g.*, Pa. Const., decl. of rts., art. III (1776), STATE CONSTITUTIONS, *supra* note 36, at 3082; N.C. Const., decl. of rts., art. III (1776), *reprinted in* STATE CONSTITUTIONS, *supra* note 36, at 2787.

³⁹ Del. Const., decl. of rts., art. V, *cited in*, Robert C. Palmer, *Liberties as Constitutional Provisions 1776-1791*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 69 n.80 (1987). To be sure, the thinking that eventuated in the adoption of the federal Constitution was increasingly less populist and democratic, and the American people associated to a degree the move to increase protection of rights with a move toward a greater checking of government and a less democratic system. But the basic idea that the people as a whole needed to make the fundamental decisions about what form of government would yield them the most satisfaction remained a critical part of the fundamental law philosophy of the founding generation.

⁴⁰ Massachusetts General Court, Proclamation of the General Court, Jan. 23, 1776, *cited in*, WOOD, *supra* note 28, at 362. Similarly, in 1783 it was asserted that it was "in the people alone 'that plenary power rests and abides which all agree should rest somewhere.'" Hartford Conn. Courant, Aug. 12, 1783, *quoted in*, WOOD, *supra* note 28, at 382. In 1788, the federal Constitution was described as "[a] whole people exercising its first and greatest power - performing an act of sovereignty, original, and unlimited." F. Hopkinson, *Account of the Grand Federal Procession* 14 (1788), *quoted in* MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY 23 (1988).

⁴¹ Pa. Const., decl. of rts., art. V (1776), STATE CONSTITUTIONS, *supra* note 36, at 3082. Lawrence Leder observed that this political theory, emphasizing popular authority, had roots in the colonial period and predated the revolutionary struggle. LAWRENCE H. LEDER, LIBERTY AND AUTHORITY: EARLY AMERICAN POLITICAL IDEOLOGY, 1689-1763, 82 (1968) (observing that the colonists believed that "if government failed to attain the ends for which it was created, 'the compact is void,' as one spokesman put it, '*frustratione finis*,' inasmuch

eral view that “[t]he community, however represented, ought to remain the supreme authority and ultimate judicature.”⁴²

The move to reduce rights to positive form undoubtedly contributed to the tendency to equate constitutionalism with written limitations on government, particularly as Americans pondered the consequences of failing to have needed limitations put into writing. Indeed, this is one of the “lessons” they took from their revolutionary experience. Now that they were on the other side of the decision for Revolution, Americans came to see the British constitution through new eyes and in decidedly realistic terms. Accordingly, thoughtful Americans saw the British constitution’s flexibility and mutability (the qualities they had so recently insisted that it lacked) as embodying the very antithesis of a true constitution—one that fixes basically immutable limitations on government power.⁴³ If the absence of effective checks on power could yield a system of positive law that violated the norms of tradition and natural law with impunity, including norms deemed fundamental by the political order itself, it follows that although unwritten natural law provides a standard for judging positive law, it does not invariably have the status of positive law in a given legal system.⁴⁴

as the people always reserve a right to alter the contract as warranted”). For a useful review of the founding period’s emphasis on the authority of the people, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1436-39 (1987).

⁴² WOOD, *supra* note 28, at 382; LEDER, *supra* note 41, at 57 (quoting 1750’s letter to a Boston Weekly newsletter asserting that the people “have an undoubted right to judge for themselves whether that power is improved to good purposes or not”).

⁴³ Herman Belz, *Constitutionalism and the American Founding*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 333, 337 (Leonard Levy & Dennis Mahoney eds., 1987); Gordon S. Wood, *The Political Ideology of the Founders*, in TOWARD A MORE PERFECT UNION 7, 23 (Neill York ed., 1988). The revolutionary, Tom Paine, would write: “From the want of a Constitution in England to restrain and regulate the wild impulse of power, many of the laws are irrational and tyrannical, and the administration of them vague and problematical.” Thomas Paine, *Rights of Man*, in THE SELECTED WORK OF TOM PAINE 218 (H. Fast ed. 1945). See also THE FEDERALIST NO. 53, at 359-61 (James Madison) (Jacob E. Cooke ed., 1961) (noting that the distinction “between a constitution established by the people, and unalterable by the government” and “a law established by the government,” has not been understood elsewhere, and that Parliament is viewed as “uncontrollable” even by the constitution); Philodemus [Thomas Tudor Tucker], *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, 606, 610 (Charles Hyneman & Donald S. Lutz eds., 1983) (describing British system as granting Parliament “undefinable privileges, transcendent power, and political omnipotence”).

