

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2001

Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights

Thomas B. McAfee

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

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Constitutional Law Commons](#)

Recommended Citation

McAfee, Thomas B., "Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights" (2001). *Scholarly Works*. 521.
<https://scholars.law.unlv.edu/facpub/521>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

INALIENABLE RIGHTS, LEGAL ENFORCEABILITY, AND AMERICAN CONSTITUTIONS: THE FOURTEENTH AMENDMENT AND THE CONCEPT OF UNENUMERATED RIGHTS

*Thomas B. McAfee**

It has become common to believe that those who ratified the Fourteenth Amendment "incorporated" not only the specific guarantees of the federal Bill of Rights, but also the other fundamental rights "retained by the people" in the Ninth Amendment. Even among those who acknowledge that the Ninth Amendment was originally a "federalism" provision that simply "retained" all that had not been granted as "powers" to the federal government are those who contend that, in light of the adoption of similar provisions in the state constitutions, by 1866 this language had become a free-floating affirmation of unenumerated rights. This Article attempts to show that the state constitutional equivalents of the Ninth Amendment were not understood as stating limitations on state powers and that the Fourteenth Amendment was designed to prevent the kind of discrimination that would "abridge" the rights of citizens, but not to guarantee unenumerated fundamental rights.

I. INTRODUCTION

At least since the phrase was used in the Declaration of Independence, Americans have responded almost magically to the idea that some of their claims against government constituted rights that were "inalienable"—they could not be transferred to government, even though a person desired to do so. If the idea that all men are created equal did not initially, in a nation almost as dedicated to its slave system as to its assertion of rights, make the charts of popular sayings and phrases,¹ the concept of inalienable

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I would like to thank Nathan N. Frost for his valuable research assistance in the preparation of this Article. I also thank the following scholars, some of whom are colleagues, for comments on drafts: Chris Bryant, Jay Bybee, Lynne Henderson, Patrick J. Kelley, Forrest McDonald, Steven D. Smith, William Van Alstyne.

1. See, e.g., PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE

rights has enjoyed the opposite fate. It has been adopted by numerous state constitutions and has become almost an automatic part of every American's political vocabulary. For many, the concept of inalienable rights has served an even more intensely practical purpose; it has become one of the keys to understanding and construing the system of rights secured by the Constitution.²

In fact, perhaps the central myth of modern American constitutional history is the idea that the founders of the Constitution equated inalienable natural rights with legal and constitutional rights.³ The most important symbol of this myth is the text of the

DECLARATION OF INDEPENDENCE 167 (1997) (observing that "[n]ot one revolutionary state bill of rights used the words 'all men are created equal'" and concluding that there is no evidence "that the Declaration of Independence lived in men's minds as a classic statement of American political principles"); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 61 (2000) (concluding that the "Philadelphia Constitution made its peace with, and even propped up, a regime of chattel slavery"); Thomas B. McAfee, *Did the Federal Constitution 'Incorporate' the Declaration of Independence?*, 1 NEVADA L.J. 138 (2001) [hereinafter McAfee, *Federal Constitution*].

2. Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1266 n.198 (1990) [hereinafter McAfee, *Original Meaning*] (collecting authorities "who have placed special weight on the natural rights views of the founding generation as a key to understanding the contemplated role of the ninth amendment"). In *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965) (Goldberg, J. concurring), Justice Goldberg found, based on "the language and history of the Ninth Amendment," that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." On what Justice Goldberg claimed, as well as what he did *not* claim, in his reliance on the Ninth Amendment, see Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 61 n.7 (1996) [hereinafter McAfee, *Critical Guide*]. For a treatment of the relationship between the Ninth Amendment and "the tradition of inalienable and natural rights," see McAfee, *Original Meaning*, *supra*, at 1265-77. More recently, the concept of inalienable rights has been used to strengthen the equivalent reading of the Necessary and Proper Clause. Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 780 (1997). Cf. Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). But see THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING* 83-117 (2000) [hereinafter MCAFEE, *INHERENT RIGHTS*]; Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17 (1998) [hereinafter McAfee, *Federal System as Bill of Rights*].

3. See generally DOUGLAS W. KMEC & STEPHEN B. PRESSER, *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* 136 (1998); 1 *THE RIGHTS RETAINED BY THE PEOPLE* (Randy E. Barnett ed., 1989); 2 *id.* (Randy E. Barnett ed., 1993); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Other works supporting this view are collected in McAfee, *Critical Guide*, *supra* note 2, at 63 n.11, and sprinkled throughout the present article. For recent attempts to link the Ninth Amendment with the idea of enforceable inalienable rights, see Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000); Eric M. Axler, Note,

Ninth Amendment, which specifically commands us not to “deny or disparage” the other rights “retained by the people.”⁴ The most common assumption is that this refers to the natural rights that the people “retained” when they entered into civil society by agreeing to live by the social contract that forms their system of government.⁵ It is now over a decade ago that a prominent advocate of this unenumerated rights reading contended that “the preliminary debate over the meaning of the ninth amendment is essentially over.”⁶ And the other leading advocate of the unenumerated rights understanding claimed that the textualist position defended by Justice Iredell in the 1798 decision of *Calder v. Bull*⁷ was simply not articulated during the 1787-1788 debate over ratification of the proposed Constitution.⁸

In truth, both those who opposed and those who supported ratification of the proposed federal Constitution agreed that the state constitutions that preceded it “granted limitless legislative power unless the people reserved power in a bill of rights.”⁹ As of 1787, “Americans who discussed natural liberty and constitutions typically assumed that only such natural liberty as was reserved by a constitution would be a constitutional right.”¹⁰ Americans generally

The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights, 24 SETON HALL LEGIS. J. 431 (2000).

4. U.S. CONST. amend. IX.

5. This reading of the Ninth Amendment is carefully analyzed in Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U. L.J. 267 (1992) [hereinafter McAfee, *Social Contract Theory*].

6. Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988).

7. 3 U.S. (3 Dall.) 386, 398-400 (1798) (Iredell, J., concurring).

8. Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145, 159 (Neil L. York ed., 1988); see also Sherry, *supra* note 3, at 1166 (claiming that most representatives in the first Congress “recognized that enumeration of rights made little or no difference to the legal efficacy of such rights”). Notwithstanding this overbroad historical claim, Professor Grey has elsewhere acknowledged that the apparent clash between following the written Constitution or the views of constitutional “interpreters” on basic moral issues about the legitimate reach of government power “was in fact not a choice of one over the other, but a confusing attempt to have it both ways, an ambivalence within our constitutional tradition that has lasted to our own day.” Grey, *supra*, at 157.

9. MCAFEE, *INHERENT RIGHTS*, *supra* note 2, at 135. See generally *id.* at 119-47.

10. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 932 (1993). Moreover, although Americans contended that:

some portions of natural liberty were inalienable and therefore ought not to be infringed, they tended to consider a government's infringement of an inalienable right a reason for questioning the legitimacy of the legal system that permitted such a violation rather than a basis for making a claim through such a system.

agreed that "one great end of a bill of rights" is to "define what portion of his natural liberty, the subject shall at all times be entitled to retain."¹¹ And when the Constitution's opponents contended that individuals retain their "natural liberties only to the degree they reserved these rights in their constitution or, less securely, provided for them in other civil law," they met no dispute from the Constitution's Federalist proponents.¹² This need to secure fundamental rights in specific constitutional text was recognized as applying to "inalienable" rights as well as to other fundamental rights.¹³

One cannot understand the original meaning of the Ninth Amendment without grappling with the debate over the omission of a Bill of Rights in the proposed 1787 Constitution. It turns out that the same is true if you are attempting to understand how the Fourteenth Amendment confronted the issue of unenumerated rights in the Privileges or Immunities Clause of Section One. To understand the Privileges or Immunities Clause, one must confront the differences between the state and federal constitutions that led to the adoption of the Ninth Amendment, the adoption of "mini-Ninth Amendments" by a number of state constitutions, and the reasons the framers of the Fourteenth Amendment were not highly moti-

Id.

11. Letter from An Old Whig, in 3 THE COMPLETE ANTI-FEDERALIST 30, 33 (Herbert J. Storing ed., 1981). When on January 9, 1788, a prominent Antifederalist contended that "a constitution does not in itself imply any more than a declaration of the relation which the different parts of the government bear to each other, but does not in any degree imply security to the rights of individuals," he was not contradicted. Letter from Agrippa to the Massachusetts Convention (Jan. 29, 1788), in 4 *id.* at 106, 108.

12. Hamburger, *supra* note 10, at 934-35.

13. See, e.g., *infra* note 38 and accompanying text; Letter from Cincinnatus to James Wilson, Esquire, in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 10, 11 (wanting to see freedom of the press "previously secured as a constitutional and unalienable right" rather than "left to the precarious care of popular privileges"); James Wilson's Speech in the State House Yard (Oct. 6, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION] (acknowledging that if Congress had been granted a power "to regulate literary publications," it would have been, despite its status as an unalienable right, essential to include a freedom of the press provision as an exception to, or limitation on, this general regulatory power and that such a fundamental law guarantee would be essential in the District of Columbia since Congress would hold general legislative powers in the District); see also MCAFFEE, INHERENT RIGHTS, *supra* note 2, at 134 (concluding that the Constitution's Antifederalist opponents believed that "though there are rights that cannot, as a matter of moral theory, be ceded to government even by the sovereign people, the failure to give effect to those rights in the written Constitution would amount to 'resigning' those rights to government as a matter of law"); *id.* at 162 n.111 (contending that "[i]f the Federalist argument that the idea of limited powers guaranteed freedom of the press rested on its status as an inherent right, the same implied limitation would logically be read into Congress' legislative power as to the district as well" and concluding that Wilson's reasoning "clarifies that his argument from limited powers is to be understood straightforwardly").

vated to specify in detail all the rights that were to receive federal constitutional protection. One must, perhaps most centrally, be aware that the constitution-making process is an extremely human one in which people are inclined to lean rather heavily on existing patterns—especially if they have been reasonably effective at achieving the ends of constitutionalism. With this as a starting point, we will seek to understand the Fourteenth Amendment by seeing its relationship to the issues that beset those who adopted the federal Constitution.

II. THE NINTH AMENDMENT AND THE STRUCTURE OF THE CONSTITUTION

A. “Enumerated” v. “General” Powers

There is no question that the Federalist defenders of the proposed Constitution, and particularly of the decision of the Convention to omit a bill of rights, emphasized the structure of the federal government and the role it was to play in securing the people's rights. In September of 1787, the Convention that drafted the Constitution rejected a proposal to establish a committee to draft a bill of rights for the proposed Constitution, as well as a subsequent call for a provision guaranteeing freedom of the press.¹⁴ Defenders of the Constitution relied upon the example of the Articles of Confederation. In *The Federalist*, for example, Madison posed the question: “Is a Bill of Rights essential to liberty?” He answered that the “Confederation has no Bill of Rights.”¹⁵ The basic idea was the simple one that if you have granted limited powers, you have accomplished the same thing as if you had included a bill of rights.

The point is a more compelling one than we might be inclined to think. The Constitution's defenders believed that the system of enumerated powers raised an inference against government power and in favor of liberty. By contrast, the state constitutions started with a presumption in favor of government power. It was the standard view that the state governments, “unlike governments of delegated and enumerated powers, had (as representatives of the sovereign people) all powers not constitutionally forbidden them.”¹⁶ One

14. McAfee, *Original Meaning*, *supra* note 2, at 1227. For an overview of this history, see *id.* at 1238-48; McAfee, *Critical Guide*, *supra* note 2, at 65-67.

15. THE FEDERALIST NO. 38 (James Madison), *reprinted in* THE FEDERALIST PAPERS: ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY 182, 187 (Garry Wills ed., 1982).

16. Forrest McDonald, *The Bill of Rights: Unnecessary and Pernicious*, in THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 387, 388 (Ronald Hoffman & Peter J. Albert eds., 1997) [hereinafter GOVERNMENT PROSCRIBED]; see also DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL 60 (1980) (The drafters of the state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights.”); MCAFEE, INHERENT

of the Constitution's leading defenders, James Wilson, explained this on the State House Yard before the Pennsylvania Ratifying Convention:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case [of the states] every thing which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and everything which is not given, is reserved.¹⁷

Wilson stated a general understanding of the power granted to legislatures by the state constitutions. When the Constitution was briefly considered by Congress prior to its transmittal to the states, Nathaniel Gorham of Massachusetts explained that "a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers."¹⁸

For those who had framed the Constitution, the key was to examine the grants of power to the federal government. To use the example relied upon above, James Wilson clarified that if Congress had been granted a power "to regulate literary publications," it would have been essential "to stipulate that the liberty of the press

RIGHTS, *supra* note 2, at 133 (concluding that "the legal arguments on behalf of bills of rights had tap roots reaching deeper than the debate over ratification, a fact that cuts against viewing them as purely pragmatic ratification inventions"); G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 50 (1988) (recognizing that "[a]ccording to traditional legal theory, the state government inherently possesses all governmental power not ceded to the national government, and thus a state constitution does not grant governmental power but merely structures and limits it"); McDonald, *supra*, at 390 & n.6, (quoting Rufus King & Nathaniel Gorham, *Response to Elbridge Gerry's Objections*, in *SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 284 (James H. Hutson ed., 1987)) (observing that Rufus King and Nathaniel Gorham had contended that a Bill of Rights was essential where there is a legislature of "full power & authority," but not where its powers are "explicitly defined").

17. James Wilson's Speech in the State House Yard (Oct. 6, 1787), in 2 *RATIFICATION OF THE CONSTITUTION*, *supra* note 13, at 388.

18. Statement of Nathaniel Gorham at the Pennsylvania Ratifying Convention (Sept. 27, 1787), in 1 *RATIFICATION OF THE CONSTITUTION*, *supra* note 13, at 335. This is 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).

should be preserved inviolate.”¹⁹ Considering that members of the founding generation, including James Wilson, saw freedom of the press as one of the inalienable rights to which they were entitled, it is clear that he was not relying on a general implication that inalienable rights are in fact constitutional rights. The question this raises is this: Why, then, were Federalists concerned about adding a bill of rights to the proposed Constitution?

Their concern was that interpreters might take the inclusion of a bill of rights as raising the inference that the newly created Congress was a legislature with general powers subject only to the exceptions to power contained in the Bill of Rights. Alexander Hamilton, to use a prominent example, asserted that a bill of rights would “contain various exceptions to powers which are not granted,” and that this “would afford a colourable pretext to claim more than were granted.”²⁰ This presumption, that to adopt a bill of rights would be to create a possible inference of a basically unlimited grant of powers, is what explains Wilson’s assertion “that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.”²¹ It was because he agreed fully with this analysis that Madison stated that he could support a bill of rights “provided it be so framed as not to imply powers not meant to be included in the enumeration.”²²

19. 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 168. For a treatment of Wilson’s argument that a free press right would threaten the rights-protective scheme of enumerated powers, see MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 94, 137, 140-42. Indeed, Wilson was equally insistent that, given that Congress would be empowered to regulate the press in the District of Columbia, and given its general regulatory powers there, the “compact” that should be adopted to govern the District should include a provision for freedom of the press. 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 168. But such a guarantee in the federal Constitution would be “merely nugatory” because no such regulatory power had been granted to Congress; indeed, such a guarantee would actually be dangerous because it could be construed “to imply that some degree of power was given, since we undertook to define its extent.” *Id.*

20. THE FEDERALIST NO. 84 (Alexander Hamilton), *reprinted in* THE FEDERALIST PAPERS, *supra* note 15, at 434, 437.

21. Statement by James Wilson at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 388. This is why Wilson could assert “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.” *Id.* at 391 (emphasis added).

22. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 614, 615 (1971). For material supporting the view that Madison’s perception of the danger of a bill of rights concerned the possibility of it undermining the system of enumerated powers by which the framers had secured rights, see MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 142-47.

B. *The Problem of Unenforceable Declarations of Rights*

The state constitutions drafted in the period from 1776 to 1787 were not drafted with judicial review in mind.²³ These constitutions “were not yet accorded full status as a higher law,” and “were not viewed as legalistically as they are today.”²⁴ The state constitution declarations of rights “were framed in terms of ‘ought’ or ‘ought not’ rather than ‘shall’ or ‘shall not,’”²⁵ or sometimes “as statements of political ideals.”²⁶ The result was that the problem of legislative

23. This omission of explicit provision for judicial review “reflects the confidence reposed in the revolutionary-era legislatures,” and “there is little reason to think that the framers of the early state constitutions intended the exercise of judicial review.” MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 43 n.133. *See generally id.* at 15-16, 23-24, 41-43 nn.108-18, 134-37, 159-60 nn.94-97; G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 72 (1998) (“The notion that judges could invalidate all governmental actions inconsistent with their interpretation of the constitution was simply unknown in the 1770s and early 1780s and would have been considered far beyond the scope of legitimate judicial power.”). For a discussion of the impact of the language in these state declarations on the drafting of the Bill of Rights, including the Ninth Amendment, see McAfee, *Social Contract Theory*, *supra* note 5, at 296-305.

24. Donald S. Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 328 (1989); *see also* BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 169-70 (1977) (referring to state declarations as “simple admonitions, rudimentary efforts to restrain the legislatures”); Herman Belz, *Constitutionalism and the American Founding*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 333, 338-39 (Leonard Levy & Dennis Mahoney eds., 1987) (arguing that more than the “language of urging and admonition” found in the state constitutions “was needed to transform them into effective restraints on the actual exercise of power”); Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998) (The early New Jersey constitution “really didn’t have the attributes of higher law that we think of for a constitution now.”).

25. MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 24; *see* TARR, *supra* note 23, at 76 (referring to “use of the hortatory *ought*, rather than the more mandatory *shall*,” as being one of ways early state declarations differed from the federal Bill of Rights); Donald S. Lutz, *The Pedigree of the Bill of Rights*, in *GOVERNMENT PROSCRIBED*, *supra* note 16, at 42, 70-71 (“[A]lmost all” of the amendments proposed by various states used “admonitory” language, which was replaced by “legally enforceable” language drafted by Madison.); Robert C. Palmer, *Liberties as Constitutional Provisions 1776-1791*, in *CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 64-65 (William E. Nelson & Robert C. Palmer eds., 1987); Bernard Schwartz, *Experience versus Reason: “Beautiful Books and Great Revolutions,”* in *GOVERNMENT PROSCRIBED*, *supra* note 16, at 421, 431 (emphasizing that provisions in the federal Bill of Rights “had the status of a constitutional command, which could be enforced by the courts even against the legislature”).

26. MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 24; *see, e.g.*, LESLIE FRIEDMAN GOLDSTEIN, *IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY* 74-76 (1991); TARR, *supra* note 23, at 76 (concluding that a second critical feature of state declarations was the “inclusion of general statements of political principle not susceptible to judicial enforcement”); McDonald, *supra* note 16, at 388 (finding that early state declarations “were, by and large, mere statements of principles . . . without substantive force in law”); *see also* VA. CONST., BILL OF RTS. § 4 (1776), *reprinted in* 7 *THE FEDERAL AND*

abuse of authority became a central theme in the political discourse leading to the Philadelphia Convention. Indeed, many would have shared James Wilson's sentiment when he asserted "[w]ith how much contempt have we seen the authority of the people treated by the legislature of this state."²⁷

There is little question that the Antifederalist arguments against the Constitution reflected their fears of the potential power of the newly-proposed national government. And, as has been pointed out by many, these fears reflected both eighteenth century distrust of human nature and government officials, as well as the voice of experience harking back to the American Revolution.²⁸ In attempting to bring home to Americans the frighteningly real dangers of the proposed Constitution, as they perceived it, we would hardly expect the Antifederalists to devote energy to elaborating an assumption that these threatened rights retained their constitutional status whether or not they were embodied in writing.

At the same time, however, these fears also lend support to the sincerity of the Antifederalist constitutional and legal arguments. If one begins with a premise of the "depravity of human nature" and thus concludes that the goal must be "to guard against it by proper checks,"²⁹ the argument that certain rights will retain their status as fundamental rights within a legal system, whether set out in writing

STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3813 (Francis N. Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS] (stating the principle "[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services"); *id.* § 12 (stating that "freedom of the press is one of the great bulwarks of liberty," and stating further that it "can never be restrained but by despotic governments"). Sometimes the two methods were combined. *See id.* § 11 (stating that "in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred").

27. Proceedings of the Pennsylvania Ratifying Convention (Dec. 1, 1787), in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 450. Gordon S. Wood observes that state constitution reformers consistently relied on the theme that the legislatures were abusing the people by violating the terms of their written constitutions. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 443-44 (1969). *See generally* MCAFFEE, INHERENT RIGHTS, *supra* note 2, at 45-81 (chapter entitled *Constitutional Practice in the Confederation Period: The Search for Effective Limits on Legislative Power*).

28. Cecelia M. Kenyon, *Introduction to THE ANTIFEDERALISTS* lxxv-lxvii (Cecelia M. Kenyon ed., 1966); JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-88, at 161 (1961); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 320-21 (1992).

29. Statements by Patrick Henry at the Virginia Ratifying Convention (June 12, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327 (Jonathan Elliot ed., 2d ed. 1866) [hereinafter ELLIOT'S DEBATES]; *see also* MAIN, *supra* note 28, at 127 (quoting William Lenoir) (arguing that "it is the nature of mankind to be tyrannical").

or not, is likely to seem beside the point, if not as simple nonsense. In fact, when Federalists argued that the mere omission of a particular right did not imply that the right had been rejected, or that the government would deny or abuse it, Antifederalists ridiculed *both* the purported distinction between “denying” and “failing to secure” an important right³⁰ and the further suggestion that republican government could simply be trusted not to abuse the interests at stake.³¹

30. *E.g.*, Letter from Cincinnatus II to James Wilson, Esquire, NEW YORK J., Nov. 8, 1787, *reprinted in* 14 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 11, 12-13 (rejecting argument that right to civil jury will be adequately secured by accepted practice that will be supported by Congress, contending that civil jury practice should not be “dependent on the arbitrary exposition of future judges”); Letters from a Federal Farmer, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 324 (counting on time-honored nature of rights inadequate—declarations do not “change the nature of things, or create new truths,” but they “establish in the minds of people truths and principles which they might never otherwise have thought of, or soon forgot”; we therefore “ought to recognize the leading principles of [the political system] in the front page of every family book”).

31. *See, e.g.*, Letter from Cincinnatus II to James Wilson, *supra* note 30, at 11-12 (“[U]nalienable” right of free press should not be “left to the precarious care of popular privileges which may or may not influence our new rulers”; the Constitution grants “totally unlimited” power over press.); Statements by Patrick Henry at the Virginia Ratifying Convention (June 4, 1788), *in* 3 ELLIOT’S DEBATES, *supra* note 29, at 445 (“[T]o reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights.”); Statements by Samuel Spencer at the North Carolina Ratifying Convention (July 29, 1788), *in* 4 *id.* at 153 (“[C]ertain human rights . . . ought not to be given up.”) (emphasis added). This sort of qualification of the notion of inalienability was embraced even by the author of *Letters from a Federal Farmer*, who provided the most elaborate analysis of natural rights (“of which even the people cannot deprive individuals”), fundamental rights (which cannot be altered by the legislature because placed in a charter or constitution), and ordinary legal rights (that legislatures can alter). 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 261. Despite his recognition that natural rights are not properly abrogated even by the sovereign people, the author had previously contended that although “the national laws ought to yield to unalienable and fundamental rights,” this “will not be the case with the laws of congress.” *Id.* at 247 (emphasis added); *id.* at 231 (“[U]nalienable and fundamental rights. . . ought to be explicitly ascertained and fixed,” and “a free and enlightened people . . . will not resign all their rights to those who govern.”) (emphasis added); *id.* at 324-25 (In giving “general powers” to a government, the people must “reserve certain rights”; and thus “all powers are given which are not reserved.”); *id.* at 325 ([P]eople “do not remain free, merely because they are entitled to natural and unalienable rights,” but because “by repeated negotiations [sic] and declarations, all parties are brought to realize them.”); *id.* at 329 (Since a free press, as well as the other rights claimed under the state constitutions, are founded on fundamental law “made by the people,” it follows that “[t]he people, who can annihilate or alter those constitutions, can annihilate or limit [such] right[s].”). The most perceptive Antifederalist commentator, then, saw the inalienable rights as obligating the sovereign people, but not as meaningfully limiting their power to grant away their rights.

C. *The Antifederalists as Constitutional Positivists*

Indeed, the Antifederalist arguments strongly suggest that their general skepticism of human nature had combined with their fear of national power to drive them to a staunchly positivist constitutional jurisprudence.³² As Cecelia Kenyon observed, the Antifederalists seemed on a quest for clarity, explicitness, and specificity in clarifying the nature and limits of government power.³³ A jurisprudence of implied limits on government seems most likely in a context of long-established custom, expectation, and shared assumptions about the nature of government and its limits. By contrast, the ratification debate over a new Constitution that many perceived as a reckless experiment with liberty and traditional political values was hardly a setting in which such a conception of jurisprudence was likely to flourish.

Instead, as Michael Lienesch has observed, the Antifederalist social contract/natural rights philosophy came face to face with a developing emphasis on securing effective checks on power.³⁴ Consistent with deep skepticism about human nature and especially the tendencies of power-holders, Antifederalist constitutional theory underwent a subtle shift of emphasis. Lienesch argues persuasively that Antifederalist thinkers went from viewing bills of rights as "packages of political principles, educating and inspiring citizens," to "describing them as lists of personal liberties."³⁵ In this process, something is clearly gained, but there is an undeniable sense of loss as well: "Above all, where before Antifederalists had considered rights to be preeminent, the very prerequisites of freedom, they were now describing them as somehow secondary—less a precondition than a product of their politics—'secured to individuals in consideration of the other rights which they give up to support society.'"³⁶

Lienesch's perceptive comments mark the developing vision of bills of rights as binding rules of law rather than obligating statements of principle—rooted in nature, to be sure, but effective constitutionally only as they are reduced to writing and placed in the written constitution.

The central clue as to the authentically positivist orientation of the Antifederalists, however, is that they did not simply soft pedal (or even suppress) the idea of inherent constitutional rights—they

32. See, e.g., MCAFEE, *INHERENT RIGHTS*, *supra* note 2, at 128-34. In particular, "the Antifederalists were genuinely alarmed by the absence of traditional procedural rights in law suits." Lois G. Schworer, *British Lineages and American Choices*, in *GOVERNMENT PROSCRIBED*, *supra* note 16, at 1, 17 n.53.

33. Kenyon, *supra* note 28, at lxxv-lxxvi; accord Michael Lienesch, *North Carolina: Preserving Rights*, in *RATIFYING THE CONSTITUTION* 343, 359 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

34. See Lienesch, *supra* note 33, at 362.

35. *Id.*

36. *Id.* (quoting Statement of Samuel Spencer at the North Carolina Ratifying Convention (July 29, 1788), in 4 *ELLIOT'S DEBATES*, *supra* note 29, at 154).

rejected the idea outright. They might have argued for the need to secure the people's rights solely by reference to the uncertainties of disagreement over definition, official abuse, popular frenzy, or gradual relinquishment by some forgetful future generation. While such arguments were used,³⁷ Antifederalists went much further, contending that adoption of the Constitution would have the constitutional and legal effect of granting away the people's fundamental rights. This is nowhere better illustrated than in the remarkable consistency with which the Antifederalists qualified the idea of "inalienable" rights in such a way as to clarify the concept as one of moral and political importance rather than of inherent constitutional and legal significance.³⁸

It is difficult to account for these arguments as a reflection of anything other than the importance which attached to the ideas of popular sovereignty and the written constitution by the end of the revolutionary and confederation experiences. With the arrival of America's own original contracts—the written constitutions—it was rather clear that Americans could no longer look back to England's original contract, and the years of confirming practice and use, as the source of their constitutional rights.³⁹ Indeed, by 1787 many thoughtful Americans had come to see Great Britain's unwritten constitution as lacking an essential element of constitutionalism in failing to provide explicit and binding limits on government power.⁴⁰

Moreover, since the federal constitution would be the most recent original contract binding the American people, its terms would

37. The issue is fully treated in MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 131-34.

38. See, e.g., Letters from a Federal Farmer (Oct. 9, 1787), in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 11, at 231 (contending that a "free and enlightened people . . . will not resign all their [unalienable and fundamental] rights to those who govern"); Letters from a Federal Farmer (Oct. 12, 1787) *in id.* at 247 (Although there are inalienable rights "of which the people cannot deprive individuals," it follows only that "the national laws *ought to yield to* unalienable and fundamental rights" and concluding, however, that this "will not be the case with the laws of congress."); Essays by the Impartial Examiner (Feb. 20, 1788), in 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 11, at 176, 177 (Feb. 20, 1788) (While it is the "great object [of the people] in forming society" to "secure their natural rights," where the people fail to reserve expressly these rights "every right whatsoever will be under the power and controul of the civil jurisdiction."); Statements by David Caldwell at the North Carolina Ratifying Convention (July 24, 1788), in 4 *ELLIOT'S DEBATES*, *supra* note 29, at 9 (arguing that Constitution should reflect "maxims" deemed fundamental to "every safe and free government," and describing one such maxim as the statement that "[u]nalienable rights ought not to be given up, if not necessary").

39. See, e.g., Letters from a Federal Farmer (Oct. 12, 1787), in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 11, at 246 (referring to the Constitution as the people's "last and supreme act" that will prevail over all incompatible customs, rights, or laws, ancient or modern); Essays of Brutus (Nov. 1, 1787), *in id.* at 376 (arguing that the Constitution, as "an original compact," will "vacate every former agreement inconsistent with it").

40. See MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 10-12, 16-17.

overcome those of the state constitutions and declarations of rights.⁴¹ Considering the priority given to consent and popular sovereignty as the sources of governmental legitimacy in the early republic—particularly in that the people, in their constitutive role, were placed in the position of Blackstone’s absolute sovereign—it is not surprising that even the so-called inalienable rights would come to be viewed by many as dependent on the terms of the written constitution for their constitutional status, however central the idea that they deserved protection.

