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PROLEGOMENA TO A MEANINGFUL DEBATE OF THE “UNWRITTEN CONSTITUTION” THESIS

Thomas B. McAfee*

INTRODUCTION

Seventeen years ago Professor Grey launched the modern debate over the idea of an unwritten Constitution by suggesting that the key to defending modern fundamental rights decision-making might be to rediscover the founding generation's commitment to natural law and unwritten sources of basic rights.¹ Some modern Supreme Court decisions, Grey suggested, might be better justified by reliance upon the methodology suggested by Justice Chase's famous opinion in *Calder v. Bull*² than by looking to the justification for judicial review offered by Chief Justice Marshall in *Marbury v. Madison*.³ Grey's arguments for the unwritten Constitution idea has struck a chord with many constitutional thinkers precisely because it links modern constitutionalism to a venerable past and presents recent developments as renewal rather than departure.

The “unwritten Constitution thesis” referred to in the title of this article refers not to the view that courts should be empowered to enforce rights not found in or inferred from the text of the Constitution, but rather to the historical claim that the founding generation saw the Constitution as including a written document and unwritten principles of fundamental law.⁴ Needless to say, this historical claim

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1. Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 716 (1975). Grey's article invoking natural law and unwritten constitutionalism was a seminal work in the scholarly responses to the debate over constitutional decision-making generated by *Roe v. Wade*, but it built upon the work of constitutional scholars who had written about natural law in American constitutionalism earlier in this century. See, e.g., CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPT* (1930); B.F. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* (1931).

2. 3 U.S. (3 Dall.) 386 (1798).

3. 5 U.S. (1 Cranch) 137 (1803).

4. In addition to his initial suggestive work, Professor Grey has contributed two articles developing the historical thesis of the unwritten Constitution. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) [hereinafter “*Origins*”]; Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145 (Neil L. York ed., 1988) [hereinafter “*The Original Understanding*”]. Perhaps the most thoroughgoing defense of this historical claim is found in Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

In addition to the works of Grey and Sherry, a number of prominent constitutional scholars during the last decade have argued for the unwritten Constitution thesis,

has been challenged.⁵ However, although the modern debate was launched seventeen years ago, many important issues remain unexplored to a large degree; the contestants have hardly engaged each other as to a number of central questions. The purpose of this article is to suggest why that may be and to offer suggestions as to the issues that need to be engaged if the historical thesis of unwritten constitutionalism is to be sustained or rejected on adequate historical grounds.

The underlying problem is that we consult the thinking of the founding generation mainly for help in sustaining our own viewpoints in contemporary debates over constitutional or jurisprudential theory. This creates a tendency to rely on selective evidence that lends support to our preferred position. Equally seriously, we tend to construe their statements in light of our own presuppositions. For example, we assume that we know the meaning and implications of natural law jurisprudence in general and therefore what it "must" have meant to the founders. Similarly, we presume to know what the possibilities are for harmonizing commitment to natural law jurisprudence with an authentic doctrine of sovereignty in particular.

frequently by contending that unwritten constitutionalism is reflected in (and, indeed, explains) the Ninth Amendment of the Constitution. See, e.g., CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* (1981); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 367-83 (1988); DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 220-26 (1989); BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* (1990); Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT I* (Randy E. Barnett ed., 1989); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 *HASTINGS L.J.* 305 (1987).

5. For works challenging various claims related to the unwritten Constitution thesis generally, see LESLIE F. GOLDSTEIN, *IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY* 18-31, 67-91 (1991); GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 74-94 (1986); Walter Berns, *The Constitution as Bill of Rights*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 50, 54-59 (Robert A. Goldwin & William A. Schambra eds., 1985); Leslie F. Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 *J. POL.* 51 (1986) [hereinafter "*Origins of Judicial Review*"]; 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 "*Social Contract Theory*"]; Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights*, 69 *N.C. L. REV.* 421 (1991).

For works presenting an understanding of the Ninth Amendment that does not lend support to the unwritten Constitution thesis, see Raoul Berger, *The Ninth Amendment*, 66 *CORNELL L. REV.* 1 (1980); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *COLUM. L. REV.* 1215 (1990) [hereinafter "*Original Meaning*"]; see also McAfee, *Social Contract Theory*, *supra*, at 268 n.3 (citing other works supporting the traditional view that the Ninth Amendment sought to secure the rights retained by the Constitution's scheme of limited powers).

The result of these tendencies is that advocates of the unwritten Constitution thesis have actually done little beyond documenting what was already rather clearly shown by the 1798 Chase/Iredell debate in *Calder v. Bull*—namely, that one view articulated during the founding era was that principles of natural or fundamental law, beyond the norms specified in the written Constitution, might be invoked by ordinary courts of law as enforceable limits on legislative power. The unwritten Constitution literature has consisted largely of the attempt to trace this line of thinking back to the Revolutionary era and to indicate some of its origins in American and English Whig thought. By contrast, the view articulated by Iredell has been virtually presumed to be a late invention and has not received the equal treatment of a similarly careful sources-and-origins analysis.

As early as 1978, Professor Grey acknowledged that scholars had yet to carefully examine the impact of the development of written constitutions established in popular conventions and the evolution of the theory of popular sovereignty on American thinking about constitutionalism and, in particular, on the tradition of unwritten constitutionalism they inherited from England.⁶ The scholarly record shows that a careful review of the issues suggested by these topics still has not been undertaken. For example, in some of the leading works published since then, Professors Grey and Sherry have traced unwritten Constitution themes in confederation-era case law and in the processes of drafting and ratifying the Constitution.⁷ Neither treatment, however, took seriously the carefully crafted Antifederalist arguments against the Constitution based on premises assuming the exclusivity of the written Constitution in conferring constitutional status to fundamental rights.⁸ Moreover, Grey treated the potential tension between the unwritten Constitution and popular sovereignty in a single paragraph;⁹ Sherry confronted it in a single footnote.¹⁰ These works remind us that the most telling issues are yet to be engaged.¹¹

6. Grey, *Origins*, *supra* note 4, at 892-93.

7. Grey, *Original Understanding*, *supra* note 4; Sherry, *supra* note 4.

8. For development of this point, see *infra* notes 97-102, 108-22 and accompanying text.

9. Grey, *Original Understanding*, *supra* note 4, at 164.

10. Sherry, *supra* note 4, at 1156 n.132.

11. Thus, by contrast to his carefully documented fifty page law review article analyzing the intellectual origins of the unwritten Constitution, Grey's own sequel treated the founding era in a twenty-eight page article, of which only eighteen are dedicated to analyzing the confederation period and the drafting and ratification of the Constitution. See Grey, *Original Understanding*, *supra* note 4, at 155-73. Indeed, the debates over ratification of the Constitution were analyzed in five pages. *Id.* at 162-66.