⁴⁴ Thus Madison, in drafting the Bill of Rights, proceeded with caution, concluding that provisions of a “controvertible nature ought not to be hazarded,” inasmuch as “two or three contentious additions would even now prostrate the whole project.” Letter from James Madison to John Pendleton, in 5 WRITINGS OF JAMES MADISON 405-06 (G. Hunt ed. 1904), cited in Nichol, *supra* note 3, at 1312. See also Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C.L. REV. 781, 832-33 (1997) (Bill of Rights adoption reflected Federalist unwillingness to accept changes that affected “the structure and stamina” of the proposed government, but willingness to accept individual rights limitations “which are important in the

The written constitution, moreover, was viewed as the memorialization of the contract between the government and the governed, and the powers held by government were viewed as grants from the people. Given that the state governments were governments with general legislative powers, the presumption was that the people parted with all the power they did not expressly reserve. As noted above, the drafters of these state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights.”⁴⁵ Thus even though there are “inherent rights pertaining to all mankind in a state of natural liberty,” and government is instituted to provide greater security to these rights, it nevertheless follows from the universal nature of the grant of powers to a general legislature that such legislative powers will, in the absence of express reservations, “include every *power* of acting, and every *claim* of possessing or obtaining any thing.”⁴⁶ Consequently there is a strict necessity to have “an *express stipulation* for all such rights as are intended to be exempted from the civil authority.”⁴⁷

These assumptions about the need to limit legislative authority in the written constitution are reflected, moreover, in the various states’ debates surrounding particular provisions of their declarations of rights. In Virginia, for example, Patrick Henry successfully opposed the inclusion of a ban on legislative criminal trials, in the form of bills of attainder, in Virginia’s declaration of rights. According to one account, Henry presented “a terrifying picture of some towering public offender, against whom ordinary laws would be im-

eyes of many and can be objectionable in those of none”).

⁴⁵ LUTZ, *supra* note 22, at 60. See also 1 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 335, (bills of rights were “intended to retain certain powers [in the people] as the legislatures had unlimited powers”); James Wilson, 13 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 391 (Pennsylvania Ratifying Convention, Nov. 28, 1787) (contending that a bill of rights “would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given [as in the state constitutions], which is not the principle of the proposed Constitution”); MCAFEE, *supra* note 10, at 133-34.

⁴⁶ Essays by The Impartial Examiner (*Virginia Independent Chronicle* February-June 1788) (Feb. 20, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 172, 177 (Herbert J. Storing ed., 1981) (Feb. 20, 1788) [hereinafter The Impartial Examiner]. This is why it is an extremely orthodox view, from an originalist standpoint, to suggest that the Constitution “may have its own theory of justice,” and to suggest further that “it is *that* theory which is to govern” rather than a system of ideal justice that might be apprehended by the Constitution’s interpreter. William Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court (Part 2)*, 72 IOWA L. REV. 1281, 1289 (1987).

⁴⁷ The Impartial Examiner, *supra* note 46, at 177. The prescription became clear. The people must insist upon a bill of rights, and then they “ought to give up no greater share [of the mass of natural rights] than what is understood to be absolutely necessary.” *Id.* at 176. Despite his clearcut positivism, the present casebook authors cite the “Impartial Examiner” only for the proposition that a purpose of government is “to secure . . . natural rights.” KMIEC & PRESSER, *supra* note 1, at 133. Even though they acknowledge that the Examiner complained that “the proposed union would not guarantee the unalienable natural rights of individuals,” *id.*, they fail to admit that his reading conflicts with an inherent rights reading of the Constitution and is irreconcilable with their understanding of the Ninth Amendment.

tent.”⁴⁸ This victory was won even though legislative trials for criminal conduct quite obviously undermined traditional common law guarantees relating to due process and fair trials, most especially the right to trial by jury. In addition, to the extent that traditional due process guarantees, especially the fundamentals of notice and hearing, were also viewed as civil guarantees of natural rights--the most fundamental rights of life, liberty, and property--a bill of attainder could be called an invasion of an individual's natural rights.⁴⁹ Considering that England had bills of attainder, those considering the proposed ban on bills of attainder would have assumed that the Virginia assembly would hold such a power in the absence of the prohibition.⁵⁰ “And subsequently Virginia actually enacted a bill of attainder against an unpopular Tory at the instigation of Governor Patrick Henry.”⁵¹

This need to put limits on legislative authority expressly in writing is reflected as well in the “natural equality” principle declared in the 1776 Virginia Declaration of Rights. Fearing that under the proposed statement, recognizing equal rights, slavery would be viewed as an unconstitutional infringement of “natural equality,”⁵² the provision was amended to state that all men are “by nature free and independent, and have certain inherent rights, of which, *when they enter into society*, they cannot, by any compact, deprive or divest their posterity.”⁵³ (The changed language is italicized.) As Warren Billings observes, the language inserted into the provision under consideration was included precisely in order to clarify that the fundamental rights that people retain as they enter civil society did not apply to the Black race because the slaves had

⁴⁸ Edmund Randolph, *Essay on the Revolutionary History of Virginia*, reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 249 (1971).