The central importance of the ideas of the written constitution and popular sovereignty as the ratification period closed is illustrated by the strange and fascinating discussion between the contestants over the nature of bills of rights under the British constitution. The ratification debate provided the occasion for a newly-enhanced rendition of the popular sovereignty theme, as the Federalists discovered it to be the all-purpose solution to several of the most difficult challenges posed to the Constitution, including the omission of a bill of rights.⁴² In fact, a number of Federalists, including such luminaries as James Wilson and Alexander Hamilton, contended that bills of rights had no place in America because in England they had represented grants from the king to the people.⁴³ In America, by contrast, it is the people who initially hold all power, and the government requires a “bill of powers” from the people.⁴⁴

41. George Mason, the draftsman of the Virginia Declaration of Rights, stated that “the Laws of the general Government being paramount to the Laws & Constitutions of the several States, the Declarations of Rights in the separate States are no Security.” George Mason, *Mason’s Objections to the Constitution of Government Formed by the Convention* (Oct. 7, 1787), in 13 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 348. The Supremacy Clause, then, was correctly perceived as making explicit the view that laws enacted pursuant to the express powers of Congress would override state constitutional guarantees as well as imperfect natural or customary rights.

42. MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 125-27, 135-36.

43. See, e.g., Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 569 (Bills of rights reflected king as “fountain of all power” and rights as “his gift.”); A Landholder VI, *CONNECTICUT COURANT*, Dec. 10, 1787, in *id.* at 487, 489 (English bills of rights as “grants to the people”) (emphasis in original); *Reply to George Mason’s Objections to the Constitution*, *NEW JERSEY J.*, Dec. 26, 1787, reprinted in *id.* at 154 (Since “the king claims the sovereignty and supports an interest in opposition to the people,” they “obtain a declaration and acknowledgment of those rights they should hold against their sovereign.”); *THE FEDERALIST* NO. 84 (Alexander Hamilton), reprinted in *THE FEDERALIST PAPERS*, *supra* note 15, at 436 (Bills of rights were “stipulations between kings and their subjects, abridgments of prerogative in favor of privilege.”).

44. See, e.g., *Reply to George Mason’s Objections to the Constitution*, *supra* note 43, at 154 (Governors “may call for the Constitution to show their rights and powers,” but the people are “the only human source of power known in the empire.”); *THE FEDERALIST* NO. 84 (Alexander Hamilton), *supra* note 43, at 436 (Bills of rights “have no application to constitutions professedly founded upon the power of the people,” and the preamble thus protects rights better than provisions in a bill of rights.).

While this Federalist interpretation of English bills of rights provided a nice foundation for developing themes of republican checks on government and reserved rights and powers, it was an unorthodox reading of British constitutionalism that stood in the place, ironically enough, of the original contract theory that had dominated colonial constitutional theory during the revolutionary struggle with Great Britain.⁴⁵ If the Federalist argument were correct that bills of rights constituted mere grants from kings to the people, it should have been difficult for revolutionary Americans (not to mention many eighteenth century Englishmen) to contend, as they had, that English rights could not be abrogated—given that they arguably were being withdrawn by the same authority that granted them. While several Antifederalists provided effective rebuttals of this piece of Federalist revisionism, focusing on the traditional idea of the ancient constitution and the justifications for bills of rights in a republic,⁴⁶ it is striking that a number of Antifederalists treated the guarantees found in British constitutional history as establishing (rather than as confirming) their rights.

Patrick Henry, for example, contended that in Great Britain “every possible right, which is not reserved to the people by some express provision or compact, is within the king’s prerogative.”⁴⁷ The Federal Farmer at one point contended that it had been “by compacts” that the English people “were able to limit, by degrees, the royal prerogatives, and establish their own liberties.”⁴⁸ And elsewhere we learn that the *Magna Carta*, the Bill of Rights, and various acts of Parliament “shew the care and watchfulness of that nation . . . to obtain the most explicit declarations in favor of their liberties.”⁴⁹ As with the inalienable rights for which they contended, many Antifederalists now viewed the rights of Englishmen as only effectively established by the written guarantees that created mean-

visions in a bill of rights.).

45. It also, of course, was ahistorical in that such documents had been widely adopted by republican governments in America; moreover, it ran against the grain of the widespread and growing recognition of the need to curb popular legislatures as well as unbridled executives. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 156-57 (1988).

46. *E.g.*, Letters from the Federal Farmer (Dec. 25, 1787), in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 11, at 260 (The people by Magna Carta “did not acquire powers, or receive privileges from the king,” but “only ascertained and fixed those they were entitled to as Englishmen; the title used by the king ‘we grant,’ was mere form.”); Essays by a Farmer (Feb. 15, 1788), in 5 *id.* at 10 (Feb. 15, 1788) (asserting that bills of rights were “grants of the King or Prince, and that the liberties which they secure are the gracious concessions of the sovereign, betrays an equal ignorance of history and of law”).

47. Statement by Patrick Henry at the Virginia Ratifying Convention (June 14, 1788), in 3 *ELLIOT’S DEBATES*, *supra* note 29, at 445.

48. Letters from the Federal Farmer (Jan. 3, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 11, at 270-271.

49. Letters from An Old Whig (1787-1788), in 3 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 11, at 34.

ingful limitations: It is all up to the care with which the people establish their governments.⁵⁰

If the Antifederalist approach to ensuring rights is properly described as legalistic, their rivals' opposition to a bill of rights reflected deep skepticism of the power of mere positive declarations of fundamental law to control the realities of political life. The Federalists regularly inveighed against the futility of paper declarations as meaningful checks on government,⁵¹ particularly as contrasted with the effective limits on power embodied in the enumerated powers scheme and the checks built into the system of national government⁵² and inherent in the extended republic which the Constitution

50. As we have seen, moreover, the standard Federalist defense of the omission of a bill of rights boasted that the structural design of the federal Constitution effectively secured the people's rights by the granting of limited powers. While using the language of natural and inalienable rights in many of their formulations, the Federalist argument amounted to the claim that the rights were secured by the care with which they had established the proposed Constitution.

51. *E.g.*, Alexander White, WINCHESTER, VIRGINIA GAZETTE, Feb. 29, 1788, reprinted in 8 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 438 ("Paper chains are too feeble to bind the hands of tyranny or ambition."); A Countryman II, NEW HAVEN GAZETTE, Nov. 22, 1787, reprinted in 3 *id.* at 471 (people's rights too important "to depend on mere paper protection"); Uncus, MARYLAND J., Nov. 9, 1787, reprinted in 14 *id.* at 76, 78 (bill of rights "would be no kind of security to the people"); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 43, at 437 (referring to bill of rights provisions as "aphorisms" that "would sound much better in a treatise of ethics than in a constitution of government"); THE FEDERALIST NO. 49 (James Madison), reprinted in THE FEDERALIST PAPERS, *supra* note 15, at 254, 258 ("[M]ere declarations in the written constitution, are not sufficient to restrain the several departments within their legal limits."); Statement by Edmund Randolph at the Virginia Ratifying Convention (June 9, 1788), in 3 ELLIOT'S DEBATES, *supra* note 29, at 190-91 ("[M]axims" contained in a bill of rights "cannot secure the liberties of this country."); Statements by George Nicholas at the Virginia Ratifying Convention (June 12, 1788), in *id.* at 459 (A bill of rights "is but a paper check").

52. In general, the Constitution's defenders claimed that it embodied all the safeguards required, as revealed by the insights gained during the confederation-era experience with single-house legislatures and the lack of effective division and checking of power. *See, e.g.*, Aristides, MARYLAND J. AND BALT. ADVERTISER, Mar. 4, 1788, at 4 (arguing against the necessity of a bill of rights based on "[t]he manner, in which Congress is appointed; the terms upon which it's members are elected; the mutual checks between the branches; the check arising from the president's privilege; the sure pledge we enjoy in the proper interests of the members . . ."); THE FEDERALIST NO. 49 (James Madison), *supra* note 51, at 333, 338 (Whereas states failed to effectively separate powers because they relied on "mere demarcation on parchment," framers saw the tendency of the legislature to absorb all power and the need to connect and "blend" powers to actually achieve the separation "essential to a free government."). *See generally* LEVY, *supra* note 45, at 150 (Framers saw "a libertarian character" in "the election of public officials, the representative system, the separation of powers among three branches of government, and the requirement that revenue and appropriation measures originate in the House of Representatives."); WOOD, *supra* note 27, at 547-62 (discussing checking power

established.⁵³ Indeed, many Federalists contended that paper declarations were inferior checks to the power of the people and the states to call the federal government into account⁵⁴ and, remarkably enough, even to the general spirit of virtue and vigilance of the people of the nation.⁵⁵

D. Republican Checks on Power as an Alternative to a Bill of Rights

It was thus common during the period leading to the adoption of the Constitution for its proponents to contend that bills of rights were designed to limit the otherwise unqualified power of rulers and did not really fit in a republican form of government.⁵⁶ The clear

and refining the American concept of bicameralism); Herbert J. Storing, *The Constitution and the Bill of Rights*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 15, 26 (Robert A. Goldwin & William A. Schambra eds., 1985) [hereinafter *SECURE RIGHTS?*] (Federalists argued that the Constitution is a bill of rights because "it provided for a sound system of representation, and that it granted limited powers to a balanced government."); Walter Berns, *The Constitution as Bill of Rights*, in *id.*, at 50, 60 (Federalists believed that the most effective way to secure rights was through "a regular distribution of power into distinct departments, a system of legislative balances and checks, an independent judiciary, a system of representation, and an enlargement of the orbit 'within which such systems are to revolve.'").

53. See, e.g., *THE FEDERALIST* NOS. 10 & 51 (James Madison), reprinted in *THE FEDERALIST PAPERS*, *supra* note 15. For useful commentary on the framers' views of the contribution of a stronger union to obtaining real security of rights in exchange for somewhat diminished state autonomy, see Peter S. Onuf, *Anarchy and the Crisis of the Union*, in *TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION* 272, 294-99 (Herman Belz et. al. eds., 1992).

54. As to the power of the people, see, for example, *A Countryman II*, *supra* note 51, at 473 (The crucial question is the "control" the people have over their legislature.); Statement of Edmund Pendleton at the Virginia Ratifying Convention (June 12, 1788), in 3 *ELLIOT'S DEBATES*, *supra* note 29, at 298 ("[S]pirit of liberty, in future elections" is "far superior to paper bills of rights."). The Federalist emphasis on declarations of rights presenting only a "paper barrier" reflected their colonial experience; even though fundamental law was "the major refuge of the colonists during the Revolutionary struggle," it remained "a weak ally at best until a new polity was set up in which government was limited by an express fundamental law enforced by the courts." Schwartz, *supra* note 25, at 441.

55. E.g., *Uncus*, *supra* note 51, at 78 ("[T]he sense of the people at large" is the most effective check on government power.); *THE FEDERALIST* NO. 84 (Alexander Hamilton), *supra* note 43, at 438 (Security of a free press "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.").

56. MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 17-18. This contention, of course, is not only ahistorical given that bills of rights reflect American institutional experience as much as they do this revisionist reading of British constitutional theory, but it also evades the reality that the federal Constitution itself was designed in various ways to limit the immediate power of the people to control the course of governmental decision-making. Even so, this view had been

implication for those making such arguments, and they included the likes of James Wilson and Alexander Hamilton, was that since structural, and ultimately even the mere political check of democracy, are in general of greater efficacy than specific constitutional limitations, there is simply no need to include the empty gesture of specific constitutional provisions in the fundamental charter.⁵⁷ So long as American political life proceeded in recognition of the inherent right of the people's sovereign power to constitute (and to reform and alter) their government, and was established to be subject (at least ultimately) to popular control, specific limitations were superfluous at best.

The negative implication of such arguments, moreover, seems to be that perceived limits on legitimate government action rooted in natural law and customary expectations were not generally understood to constitute implied constitutional and legal limitations. The choice is between ineffectual "paper barriers" or meaningful political checks on arbitrary power. Otherwise, Federalists would have argued that the written limitations were superfluous for the quite different reason that they would be redundant of the legal limitations on granted powers that were implicit in the social contract.⁵⁸

At the very least, these arguments help explain the willingness of the Federalists to defend the Constitution as itself a bill of rights based on its limited powers scheme and (perhaps even more centrally) the political checks it offered to the exercise of power.⁵⁹ If

expressed prior to the ratification debate and reflected the common assumption of the revolutionary era that the problem of freedom was answered with democratic government.

57. See Statements by James Wilson at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 *THE RATIFICATION OF THE CONSTITUTION*, *supra* note 13, at 388; *THE FEDERALIST* NO. 84 (Alexander Hamilton), *supra* note 43. See generally MCAFEE, *INHERENT RIGHTS*, *supra* note 2, at 94-96.

58. This conclusion seems warranted because the language employed in these arguments reflects the tendency to equate constitutional limitations with those placed in constitutional text—a tendency which had been around at least since the debate over inclusion of a prohibition on bills of attainder in the Virginia declaration of rights. See MCAFEE, *INHERENT RIGHTS*, *supra* note 2, at 18 (noting that Patrick Henry successfully opposed inclusion of a ban on legislative criminal trials in the state's 1776 Declaration of Rights). Indeed, the Federalist argument appears to be that the omission of a limiting provision that effectively grants discretion to the legislature actually changes things very little, given the inefficacy of such limiting provisions. Alternatively, to the extent that these arguments are reconcilable with a jurisprudential view that sees the rights in question as in some sense part of fundamental law, they nevertheless reflect the view that the rights are not meaningfully secured by being placed in a text inasmuch as they are not protected by reliance on traditional legal remedies. It thus hardly mattered whether they were confirmed and clarified in the written Constitution so as to be unequivocally established as part of the supreme law of the land.

59. For citations to Federalists describing the limited powers scheme as a bill of rights, see McAfee, *Original Meaning*, *supra* note 2, at 1246 n.123. As to the view that the Constitution as a whole should be seen as a bill of rights, see

written declarations of rights are basically worthless as checks on republican government, it becomes more plausible to rely on debatable assumptions about how the system of powers will be understood, as supplemented by the political checks inherent in the extended republic and the system of balanced government. While for the Antifederalists, it was a frightening prospect that the enumerated powers scheme should be "the only security that we are to have for our natural rights,"⁶⁰ with the alarming implication that "[t]here is no check but the people,"⁶¹ the Federalists began their analysis with the assumption that structural and political checks were the only ones that counted in any event.⁶²

This skepticism about the value of bills of rights, of course, reflected the experiences of the Federalists under the state constitutions.⁶³ In giving the argument against "parchment barriers" its most eloquent expression in an oft-cited letter to Jefferson, dated October 17, 1788, Madison argued:

[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.⁶⁴

THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 43, at 438 ("[T]he constitution is itself in every rational sense, and to every useful purpose A BILL OF RIGHTS."); Letter from Landholder VI, *supra* note 43, at 489 (The people's constitution is "to the legislator and magistrate, what originally a bill of rights was to the people.").

60. A Democratic Federalist, PENN. HERALD, Oct. 17, 1787, *reprinted in* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 193.

61. Statement by John Smilie at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *reprinted in id.* at 386.

62. See, e.g., A Countryman II, *supra* note 51, at 472 ("[O]nly real security that you can have for all your important rights must be in the nature of your government;" securing rights must be in the interest of the rulers.); Uncus, *supra* note 51, at 78 (insisting that liberty of the press is a natural right "too sacred to require being mentioned" and inclusion of which "should disgrace the legislature of the United States;" security for the right will rest in the sense of the people at large). Indeed, the Federalist skepticism as to the efficacy of declarations of specific limitations on government cuts sharply against the view that their argument from limited powers rested on an assumption of enforceable implied limitations and that the concept of implied limitations on granted powers was the background assumption that illuminates their argument that inclusion of a bill of rights would endanger rights omitted from an enumeration of rights.