These issues, as well as many others, need to be fully explored. This article is a part of a larger project aimed at addressing the historical issues raised by the unwritten Constitution thesis. The balance of this article seeks to lay a foundation for the larger project by addressing a number of preliminary issues that the parties to the debate have not sufficiently attended to, until now. Part I outlines the problems caused by the tendency to approach the unwritten Constitution thesis as a straightforward debate as to whether the founders were "legal positivists" or advocates of "natural law jurisprudence." Some unwritten Constitution advocates have rested on the historical reality that the founders were natural law thinkers, concluding that this fact alone is sufficient evidence of their rejection of the positivist orientation of constitutional textualism in favor of the unwritten Constitution of natural law. It will be shown that this approach rests on an oversimplification of the debate between the positivist and natural law perspectives, and indeed that it does a disservice to both modern theorists and the founders.

Part II seeks, in turn, to demonstrate that subtle presuppositions regarding the implications of the natural law/social contract thinking of the founders appear to have shaped modern commentators' interpretations of the founders' writings and speeches. Taken seriously, the debates over ratification of the Constitution, as confirmed by materials relating to state constitutional practice, show that thoughtful constitutionalists were committed to a textualist vision that runs counter to the idea of an unwritten Constitution. This treatment does not attempt to resolve the issue as to whether textualism or unwritten constitutionalism was predominant as of 1787, but it does seek to establish that the textualist approach cannot be ignored or brushed aside.

In Part III, the focus shifts to a review of the significant tensions that exist between and within the works of scholarly proponents of the unwritten Constitution thesis. In particular, Section III-A develops the point that modern theorists have yet to confront the differences in the case for unwritten constitutionalism based on fundamental law principles of the English constitution and one based on a jurisprudence of natural law and natural rights. Similarly, III-B will show that recent interpretations of the language of the Ninth Amendment as a unique reference to natural rights theory appear rather clearly to have the effect of excluding custom-based rights from the scope of the amendment—an outcome that undercuts the position of most Ninth Amendment theorists who also advocate the unwritten Constitution theory.

Similar unacknowledged tensions permeate the arguments of unwritten Constitution theorists in support of their understanding of the Ninth Amendment. The central tension, discussed in Section III-C, arises as proponents of the view that the Ninth Amendment is the textual embodiment of unwritten constitutionalism split dramatically over how to confront the single piece of historical data that most obviously threatens to undermine their reading—the Federalists' pervasive reliance on the enumerated powers scheme of the Constitution, as contrasted with the general powers schemes of the various state constitutions, to justify the conclusion that a federal Bill of Rights was unnecessary. The differences among various commentators present serious questions not only for justifying their overall thesis, but also for any descriptive theory of the unwritten Constitution. The unwritten Constitution debate will truly come of age when unwritten Constitution theorists decide to take up the task of addressing what are in reality competing theories of the unwritten Constitution.

Finally, Part IV addresses some preliminary issues relating to judicial review of unwritten rights and its relation to the unwritten Constitution debate. Some modern commentators have suggested that, given the founders' undoubted commitment to unwritten rights, the real issue is simply whether they intended judicial review to enforce those rights. A related suggestion is that once the doubts about the founders' intent to establish judicial review at all is resolved, judicial review on behalf of unwritten rights is not a difficult step. In contrast, I suggest an alternative thesis, that the development of judicial review in our constitutional scheme is largely a product of the same forces that led to an emphasis on the device of a written Constitution to be ratified by the sovereign people. A plausible thesis, worthy of serious consideration, is that the founders came to embrace judicial review and to equate constitutional law with written law, and not with unwritten principles of traditional fundamental law or natural law, for largely the same reason: the evolution of an orientation toward viewing constitutionalism in terms of the creation of meaningful restraints on government rather than as an ineffectual general theory of limited government.

I. LEGAL POSITIVISM *VERSUS* NATURAL LAW?

Constitutional textualists who oppose the idea of the unwritten constitution share a commitment to a positivist constitutional jurisprudence. Values to be enforced in the name of the Constitution are those that can fairly be derived from traditional "sources" of law: from the text, structure, and history of the written Constitu-

tion, and perhaps the authoritative precedents construing the terms of that document as well.¹² This view does not insist that every constitutional principle or right must be spelled out in explicit language in the text, but it does imply that moral principles which lack any pedigree in these traditional sources cannot be invoked as law merely because they are thought to embody a moral reality that law should recognize.¹³

One way to initiate the argument that modern textualism is ahistorical is to simply remind the audience that the founders were not modern legal positivists, but rather were committed to the concepts of natural law, natural right, and the pursuit of simple justice.¹⁴ Some writers argue that it is precisely this commitment to a natural law jurisprudence focused on protecting natural rights and achieving the ends of justice that explains the decision to include the Ninth Amendment in the Bill of Rights.¹⁵ It is fair to say that many arguments for an unwritten Constitution, whether tied to the Ninth Amendment or not, have virtually started and ended with the striking claim that constitutional textualism is hopelessly tied to a mod-

12. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 90 (1988).

13. See Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 230-31 (1988) (describing textualist position in this fairly broad fashion). Despite occasional claims to the contrary, e.g., Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 CHI.-KENT L. REV. 981, 983-84 (1988), this positivist view also does not entail that the constitutional text may not itself incorporate unenumerated principles or value-laden norms. See Neil MacCormick, *A Too Brief Reply to D'Amato, Boyle, Cullison and Stith*, 20 VAL. U. L. REV. 77, 80 (1985) (leading positivist articulating advantages of value-laden norms in positive law of a constitution); McAfee, *Original Meaning*, *supra* note 5, at 1316 n. 376 (stating view that positivism does not preclude value-laden constitutional norms or the possibility of incorporating unenumerated norms); McConnell, *supra* note 12, at 91 (stating that most judges and commentators "perceive some degree of 'open-endedness' in the Constitution" that requires attention to "the vision of the framers and ratifiers" rather than merely to the narrow applications of provisions they considered).