⁴⁹ Thus Professor Sherry contends that the founding generation perceived at least the prohibition on ex post facto laws as a guarantee protecting a natural right that would have been deemed implicit in the state constitutions if the limitation were not stated explicitly in a state's declaration of rights. Sherry, *supra* note 10, at 1157. She contends that this is the reason some at the Philadelphia Convention opposed inclusion of such a prohibition in the proposed federal Constitution as unnecessary. *Id.*

⁵⁰ Sherry contends that the prohibition on bills of attainder was viewed as a “positive right,” rather than a natural right, so that a written guarantee was required so as to exclude legislative trials as a weapon that constitutionally could be employed. *Id.* See also KMIEC & PRESSER, *supra* note 1, at 139-41. But Madison viewed bills of attainder in the same light as ex post facto laws, with both of them being “contrary to the first principles of the social compact, and to every principle of sound legislation.” *THE FEDERALIST* NO. 44, at 301 [(James Madison) (Jacob E. Cooke ed., 1961).] The written constitution does not purport to place these limitations on different constitutional grounds; nor does it suggest that one of these rights could be eliminated by amendment, but the other could not.

⁵¹ McAfee, *supra* note 18, at 294.

⁵² See generally Warren M. Billings, “*That All Men are Born Equally Free and Independent*”: *Virginians and the Origins of the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES* 335, 339-40 (Patrick T.J. Conley & John P. Kaminski, eds., 1992).

⁵³ Va. Const., decl. of rts., Sect. 1, reprinted in *STATE CONSTITUTIONS*, *supra* note 36, at 3813 (emphasis added).

never entered into a state of civil society in Virginia.⁵⁴ This Virginia example is especially compelling since it (1) assuredly dealt with a quintessential natural right, and (2) presumed that constitution-makers were empowered to determine the scope of constitutional limits on legislative powers - including limits rooted in principles of natural right. This second point pervaded the debate over the federal Constitution that would occur eleven years later.⁵⁵

The need for express limits on legislative power was recognized even as to the proposed federal Constitution. Even though the federal government held only the powers specifically granted to it, it was presumed that it also held the powers that logically fell within the grants of power delegated. The Constitution's opponents, for example, assumed that since Congress was granted power to establish federal courts, it could establish the procedures to be followed in those courts, and there was thus a need for a constitutional guarantee of juries in civil cases.⁵⁶ Rather than claiming that such a right was implied, defenders of the Constitution argued that "[t]he Representatives of the people may be safely trusted in this matter."⁵⁷ So the Constitution's defenders relied on traditional ideas of "popular control" of legislatures as much as on limits to power thought to be based on the scheme of enumerated powers. So when the author of Virginia's declaration of rights, George Mason, contended at the Philadelphia Convention that "[t]he Laws of the U.S. are to be paramount to State Bills of Rights,"⁵⁸ there was no meaningful response, but delegates voted against in-

⁵⁴ Billings, *supra* note 52, at 339-40. As a Jefferson biographer notes, "at least it freed the state of Virginia from an obligation to recognize and protect the inherent rights of slaves" since it was clear that they "had never entered Virginia's society, which was confined to whites." MAIER, *supra* note 9, at 193. See also Pauline Maier, *The Strange History of "All Men Are Created Equal"*, 56 WASH. & LEE L. REV. 873, 881 (1999) (noting that Virginia amended Mason's draft of the state's declaration of rights "so it imposed no obligation on the state to honor and protect the rights of enslaved blacks").

⁵⁵ Here the doctrine of popular sovereignty worked as a key to limiting the powers granted to government. Constitutional conventions, which gradually became the norm, "gave institutional reality to the theoretical ideal that governmental authority should rest on a constitution that proceeded directly from the people and that took precedence over ordinary legislation." Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145, 155 (Neil L. York ed., 1988) [hereinafter Grey].

⁵⁶ KMEC & PRESSER, *supra* note 1, at 141 (excerpting speech by Mr. Williamson arguing that "no provision was yet made for juries in Civil cases and suggesting the necessity of it").

⁵⁷ *Id.* See also *id.* at 142 (argument by Representative Roger Sherman that "[t]he Legislature may be safely trusted"). Alexander Hamilton took this sort of argument to its logical extreme:

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature.

THE FEDERALIST NO. 83, at 573 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁵⁸ KMEC & PRESSER, *supra* note 1, at 142.

clusion of the proposed Bill of Rights.⁵⁹

While the declarations of rights were undoubtedly thought to state fundamental principles of government that ought to be honored perpetually, nothing in them reflects a founding-era consensus limiting the power of the people to decide the fundamental questions about government by altering their constitutions.⁶⁰ As we have noted, the people's power to alter and reform their governments were among the fundamentals set forth in a number of Declarations of Rights.⁶¹ While the idea of perpetual constitutions dominated the framing of both the declarations and the frames of government,⁶² so that, for example, most of the early state constitutions created no mechanism for amendment,⁶³

⁵⁹ And the omission in particular of a guarantee of the right to trial by jury in civil cases was one of the most oft-cited objections to the proposed Constitution. See Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 105 n.328 (1998). Indeed, advocates of inherent constitutional rights have contended that the right to trial by jury in civil cases was intended to be an implicit limit on federal powers. See, e.g., Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Reading of the Sweeping Clause*, 43 DUKE L.J. 267, 320-21 (1993) ("Congress, under the original Constitution, could not abolish jury trials in civil cases . . ."); Sherry, *supra* note 10, at 1138-40, 1146. But see MCAFEE, *supra* note 10, at 104-110 (indicating the right to civil juries was purposefully omitted, and Federalist arguments did not claim that it was in fact a constitutional right).