63. Federalists would generally have agreed that "the lack of safeguards against the abuse of legislative power is the single most striking characteristic of the early state constitutions." MCAFFEE, INHERENT RIGHTS, *supra* note 2, at 26; see also *id.* at 46-48.

64. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 1 SCHWARTZ, *supra* note 22, at 614, 616.

Writing a year after the Convention and several months after the Virginia Ratifying Convention, Madison believed that the experiences of the states demonstrated that bills of rights could not effectively counter the power of popular majorities.⁶⁵ After all, the threat to rights came from the sovereign people themselves, who (unlike a monarch) could hardly be "controuled by the dread of an appeal to any other force within the community."⁶⁶ It is thus apparent that Madison had not by this time come to perceive a bill of rights as a tool that could be effectively utilized by courts to prevent encroachments on the rights of the people.

What is not quite clear is the precise reason (or reasons) for Madison's diffidence about the possibility of meaningful judicial review to protect the rights found in a bill of rights. While judicial review was hardly inevitable going into the Convention, its inclusion appears to have been the cost for avoiding a national veto of state laws, and the participants in the ratification debate appear to have largely agreed that the Constitution provided for judicial review.⁶⁷ Moreover, the invocation of judicial review was becoming more common in the years preceding the drafting of the Constitution.⁶⁸

In addition, the evidence does not, on the whole, suggest that Madison opposed the idea of judicial review or thought it to be entirely without value.⁶⁹ Two considerations (perhaps interrelated) seem to explain his skepticism. First, it appears that Madison believed that judges simply would not have the spine, or the political clout, to oppose legislatures backed by popular majorities on behalf of rights set forth in a bill of rights. Second, he may have, at this point, simply conceived of bills of rights as in their nature statements of limiting principles rather than as legally enforceable commands and prohibitions. Presuming that most adverse legislation would reflect the voice of a majority faction, Madison apparently believed that without the voice of the people demanding compliance with the Constitution, paper declarations of the sort in a bill of rights would be bound to be ignored.

Both ideas receive some support in Madison's letter to Jefferson expressing skepticism about the value of bills of rights in a republican government. Madison clearly points the finger at "overbearing majorities" and observes the importance of determining where the

65. *Id.* According to Madison, "[w]herever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party [of the majority] than by a powerful and interested prince." *Id.* Notice that Madison's argument runs against the grain of the contention of some Federalists that bills of rights are not essential *because* the Constitution establishes republican government.

66. *Id.*

67. See MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 49-50, 122.

68. See, e.g., *id.* at 51-66.

69. See, e.g., Letter from James Madison to Thomas Jefferson, *supra* note 64, at 616.

"real power in a Government lies."⁷⁰ His argument seems to be rooted in political realism and an awareness that concern for preserving liberty requires a confrontation with the realities of power if it is to be more than an abstract exercise in a political or moral theory of rights.⁷¹ So Madison almost certainly believed that courts would be unable to stand up to the political power of majorities.

In addition, though, Madison's language suggests that he did not even conceive bills of rights as establishing enforceable legal limitations. In describing the role that bills of rights might constructively play in a republic, Madison states: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulse of interest and passion."⁷² Madison's statement that bills of rights articulate "political truths" that might acquire the status of "fundamental maxims" in the sentiment of the people hardly sounds like a description of legal rules in any ordinary sense.

It might be suggested that Madison did not see bills of rights provisions as meaningfully enforceable legal rules *because* he viewed courts as lacking the means to resist majoritarian will. No doubt his view of the nature of the rights would be shaped by his realistic conception of the judicial power (and will). But it could also be that the prevalent practices in drafting bills of rights, rooted in part in limited conceptions of the judicial role, had also shaped Madison's assumption that, despite a potential educative role, provisions in a bill of rights were not legally enforceable limitations, but an attempt to commit government by the mere restatement of first principles. As we have seen, the language of the declarations of rights typically was not the language of command and prohibition, but the language of principle and obligation.⁷³

This limited sort of view of provisions in a bill of rights was in fact relied upon by Federalists to bolster the parchment barriers argument. Some Federalists thus contended that legislative discretion would remain unaffected whether or not there was a declaration of the first principles of the social contract as would be contained in a bill of rights; declarations of rights were not legally binding in a strict sense. Thus, in defending the omission of a provision against standing armies, Hamilton contended that state provisions declaring that they "ought not to be kept up" were "in truth rather a cau-

70. *Id.* This explanation is reinforced by Madison's argument that mere paper declarations were also insufficient to secure the necessary separation of powers absent a reinforcing structural design. See, e.g., THE FEDERALIST NO. 38 (James Madison), reprinted in THE FEDERALIST PAPERS, *supra* note 15, at 239-49.

71. Letter from James Madison to Thomas Jefferson *supra* note 64, at 617.

72. *Id.*

73. See *supra* notes 23-26 and accompanying text.

tion than a *prohibition*.”⁷⁴ In defending the omission of a civil jury provision before the Virginia Ratifying Convention, John Marshall went even further:

Does our Constitution direct trials to be by jury? It is required in our Bill of Rights, which is not a part of the Constitution. . . . The Bill of Rights is merely recommendatory. Were it otherwise, the consequence would be, that many laws which are found convenient, would be unconstitutional. What does the Government before you say? Does it exclude the Legislature from giving a trial by jury in civil cases? If it does not forbid its exclusion, it is on the same footing on which your State Government stands now.⁷⁵

While these Federalist arguments occasionally seem overstated, they raise the question as to the extent to which there was a correlation between the tendency to talk of unwritten rights in fundamental law terms and the tendency to see fundamental law as something apart from ordinary law that might be enforced in court. For example, Aristides, a Maryland Federalist, seemed to suggest that even without a bill of rights there were unwritten rights that the national government could not violate.⁷⁶ Strikingly, Aristides at another point also relied on the argument “that the constitution of Maryland was indeed binding; but the declaration of rights was only

74. THE FEDERALIST NO. 24 (Alexander Hamilton), reprinted in THE FEDERALIST PAPERS, *supra* note 15, at 117 n.1.

75. Statement by John Marshall at the Virginia Ratifying Convention, 10 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 1438. For similar arguments by other Federalists, see THE FEDERALIST NO. 26 (Alexander Hamilton), reprinted in THE FEDERALIST PAPERS, *supra* note 15, at 128 (State provisions against standing armies reflected “a conflict between jealousy and conviction,” and would be interpreted by the legislature as a “mere admonition.”); Statement by Edmund Randolph at the Virginia Ratifying Convention (June 24, 1788), in 3 ELLIOT’S DEBATES, *supra* note 29, at 600 (contending that state guarantees, as well as proposed amendments, stating that “standing armies should be avoided in time of peace . . . does not absolutely prohibit them,” but leaves it to legislative discretion; Congress should have discretion over this decision); *id.* at 191 (June 9, 1788) (Randolph contended that the Virginia bill of rights “is no part of [Virginia’s] Constitution” and creates confusion “[b]y not saying whether it is paramount to the Constitution or not.”). For a different view, compare VIRGINIA DECLARATION OF RIGHTS, § 11 (1776), reprinted in 7 STATE CONSTITUTIONS, *supra* note 26, at 3814 (providing that “in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred”) (emphasis added), with Statement by Patrick Henry at the Virginia Ratifying Convention (June 23, 1788), in 3 ELLIOT’S DEBATES, *supra* note 29, at 578 (“Is not the ancient trial by jury preserved in the Virginia bill of rights? and is that the case in the new plan?”).

76. See MCAFFEE, INHERENT RIGHTS, *supra* note 2, at 130-31 (quoting Aristides, MARYLAND J. AND BALT. ADVERTISER, Mar. 4, 1788) (noting that Aristides (Alexander Contee Hanson) asserted that “Congress cannot legally violate the natural rights of an individual,” but offering alternative readings of his statement).

declaratory."⁷⁷ The characterization of rights as being "declaratory" might suggest only that the rights referenced are inherent or inalienable, but when this characterization of the declaration of rights is placed in such sharp contrast to the notion of a "binding" constitution, it suggests doubt, at least, as to whether declaratory provisions stand on a lesser footing in the ordinary legal system.⁷⁸

It might be observed that to the extent that some of these arguments suggest that the state bills of rights lacked constitutional status, they seem rather clearly to cut against the Federalist claim that bill of rights provisions presented a real danger in that they would create "exceptions" to (nonexistent) powers that might thereby be implied. On the other hand, even if the most extreme of such arguments are properly taken as questionable debating points, they point out that Federalists viewed rights provisions skeptically and were more concerned about the prospect of reversing the fundamental postulate of enumerated powers than of failing to establish additional limitations.

It could also be argued that this same political realism about rights provisions might also have prompted some Federalists to emphasize structural themes to the exclusion of issues about the sources for rights under fundamental law. If so, views that customary or natural rights would hold the same status as any in a formal document might have been repressed precisely because both written and unwritten fundamental rights were seen as less than central. But even if this sort of explanation has some potential merit, it would not necessarily tell us how such individuals would see the status of unwritten rights as provisions in bills of rights shifted from declarations of general principles to enforceable legal provisions and as fundamental law was increasingly identified with the written constitution and the principles embodied therein.

Even if some of these arguments were mainly window dressing for an underlying view based on political realism, they underscore that Madison and other Federalists did not oppose a bill of rights because they presumed that courts would enforce implied limitations. In fact, many of them held doubts whether courts would (and perhaps even should) enforce specific written limitations framed in the traditional fashion. Rather, for them the most effective answer to the problem of securing liberty was not to attempt to spell out the specifics of what was already a generally accepted (if somewhat imprecise) commitment, but actually to prevent oppressive and arbitrary government through the structural checks built into the system of government proposed by the Constitution.

77. Aristides, *supra* note 52, at 4 (quoting an unnamed individual).

78. *But see id.* (Despite the above characterization, Aristides is also found describing such provisions as "reservations and exceptions."). Cf. Uncus, *supra* note 51, at 78 (referring to free press as natural right while acknowledging that the only check would be the people).

In short, the Federalists' political realism actually helps explain why otherwise brilliant theorists offered a generally unsatisfying enumerated powers response to Antifederalist claims that the Constitution created powers that could be abused. The Constitution's theory of granted powers was undergirded by the system's real checks on government and was thus seen as (in reality) secondary in any event.

E. Madison's Contribution of an Enforceable Bill of Rights

As we have noted, one source of Federalist skepticism about the utility of a bill of rights was precisely that the provisions contained in the state constitutions were not drafted as legal limitations on political power. This form of skepticism was perhaps reflected in James Madison's affirming the advantages of a bill of rights in a letter to Thomas Jefferson without referring to its value as a legal limit on the powers of government.⁷⁹ In response, Jefferson referred to a purpose "which has great weight with me, the legal check which it puts into the hands of the judiciary."⁸⁰ Most who have examined the matter closely find it no coincidence, then, that when Madison presented the amendments he had drafted to Congress, he contended that courts could be the key to making them effective "[i]f they are incorporated into the constitution."⁸¹ Modern scholars have agreed that one of Madison's most significant contributions was to draft his proposed amendments in the hard language of legal command, reflecting his growing awareness of a bill of rights as a source of meaningful legal limits on government power.⁸² It is noteworthy, however, that Madison reserved for insertion into a proposed new preamble of the Constitution some of the "softer" language that had characterized the state declarations of rights: "That government is

79. See *supra* notes 64-73 and accompanying text; Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CINC. L. REV. 107, 168 (1992) (noting that a March 1789 letter from Jefferson to Madison "responded to reflections of Madison on the uses of a Bill of Rights that omitted mention of a purpose" which Jefferson had found persuasive—the legal check it gives the judiciary).

80. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 1 SCHWARTZ, *supra* note 22, at 620.

81. 1 ANNALS OF CONG. at col. 457 (Joseph Gales ed., 1789).

82. See, e.g., 1 SCHWARTZ, *supra* note 22, at 593 (attributing Madison's emphasis on the judicial check created by a bill of rights to his correspondence with Jefferson); Bernard Schwartz, *Madison Introduces His Amendments, May-June 1789*, in 2 SCHWARTZ, *supra* note 22, at 1009 (referring to Madison's acknowledgment that courts would enforce the limits stated in a bill of rights); Schwoerer, *supra* note 32, at 37 (concluding that Jefferson's argument "apparently found favor with Madison," who "used it in support of a bill of rights," reasoning that judges "will consider themselves in a peculiar manner the guardians of those rights"); David N. Mayer, "Parchment Barriers?" The Jefferson-Madison Dialogue and English Real Whig Influences on the American Bill of Rights (unpublished paper, on file with the author).

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."⁸³

This language approximated what had appeared in the 1776 Virginia Declaration of Rights as Section 1.⁸⁴ Madison managed to summarize the gist of what was known as a natural and inalienable rights provision without referring to these interests with these terms. In doing this, Madison followed the lead of the New York state ratifying convention, which had proposed an amendment that referred to the same specified rights as "essential rights which every Government ought to respect and preserve."⁸⁵

There are at least two reasons that would explain Madison's omission of the language referring to "inherent" rights and his decision to propose including the amendment in softer language and in a preamble. Herbert Storing once suggested that Madison was attempting to move "in the direction of supporting government," as he begins with society as a starting point and refers to government being for the "benefit of the people" rather than referring to "inherent rights of which man cannot be divested."⁸⁶ The somewhat more sinister conclusion is that "[t]he Founders deliberately omitted the Declaration's doctrine of equal rights from the Bill of Rights, not because that doctrine was considered mere rhetoric, but because its inclusion in the Constitution would have been dangerous to the continued existence of slavery."⁸⁷ The truth may lie somewhere in the middle. It seems reasonably clear that the cautiousness that characterized the federal Bill of Rights reflected in part federalism con-

83. Madison Resolution (June 8, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

84. The Virginia provision 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.

VIRGINIA DECLARATION OF RIGHTS, § 1, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 26, at 3813.

85. NEW YORK PROPOSED AMENDMENTS (1788), *reprinted in* 2 SCHWARTZ, *supra* note 22, at 911.

86. Storing, *supra* note 52, at 15, 33 n.50; *see also* Kenneth R. Bowling, *Overshadowed by States' Rights: Ratification of the Federal Bill of Rights*, in GOVERNMENT PROSCRIBED, *supra* note 16, at 77, 81-82 (referring to the rejection of "Madison's majestic natural law preamble" that effectively "guaranteed the right of revolution").

87. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 362-63 (1993).

cerns that went beyond protecting the institution of slavery.⁸⁸ Moreover, 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 appropriate lip service to basic principle.”⁸⁹ In any event, the proposed language was never adopted as part of the Bill of Rights, and a committee that Madison served on did not recommend such a provision for the consideration of the whole House.⁹⁰

The central point to derive from these events, however, is that when concepts were deemed not to lend themselves to legal enforcement, Madison chose to convey the idea both by placement in a preamble and by wording that conveyed the idea of obligation rather than command. Moreover, even though prior provisions, such as Virginia’s statement that “all men” have “certain inherent rights,” were taken as statements of widely accepted principles rather than as enforceable limitations on government power,⁹¹ Madison steered away from language that could be construed as stating open-ended limits on government power. The only exception to this general rule is the language of the Ninth Amendment—a provision that Madison clearly (and, he undoubtedly thought, clearly) linked to the power of the people (as popular sovereign) to reserve rights and powers to both the people and the states.