14. See, e.g., Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?* 64 CHI.-KENT L. REV. 67, 77-79 (1988); 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 (1987) (providing general critique of positivist reading of the Constitution in light of founders' commitment to natural law jurisprudence rooted in the Declaration of Independence).

15. E.g., Barber, *supra* note 14, at 79 (arguing that interpretation of the Ninth Amendment should look to framers' commitment to natural rights to preserve Constitution's legitimate authority); Stephen Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT L. REV. 163, 165 (1988) (stating notion that "citizens retain only the rights specifically enumerated" was "precisely the sort of error that the framers of the ninth amendment sought to guard against"); RICHARDS, *supra* note 4, at 222-23 (arguing that Ninth Amendment sought to avoid the very textualist focus illustrated by philosophy of Judge Bork).

ern, positivist conception of law that is foreign to the natural law underpinnings of the founders' jurisprudence.¹⁶ To make sense of the debate over the historical thesis of the founders' unwritten Constitution, an important preliminary step is to analyze this presumed dichotomy between legal positivism and natural law jurisprudence that is so often traded on by proponents of the unwritten Constitution.

A. Modern Legal Positivism and Traditional Natural Law

According to those who contrast the basic assumptions of modern legal positivists with the natural law underpinnings of the founding generation, legal positivism reduces law to power by rejecting any necessary connection between morality and legal validity; in contrast, the founders assumed that law necessarily has a moral foundation.¹⁷ A standard argument is that positivists "confer upon the political order the totality of authority so that the essence of law is not justice, based on reason, but the will of the sovereign."¹⁸ Legal positivism thus views rights as reflecting mere subjective preference and as resting purely on the will of the authority that creates those rights.¹⁹ Conversely, the founding generation saw rights as having their origin in God or nature, and their rights theory is thus seen as providing a stronger foundation for our commitment to the rights of individuals than do the premises of modern positivism.²⁰

There is much to sympathize with in this critique. In recent decades, we have seen a renewal of serious dialogue about the possibility of a discoverable and objective moral reality, and it is

16. As I have observed elsewhere, scholars have not only tended to assume a connection between the Ninth Amendment and the "higher law" background of the Constitution, in part because of the apparent fit between the amendment's language and founding period rhetoric of inherent rights, they have also assumed that the historical tendency to misunderstand the meaning of the amendment reflected the shift of our legal culture from a jurisprudence of natural law to one of legal positivism. McAfee, *Original Meaning*, *supra* note 5, at 1266 n. 197.

17. See Edward J. Erler, *Natural Right in the American Founding*, in *THE AMERICAN FOUNDING—ESSAYS ON THE FORMATION OF THE CONSTITUTION* 195, 197 (J. Jackson Barlow et al. eds., 1988); Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 *WAKE FOREST L. REV.* 539 (1989); Ellis Sandoz, *The Constitution and Civil Rights in the Founding*, in *TO SECURE THE BLESSINGS OF LIBERTY: FIRST PRINCIPLES OF THE CONSTITUTION* 172, 173 (Sarah B. Thufow ed., 1988).

18. BRENDAN F. BROWN, *THE NATURAL LAW READER* 1 (Brendan F. Brown, ed., 1960).

19. Erler, *supra* note 17, at 203, 211-12; Rice, *supra* note 17, at 541-42. Mortimer Adler wrote that positivists are those who think "that there is only positive law and that there are no rational grounds for the criticism of positive law." Mortimer Adler, *The Doctrine of Natural Law Philosophy*, in *THE NATURAL LAW READER* 1, 1 (Brendan F. Brown ed., 1960); see *infra* note 21.

20. E.g., Jaffa, *supra* note 14, at 362; Rice, *supra* note 17, at 370-71.

encouraging to see the emergence of powerful challenges to the positivism that reduces morality to emotivism and perceives the search for justice as an irrational ideal.²¹ There is also the concern of thoughtful individuals, such as Harold Berman, that modern legal thought and education tend to shortshrift the connections between law, reason, history, and religion; this tendency reinforces the idea that law represents more or less the arbitrary will of the lawmaker.²²

Nevertheless, the obvious conflict between modern skepticism and relativism and the founders' commitment to moral reality in fact has very little bearing on the unwritten Constitution debate. To the extent that the "higher law" background of the Constitution is embodied in constitutional norms, whether expressly or as fairly implied from the text itself, constitutional positivists should have no problem with giving full effect to those norms. Legal positivism need not rest on a rejection of moral realism, or what the founders called natural law. Indeed, at least since the famous Hart/Fuller debate, a central theme in the debate between legal positivism and natural law jurisprudence has focused on the question of whether legal positivism's insistence on the *logical* separation of "law" and "morality" facilitated or inhibited the moral criticism of the positive law as it actually operates within a given society.²³

H.L.A. Hart contended that separating the question of legal validity from moral force encouraged a moral scrutiny of law that he felt was essential:

So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear sighted in confronting the

21. See Hans Kelsen, *What is Justice, in WHAT IS JUSTICE? JUSTICE LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 21 (1971) (contending that "only relative values are accessible to human reason" and that "[a]bsolute justice is an irrational ideal or, what amounts to the same, an illusion"); Rice, *supra* note 17, at 541 (criticizing Kelsen's view as typical of positivist perspective).