⁶⁰ In the minds of the founding generation, this was simply a matter of putting first things first. It was the people who held all power. As James Wilson said: "In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal and which is therefore called absolute, supreme, and uncontrollable." 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 348 (Pennsylvania Ratifying Convention, Nov. 24, 1787). Wilson concluded that this sovereignty "is a power paramount to every constitution, inalienable in its nature, and indefinite in its extent." *Id.* at 349. A consequence is "that the people may change the constitutions whenever and however they please." *Id.* at 362. This is not only their right, but it is one of "which no positive institution can ever deprive them." *Id.* (Talk about inalienable rights.)

⁶¹ Goldstein states that eight of the fourteen state constitutions adopted between 1776 and 1780 included paraphrases of the notion of the people's right to "alter or abolish" their "form" of government. LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 73-74 (1991).

⁶² If the only relevant question were really "whether the Constitution must be construed in accordance with fundamental principle," KMEC & PRESSER, *supra* note 1, at 152, it really would follow from an affirmative response, the one supplied by these casebook authors, that the Ninth Amendment is properly read as prohibiting constitutional amendments that violate inalienable natural rights. E.g., Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991). But if our commitment to judicial review is strong enough to warrant trusting courts to make the judgments called for, even if in theory it means they have authority to impose some strange-sounding rights, it is not clear why the people are not to be entrusted to make analogous judgments in determining the rights deemed to be sufficiently fundamental to warrant constitutional protection. This is just one reason, among many, to reject the unenumerated rights construction (permitting courts to discover new affirmative limits on government authority) of the Ninth Amendment—it is a construction that opens the door to courts overruling the judgments of the sovereign people.

⁶³ See, e.g., DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 105 (1988) (observing that only four of the first eleven state constitutions made explicit provision for amendment).

there is no reason to think that in general this implied any limitation on the power of the people to alter and reform their government according to their will.⁶⁴

There is no question that the framers believed in inalienable natural rights. But at least as fundamental is that they believed that the authority of the people to make decisions about government was among the rights properly deemed inalienable. At the center of the constitutional project for those involved in drafting and ratifying the Constitution was that it was an experiment in collective self-government. If the Declaration of Independence stated the principle that animated those who gathered in Philadelphia, it was in asserting that the legitimacy of government stems from the consent of the governed. As the authority of the people became more central, however, it necessarily meant that the importance of the written constitution where their decisions were embodied would grow as well.

III. THE RIGHTS "RETAINED" BY THE NINTH AMENDMENT

If the adoption of the Ninth Amendment concerned a fear of losing rights omitted from an ostensibly thorough enumeration, it would have made as much sense being applied to the bills of rights that existed in the state constitutions.⁶⁵

⁶⁴ Andrew McLaughlin long ago argued that the failure to provide for amendment probably reflected haste and the failure to pause to consider that there would be such a need. ANDREW C. McLAUGHLIN, *THE COURTS, THE CONSTITUTION, AND PARTIES* 115 (Da Capo Press 1972). McLaughlin's insight seems confirmed by the provision for amendment in most of the second wave of constitutions, enacted from 1777 to 1786. LUTZ, *supra* note 63, at 105. I have seen no evidence of fundamental objections being raised to any of these constitutions providing for amendment, nor any evidence that the power of amendment was conceived to be limited to provisions not dealing with natural rights.

⁶⁵ Of course, the limits on government found in the federal Bill of Rights were not viewed historically as having any application to state governments. *E.g.*, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); KMIEC & PRESSER, *supra* note 1, at 725 (finding "little doubt" that "the Court is correct on this point, as a glance at any of the better histories of the period will confirm"). But if these authors have correctly read the Ninth Amendment as the people retaining to themselves inalienable natural rights, they at least owe readers an explanation why it limits only the national government, since it apparently is a decision to "vest these rights in the people, rather than in any government." Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 291, 335 (Randy E. Barnett ed., 1989) [hereinafter *THE RIGHTS RETAINED*]. There is a substantial group of legal scholars who have read the Ninth Amendment as applying by its own terms to limiting the powers of the states. *E.g.*, Charles Black, Jr., "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 29 (1991); Bennett B. Patterson, *The Forgotten Ninth Amendment*, in *THE RIGHTS RETAINED*, *supra*, at 107, 114-20; Norman G. Redlich, "Are There Certain Rights . . . Retained by the People?", 37 N.Y.U. L. REV. 787, 805-806 (1962). If the rights "retained" by the people are appropriately thought to be essentially the same as the "powers" reserved "to the people," as suggested in Nichol, *supra* note 3, at 1312, and Redlich, *supra*, at 806, logically it would be difficult to contend that they only limit one level of government.