III. THE OTHER RIGHTS “RETAINED” BY STATE CONSTITUTIONS

In an important, recent book-length treatment of the federal Bill of Rights, Professor Amar observed that “the federalism roots of the Ninth Amendment, and its links to the unique enumerated-power 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.”⁹² What Professor Amar did not underscore in this account is that a number of state constitutions adopted in the nineteenth century prohibited constru-

88. For useful comments on related questions, see McAfee, *Federal Constitution*, *supra* note 1, at 153-550.

89. *Id.*

90. See HOUSE OF REPRESENTATIVES JOURNAL (Aug. 1789), reprinted in 2 SCHWARTZ, *supra* note 22, at 1122-23 (amendments reported by Select Committee to entire House). For a general treatment of these events, and their bearing on the original meaning of the Ninth Amendment, see McAfee, *Social Contract Theory*, *supra* note 5, at 299-305.

91. See McAfee, *Federal Constitution*, *supra* note 84; Schwartz, *supra* note 25, at 423 (referring to French Declaration of Rights as stating concepts in a manner “so general that it can scarcely form the basis of any action to challenge governmental restrictions upon liberty”); Schworer, *supra* note 82, at 19 (observing that even the preamble of the English bill of rights declares “that the ‘rights and liberties asserted . . . are the . . . indubitable rights and liberties of the people of this kingdom’”).

92. AMAR, *supra* note 18, at 124.

ing their constitutions and bills of rights so as to "deny or disparage" other rights "retained" by the people.⁹³ To perceive accurately the role of so-called "unenumerated" rights in the Constitution today, it becomes important to examine the claims that have been made about the significance of these mini-Ninth Amendments—both to support interpretations of the original Ninth Amendment and to understand the Privileges or Immunities Clause of the Fourteenth Amendment.

A. *The Bearing of State "Unenumerated" Rights Provisions on the Original Meaning of the Ninth Amendment*

Akhil Amar was not the first to note that constitutions adopted near the same time as our federal Constitution did not include language of analogous import as the Ninth Amendment. Early on, Alfred Kelly noted that "if the Ninth Amendment were concerned primarily with safeguarding individual liberties, one might expect to find similar provisions in some of the bills of rights of contemporary state constitutions; but the Ninth Amendment is unique."⁹⁴ John Hart Ely responds that, although the point is "technically accurate," it misses that nineteenth century state constitutions frequently included provisions that prohibited disparaging other rights retained by the people.⁹⁵ Ely, moreover, expresses great confidence that these provisions "were inspired by the Ninth Amendment," and he contrasts this with the fact that "for reasons that are entirely obvious," constitutional framers did not "copy or paraphrase Article I, Section 8 or other provisions of the federal Constitution that related to the bounds of federal power."⁹⁶ For Ely the conclusion is clear:

93. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 203 n.87 (1980) (observing that "one discovers that no fewer than twenty-six of them [the state constitutions] contained provisions indicating that the enumeration of certain rights was not to be taken to disparage others retained by the people").

94. *Id.* (quoting PAUL BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 708 (1975)).

95. *See supra* note 93.

96. ELY, *supra* note 93, at 203 n.87. Ely does not indicate, however, that the Ninth Amendment, unlike Article I, Section 8, is found within the federal Bill of Rights, and it became a standard Nineteenth Century practice to copy provisions from the federal Bill of Rights into state constitutions. *See infra* note 116 and accompanying text. As Ely also observes, though, several of these state constitutions "were quite clear about distinguishing this caveat," apparently referring to "unenumerated" rights, from those stating "that unenumerated powers are not to be inferred." *Id.*; *see, e.g.*, KANSAS CONST. OF 1855 art. I, § 22, *reprinted in* 2 *STATE CONSTITUTIONS*, *supra* note 26, at 1181 (providing that "all powers not herein delegated shall remain with the people"). If Ely and others wonder why a state constitution establishing a legislature with general powers would include an "unenumerated" rights provision, they might also ponder why such a constitution would include a prohibition on "undelegated" powers. It is, after all, a matter of standard understanding that "the federal Constitution is a grant of power, while the state Constitution is only a limitation of power." Al-

The fact that constitution-makers in, say, Maine and Alabama in 1819 saw fit to include in their bills of rights provisions that were essentially identical to the Ninth Amendment is virtually conclusive evidence that they understood it to mean what it said and not simply to relate to the limits of federal power.⁹⁷

At the least, however, there is a mystery here worthy of exploration in greater depth. If those who brought us the federal Bill of Rights were concerned that there was, in general, a danger in setting forth the people's rights, inasmuch as it might be inferred that the rights positively set forth exhausted those rights, and would have the effect of disparaging unnamed rights, we would expect a similar hesitancy about bills of rights in other cases. Logically, we would expect such concerns to have motivated a desire for analogous security as the Ninth Amendment in other settings in which the people set forth their rights in a bill of rights. From this perspective, it seems barely relevant that "there weren't many state bills of rights of any sort—or for that matter many states—back then."⁹⁸ States adopted constitutions on numerous occasions during the more than thirty years between adoption of the federal Bill of Rights and Alabama's adoption in 1819 of a "little Ninth Amendment."⁹⁹

ford v. State, 54 So. 213, 222 (Ala. 1910). What does this mean if it is not that states are governments of "unenumerated" (or "undelegated") powers? Cf. AMAR, *supra* note 18, at 280 (observing that none of the states that adopted counterparts to the Ninth Amendment had "adopted baby Tenth Amendments"); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1013 (1993) (observing that "none of the states that had baby Ninths included separate Tenth Amendment analogues"). Professors Amar and Yoo apparently see it as significant that state constitutions included Ninth Amendment counterparts, but not Tenth Amendment counterparts, suggesting that they may be inclined to accept the argument that the traditional reading of the Ninth Amendment makes it utterly redundant of the Tenth, but to reject the idea that the Tenth Amendment itself is a source of fundamental rights. See MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 23-27, 85-88, 170-72. But notice that Amar relies on Chief Justice Joseph Henry Lumpkin as illustrating the position he describes as *Barron* "contrarian" because it rejected the Supreme Court holding that the federal Bill of Rights does not limit the states—the view that he sees as linked to the coming forth of the Fourteenth Amendment and as lending strong support to an incorporation theory. AMAR, *supra* note 18, at 152. But Lumpkin was equally emphatic that the Tenth Amendment implied that "the people" had certain rights in contradistinction to the "states." *Id.*

97. Ely, *supra* note 93, at 203 n. 87; see also Suzanna Sherry, *Natural Law in the States*, 61 CINC. L. REV. 171, 182 (1992) (concluding that "[b]ecause both the state constitutions and the federal constitution contain such language strongly suggests that the language was put in to safeguard unwritten inalienable rights").

98. ELY, *supra* note 93, at 203 n.87.

99. *Id.*; see ALA. CONST. art. I, § 30, reprinted in 1 STATE CONSTITUTIONS, *supra* note 26, at 98-99.

During the decade following the adoption of the federal Constitution, the states had the opportunity to revise their constitutions and model them on the federal charter. Yet although six states adopted seven new state constitutions and other states amended their constitutions,

It is clear, for example, that Theophilus Parsons was an opponent of the constitution proposed for Massachusetts in 1778 in part because it did not include what the people were entitled to—a bill of rights.¹⁰⁰ On the other hand, Mr. Parsons spoke at the Massachusetts ratifying convention in favor of the proposed Constitution and, according to the convention's reporter, "demonstrated the impracticability of forming a bill, *in a national constitution*, for securing individual rights, and showed the inutility of the measure, from the ideas, that no power was given to Congress to infringe on any one of the natural rights of the people."¹⁰¹ If Parsons' argument was not based on the federal Constitution's unique enumerated powers scheme, but referenced implied rights that would limit government regardless of the grant of powers, provided there was no bill of rights, one would expect him to return to Massachusetts with a demand that its bill of rights should be amended to include a guarantee of rights not enumerated in the Bill of Rights.¹⁰²

Similarly, we have no record showing that James Madison, James Wilson, James Iredell, or any other of the leading figures who defended the proposed Constitution were opponents of including a bill of rights in the constitutions of their states, or expressed a general reservation about reducing appropriate limits on government to written form. Considering that Americans during the Founding era tended to distinguish American constitutionalism from its English counterpart based on the American inclination to put in writing "basically immutable limitations on government power,"¹⁰³ it would be

what is striking is how limited the impact the federal Constitution had on the structure of state governments during this period.

TARR, *supra* note 23, at 88.

100. See Theophilus Parsons, *The Essex Result*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 480, 507 (Charles S. Hyne-man & Donald S. Lutz eds., 1983).

101. Statements by Theophilus Parsons at the Massachusetts Ratifying Convention (Feb. 5, 1788), in 2 ELLIOT'S DEBATES, *supra* note 29, at 161-62 (emphasis added); see also Statements by James Wilson at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 391 (arguing 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") (emphasis added); Statements by James Iredell at the North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, *supra* note 29, at 149 (arguing that although a bill of rights would be "necessary" as to a government in which "the powers of legislation are general," where the powers are "of a particular nature, and expressly defined, as in the case of the Constitution before us," a bill of rights is "unnecessary" as well as "absurd and dangerous") (emphasis added).

102. Of course, some have insisted on reading Parsons' statement as a reference to inherent, unwritten limits on federal powers, but for an alternative construction and explanation of Parsons' (and other Federalists') defense of the Constitution's omission of a bill of rights, see McAfee, *Original Meaning*, *supra* note 2, at 1270 n.216.

103. MCAFFEE, INHERENT RIGHTS, *supra* note 2, at 16. In particular, Madi-

surprising if they had. Professor Ely does not emphasize it, but it was more than thirty years before the state of Alabama included a mini-Ninth Amendment in its state constitution, and it was more than eighty years before any of the thirteen original states adopted such a provision.¹⁰⁴ But if the ratification-era debate over the proposed federal Constitution brought home a new concern about putting rights in writing, we would expect the impact of that debate to be relatively immediate as well as far-reaching, rather than delayed and spotty—at best.

For some, the state constitutional equivalents of the Ninth Amendment become evidence that the debate leading to the Ninth Amendment did not turn on the distinction between governments of general legislative powers versus governments of enumerated powers. If such a distinction drove the debate leading to the Ninth Amendment, according to Professor Sherry, “we would not expect to find the equivalent of the Ninth Amendment in state constitutions because it would serve no purpose.”¹⁰⁵ The traditional reading of the Ninth Amendment, on this view, is clearly wrong because “there is no reason to incorporate language protecting ‘reserved’ rights in the constitution of a general government, such as a state government.”¹⁰⁶ One might hope for more explanation.¹⁰⁷ It was James Wilson who justified the convention’s decision to omit a bill of rights by explaining that the people in the states had “invested their representatives with every right and authority which they did not in explicit terms reserve,” while national power “is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union.”¹⁰⁸ And it was Nathaniel Gorham who explained that “a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers.”¹⁰⁹ By contrast, the national government did not involve a legislature with “unlimited powers,” and the people could count on the

son distinguished between “a constitution established by the people, and unalterable by the government” and a mere “law established by the government,” under which Parliament was ultimately “uncontrollable.” *THE FEDERALIST* NO. 53 (James Madison), reprinted in *THE FEDERALIST PAPERS*, *supra* note 15, at 359, 360-61, quoted in MCAFEE, *INHERENT RIGHTS*, *supra* note 2, at 32 n.43.

104. In 1868, North Carolina adopted a mini-Ninth Amendment. ELY, *supra* note 93, at 203 n.87.

105. Sherry, *supra* note 97, at 181.

106. *Id.* at 181-82; see also Yoo, *supra* note 96, at 968 (concluding that “[t]he presence of these provisions in state constitutions undermines the reading of the Ninth Amendment as a rule of construction”).

107. The centrality of the distinction between governments of general powers and governments of enumerated powers for understanding the debate leading to adoption of the Ninth Amendment is well documented. See *supra* notes 14-41 and accompanying text; MCAFEE, *INHERENT RIGHTS*, *supra* note 2, at 17-18, 33 n.49, 37 n.82, 84-85, 89-90, 128-31, 133-34, 137-40, 144-45, 155 n.66.

108. 2 *RATIFICATION OF THE CONSTITUTION*, *supra* note 13, at 167.

109. Statement by Nathaniel Gorham (Sept. 17, 1787), in 1 *RATIFICATION OF THE CONSTITUTION*, *supra* note 13, at 335.

"unlimited powers," and the people could count on the protection of their rights assured by enumerated powers. These arguments that draw the distinction between governments of general legislative powers and governments of enumerated powers are those that lead directly to the Ninth Amendment.

This standard distinction between the state and federal constitutions, and the difference it makes in understanding the people's rights, is recognized even today.¹¹⁰ The first state to adopt a mini-Ninth Amendment, Alabama, said expressly in the same constitution "that everything in the article [setting forth the Declaration of Rights] is excepted out of the general powers of government."¹¹¹ And Alabama's Supreme Court has concluded that "the federal Constitution is a grant of power, while the state Constitution is only a limitation of power."¹¹² Even more directly on point, that court has specifically stated that the constitution's mini-Ninth Amendment refers only to "rights enumerated in the preceding . . . sections of the Constitution constituting the bill of rights . . ."¹¹³ Another of the Su-

110. It is almost a matter of hornbook law to recognize that "[s]tate governments are considered to be governments of plenary power." Louis Karl Bonham, Note, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321, 1333 (1985). Indeed, this law student sounds almost like Professor Sherry in asserting that these provisions "seem out of place in the constitutions of state governments, whose power scholars generally consider to be plenary." *Id.* at 1325.

111. ALA. CONST., art. I, § 30 (1819), reprinted in 1 STATE CONSTITUTIONS, *supra* note 26, at 96, 98.

112. *Alford v. State*, 54 So. 213, 222; *see also State v. Kennedy*, 587 P.2d 844, 850 (Kan. 1978) (concluding that "[w]here the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby"), quoted in TARR, *supra* note 23, at 7. Thus, the ratification-era debate over the omission of a bill of rights centered on whether the federal Constitution adequately defined, and limited, the powers; *see, e.g., McAfee, Original Meaning, supra* note 2, at 1230-32, 1246-47, 1232 n.62 (citing statements by Washington, Madison, Hamilton, and James Iredell). Thus, James Wilson said:

when general legislative powers are given [as in the states], then the people part with their authority, and on the gentleman's 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.

Statements by James Wilson at the Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 470; *see also* Statements by Henry Lee at the Virginia Ratifying Convention (June 9, 1788), in 3 ELLIOT'S DEBATES, *supra* note 29, at 186 (Whereas "under the state governments, the people reserved to themselves certain enumerated rights" and "the rest were vested in their rulers," under the federal Constitution, "the rulers of the people were vested with certain defined powers.").