22. Harold J. Berman, *The Crisis of Legal Education in America*, 26 B.C. L. REV. 347, 348-49 (1985).

23. The Hart/Fuller debate consisted of Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595 (1958). Fuller contended that the separation of law and morals contributed legitimacy to lawless regimes like the one that existed in Nazi Germany. For useful retrospective on the famous Hart/Fuller debate, see JOHN D. FINCH, *INTRODUCTION TO LEGAL THEORY* 46-69 (1974); MICHAEL MARTIN, *THE LEGAL PHILOSOPHY OF H.L.A. HART* 209-37 (1987). Martin concluded his careful review with the observation that a tracking of all the arguments "leaves one with the lingering suspicion that . . . if their positions were clarified Fuller and Hart would not be in as much disagreement as they suppose." MARTIN, *supra*, at 231.

official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.²⁴

Although the debate over the validity of Hart's assessment that legal positivism actually contributes to the moral scrutiny of the law continues even today,²⁵ it is quite clear that many moral realists—including some who contend for the unwritten Constitution thesis—are persuaded that the positivist argument for the logical separation of law and morals has much to commend it.²⁶

When the debate between natural law and legal positivism is basically reduced to one over the most appropriate use of the appellation "law," it soon becomes apparent why the recognition that the founders were moral realists, believers in natural law, does not provide a firm grounding for the view that they were not legal positivists as well.²⁷ As Philip Soper observed, "natural law theories are hardly theories [of law] at all,"²⁸ inasmuch as historical natural law thinking reflected efforts to grapple with the idea of obligation to

24. H.L.A. HART, *THE CONCEPT OF LAW* 205-06 (1961).

25. As recently as 1985, scholars engaged in a new round of debate over the validity of Hart's "practical" justification of the positivist analysis of the meaning of "law." Compare Neil MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 VAL. U. L. REV. 1, 10-18 (1985) (defending Hart's thesis), with Anthony D'Amato, *The Moral Dilemma of Positivism*, 20 VAL. U. L. REV. 43 (1985) (criticizing Hart's thesis), and Joseph M. Boyle, Jr., *Positivism, Natural Law, and Disestablishment: Some Questions Raised by MacCormick's Moralistic Amoralism*, 20 VAL. U. L. REV. 55, 55 (1985) (expressing surprise that the argument for positivism reduces to the claim "that it makes for a healthier skepticism of political authorities if we accept the idea that an enactment can be a law in the fullest and most proper sense, but still be morally indefensible," and that this view opposes only "the view that such an enactment is not really a law unless it is morally justifiable"). See also Rice, *supra* note 17, at 567 (arguing that legal positivism lends legitimacy to morally abhorrent positive law).

26. For example, Professor Richards considered unwritten constitutionalism to be among the foundational principles of American constitutionalism, RICHARDS, *supra* note 4, at 220-26, but he has long since been on record as endorsing the modern positivist insistence on the logical separation of law from morals so as to facilitate the moral criticism of law. DAVID A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977). Even in the more recent of these works, moreover, Richards acknowledged that the American revolutionaries relied on both constitutional and moral argument in their struggle with Great Britain, RICHARDS, *supra* note 4, at 74, flirted with their own version of legislative supremacy, *id.* at 92, and eventually perceived the need to limit all government power "by a fixed constitution of government" adopted by the people. *Id.* at 94 (quoting JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* (1794)).

27. See, e.g., SAMUEL STOLJAR, *MORAL AND LEGAL REASONING* 157 (1980) (commenting on need to recognize that "positivism and naturalism are not mutually exclusive").

28. PHILIP SOPER, *A THEORY OF LAW* 53 (1984).

law more than with the questions of descriptive jurisprudence. So- per pointed out, for example, that the classical natural law slogan that "an unjust law is not law" appears to rest on a contradiction inasmuch as the identification of an "unjust law" as not *really* law calls for reliance on the formal tests of legal validity along the lines proposed by modern positivists.²⁹ It is therefore quite logical for a natural law thinker to view natural law standards as tests of the validity of positive law, understood as its power to obligate morally, without claiming that an actual legal system implicitly incorporates natural law.

Indeed, traditionally natural law thinkers acknowledged the independent existence of positive law,³⁰ and they understood that in the world of practice the natural law was implemented by the process of reducing its general principles into positive, human law.³¹

29. *Id.* at 52; see also STOLJAR, *supra* note 27, at 157 ("Without positivism, and its principal assertion that laws are valid simply by coming down from a higher (political) authority, we could not even describe certain laws, statutes in particular, as unjust or immoral; indeed on a strictly naturalistic basis to speak of unjust or immoral laws is virtually self-contradictory, if only because unjust laws cannot 'naturally', but only 'positivistically' exist").

Alternatively, Barry Hoffmaster has contended that the understanding that the natural law view of unjust laws presents an exclusionary test, which concludes that a putative law cannot be a valid human law if it is determined to be at odds with natural law, is a misconstruction of the traditional natural law view:

What I think Aquinas says is not that any human law that fails the exclusionary test ceases to be a valid human law, but rather that there is no obligation to obey a human law that fails the exclusionary test. A human law that fails the exclusionary test retains its status as valid human law, but it ceases to be law in a full-fledged sense because there is no obligation to obey it.

Barry C. Hoffmaster, *Natural Law and Legal Obligation*, in *THE MEDIEVAL TRADITION OF NATURAL LAW* 67, 68 (Harold J. Johnson ed., 1987); see *id.* at 69 (stating that since traditional natural law theory links moral principles to legal obligation, which implies a real obligation to obey the law, rather than legal validity, Aquinas could agree with legal positivists that "it is possible, at least in principle, to construct a set of criteria based on pedigree for demarcating legal norms from other kinds of social norms"). Hoffmaster concluded that "legal positivism and traditional natural law are much closer views than is generally allowed." *Id.* at 73.

30. It has been observed, for example, that although natural law was fundamental to the political philosophy of St. Thomas Aquinas, "positive civil law, as the vehicle through which the state governed, is, for him, something super-added and imposed from without by human authority. As such it is distinct from natural law, which stems from the inner rational animality of man." Edgar Scully, *The Political Limitations of Natural Law in Aquinas*, in *THE MEDIEVAL TRADITION OF NATURAL LAW* 149, 154 (Harold J. Johnson ed., 1987).

31. Aquinas, for example, acknowledged that we face enormous difficulties in bringing the unchangeable principles of natural law down to the level of application through practical reason. ST. THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS* 50-51 (William P. Baumgarth & Richard J. Regan eds., 1988); *id.* at 60 (stating that the "general principles of the natural law cannot be applied to all men in the same way on

One traditional position was that the need for legal order was itself an important good, so that existing law should not be changed unless it "is clearly unjust or its observance extremely harmful."³² Unsurprisingly, then, in an important modern work John Finnis defined "law" in terms that would satisfy many modern positivists, and suggested that "Natural law" is, by reference to his "focal use of the term," only "analogically law."³³

Given the inevitable debate that occurs about the specification of the natural law in human law, and in light of the efficacy of many existing legal systems, throughout history people of affairs who were concerned about justice have tended to focus their energy on arguments for interpreting or reforming the positive law to accomplish desired ends rather than on arguing their case on natural law alone.³⁴ Indeed, as in the case of the Declaration of Independence,

account of the great variety of human affairs, and hence arises the diversity of positive laws among various peoples"). Aquinas concluded that human law meets human needs both by regulating for the common good, including regulations that are morally indifferent, as well as by determining the implications of the general principles of natural law within a given legal culture. *See, e.g., id.* at 59-60.