If the Ninth Amendment is read as limiting state governments, however, the wedge be-

If the danger to rights stemmed from the mere possibility of being omitted, that danger would apply in each case of a bill of rights, since there is always the risk that a right worthy of legal security could be omitted.⁶⁶ But if anything is clear, the Federalist proponents of these arguments believed that they were limited to the constitutional scheme embodied in the federal constitution.⁶⁷ One of the spokesmen favoring adoption of the Constitution, James Wilson, tracked the general understanding of the state constitutions, outlined above,⁶⁸ when he observed that under them the people had “invested their representatives with every right and authority which they did not in explicit terms reserve.”⁶⁹ By contrast, under the federal Constitution, “the reverse of the proposition prevails, and everything which is not given, is reserved.”⁷⁰ Federalist proponents of the unamended Constitution feared that the inference in favor of the people’s rights, an inference that grew in their minds from the federal system of enumerated powers combined with a general reservation of rights (the reservation of all not granted as powers),⁷¹ would be reversed if the system of enumerated powers were replaced with an attempt to set out the rights of the people.⁷² This

tween this view of the Constitution and the views of Thomas Jefferson becomes an unbridgeable gulf. In 1819 and 1820, the nation experienced the crisis of the Missouri Compromise. In the midst of this crisis, it was clear to Jefferson that the threatened rejection of Missouri’s bid for statehood unless it abandoned its slave system or opened its borders to free blacks represented a violation of the original federal bargain and threatened to undermine Missouri’s sovereign power to determine its own domestic affairs. MAIER, *supra* note 9, at 185. Even if Jefferson was a “natural rights” thinker, there is little doubt that he was also a “states’ rights” thinker, and he would have put states’ rights ahead of natural rights in the context of seeking to resolve the central constitutional issue of his day.

⁶⁶ And, indeed as we have seen, the Federalists exerted great energy to distinguish the proposed federal Constitution from the constitutions that existed within the states. See *supra* notes 43-45 and accompanying text. State legislatures even today are viewed as possessing all governmental power not ceded to the national government so that “a state constitution does not grant governmental power but merely structures and limits it.” G. ALAN TARR AND MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN THE NATION* 50 (1988).

⁶⁷ Reinstein accurately perceives that, according to those who defended the Constitution, since “[s]overeignty remained with the people, and the government had only those powers delegated to it,” Reinstein, *supra* note 14, at 366, the people’s rights were “secured by the structure of the new government and not by an enumeration of rights.” *Id.*

⁶⁸ See *supra* notes 39-45 and accompanying text.

⁶⁹ 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 167 (Speech in the State House Yard, Oct. 6, 1787). See generally McAfee, *supra* note 14, at 1230 n.58.

⁷⁰ 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 167-68. See generally McAfee, *supra* note 14, at 1231 n.59.

⁷¹ One of the keys to understanding this debate is to realize that “[t]he best way to protect civil liberty, Madison believed, was by imposing structural limits on power such as those the Philadelphia convention had built into the federal Constitution.” MAIER, *supra* note 9, at 196.

⁷² This is why Wilson would argue that a proposal to adopt a measure “that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at, in that house [the federal convention], with the greatest indignation.” 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 387-88. Wilson apparently believed that the adoption of a federal Bill of Rights would turn the federal government of specific, enumerated powers into a government of essentially unlim-

is precisely why Madison could argue that the unamended Constitution provides that “every thing not granted is reserved,” but could also contend that “[i]f an enumeration be made of our rights” it will be “implied that every thing omitted is given to the general government.”⁷³

This entire line of analysis could not have been set forth more clearly than it was by James Iredell in North Carolina. He stated:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [federal] Constitution before us, I think, for the reasons I have given, a bill of right is not only unnecessary, but would be absurd and dangerous.⁷⁴

The distinction between governments of general legislative powers, as existed in the states, and governments of enumerated powers, as was embodied in the federal government, was the distinction that drove the entire Bill of Rights debate.⁷⁵ This is why Wilson could argue: “[W]hen general legislative powers are given, then the people part with their authority, and, on the gentleman’s

ited powers subject only to the limitations imposed in favor of particular rights.

⁷³ Madison’s Report, in 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787*, at 620 (June 24, 1788) (Jonathan Elliot ed., 2d ed. 186996) [hereinafter *Elliot’s Debates*].

⁷⁴ Address to the North Carolina Ratifying Convention (July 28, 1788), in 4 *Elliot’s Debates*, *supra* note 73, at 149 (North Carolina Ratifying Convention, July 28, 1788). See also Edmund Randolph’s address to the Virginia Ratifying Convention (June 15, 1788), in 3 *Elliot’s Debates*, *supra* note 73, at 467 (Virginia Ratifying Convention, June 15, 1788). One of the most disappointing experiences I’ve had was to attend a colloquium on the Ninth Amendment and have an experienced legal scholar examine the above statement by James Iredell with me, only to have him express the view that it had little relevance to understanding the case eventually made for the adoption of the Ninth Amendment.