113. *Johnson v. Robinson*, 192 So. 412, 416 (Ala. 1939); *see also id.* at 415 (finding that the "Legislature . . . is plenary and unrestricted except by specific limitations in the Constitution"). It appears that the courts' holdings in *Johnson* and *Alford* remain good law today. *But see In the Matter of J.L. Dorsey*, 7 Port. 293 (1838) (accepting argument that Alabama government was one of

preme Courts in a state that has adopted a mini-Ninth Amendment, Maine, has stated that “the legislative power is plenary except as it may have been circumscribed expressly or inferentially by the constitution of the state or nation.”¹¹⁴

If scholars had taken a closer look at the history of state constitutions, they would not have been surprised that they included provisions of doubtful worth as to which an argument could be made that they “serve no purpose.”¹¹⁵ There are at least two problems that have contributed to the situation. The first is that there has been a historical tendency to borrow, sometimes rather uncritically, provisions from earlier constitutions.

[I]n the typical constitution, the bill of rights was a copy-cat version of the bill of rights of some other state or some earlier constitution. The provisions were carried over without much thought or debate The federal Bill of Rights, of course, was the ultimate source of most state provisions (except for a few of the original states).¹¹⁶

The second problem is that the early state constitutions, from which a certain amount of this borrowing was done, were not drafted to create enforceable limits on government power.¹¹⁷ Indeed, the state constitution declarations of rights were stated as obliga-

“enumerated” powers and the legislature lacked power to implicitly prohibit dueling); Yoo, *supra* note 96, at 1016-18 (relying on *Dorsey* for baby Ninth Amendments as “powerful rights-bearing texts”).

114. *Ace Tire Co. v. Municipal Officers*, 302 A.2d 90, 96 (Me. 1973); *see also* *Baxter v. Waterville Sewerage Dist.*, 79 A.2d 585, 588 (Me. 1951) (concluding that the “people of the State of Maine” conferred upon the legislative department “the whole of their sovereign power of legislation, except in so far as they delegated some of this power to the Congress” and “imposed restrictions on themselves, by their own constitution”); TARR, *supra* note 23, at 7 (finding that “state governments have historically been understood to possess plenary legislative powers—that is, those residual legislative powers not ceded to the national government or prohibited to them by the federal Constitution”).

115. Sherry, *supra* note 97, at 181. I confess that the state constitutional equivalents of the Ninth Amendment might well have gotten my nomination for treatment in the already-classic *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

116. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 ALBANY L. REV. 265, 266 (1989); *see also* Gordon B. Baldwin, *Celebrating Wisconsin's Constitution 150 Years Later*, 1998 WIS. L. REV. 661, 673 (“New states did not adopt novel forms of government,” but borrowed from “state constitutions predating the federal, and those constitutions adopted by states under the mantle of the Northwest Ordinance” as well as other states.); G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 730 (“Constitutional borrowing in the United States is as old as the nation.”). For one thing, “states seeking congressional approval for their admission to the Union sought to avoid controversy by modeling their constitutions on those of existing states.” *Id.* at 731.

117. *See supra* notes 23-24 and accompanying text.

tions rather than as commands and prohibitions.¹¹⁸ As we have seen, part of the transition that Madison accomplished was to shift bill of rights guarantees in the federal Constitution to enforceable terms.¹¹⁹ It is true that Madison went to great lengths to ensure that "[t]he structure & stamina of the [government] are as little touched as possible," and that the proposed amendments would be limited to those "which are important in the eyes of many and can be objectionable in those of none."¹²⁰ But the declarations found in the early state constitutions were even more cautious about challenging legislative authority. It has been accurately observed by Leslie Goldstein that the state declarations set forth "moral admonitions" that were not treated as binding legal obligations.¹²¹ But Madison deliberately shifted away from declarations of rights as "a public elaboration, almost a celebration, of a people's fundamental values," that served mainly to remind legislators that "action contrary to these commitments should not be undertaken lightly."¹²²

As the practice of judicial review developed, however, judges in the various states confronted difficult decisions about how to treat constitutional provisions that were not designed for legal enforcement. A classic example was the nearly universal practice of including clauses recognizing "[t]hat all men are born equally free and independent, and have certain natural, inherent and inalienable

118. See *supra* notes 25-26 and accompanying text.

119. See MCAFFEE, *INHERENT RIGHTS*, *supra* note 2, at 65-66, 80-81, 120-21, 147-48. For insight into this process, and in particular the role played by Roger Sherman's insistence that the amendments be placed at the end of the document rather than "scattering them throughout the document as Madison wanted," see Lutz, *supra* note 25, at 70. See generally *id.* at 70-74; Schworer, *supra* note 32, at 40 (By attaching their bill of rights "rather than gathering rights in a separate document," the framers managed "to elevate the importance of rights and to protect them.").

120. Letter from James Madison to Edmund Randolph (June 15, 1789), in 11 *THE PAPERS OF JAMES MADISON* 219 (Charles F. Hobson & Robert A. Rutland eds., 1977). On the efforts by Madison and the Federalists to strike a balance between critical government energy and security for the rights of people, see Bowling, *supra* note 86, at 79-80 ("When the House considered the amendments in August, Antifederalists proposed several structural amendments, but Federalists defeated them one by one."); Paul Finkelman, *Between Scylla and Carbydis: Anarchy, Tyranny, and the Debate over a Bill of Rights*, in *GOVERNMENT PROSCRIBED*, *supra* note 16, at 103; McAfee, *Social Contract Theory*, *supra* note 5, at 290-95; 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, 832-34 (1997).

121. GOLDSTEIN, *supra* note 26, at 74; see also *THE FEDERALIST* NO. 84 (Alexander Hamilton), *supra* note 43, at 487 (Constitution's proceeding from "We the People" is more effective than "those aphorisms" in a bill of rights that "would sound much better in a treatise of ethics than in a constitution of government.").

122. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 32-33 (1980).

rights”¹²³ The question is whether such a provision states a general principle that is largely accepted by the people, but not intended to establish a legally enforceable limitation on the powers of government.¹²⁴ While there are variations according to the state involved, as well as the issue, it is fair to say that state courts have not treated such “inalienable rights” clauses as establishing an independent basis for recognizing an enforceable fundamental law right.¹²⁵ In general they have not been treated as creating enforceable limits on government power. As a general proposition, the mini-Ninth Amendments have received similar treatment; most states continue to treat their legislatures as holding general legislative powers and to enforce specific, enumerated limits on governmental authority.¹²⁶ In short, the state counterparts to the Ninth Amendment have not generally been viewed as stating enforceable limits on government power.

It is difficult to imagine them being treated in another way,

123. *E.g.*, PENN. CONST. OF 1776, DECLARATION OF RIGHTS § 1, reprinted in 5 STATE CONSTITUTIONS, *supra* note 26, at 3082; see *supra* note 84 (supplying text of 1776 Virginia “inherent rights” clause); see also *supra* notes 84-89 and accompanying text. Indeed, it is fair to say that this is the provision that inspired the title of the book I published: *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS’ UNDERSTANDING*, *supra* note 2 (emphasis added). I referred to them as “inherent” rights in part because modern readings of the Ninth Amendment are divided between those who rely exclusively on “natural rights” and those who find another basis (the English constitution, for example) for thinking that “unwritten rights” were thought to be protected. The related question is whether the founders saw these “inherent” rights as being legally enforceable.

124. When Professor Tarr refers to the state declarations’ inclusion of “general statements of political principle not susceptible to judicial enforcement,” he quotes from Virginia’s “inherent rights” provision to illustrate. TARR, *supra* note 23, at 76-77. Similarly, Professor Schwartz illustrates the point by referring to Article 8 of the French Declaration of Rights of Man and Citizen, which provides: “Every law which violates the inalienable rights of man is essentially unjust and tyrannical,” and further, “is not a law at all.” Schwartz, *supra* note 25, at 426. According to Professor Schwartz, such articles “state abstract principles that, however high-sounding, add nothing to the practical rights possessed by Frenchmen.” *Id.* at 425.

125. The historian, Forrest McDonald, observes, for example, that the declarations of rights “were, by and large, mere statements of principles . . . without substantive force in law.” McDonald, *supra* note 16, at 387, 388. “The only exception of consequence,” he observed, “was involved in the Quock Walker Case (1783), in which the Massachusetts Supreme Court ordered the freedom of a slave on the ground that the state constitution of 1780 declared that ‘all men are born free and equal.’” *Id.* at 388.

126. Such provisions are “drafted only in the hortatory terms of the general rights mankind ought to have.” Schwartz, *supra* note 25, at 426. But it is critical that the language do more than make an “abstract declaration of inviolability” that is too likely to have “no effect, deterrent or otherwise,” upon decisions made by government officials. *Id.* at 425. The American system has worked as effectively as it has precisely because we have “guaranteed specific rights in legally enforceable terms.” *Id.*

given our constitutional order's theory of popular sovereignty. A classic example of another approach is illustrated by the contention that the proposed constitutional amendment to permit the statutory prohibition of flag burning conflicts with the Constitution.¹²⁷ To burn a flag was to engage in free speech, and it was an inalienable natural right—one of the sorts of rights protected by the Ninth Amendment. Trying to reconcile this constitutional theory with a premise of popular sovereignty, the author contended that such an amendment “could have been enforced . . . if it had denied explicitly that speech is a natural right.”¹²⁸ On this view, the people hold constitutional authority to decide that flag burning is not the exercise of an inalienable natural right, but lack the authority to deny what they confess is an inalienable natural right.¹²⁹ But if the Ninth Amendment secures the right to burn a flag, because doing so is to exercise an inalienable natural right—and, indeed, if our Ninth Amendment theory is that some rights are “inalienable” and cannot be given up by their omission from constitutional text—one wonders why it should make any difference what “the people” think about whether flag-burning exercises a right or whether the right is “inalienable.”¹³⁰

The very concept of inalienable natural rights is one that limits, at least in moral and political theory, the power of the people.¹³¹ But the founders were just as clear that the power of sovereignty is unlimited as they were that there are inalienable rights.¹³² So we now face a fundamental question: we can treat the founders as speaking the sentiments of an unlimited sovereign people on the applicability of a particular right, or we can choose to view their powers as substantively limited by an “inalienable” right—but we can-

127. Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991).

128. *Id.* at 1074.

129. This supplies an example of what Professor Smith has described as “regulatory reason” that has slipped into “constitutional sophistry.” STEVEN D. SMITH, *THE CONSTITUTION & THE PRIDE OF REASON* 84-124 (1998). For a more preliminary treatment of the confusion this approach reflects and encourages, see McAfee, *Social Contract Theory*, *supra* note 5, at 281 n.40.

130. One might just as well treat an amendment permitting prohibition of flag-burning as involving an implicit rejection of the thesis that flag-burning is the exercise of the right of free speech—or at least the rejection of the idea that this particular exercise of speech activity fits into what is appropriately deemed the exercise of an “inalienable” right.

131. See, e.g., Harry V. Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 360 (1987) (Under traditional social contract theory “the collective sovereignty of the people—such as that which ordained and established the Constitution—is limited.”).

132. See, e.g., Statement of James Wilson (Nov. 24, 1787), in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 362 (The right of popular sovereignty is the people’s inalienable right, of “which no positive institution can ever deprive them.”); INHERENT RIGHTS, *supra* note 2, at 14-15, 134-37.

not have it both ways.¹³³ And the framers did not unequivocally resolve the issue for us, as they managed to speak both ways. The 1776 Pennsylvania Declaration of Rights said that “all men are born equally free and independent, and have certain natural, inherent, and inalienable rights.”¹³⁴ The same Declaration stated that “the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.”¹³⁵ Undoubtedly, a member of the founding generation would characterize the Constitution as an exercise in collective self-government, and might add that one of its purposes was to provide security for the rights the people held and deserved.¹³⁶ It would take almost two centuries before fundamental accounts of the Constitution would place securing rights at the very center of the constitutional project, even ahead of the people’s power to make fundamental decisions about their government.¹³⁷

133. For efforts that seem to me to reflect the desire to have it “both ways,” see AMAR, *supra* note 18; Rosen, *supra* note 127; Yoo, *supra* note 96.

134. PENN. CONST. OF 1776, DECLARATION OF RTS, § 1 (1776), reprinted in 5 STATE CONSTITUTIONS, *supra* note 26, at 3082.

135. *Id.* § 5, reprinted in 5 STATE CONSTITUTIONS, *supra* note 26, at 3083.

136. A modern historian has correctly asserted 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.” Merrill D. Peterson, *Thomas Jefferson, the Founders, and Constitutional Change*, in THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 276 (J. Jackson Barlow et. al. eds., 1988). While the theme of securing personal rights figured in the debate over the Constitution, and animated the pressure to add a Bill of Rights to the Constitution, there is no question that the debate over the inclusion of a listing of rights reflected a recognition that the goal was to strike the right balance between personal rights and government’s needs. The purpose was “to provide for the energy of government on the one hand, and suitable checks on the other hand, to secure the rights of the particular states, and the liberties and properties of the citizens.” McAfee, *Federal System as Bill of Rights*, *supra* note 2, at 100 (quoting Letter from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), in 13 RATIFICATION OF THE CONSTITUTION, *supra* note 13, at 471). See generally *id.* at 98-104 (article section referring to “Striking the Balance Between Energy and Liberty”).

137. See, e.g., Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 263 (1988); McAfee, *Critical Guide*, *supra* note 2, at 92-93 (citing additional sources). Some of this new emphasis on “rights talk” reflects the need to counter what has become a modern inclination to feel and express concerns about various “anti-democratic” features of our constitutional order—including the doctrine of judicial review. It is helpful to recall that in the years following the Declaration of Independence, we moved toward the recognition that there is a tension between a democratic government and a just government. E.g., WOOD, *supra* note 27. But there remained a basic faith in the commitment of the American people to a just constitutional order—sufficient to place a basic trust in the people to make a decision that would move us in the right direction. So the framers retained a commitment to popu-

The only way to harmonize the founders' commitment to popular sovereignty and inalienable rights is to recognize fully the institutional implications of one's decision.¹³⁸ A decision to render "inalienable rights" clauses, or mini-Ninth Amendments, enforceable at the highest level of generality, is a decision to be ruled by judges. Even if we pay appropriate lip service to the idea that those who adopted the Constitution had authority to establish fundamental law, this will make little difference if we also find that they delegated effective authority for establishing governing norms to constitutional interpreters—which, of course, in this country means the courts.

The result would not be that we would live lives protected by natural law. At a practical level, we would live our lives under judges' views about the requirements of natural law. And yet commentators have noted that in modern cases raising the most challenging political-moral questions—especially those on abortion, homosexuality, and the right to die—the treatment of the core moral questions has been unenlightening at best.¹³⁹ Moreover, contrary to assumptions widely held, the workload of the Court and its deliberative process confirms that it is an unlikely place to center hopes for meaningful and systematic moral dialogue.¹⁴⁰ We also tend to assume that more rights invariably translate into more freedom, which can only be good.¹⁴¹ But it seems clear that the rights of some may be purchased at the cost of great harm to the community as a whole; government does not typically circumscribe rights solely for its own benefit.

As Professor Soper has recognized, under a system in which judges feel free to implement natural law, "the system remains posi-

lar sovereignty. Moreover, as Professor Smith has accurately observed, Federalist proponents of the Constitution relied not so much on the "specific legal devices" employed in the Constitution to restrict the exercise of government to legitimate functions as on "the people themselves as they pursue complex and competing interests and visions in an extended Republic." SMITH, *supra* note 129, at 68.