32. *Id.* at 79. If I understand Aquinas correctly, laws that do not perfectly conform to natural law principles might be sustained because they are not so clearly unjust or sufficiently harmful to warrant the evils implicated in lightly changing the law.

33. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 280 (1980). For Finnis's description of his own definition of "law," see *id.* at 276-77. In Finnis's scheme of things, natural law thinking has implications for analyzing obligation to (and within) law. *See id.* at 297-343 (chapter on "Obligation").

Indeed, Finnis expressed skepticism whether the natural law tradition has much to contribute to the modern debate between positivists and critics such as Ronald Dworkin (whom many associate with the revival of non-positivist, natural law-oriented jurisprudence):

The tradition of 'natural law' theorizing is not characterized by any particular answer to the questions: 'Is every "settled" legal rule and legal solution settled by appeal exclusively to "positive" sources such as statute, precedent, and custom? Or is the "correctness" of some judicial decisions determinable only by appeal to some 'moral' ("extra-legal") norm? And are the boundaries between the settled and unsettled law, or between the correct, the eligible, and the incorrect judicial decision determinable by reference only to positive sources or legal rules? The tradition of natural law theorizing is not concerned to minimize the range and determinacy of positive law or the general sufficiency of positive sources as solvents of legal problems.

Id. at 290.

34. A powerful historical example is the American Revolution. *See generally*, I JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 95 (1971) ("[F]or all the references to philosophers, it was with solid shot from the magazine of common law precedent that the American cause was chiefly vindicated"); A.E. Dick Howard, *Rights in Passage: English Liberties in Early America*, in *THE BILL OF RIGHTS AND THE STATES* 3, 11-13 (Patrick T. Conley & John P. Kaminski eds., 1992) (summarizing mixture of natural law and British constitutional argument in American revolutionary documents; showing that materials reflect a clear understanding

reliance on natural law as a sufficient grounding for political claims has frequently reflected the decision to give up on legal claims and processes in favor of a break from the established legal order.³⁵

Moreover, commitment to the principle of natural law and natural rights coexisted in eighteenth century England with the doctrine of sovereignty, which acknowledged the need for a single law-maker with absolute power to settle the law.³⁶ This historical development of itself points up that just as the question whether there are natural rights is an important one, so is "the institutional question of how they can be identified and implemented."³⁷ By the time of the American Revolution, England had long since adopted the view that Parliament was sovereign, and Parliamentary sovereignty received its most eloquent defense from William Blackstone, an advocate of natural law jurisprudence.³⁸ If it is unclear whether the founders were simultaneously legal positivists and natural law advocates, we do know that William Blackstone was exactly that.

For Blackstone, the common law was rooted ultimately in principles of natural law, and he provided the natural lawyer's definition of law as an ordinance of reason for the common good.³⁹ As William C. Wiecek observed, however, fifty pages after affirming the superior obligation of natural law, Blackstone asserted that

of the distinction between purely legal arguments and broader political claims); JOHN P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 9-15, 90-92 (1986) (contending that the American case for revolution rested on English rights and that nature served only as confirming authority for rights claims based on the British constitution).

35. See Grey, *Origins*, *supra* note 4, at 890-91 (stating that since Revolution removed colonists "from the circle of those to whom [the British constitution] applied," the Declaration based its case "upon extra-legal considerations of utility and political philosophy" rather than "legal argument").

36. REID, *supra* note 34, at 76-77 (describing eighteenth century view of Parliamentary sovereignty and its reflection of the reality "that there were no longer immutable rights in British constitutional theory"; acknowledging, however, that this implication was not universally grasped as of the 1770s); RICHARDS, *supra* note 4, at 69-70 (describing doctrine of Parliamentary sovereignty and its impact on the Revolutionary struggle); McAfee, *Social Contract Theory*, *supra* note 5, at 274-76.

37. McConnell, *supra* note 12, at 91. Professor McConnell's eloquent "moral realist" defense of an essentially positivist vision of our constitutional system provides what I consider to be the most succinct summary of the reasons why many who would identify with the founding generation's commitment to natural rights might nonetheless adhere to constitutional textualism.

38. See, e.g., I WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 41 (1765) (stating that the "law of nature, being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other;" also asserting that no human laws "are of any validity" if they violate natural law); FINCH, *supra* note 23, at 36-37 (describing Blackstone as "the last considerable English natural lawyer" and underscoring his view that human laws are not valid if they contradict natural law).

39. BLACKSTONE, *supra* note 38, at 44.

Parliament's power to establish the law was not limited by the principles of reason that make up common law and natural law.⁴⁰ For purposes of the legal system, at least, Parliament was the final judge of the natural law. The unwritten Constitution thesis, by contrast, posits that our founders adhered to the view that the natural rights, as well as perhaps other fundamental rights, are implicit in the legal order because they are essential elements of the social contract giving rise to republican government. If this claim is to be supported historically, however, it must rest on a showing of a good deal more than the importance of the idea of natural law and natural rights to the founders.

B. Modern Advocates of the Unwritten Constitution

Just as modern constitutional positivists need not be opponents of the moral vision of the founders, proponents of the unwritten Constitution are themselves often legal positivists.⁴¹ Moreover, many

40. *Id.* at 91; see WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 11 (1988). Wiecek observed that one can find equally contradictory statements in the writings of the American revolutionary thinker, James Otis. *Id.* at 11-12; see also Grey, *The Original Understanding*, *supra* note 4, at 145, 152-53 (describing Blackstone's position as one of "equivocation," and acknowledging his tilt toward legislative supremacy).