⁷⁵ A few weeks after the Constitutional Convention, James Wilson explained that under the state constitutions the people had “invested their representatives with every right and authority which they did not in explicit terms reserve,” James Wilson, *Speech in the State House Yard*, Pa. Herald, Oct. 9, 1787, reprinted in 2 *RATIFICATION OF THE CONSTITUTION*, *supra* note 23, at 167-68. See George Nicholas, *Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* (June 14, 1788), in 3 *Elliot’s Debates*, *supra* note 73, at 449, 450 (contrasting case of Virginia, where “all powers were given to the government without any exception,” with “the general government, to which certain special powers were delegated for certain purposes”); Edmund Randolph, *Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* (June 5, 1788), in 3 *Elliot’s Debates*, *supra* note 73, at 463, 467 (distinguishing state legislatures that have “no limitation to their powers” from legislature “with certain delineated powers” and contending that while bill of rights is “necessary in the former, it would not be in the latter” because “the best security that can be in the latter is the express enumeration of its powers”). The pervasive antifederalist fears that their rights were forfeited by the proposed Constitution indicates that traditional and natural rights did not in general hold the status of well-established jurisdictional limitations in a legal sense--a fact that cuts sharply against an implied rights reading of the Ninth Amendment.

principle of government, retain nothing. But in a government like the proposed one, there can be no necessity for a bill of rights. For, on my principle, the people never part with their power.”⁷⁶ The Ninth Amendment was included to clarify that the people retained all they had not granted to the national government, to prevent an undercutting of the limited powers scheme; it was not included to create a method for judicial imposition of unwritten rights.

IV. JEFFERSON AND THE INSTITUTION OF HUMAN SLAVERY

Historically, it is clear that there was contradiction between the concept of human equality articulated in Jefferson’s Declaration and the institution of human slavery.⁷⁷ We have already seen that in the very year that Jefferson drafted his Declaration, and indeed in the very state, members of the Virginia state constitutional convention struggled with the difficulty of asserting equal claims to fundamental natural rights without calling the legitimacy (and constitutionality) of slavery into doubt.⁷⁸ Their “solution,” as detailed in Part II above, was to change the constitutional text to clarify that African slaves had not entered into civil society. It was as though this “positive law” change could rescue them from their problem with the natural or moral law (which they asserted was the basis of the declared independence).

But this was no temporary adjustment uniquely related to the revolution or the decision to declare independence. A careful student of the constitutional history has concluded that “[t]he Founders deliberately omitted the Declaration’s doctrine of equal rights from the Bill of Rights, not because the doctrine was considered mere rhetoric, but because its inclusion in the Constitution would have been dangerous to the continued existence of slavery.”⁷⁹ There is

⁷⁶ James Wilson, 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 470 (Pennsylvania Ratifying Convention, Dec. 4, 1787). Elsewhere Wilson clarified his point: “In short, sir, I have said that a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution.” *Id.* at 391 (Pennsylvania Ratifying Convention, Nov. 28, 1787). Little wonder that Wilson uniformly limited his statements about the danger of inserting a bill of rights in the proposed Constitution to “a government possessed of enumerated powers.” *Id.* at 388 (Nov. 28, 1787).

⁷⁷ It was difficult not to see that “the same argument that denied kings an inherited right to rule denied the right of masters to own slaves whose status was determined by birth, not consent.” MAIER, *supra* note 9, at 198. Although the Declaration started with the proposition that “we are all equal in the sight of God,” it is clear in the year 2000 that, as President Ronald Reagan put it, “as Americans that is not enough—we must be equal in the eyes of each other.” Gordon S. Wood, *Thomas Jefferson, Equality, and the Creation of a Civil Society*, 64 FORDHAM L. REV. 2133, 2137 (1996). At the least, the Declaration proclaims “the obligation of government to accord equal legal status to all individuals, to confer upon all the same rights, and to impose on all the same duties.” Paul D. Carrington, *Remembering Jefferson*, 2 WILLIAM & MARY BILL OF RTS. J. 455, 463 (1993).

⁷⁸ See *supra* notes 52-54 and accompanying text. For additional useful commentary on this course of events, see Reinstein, *supra* note 14, at 370-71.

⁷⁹ Reinstein, *supra* note 14, at 362-63. There is little question that this decision reflected earlier determinations not to confront slave states as to their decision to permit chattel slavery

no question that the framers of the Constitution who were philosophically opposed to slavery saw compromises in drafting the Constitution to accommodate the institution as critical to preserving the union.⁸⁰ As early as 1788, George Mason drafted a proposed federal Bill of Rights that omitted the most troublesome equal rights language and conditioned protection of specified rights to “freemen” only.⁸¹ Madison did not go quite this far, but omitted from his draft Bill of Rights specific reference to natural rights.⁸² Although it has been suggested by Dean Reinstein that Madison’s language reflected “scruples” against using the term “slave” or “freeman” in constitutional text,⁸³ as it well might have, it is no coincidence that Madison’s proposal was to be a prefix to the Constitution, and omitted the “harder” language of command and prohibition that could create legal limits on government.⁸⁴ The very fact that Madison chose to draft this language in the “softer” format that had characterized state declarations, despite the marked trend in another direction, is suggestive that he was seeking to avoid legally undermining slavery even while paying appropri-

within their borders. See, e.g., PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 23 (The Lawbook Exchange, Ltd. 2000) (1981) (slave state representatives obtained “power and protection for slavery” at Philadelphia convention); Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 468 (1992) (considering that the Constitution was designed to preserve slavery, “[n]one but a handful of the most radical abolitionists . . . believed that the Constitution by its terms abolished slavery, or that the federal government possessed the power to outlaw slavery in existing states”). “It is, of course, difficult to convey the horror of this chapter of American life.” Nichol, *supra* note 3, at 1326 n.126.