138. For documentation of the importance attached to popular sovereignty by the framers, see *INHERENT RIGHTS*, *supra* note 2, at 125-27, 172-73; Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501, 519 n.56 (1995) [hereinafter McAfee, *Substance Above All*]. It is critical, in any event, to recognize that "our choice is not between natural right and majoritarian rule" but "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).

139. *E.g.*, Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1536-37 (1989).

140. *Id.* at 1537.

141. See Lino A. Graglia, *Judicial Review, Democracy, and Federalism*, 4 DET. C.L. REV. 1349, 1350-51 (1991) (Rights are not "costless benefits," but serve to create new benefits to some interests while diminishing others; "[t]rade-offs are necessarily involved.").

tivist in the most significant sense, with the judge simply serving as the sovereign in place of the legislature."¹⁴² Those who framed the Constitution thought that sovereignty rested in the people. Even if we see the Constitution's purpose as being to protect rights, or to "establish justice," we would be better off in the long run also to recognize the sovereignty of constitution-makers.¹⁴³ But the easiest way to harmonize all of this is to read the Ninth Amendment consistently with the framers' intentions. The question is not simply whether a right should be understood to be "inalienable," but whether there was sufficiently widespread agreement that it should be secured by the written Constitution as a limitation on government power. The framers did not equate constitutional and "inalienable" rights and they were able to distinguish moral and legal claims.¹⁴⁴

B. The States' "Retained" Rights and the Incorporation of the Unenumerated Rights into the Fourteenth Amendment

In the concurring opinion that commenced the modern debate over unenumerated rights, Justice Goldberg acknowledged that the Ninth Amendment, and the entire federal Bill of Rights, was not written to limit state governments.¹⁴⁵ But the Fourteenth Amendment, he said, "prohibits the States as well from abridging fundamental personal liberties."¹⁴⁶ To hold that the basic right of privacy in marriage, Goldberg reasoned, "may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to

142. Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2415 (1992).

143. There is no way to preclude *a priori* that liberty and justice will not be the victims of the activist imposition of unenumerated rights. Professor Michael McConnell writes:

If rights are wrongly conceived, they can be as inimical to justice, and even to liberty, as any recognition of state power. Enforcement of the unenumerated right to own slaves precludes emancipation. Enforcement of the unenumerated right of freedom of contract precludes minimum wage laws. Enforcement of the unenumerated right to abort overrides the right to life. Enforcement of the right of voluntary associations to control their own membership makes it more difficult for the community to eradicate race and sex discrimination. Enforcement of children's rights against parental control conflicts with parents' rights to control the family. The point is not that any or all of these rights are wrongful, but that the recognition of unenumerated rights is likely to conflict with plausible assertions of right on the other side.

McConnell, *supra* note 138, at 103-04.

144. For a more complete critique of reliance on the Ninth Amendment as a justification of a general search for inalienable natural rights, see McAfee, *Substance Above All*, *supra* note 136.

145. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring).

146. *Id.* at 493.

give it no effect whatsoever.”¹⁴⁷ Justice Goldberg, then, relied upon an “incorporation plus” view of the relationship between the original Bill of Rights and the Fourteenth Amendment and viewed the Ninth Amendment as a means of challenging the conventional idea that the Court should limit its use of close judicial scrutiny to cases arising under the particular provisions of the federal Bill of Rights.¹⁴⁸

Perhaps the most novel effort to justify Justice Goldberg’s reading of the Ninth Amendment begins with the textual source of incorporation theory—the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment.¹⁴⁹ Professor Amar begins by acknowledging that when the Ninth Amendment is viewed “merely as a federalism-based companion to the Tenth,” it does not “sensibly incorporate in any refined way.”¹⁵⁰ Acknowledging that the amendment originally “sounded in federalism,” Amar finds it significant that by 1867 fifteen states “had borrowed from the federal template and adopted ‘baby Ninth Amendments.’”¹⁵¹ Having already concluded that “refined” incorporation requires modern interpreters to discover the personal rights that attached to what may originally have been conceived as protections for majorities within the states,¹⁵² he finds that the Ninth Amendment “soon took on a substantive life of its own, as a free-floating affirmation of unenumerated rights.”¹⁵³ According to Amar, it becomes extremely relevant that Senator James Nye of the Thirty-Ninth Congress described “the Ninth as a kind of gap filler among the first eight amendments, lest something essential in the specification of ‘natural and personal

147. *Id.* at 491.

148. For additional commentary on Justice Goldberg’s treatment of the relationship between the Fourteenth Amendment and the federal Bill of Rights, see McAfee, *Critical Guide*, *supra* note 2, at 61 n.7.

149. Professor Amar followed a fairly well-established tradition of looking to the Privileges or Immunities Clause as a source from which we might derive unenumerated fundamental rights. See, e.g., ELY, *supra* note 93, at 22-30; Grey, *supra* note 8, at 167 (contending that the Ninth Amendment’s rule of construction supports “interpreting Section One of the Fourteenth Amendment as finally incorporating into the federal Constitution the implied limitations on state legislative power that from the beginning had been regarded as a matter of general state constitutional law”).

150. AMAR, *supra* note 18, at 280. There is no question that Professor Amar agrees that the Ninth Amendment, as originally drafted, had “federalism roots” and was tied to “the unique enumerated-power strategy of Article I.” *Id.* at 124; see also *id.* at 123-24; INHERENT RIGHTS, *supra* note 2, at 158 n.91.

151. AMAR, *supra* note 18, at 280. In developing the thesis that the “privileges or immunities” clause transformed the Ninth Amendment, Amar relies heavily on research of a former student of his. Yoo, *supra* note 96.

152. The “incorporation” controversy is by itself a large one, and, fortunately, we need not fully confront it here. For Amar’s arguments on behalf of incorporation of the Federal Bill of Rights, see AMAR, *supra* note 18, at 181-294. For additional arguments on both sides, see RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

153. AMAR, *supra* note 18, at 280.

rights' in earlier amendments 'should have been overlooked.'¹⁵⁴

Given the distinct possibility that state constitutions simply copied rather uncritically the Ninth Amendment, because it was found in the federal Bill of Rights,¹⁵⁵ one would hope for substantial and powerful evidence that it had indeed mutated "into a celebration of liberal civil rights of persons" before it was "incorporated"¹⁵⁶ as a virtually open-ended unenumerated rights guarantee.¹⁵⁷ But the historical evidence points against this thesis.¹⁵⁸

There are at least two questions of relevance to evaluating whether a person can make a claim under the Privileges or Immunities Clause of the Fourteenth Amendment: "(1) what are the fundamental rights guaranteed under the Amendment and (2) what is the nature of the protection afforded these rights."¹⁵⁹ The "incorporation" controversy presents the first of these issues and concerns whether the rights guaranteed by the federal Bill of Rights are

154. *Id.* at 281 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (Statement of Sen. Nye)) (emphasis added); see also Yoo, *supra* note 96, at 1025-26. For Amar and Yoo, the evidence is supplemented when Senator John Sherman relied on the Ninth Amendment in support of the Civil Rights Act of 1875. AMAR, *supra* note 18, at 281; Yoo, *supra* note 96, at 1027-30. But see *infra* note 172 (suggesting that the statements made by both Senators are reconcilable on balance with an antidiscrimination reading of the Privileges or Immunities Clause under which courts would not be responsible for discerning substantive unenumerated rights).

155. See *supra* note 116 and accompanying text.

156. AMAR, *supra* note 18, at 281. This may well be one of those areas where there is reason to "fear that the metaphor of incorporation will continue to mislead us, even once Professor Amar's analysis has demonstrated that the metaphor serves no useful purpose." Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 523 (1999); see also Douglas G. Smith, *Reconstruction or Reaffirmation? Review of "The Bill of Rights: Creation and Reconstruction,"* 8 GEO. MASON L. REV. 167, 197 (1999) (concluding from Amar's analysis that "the incorporation thesis in its various incarnations is a misnomer" even though Fourteenth Amendment drafters "viewed the Bill [of Rights] as one source among many for determining what the terms 'privileges' and 'immunities,' as used in Section One, meant").

157. See also Randy E. Barnett, *Ninth Amendment (Update)*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1813, 1814 (Leonard W. Levy & Kenneth L. Karst eds., 2000) (concluding that "the current weight of scholarly opinion is that . . . this protection [of unenumerated liberties that limit state government] is best accomplished by reference to the PRIVILEGES OR IMMUNITIES clause of the FOURTEENTH AMENDMENT—though the existence of the Ninth Amendment argues against rigidly limiting these privileges and immunities solely to 'the enumeration in the constitution of certain rights'").

158. Professor Amar's endorsement of the view that the Privileges or Immunities Clause is the best text for justifying "constitutional protection of unenumerated rights" that limit the exercise of state power is strongly supported by Professor Tribe. See LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 7-6, at 1320 (3d ed. 2000); see also *id.* at 1320-31.

159. Smith, *supra* note 156, at 190 n.101 (citing MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 124, 127 (1994)).

among the "privileges or immunities" protected by Section One.¹⁶⁰ But it may well be that answering the second of these questions is more relevant and important to evaluating whether a person can base a Fourteenth Amendment claim on an unenumerated right. While Amar devotes considerable energy to justifying application of the Bill of Rights to the states, it is fair to say that he "remains relatively silent" on the second question.¹⁶¹

One answer to this second question, provided by Professor Harrison, is that, once we are beyond the protections guaranteed by the relatively specific guarantees of the federal Bill of Rights, and are referring to what might be described as "common-law rights," the rights are given only "antidiscrimination" protection.¹⁶² "In textual terms, this means that the term 'abridge' in the Privileges or Immunities Clause has an antidiscrimination rather than prohibitionist meaning, just as it has in Section 2 of the Fourteenth Amendment and in the Fifteenth Amendment."¹⁶³ Professor Amar seems to think "that the term 'abridge' might have a 'two-tiered' meaning that embraces this antidiscrimination notion in connection with private law rights but calls for prohibitionism in connection with other kinds of rights."¹⁶⁴

160. One reason the issue remains relevant is that there is almost universal agreement that the Supreme Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), that the clause protected only a narrow set of uniquely national rights, was simply wrong. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414 (1992) (the Privileges or Immunities Clause was "effectively banished from the Constitution" in the *Slaughter-House Cases*); Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282-83 (1987) [hereinafter McAfee, *Constitutional Interpretation*] (citing lengthy list of commentators with diverse views on constitutional interpretation and meaning who agree that the Court misconstrued the Privileges or Immunities Clause).

161. Smith, *supra* note 156, at 191.

162. Harrison, *supra* note 160.

163. Lawson, *supra* note 156, at 512 n.5.

164. *Id.* (citing AMAR, *supra* note 18, at 178-79 & n.*). But see *id.* (Professor Lawson confirming that he is "not (yet?) persuaded that it is the best reading of the word 'abridge' in Section 1 of the Fourteenth Amendment"); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 79 (1999) (concluding that:

[c]ontrary to what participants in the debates about the original meaning of the privileges or immunities provision generally assume, one can believe both that the privileges or immunities norm established by 'We the people' is nothing more than an anti-discrimination norm and that the privileges or immunities norm is the instrument that makes Bill-of-Rights rights (e.g., the freedom of speech) applicable to the states—and applicable in the same way they are applicable to the national government

and finding the incorporation theory can be supported historically without "anything like Akhil Reed Amar's 'two-tiered' approach to the privileges or immunities language of the Fourteenth Amendment"; Smith, *supra* note 156, at 193-98 (formulating an alternative vision of the sort of protection offered, but seeking

The “other kinds of rights,” of course, are most clearly the rights found in the Bill of Rights of the federal Constitution, where for Amar the more appropriate analogy is not the equality guarantee of the Article IV “Privileges and Immunities Clause,”¹⁶⁵ but its “fundamental-rights counterpart in the First Amendment, whose language section 1 so carefully tracks.”¹⁶⁶ If Amar seriously maintains the distinction between common law rights and rights protected directly by the Constitution, all of the “unenumerated” rights, those not “specified and declared by We the People,”¹⁶⁷ would receive “antidiscrimination” protection only, and we would not in reality face the prospect of judicially discovered and declared fundamental rights.¹⁶⁸ The only problem is that Professor Amar has been as equivocal in addressing this question as any who drafted constitutions, past or present.¹⁶⁹ If he followed the lead of those who brought us the Four-

to reconcile it with recognition of broad state authority to decide on the existence and scope of rights); Daniel J. Levin, Note, *Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce*, 35 HARV. C.R.-C.L. L. REV. 569, 573 (2000) (reasoning that “the Fourteenth Amendment’s phrasing was borrowed from Article IV to reflect structural guarantees referred to by both sides in the ratification debate and in antebellum precedent,” and proposing a structural reading of the clause that leaves broad power to States, but assures participatory privileges of citizenship).

165. U.S. CONST. art. IV, § 2: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” See Harrison, *supra* note 160, at 1398 (Article IV’s provision “forbids the states from giving unfavorable treatment to visiting out-of-state Americans with respect to the body of rights that constitutes the privileges and immunities of state citizenship.”); *id.* at 1400 n.48 (concluding that the interstate Privileges and Immunities Clause is “perfectly adapted for an intrastate equality rule, under which every citizen has the same rights, whatever the state determines they shall be”).

166. AMAR, *supra* note 18, at 178-79 n.*.

167. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1291 (1992). Professor Amar does acknowledge that at least the “core set of fundamental freedoms that the People aimed to affirm in the Fourteenth Amendment’s Privileges or Immunities Clause” are “catalogued elsewhere in documents that the American people have broadly ratified.” Amar, *supra* note 1, at 123. But he is equally insistent that “there is indeed constitutional text that limits state power to restrict unspecified and substantive fundamental freedoms—namely, the Privileges or Immunities Clause.” *Id.*

168. The historical evidence supports the conclusion that “[i]t is a wrong turn to apply a natural rights analysis to the Privileges or Immunities Clause.” Levin, *supra* note 164, at 588. The discussion that led to the adoption of the clause “was always fastened to citizens’ rights,” and therefore attempts “to look to the natural law political philosophy of the founding fathers to nail down ‘natural rights of all men’ in order to define the content of the Privileges or Immunities Clause” is simply misguided. *Id.* In fact, it was precisely the attempt to separate “the fundamental rights of citizenship from the structure of government and instead defining them by reference to notions of personal liberty” that inhibited “post-Civil War judges from taking them seriously.” *Id.*

169. Professor Hartnett accurately observes that “Amar is rather non-committal in addressing the extent to which the privileges or immunities clause

teenth Amendment, Professor Amar's answer would not, however, be a difficult one.