41. See, e.g., LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 96-97 (1985) (contending that Supreme Court nominees who "would strike down duly adopted constitutional amendments" to preserve favored constitutional principles of individual right would be "unworthy of confirmation" because they would have failed to recognize that the Supreme Court's power to say what the Constitution means "is subservient to the power to amend that document through the machinery expressly set forth in Article V"). Clearly, in making the people's power to amend overriding even of principles of individual right, Tribe adopts the familiar positivist view that the law of our Constitution is to be identified by the source of the decision (the people) rather than its conformity with principles of natural law.

Even a recent commentator who insisted that the Supreme Court may properly "strike down" a constitutional amendment, based on the constitutional vision implicit in the Ninth Amendment, nevertheless argued for "a historically rooted standard for limiting the scope of the Ninth Amendment" that would look for the people's inalienable rights in the positive law of the historical and contemporary federal and state constitutions. Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?* 100 *YALE L.J.* 1073, 1074 (1991); see *id.* at 1082-83. While I disagree with Rosen's construction of the Ninth Amendment, there is a good deal to be said for his proposed methodology; a point of establishing a constitution, even if it is only partially integrated, is to firmly establish limits on government, and there is reason to think that the founders sought to establish a fairly particular vision of natural law and natural rights rather than an open-ended methodology in which subsequent decision-makers would feel free to reject their decisions as to the basic content of the natural rights. Cf. William Van Alstyne, *Notes on a Bicentennial Constitution: Antinomial Choices and the Role of the Supreme Court (Part 2)*, 72 *IOWA L. REV.* 1281, 1289 (1987) (suggesting that the Constitution "may have its own theory of justice," and it is that theory "which is to govern" rather than the system of ideal justice as apprehended by the interpreter.)

are committed to some variation of moral conventionalism as the appropriate source of guidance for construing the Constitution's open-ended provisions.⁴² Indeed, the largest number of scholarly advocates of the unwritten Constitution do not accept the metaphysical underpinnings of the founding generation's thinking about natural law and natural right.⁴³ This may not be a group from which to

In fact an entire school of Ninth Amendment jurisprudence passes quickly over the natural rights underpinning of the most plausible historical arguments for the modern reading of the amendment in the effort to build an acceptably limited (positivist) methodology for identifying and protecting the unenumerated rights. See, e.g., Norman G. Redlich, *Are There "Certain Rights . . . Retained by the People"*, 37 N.Y.U. L. REV. 787, 810-12 (1962) (arguing for criteria for discovering unenumerated rights that seek rights comparable in nature to the enumerated rights). This view receives an assist from the ambiguities created by the existence of the common law heritage of British constitutionalism that can be viewed as another potential source of unenumerated rights. There is room both for arguments that these would have been the rights contemplated and that the common law rights were presumed to be rooted in nature and reason. For insight into the connections between the customary rights of British constitutionalism and the natural rights discovered by reason in the thinking of the founding period, see James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?* 58 U. CHI. L. REV. 1321 (1991).

42. See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* 53-54 (1980); Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995 (1986). Ronald Dworkin presented a similar case. While it is unclear whether Dworkin is an advocate of the unwritten Constitution thesis, he stands as a critic of modern positivism whose approach to constitutional decision-making gives important weight to the background principles of American moral and political thought. Even so, he is hardly an advocate of traditional natural law jurisprudence. He purports to "interpret" the Constitution (and all law) by following positive law commands in clear cases and explicating a legal provision's background principles (and not some purely ideal set of principles) in hard cases. See, e.g., Jules L. Coleman, *Negative and Positive Positivism*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 28, 29 (Marshall Cohen ed., 1984) [hereinafter *CONTEMPORARY JURISPRUDENCE*]; E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, in *CONTEMPORARY JURISPRUDENCE*, *supra*, at 21 (stating that Dworkin's theory "capitalizes on the problem of uncertainty to reintroduce value judgments in the description of the law, but in so doing gives away most of what the classical debate was about in the first place").

This sort of ultimate reliance on moral convention or societal consensus in construing the Constitution has, of course, been subjected to criticism by advocates of a purer commitment to fulfilling the Constitution's purported quest for simple justice. See Barber, *supra* note 14, at 69-72.

43. In his now-famous article that launched the modern unwritten Constitution debate, Thomas C. Grey acknowledged that modern skepticism about the metaphysical underpinnings of the founding generation's natural law thinking presented a significant objection to the project of defending an unwritten Constitution. Grey, *supra* note 1, at 718. More recently, Randy Barnett took the position that the Ninth Amendment should be ignored because it rests on a view of natural rights that presents a philosophical mistake. Barnett, *supra* note 4, at 31-34; see *id.* at 33 (clarifying that he did not consider the natural rights view of the founders as mistaken). Barnett concluded that under a social contract analysis, our generation is bound by the open-ended model of rights he sees embodied in the amendment. While Barnett underscored the moral skepticism of those who oppose reliance on the Ninth Amendment, skepticism about the foundations of moral knowledge characterizes the thought of many of the proponents of Barnett's

derive a sense of comfort because of their affinity to the commitment to a transcendent moral order that was held by many of the founding generation.⁴⁴

Moreover, when the historical thesis of a founders' unwritten Constitution is converted into a legal argument, as it frequently is, it rests on a positivist footing: we are constitutionally justified in explicating a fundamental rights jurisprudence because the founders intended and established this commitment to an open-ended set of limits on government as the point of our constitutional practice.⁴⁵ From some, this positivist justification for the unwritten Constitution idea appears to be more than a simple table-turning device in a continuing debate with constitutional originalists. For example, it appears that Professor Thomas C. Grey, who is a central figure in the movement to explicitly renew our commitment to unwritten fundamental law, not only views the historical materials as providing an important kind of justification for modern practice,⁴⁶ but also perceives the historical unwritten Constitution as limited by positive law principles. While he did not elaborate the point at great length, in his most recent treatment Grey appeared to embrace the view that the founders saw unwritten principles as presumptively binding

reading of the Ninth Amendment as well. *E.g.*, Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 155 (1988) (surmising that "relatively few of us continue to believe in the existence of a foundational 'human nature' or the presence of a divinity who inscribes his or her teachings either into a decodable text of nature or upon our minds via self-evident truths or disciplined right reason").