⁸⁰ See, e.g., Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON 206-19 (Robert A. Rutland et al. eds., 1977), cited in Reinstein, *supra* note 14, at 374. Even in his Inaugural Address, President Washington suggested that the proposed federal Bill of Rights ought to show “a reverence for the *characteristic rights of freemen*, and a regard for the public harmony.” 2 PAPERS OF GEORGE WASHINGTON 176 (W. W. Abbot ed., 1987) (emphasis added).

⁸¹ Reinstein, *supra* note 14, at 372. The cautiousness that characterized the federal Bill of Rights is reflected in part in federalism concerns that went beyond protecting the institution of slavery. The federal Bill of Rights was “a lean summary of restrictions on the federal government, tacked onto the end of the Constitution like the afterthought it was.” MAIER, *supra* note 9, at 194.

⁸² The Virginia provision had read:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Va. Const. bill of rts., sect. 1, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 36, at 3813. Madison proposed the following language to be included in a new “prefix” to the Constitution:

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

Madison Resolution (June 8, 1789), *reprinted in* Creating the Bill of Rights: The Documentary History From the First Federal Congress 11 (Helen E. Veit et al. eds., 1991).

⁸³ Reinstein, *supra* note 14, at 373.

⁸⁴ See McAfee, *supra* note 18, at 302-05.

ate lip service to the basic principle of equal rights.⁸⁵

In 1806, the Virginia Supreme Court of Appeals, in an opinion drafted by Judge St. George Tucker, held that slavery was unaffected by the 1776 Virginia Declaration of Rights, reversing a decision by Chancellor George Wythe.⁸⁶ Over time, “[t]his became the judicial response to the Declaration of Independence and its constitutional embodiments.”⁸⁷ Only the many years of the abolitionist movement, with its work on the nation’s ideology, and the success of the North in the Civil War, would prepare the nation to accept the fundamental changes that were at least anticipated by the Declaration of Independence.⁸⁸

V. CONCLUSION

There is no question that Thomas Jefferson figures prominently in the nation’s early history, and especially in declaring independence and bringing

⁸⁵ Professor Maier observes that it is possible that Madison and others perceived that the Declaration principles “might impede the foundation of a stable, effective national government.” MAIER, *supra* note 9, at 195. But “[p]erhaps, too, Madison feared alienating the support of slaveholders,” and so he acquiesced in rejection even of his “pared-down version of the Virginia Declaration of Rights.” *Id.* See also Maier, *supra* note 54, at 881 (arguing that “Madison’s ‘prefix’ was probably designed in part to calm antifederalists without provoking the opposition of slave holders,” but concluding that “Congress instead eliminated the ‘prefix’ altogether”). It is so clear that the Constitution was not intended to prohibit slavery that even a leading advocate of the unenumerated, natural rights reading of the Ninth Amendment frankly admits that the founders were “authorizing slavery.” Grey, *supra* note 55, at 164. See also Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 183 n.64 (1992) (acknowledging that “neither the Supreme Court nor most state courts used principles of natural justice to abolish slavery,” but contending that the “extreme political sensitivity” of the issue renders “that issue unrepresentative of their treatment of natural law generally”). While Sherry accurately observes that for some slavery represented “a conflict between two natural rights,” *id.*, rather than an opportunity to choose between natural and positive law, there can be little question that for Jefferson, Madison and other leading proponents of the Constitution, acceptance of the Constitution’s compromise on slavery required acceptance of slavery as positive law. See also Carrington, *supra* note 77, at 464 (observing that “[i]t was indeed widely recognized, even in the South, that the concept of individual equality before the law could not be reconciled with the idea of some men owning other men”).

⁸⁶ Reinstein, *supra* note 14, at 376. Wythe’s role in this story has an ironic quality, inasmuch as Professor Carrington has pointed out it was Wythe, a former law teacher of Jefferson’s, who was the influence for substituting the “pursuit of happiness” for “property” in the Declaration of Independence “so that all might understand that the new nation did not intend to preserve the institution of chattel slavery.” Carrington, *supra* note 77, at 464.

⁸⁷ Reinstein, *supra* note 14, at 377. None of this is to say that in the early years there was an acute consciousness of a conflict between the sentiments Jefferson expressed and the institution of slavery. In none of the documents that spoke to the same or similar issues “is there any evidence whatsoever that the Declaration of Independence lived in men’s minds as a classic statement of American political principles.” MAIER, *supra* note 9, at 167. For example, “[n]ot one revolutionary state bill of rights used the words ‘all men are created equal.’” *Id.*

⁸⁸ See generally Reinstein, *supra* note 14, at 383–410. Indeed, Jefferson himself acknowledged the terrible dilemma that slavery presented the nation. “Indeed,” he said, “I tremble for my country when I reflect that God is just; that his justice cannot sleep forever.” Nichol, *supra* note 3, at 1326 n.126.

forth the Bill of Rights.⁸⁹ And his Declaration of Independence brilliantly formulated the American position that government's legitimacy depended partly on whether it was adequate to the task of securing and protecting mankind's basic equality before the law.⁹⁰ There can also be no doubt that the founding generation saw it as a central purpose of a constitution to secure the natural rights for all free Americans; indeed, a genuine controversy arose as to whether the proposed federal Constitution would adequately secure those rights or would have the effect of granting them away.⁹¹ But the debate was significant, precisely because the framers of the Constitution believed that drafting of their written Constitution would determine whether the rights would be protected or not.