A central motivation of those who drafted and ratified the Fourteenth Amendment was to combine federal empowerment to protect the civil rights of the freedmen with a structure that did not altogether shift the basic power to regulate those rights away from the states.¹⁷⁰ Responding to an argument that proponents of the Civil Rights Act of 1866 would effectively grant general legislative powers to Congress, Representative Shellaburger of Ohio contended that the law "neither confers nor defines nor regulates any right whatever," but only requires "that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery."¹⁷¹ Professor Harrison's analysis of the Privileges or Immunities Clause, then, was to supply an interpretation "that is textually sound and that constitutionalizes the Civil Rights Act without writing a uniform national private law into the Constitution."¹⁷²

protects common law rights." Edward A. Hartnett, *The Akhil Reed Amar Bill of Rights*, 16 CONST. COMMENTARY 373, 393 (1999). For Hartnett, this "underscores the significance of Amar's dodge regarding the incorporation of the Ninth Amendment. Amar asserts that incorporation of the Ninth Amendment 'does not much matter' because any unenumerated rights that it affirms (other than federalism) add little to the privilege or immunities clause." *Id.* at 393 n.31. "Thus," concludes Hartnett, "Amar punts the Ninth Amendment question to the privileges or immunities clause, and then punts on an important question regarding the privileges or immunities clause." *Id.*

170. See, e.g., EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869*, at 105 (1990) (The goal was to recognize the "states' primacy in establishing and maintaining individual rights, with Congress given authority to intervene only when the states were remiss in fulfilling their obligations."); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 7-8 (1988) (concluding that history supports both the view that the amendment was "to provide blacks with full protection of their rights" and that its goal was to not "upset the existing balance of federalism"); McAfee, *Constitutional Interpretation*, *supra* note 160, at 286 n.74 (concluding that "the states were to retain sovereignty over basic rights subject to an essentially exclusive judicial responsibility to determine under what circumstances the protected privileges had been 'abridge[d]'").

171. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866), *quoted in* Harrison, *supra* note 160, at 1403-04 n.59; *see also id.* at 1089 (Congressman Bingham stating that the purpose of the amendment was to protect the equal right of all citizens of the United States in every State to all privileges and immunities of citizens); *id.* at 474 (Senator Trumbull contending that "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty"); *id.* at 1760 (Senator Trumbull clarifying that a state "may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial"); *id.* at 2766 (Senator Howard contending that absent "equal justice to all men and equal protection under the shield of the law, there is no republican government").

172. Harrison, *supra* note 160, at 1392. The Senators on whom Professor Amar relies for a revised understanding of the Ninth Amendment, *see supra*

Professor Amar's equivocal treatment reflects that he is torn between the attraction of an unenumerated rights provision that permits courts to impose rights on government as they become satisfied that the people are entitled to them and the historical evidence showing that the adopters of the Fourteenth Amendment believed they were leaving substantial power in the states to decide on the scope and content of basic rights—subject only to the requirement that their laws not embody invidious discrimination.

But the dilemma is a false one—or at least not one presented by the historical materials. At the time of Reconstruction, the distinction between governments of general powers, subject only to rights limitations specified in constitutional documents, and governments of enumerated powers, was well understood. Consider these words of explanation by Thomas Cooley:

In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted [sic] with the general authority to make laws at discretion.¹⁷³

note 153, lend even stronger support to an antidiscrimination reading of the Privileges or Immunities Clause. Senator Nye, speaking in 1866, to use his most prominent example, referred to the privileges or immunities of citizenship as “[t]hese natural and personal rights” that “are State rights, and all the legitimate sovereignty the States have, or can have, is to protect them under equal laws.” CONG. GLOBE, 39th Cong., 1st Sess. 1077 (1866). The Senator acknowledged the need for a remedy for the problems in securing rights in the South, but argued that the “remedy lies in equalized protection under equal laws.” *Id.* at 1074. And Senator Sherman directly compares the Privileges or Immunities Clause of Section 1 with the provision found in Article IV, a provision focused exclusively on discrimination against citizens of other states, and contends that “under the old provision there was no power to enforce it, while that power was expressly given by the fifth clause of the fourteenth article.” CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872). Every example of an abridgment of a privilege or immunity provided by Senator Sherman, moreover, involved a case of invidious discrimination.

173. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 104 (6th ed. 1890). Thus the leading commentator of an earlier era, Supreme Court Justice Joseph Story, concluded that, absent an express prohibition contained within its state constitution, a state “might pass a bill of attainder, or *ex post facto* law, as a general result of its sovereign legislative power.” JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 228 (1833). Not coincidentally, both Cooley and Justice Story articulated the standard Nineteenth Century view of the federal Ninth Amendment as a guarantee of the rights secured residually by the enumerated powers scheme of Article I. See McAfee, *Original Meaning*, *supra* note 2, at 1311-14.

Cooley's analysis makes clear that, under the Civil War era state constitutions, the legislatures are entities in which "[p]lenary power" is "the rule," and "[a] prohibition to exercise a particular power is an exception."¹⁷⁴

When John Bingham, the principle draftsman of the Fourteenth Amendment, argued for incorporation, he described the "privileges and immunities of citizens of the United States" as "chiefly defined in the first eight amendments to the Constitution of the United States."¹⁷⁵ Similarly, Senator Jacob Howard said the phrase included "the personal rights guaranteed and secured by the first eight amendments of the Constitution."¹⁷⁶ Even Professor Amar acknowledges that "both Bingham and Howard seemed to redefine 'the Bill of Rights' as encompassing only the first eight rather than ten amendments, presumably because they saw the Ninth and Tenth Amendments as federalism provisions."¹⁷⁷ But their approach cannot be surprising. The reason we debate the "incorporation doctrine" today is precisely that defenders of the Fourteenth Amendment consistently referred to the idea that the Privileges or Immunities Clause secured the rights already protected by the Constitution—often enough, with some acknowledgment that the federal Bill of Rights initially did not limit the states or grant enforcement power to the national government.¹⁷⁸ As Professor Levinson has observed, even radical abolitionist lawyers, whom one would expect to have "the greatest incentive to do so," did not rely on the Ninth Amendment under the unamended Constitution as a restriction on the power to protect slavery.¹⁷⁹

174. COOLEY, *supra* note 173, at 105 (quoting *People v. Draper*, 15 N.Y. 532, 543 (1857)). That Cooley would derive this principle from the nature of state legislative power is significant, given that he is well known for having imposed a "common-law gloss on constitutional government" that "substantially undermines the significance of a written constitution." PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 76 (1992). Cooley held views that anticipated the *Lochner* era on the Court.

175. CONG. GLOBE, 42d Cong., 1st Sess. 84 app. (1871) (emphasis added).

176. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

177. AMAR, *supra* note 18, at 226; see also Yoo, *supra* note 96, at 1023-24 (contending that scholarship "has proven convincingly that both the text and the legislative history of the Fourteenth Amendment's Privileges and Immunities Clause manifest an intent to incorporate the first eight amendments against the states," acknowledging that this raises a question whether the Ninth and Tenth Amendments were perceived as "twin federalism provisions" that "could not be enforced against the states").

178. See, e.g., Congressman Thaddeus Stevens, CONG. GLOBE, 39th Cong., 1st Sess., 2459 (1866), quoted in CURTIS, *supra* note 152, at 86 (defending the Fourteenth Amendment with claim that its rights "are all asserted, in some form or other, in our DECLARATION or organic law," but the amendment "supplies" the "defect" that "the Constitution limits only the action of Congress, and is not a limitation on the States").

179. See, e.g., Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 144 (1988), cited in Yoo, *supra* note 96,

A critical question, then, is whether one ought to give greater weight to the use of the language of the Ninth Amendment in state constitutions, and general silence when the same language is invoked to justify a broad reading of the Privileges or Immunities Clause, or to the pervasive evidence that states were understood, even by the amendment's framers, to be governments possessing general legislative powers subject only to specific constitutional limitations. In the context of Fourteenth Amendment studies generally, and with particular focus on the incorporation controversy, Amar has demonstrated that inferences drawn from silence, when a person might have spoken words of clarification, can much too easily be overdrawn and overstated.¹⁸⁰ On the other hand, that it was not until 1965 that the Ninth Amendment was invoked to justify heightened scrutiny of legislation impacting on unenumerated fundamental rights, and in a federal rather than a state court, suggests the significance of the silence that had previously prevailed on the issue of the applicability of the incorporation of an "unenumerated rights" interpretation of the Ninth Amendment state equivalents.¹⁸¹

In many ways, to fall into the temptation to read the Privileges or Immunities Clause as an unenumerated rights guarantee is to fall into the same trap as that facing interpreters of the Ninth Amendment as originally drafted. Precisely because those who framed the federal Constitution, as well as the Fourteenth Amendment, were by and large people who believed in a moral reality that justified the effort to limit government, we are tempted to think that we, as interpreters, have been conveyed the task of determining what limits on government moral reality requires. But the framers of the Constitution and Fourteenth Amendment confronted the difficulties of limiting government by a written Constitution. In the process, one has to face not only the question of what limits should be imposed, but also institutional questions about how the precise scope of those limits is to be determined as well as enforced.

One of Professor Amar's *Barron* contrarians, Chief Justice Lumpkin, was clearly committed to finding natural law-based limits on government. But he acknowledged that, considering that "our ideas of natural justice are vague and uncertain,"¹⁸² an open-ended search for natural rights might give judges "freedom to make, rather than to find, natural law."¹⁸³ Sounding increasingly like Justice Black, Lumpkin contended for application of the Bill of Rights to the

at 1004. Even the abolitionist lawyer Gerrit Smith argued in 1850 that "the Bill of Rights applied against the states except for the First, Ninth, and Tenth Amendments." Yoo, *supra* note 96, at 1004 (citing WILLIAM M. WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 167 (1977)).

180. *E.g.*, AMAR, *supra* note 18, at 197-206.

181. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

182. *Campbell v. State*, 11 Ga. 353, 371 (1852).

183. AMAR, *supra* note 18, at 155 (citing *Campbell*, 11 Ga. at 371).

states, nonetheless, arguing that "as to questions arising from these amendments, there is nothing indefinite" inasmuch as the people "have defined accurately and recorded permanently *their* opinion, as to the great principles which they embrace"¹⁸⁴ Lumpkin effectively explains why it makes some sense to incorporate the Bill of Rights. But there were good reasons why the framers adopted a federalism-based Ninth Amendment, and there are good reasons not to incorporate an unenumerated rights interpretation into the Fourteenth Amendment.

IV. CONCLUSIONS

For a number of years, there has been a scholarly debate as to whether the history of the Ninth Amendment warrants courts in construing the Constitution to generate unenumerated fundamental rights. As a participant in that debate, I admit that it has sometimes been disappointing to have a judge express a view that perceives the historical materials as supplying the wrong answer, or as raising a question that is largely irrelevant legally.¹⁸⁵ The metaphor that has been used (and abused, I always thought correctly) has been the comparison between the Ninth Amendment and an inkblot that could not be interpreted because it could mean almost anything.¹⁸⁶ Even though I remain convinced that the historical question is a matter of some importance, and deserves our best efforts at obtaining a correct answer, I am increasingly persuaded that, even leaving the historical issues to one side, courts have properly viewed "inalienable rights" and other "unenumerated rights" clauses (including the federal Ninth Amendment and the state mini-Ninth Amendments) as not stating meaningful, or enforceable, limitations on governmental power.

A recent, important work on the theory of constitutional interpretation offered these observations:

In order for the text to serve as law, it must be rulelike. In or-

184. *Campbell*, 11 Ga. at 372 (emphasis added), *quoted in* AMAR, *supra* note 18, at 155.

185. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J. dissenting) (stating view that parental right at stake in case was one of the "unalienable" rights referred to in the Declaration of Independence, as well as one of the "other rights retained by the people" in the Ninth Amendment; but, nevertheless, finding that the Declaration of Independence is "not a legal prescription" and that the Ninth Amendment's prohibition on denying or disparaging unnamed rights is far removed "from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people"). *But see* Amar, *supra* note 1, at 122-24.

186. See, e.g., DOUGLAS W. KMIEC AND STEPHEN B. PRESSER, *INDIVIDUAL RIGHTS AND THE AMERICAN CONSTITUTION* 790-91 (1998); Sotirious A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?* 64 CHI.-KENT L. REV. 67 (1988); Barnett, *supra* note 157, at 1813 (summarizing Bork's use of "inkblot" analogy).

der to be a governing rule, it must possess a certain specificity in order to connect it to a given situation. Further, it must indicate a decision with a fair degree of certainty. Such certainty and specificity need not be absolute, but the law does need to provide determinate and dichotomous answers to questions of legal authority. In order for the Constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms. Similarly, the Constitution is binding only to the extent that judges do not have discretion in its application. Although the application of the law may require controversial judgments, the law nonetheless imposes obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another. For the Constitution to serve this purpose, it must be elaborated as a series of doctrines, formulas, or tests. Thus, constitutional interpretation necessarily is the unfolding of constitutional law. Debates over constitutional meaning become debates over the proper formulation of relatively narrow rules.¹⁸⁷

The framers may have believed in natural rights, but the security offered by their Bill of Rights was limited to "those that experience had shown were suitable for constitutional protection, and they were secured by inclusion in a legally enforceable bill of rights."¹⁸⁸ By and large, those who framed the American constitution avoided adopting anything "so general that it can scarcely form the basis of any action to challenge governmental restrictions upon liberty."¹⁸⁹ Unlike those who have fought revolutions to vindicate broad ideals that all too often have not been translated into meaningful accomplishments, the American revolutionaries avoided centering their issues on principles "too general to be made the basis of judicial decision in specific cases."¹⁹⁰

The framers did not see the world we live in, but that is one of the reasons they did not write a constitution that spoke to every question we might want to have addressed. Still, when their intentions and understanding are clear, there are those of us who are not prepared to accept the idea that their intentions are "normally irrelevant to the needs of our society two centuries later."¹⁹¹ If this history makes anything clear it is that, when James Madison drafted the Ninth Amendment, his purpose was not to provide "an affirmation of the independent foundation of individual rights" by

187. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 6 (1999).

188. Schwartz, *supra* note 25, at 422.

189. *Id.* at 423. The American framers thus avoided the adoption of a principle that "may serve as the foundation for a system of political philosophy, but it can scarcely be the basis by itself for legal protection of specific personal rights and liberties." *Id.* at 424.

190. *Id.* at 424.

191. BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION* 35 (1990).

the "declaration of the doctrine of nontextual rights."¹⁹² If we have only managed to "retain" all "the values deemed worthy of protection during the different periods of the nation's development,"¹⁹³ we have not done more than was accomplished by the French Revolution, which Professor Schwartz characterized as establishing "only general principles deemed fundamental to man and hence universally applicable," but not as creating meaningful "legal rules, enforceable as such by the courts."¹⁹⁴ We have a Constitution that has been imperfect, but still successful in securing the basic rights that all people should have.

It is time that thoughtful American lawyers realized that rights-grounded foundational accounts of our constitutional order are bad history that produce bad law. If the period leading to adoption of the Constitution and Bill of Rights teaches us anything, it is that the really difficult questions are always ones of institutional authority. Several years ago I attended a symposium on natural law and American constitutionalism. In my presentation, I made the following comments:

Our skepticism about natural law constitutionalism does not come to us because sometime in the nineteenth century we were corrupted by skeptical, positivist views of law. It is because natural law at best speaks to only one dimension of the problem confronted by constitutional designers. The framers of any Constitution have to consider both the ends by which government is justified and limited (issues of substance) as well as the bases of legitimate decision-making power and the application of limiting principles (issues of authority).¹⁹⁵

Neither judges nor politicians were given authority to rewrite the Constitution, and yet that is exactly what the Court claims the power to do when it establishes fundamental personal rights that were never adopted by the American people. This is as true under the Fourteenth Amendment as it was under the original Bill of Rights.

192. *Id.* at 50.

193. *Id.* at 53.

194. Schwartz, *supra* note 25, at 426.

195. McAfee, *Substance Above All*, *supra* note 138, at 514.