44. This is nicely illustrated by comparing the extent to which the founding generation linked the idea of natural law to divine law with the attitude of modern constitutional scholars toward religious thought in general. Donald Lutz observed that 80% of the political pamphlets published during the 1770s were reprinted sermons, and that the most commonly cited work in the public political literature from 1760 to 1805 was the Bible. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 140-41 (1988). For an exposition of the evolution from the dominance of religiously based thought, even in justifying religious liberty, to the predominant modern view that a religious justification of a law in our secular state raises serious Establishment Clause problems, see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

45. *See, e.g.*, Barnett, *supra* note 4, at 33-34; 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, 254-61; Sherry, *supra* note 4, at 1176-77. This is not to say, however, that proponents of the unwritten constitution have failed to supplement this essentially positivist argument with broader justifications for this sort of constitutional practice from moral and political theory. *See, e.g.*, Barber, *supra* note 14; Randy E. Barnett, *Forward: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988). Strikingly, however, far fewer have defended the idea of an unwritten constitution on the ground that only law validated by moral principle can properly be called law.

46. *See* Grey, *The Original Understanding*, *supra* note 4, at 168 (arguing that given predominance of constitutional positivism, it is "particularly important" to see that implied limitations were once "the conventional wisdom").

and implicit within the written Constitution, but nonetheless as subject to being overridden by the clearly expressed intent of the sovereign people.⁴⁷

According to Grey, the written Constitution's embrace of slavery insulated that legal practice from constitutional judicial review even though it ran against the grain of the premise of natural equality that undergirded the social contract foundations of the document.⁴⁸ If Grey's historical thesis is correct, then the founders join modern legal positivists in insisting that legal validity within the American constitutional scheme ultimately rests on our ability to trace a law's source to the implied or express will of an authoritative law-giver, i.e., the sovereign people, rather than its compliance with substantive criteria. Grey did not seem predisposed, moreover, to assert that this sort of thinking was jurisprudential error because it ascribed the appellation of law to a legally sanctioned practice that rather clearly violated principles of natural law.

Even Professor Sotirios Barber, who forcefully criticized advocates of "conventionalist" understandings of our constitutional rights, as well as of the unwritten Constitution idea,⁴⁹ appeared to stop short of embracing a pure natural law jurisprudence. In contending that the Ninth Amendment and other features of the Constitution require constitutional decision-makers to pursue "simple justice," Barber was insistent that these conclusions are interpretive of the Constitution and the views expressed in founding-era documents such as *The Federalist*.⁵⁰ He did not at any point deny that the founders could have adopted a closed system of positive law without aspiring to justice,⁵¹ but argued instead that provisions such as the Preamble and Ninth Amendment should be taken as establishing the contrary position given their rhetorical commitment to the pursuit of justice and moral reality. In fact, he seemed to acknowledge that

47. *Id.* at 164.

48. *Id.* Even Suzanna Sherry, who does not appear to acknowledge the ultimate supremacy of popular sovereignty in the founders' constitutionalism, offered the founders' unwritten Constitution as a means of countering modern positivists' historical claims rather than as an exposition of the very nature of law and constitutionalism. Sherry, *supra* note 4, at 1177 (summarizing thrust of article as establishing that "the modern Court's insistence on textualist constitutionalism as the sole technique of judicial review" is "inconsistent with the intent of the founding generation").

49. *See supra* note 42.

50. Barber, *supra* note 14, at 77-80; *see also* Sotirios A. Barber, *Judicial Review and The Federalist*, 55 U. CHI. L. REV. 836 (1988). For a similar approach, advocating a "natural law" reading of the written Constitution, see Michael S. Moore, *Do We Have an Unwritten Constitution?* 63 S. CAL. L. REV. 107 (1989).

51. But they better have spoken very clearly. *See infra* note 53.

his preferred interpretation should hold only "[i]f the framers' language and the historical record yield interpretive options."⁵²

While there is room for doubt as to whether Professor Barber will ever run out of "interpretive options,"⁵³ he seems to agree in principle that the positive law of the Constitution holds at least some binding force apart from our agreement with its moral vision. Barber suggested, for example, that decision-makers would be hypothetically bound to give at least some force to the Free Speech Clause of the First Amendment, even if their own conclusion was that recognition of such a right was a mistake.⁵⁴ In contrast, the same obligation would not be in force if they viewed the unenumerated right of privacy as a mistake.⁵⁵ Admittedly, however, Barber did not address the more serious issue raised in cases in which decision-makers conclude that enforcement of an enumerated right, as long understood in history and precedent, actually violates the natural, though unenumerated, right of another citizen. Even so, in responding to Professor McConnell's charge that his constitutional theory licenses the disregard of positive constitutional law, Barber

52. Barber, *supra* note 14, at 77; *accord id.* (arguing that Ninth Amendment should be read in ways that "preserve its authority," but only if "its language and history permits").

53. Barber quite clearly eschewed any interpretive method that would consider decision-makers bound by "the framers' historical understanding of constitutional language." Sotirios A. Barber, *Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*, 64 CHI.-KENT L. REV. 111, 123 (1988). Given that he is from the school of thought that views "interpretation" as a largely normative enterprise, it is difficult to imagine what body of evidence could be brought to bear to persuade him that his reading of the Constitution and Ninth Amendment is precluded by text and history.

54. Barber, *supra* note 14, at 82. The concession admittedly strikes the reader as rather formalistic, particularly because Barber only went so far as to say that we must honor "some conception of free speech, however minimal, even if we are convinced that it was a mistake to honor any." *Id.* at 82. For a critique of this sort of approach to interpretation, that eschews the search for intended meaning but purports in some sense to be limited by language, see Steven D. Smith, *Correspondence, Law Without Mind*, 88 MICH. L. REV. 104 (1989).