The founders disagreed as to whether the proposed Constitution was adequately designed to secure the people's rights, but there was not a widespread thought that the rights would be protected simply because they were in fact moral entitlements, this was a republican government,⁹² or the people were

⁸⁹ It is hard to disagree with Professor Carrington, who asserts that "Abraham Lincoln was not wrong to conclude that, based up the impact of the Declaration, Mr. Jefferson is the 'most distinguished politician in our history.'" Carrington, *supra* note 77, at 462, *quoting* Abraham Lincoln, The Kansas-Nebraska Act, Address at Peoria, Ill. (Oct. 16, 1854), in 1 ABRAHAM LINCOLN, SPEECHES AND WRITINGS 309 (Don E. Fehrenbach ed., 1989).

⁹⁰ Lincoln offered gratitude that Jefferson had the capacity "to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and so to embalm it there, that today, and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of reappearing tyranny and oppression." Letter from Abraham Lincoln to Henry L. Pierce, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, *supra* note 89, at 18. Surely Professor Carrington is right that "[t]he heart of the Declaration, as expressed in the two ideas of government by consent and equality of status, is thus a proposition of law and the predicate to our Constitution," and the underlying theme that government "exists for us and not we for it" is "the idea for which we have been most admired by hopeful men and women of all countries." Carrington, *supra* note 77, at 463-64.

⁹¹ For an overview of the ratification-era debate over the omission of a Bill of Rights from the Constitution as proposed, see McAfee, *supra* note 14, at 1227-1237.

⁹² A leading proponent of the unenumerated rights reading of the Ninth Amendment, the one proffered by these casebook authors, has claimed that the "standard answer" of those defending the omission of a bill of rights was that, "in contrast to the British constitution," the proposed federal Constitution "was republican; any powers not expressly granted to the federal government . . . were reserved for the people, including the wide range of inalienable human rights that could not, in principle, be surrendered to the state." DAVID RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 220 (1989) (emphasis added). In the first place, the Guarantee Clause of article IV of the Constitution assured every state a "republican" government, and no one at the time suggested that the states were not already fully republican in their natures. Second, the federalism assumption that relied on the idea that the powers not granted "were reserved for the people" counted on the enumerated powers scheme, but had nothing to do with the "republican" nature of the federal government. Finally, the doctrine of inalienable rights had virtually nothing to do with the "republican" nature of the federal government, but James Wilson clarified that under the republican governments of the states the people had "invested their representatives with every right and authority which they did not in explicit terms reserve." James Wilson's Speech in the State House Yard (Oct. 6, 1787), *reprinted in* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 23, at 167. It is difficult to conceive of more unrelated ideas than the concepts of enforce-

“believers” in natural rights. Those who consistently displayed the most concern for whether the natural rights were adequately secured were the people who were the strongest advocates of the inclusion of a federal Bill of Rights. Those who opposed a Bill of Rights did so on the theory that the federal government was a government of enumerated powers; it lacked the authority, they believed, to genuinely threaten the rights considered most basic. Their fear was that the attempt comprehensively to state rights as limitations on government could undermine the federal government’s status as a government of limited powers and dislodge its capacity to secure rights by virtue of its restricted jurisdiction.

If this were not enough, the founding generation also displayed a willingness to sacrifice the Lockean ideal of human equality to establish the union they saw as vital to the development of the nation. They compromised on the issue of slavery. This could be seen as an exception to a general rule by which the founding generation attempted to remain true to its commitment to a general theory of natural rights. But we would be wise to perceive this rejection of the very idea of equal rights, the idea that underlay the Equal Protection Clause adopted during the following century, as having effects that went beyond the issue of human slavery and that implicated the entirety of thought about what was fundamental in government.⁹³ It is also possible to see the issue of human equality as haunting our constitutional order, in significant part because the law and Constitution stood behind human slavery; Jefferson may have done us a great favor, even if the ideals he stated were significantly ignored, in giving voice to a model of government and man’s role in the scheme of things that couldn’t be reconciled with slavery over the long haul. But even if we say a silent thank you to Jefferson for drafting the language that became the Declaration of Independence, we would do him a disservice in thinking that he stated the ideals that animated our constitutional system through most of the Nineteenth Century or that what he said in the Declaration constituted binding fundamental law.

able inalienable rights and the commitment to a republican form of government.

⁹³It was, after all, Jefferson whose belief in “the equal moral worth and equal moral authority of every individual” became the “source of America’s democratic equality, an equality that was far more potent than merely the Lockean idea that everyone started at birth with the same blank sheet.” Wood, *supra* note 77, at 2142. “Jefferson’s assumption that people were naturally equal and sociable and possessed an innate moral sense had important implications.” *Id.*