55. Barber, *supra* note 14, at 82. Barber's position points up the enormous gulf that separates those who identify Ninth Amendment rights by reference to a pure natural law methodology and those who advocate a more positivist (or historical) approach to explicating the rights thought to be secured (i.e., by looking to the rights that the founders saw as natural or fundamental). The historical argument that the amendment secures unenumerated limitations on the powers granted to government pointed to the founders' fears that rights they neglected to enumerate might be lost by implication, and a standard is that the amendment prohibits interpreters from "disparaging" the rights simply because they are not found in the text. See McAfee, *Original Meaning*, *supra* note 5, at 1247. But in suggesting that unenumerated rights may be rejected altogether if modern decision-makers conclude that the views of the founding generation as to the claim of a given right was simply mistaken, Barber seems rather clearly to have disparaged the rights omitted from the text.

gingerly insisted that, "I hardly appeal from law to justice in any matter of constitutional meaning."⁵⁶

Even those who identify closely with the contents of the natural rights ideology of the founders offer up highly qualified versions of natural law constitutional jurisprudence. An example is provided by the work of Harry A. Jaffa, the dean of American historians who have underscored the centrality of the connection between the Declaration of Independence and the Constitution. On the one hand, Jaffa insisted that our constitutional idea of limited government can only be understood against the assumption that individuals held inalienable rights that they necessarily reserved to themselves upon entering the social contract.⁵⁷ Consequently, it is clear that the Declaration's doctrine of inalienable rights takes priority over its stated commitment to the consent of the governed, and it follows that even "the collective sovereignty of the people—such as that which ordained and established the Constitution—is limited."⁵⁸

Jaffa is unabashed in criticizing modern constitutional jurisprudence, which he perceives as failing to give effect to this priority of natural rights over collective sovereignty.⁵⁹ However, his own constitutional jurisprudence winds up more toothless and positivist than his criticism of others would suggest when he approaches the difficulties presented by the historical reality of the legal institution of slavery. According to Jaffa, the framers embraced the principles described above, but distinguished between "principles" and "prudential morality": "Principles are necessary, but not the sufficient condition, for deciding cases," and prudential morality "means doing the most good, or least evil, in any given situation."⁶⁰

The founders, according to Jaffa, appropriately traded the immediate abolition of slavery for the acquiescence of the slave states in a stronger national government by which slavery was placed on the road to extinction.⁶¹ For Jaffa, Lincoln is thus the great model of

56. Barber, *supra* note 53, at 125. One wonders if the appropriate response of an exponent of a natural law jurisprudence to this charge would be that "of course" I advocate disregard of mere "positive law" (whether adopted by the people or not) that is not law because it departs from the requirements of natural law. It is a tribute to the power of constitutional textualism and positivism that Barber bristled at the suggestion that he had advocated disregard of the institutional and substantive limits of the positive law of the Constitution.

57. Jaffa, *supra* note 14, at 360.

58. *Id.*

59. *Id.* at 372-73.

60. *Id.* at 371. The idea that "prudence" is required to link the principles of natural law to the concrete decision-making required in an existing legal order has roots in traditional natural law thinking. See Scully, *supra* note 30, at 149-50.

61. Jaffa, *supra* note 14, at 371.

natural law constitutional jurisprudence, as he attempted to strike a prudential balance by condemning slavery based on the principles of the Constitution without claiming that it could be ended instantaneously by a mere legal decree.⁶²

If I understand Jaffa correctly, it appears fairly clear that a judge deciding cases late in the eighteenth century or early in the nineteenth, who purported to be committed to natural law and justice, might properly have determined that a decision upholding slavery would generate less evil than a contrary decision. The prudential judgment would dictate deferring full implementation of the correct moral principle under the circumstances. If so, such judges might be morally justified in embracing a sort of legal positivism on grounds of prudential morality, enforcing, and hence recognizing the "positive law" validity of, some laws violating norms of natural right, so long as they perceived the conflict between practice and principle and did not ascribe to such laws conformity with the principles underlying the Constitution.⁶³

Jaffa's prudential morality thesis may be one way to preserve the link between law and principle, but it does not seem likely to enhance the respect given the judiciary or to aid a judge in explaining to slaves the basis for the conclusion that the people who lack authority to invade their natural right of liberty had nonetheless legally established a regime of slavery sanctioned by the Constitution.⁶⁴ These views are also, despite Jaffa's suggestion to the

62. *Id.* Lincoln's approach, as summarized by Jaffa, might well be justified in one who is working to end slavery, but Jaffa's failure to argue that slavery was simply illegal points up that natural law theory is better at facilitating criticism of existing law than at explicating the nature of "law."

63. It is hardly clear that Jaffa ascribed a coherent moral and political vision to the founders. At one point, Jaffa said that the founders, without exception, held "that the only purpose of government was to secure rights whose origins is antecedent to all charters or human or positive law." *Id.* at 378. If this were true, however, it would not be acceptable for statesmen to override such rights to create a strong government that might eventually vindicate them. Arguably this sort of tension was actually present in the thinking of the founders (as it clearly is in Jaffa), but a positivist jurisprudence is one way to leave enough play in the joints for a legal system to embody such conflicting tendencies of human thought.

64. Similarly, Edward J. Erler criticized modern originalism's focus on the founders' views and values as reflecting the positivist assumption that rights "have no support other than the will of the authority that creates the rights." Erler, *supra* note 17, at 211. According to Erler, "[t]here can be little doubt that the Framers of the Constitution regarded the Declaration [of Independence] as supplying the principles of the Constitution." *Id.* at 197. At the same time, however, he acknowledged that "[t]he regime of the Founders was incomplete because it allowed the continued existence of slavery" and that a more radical position on slavery would have spelled defeat for the Constitution. *Id.* at 198.

contrary, as plausibly described as embodying a type of positivist jurisprudence as a jurisprudence of natural law.⁶⁵

In the end, Erler offered what amounts to a positivist constitutional jurisprudence inasmuch as he did not suggest that the Constitution's sanctioning of slavery did not amount to "law." In combining an acknowledgement of the legal force of slavery under the founders' Constitution with an argument in favor of interpreting the individual rights provisions of the Constitution based on the natural law commitments of the founders rather than the assumptions of modern moral skepticism, Erler merely criticized a morally skeptical variation of the positivist theme of interpreting the Constitution. Erler's argument that we should take seriously the natural rights of underpinnings of various constitutional provisions, and not retreat to strict construction based on moral skepticism or majoritarianism, is a long way from natural law jurisprudence as it has typically been formulated.

65. Try as we might, it is difficult to avoid the incongruity between a full-blown natural law/natural rights jurisprudence as a description of the Constitution and the Constitution's recognition of the institution of slavery—as recent exchanges illustrate. In a recent symposium, Professor McConnell quoted Lincoln's reliance on the principle of the Declaration of Independence, in which he was emphatic that the Declaration's statement of human equality articulated "a standard maxim for free society," but did not purport to "confer" this equality "immediately upon [all people]." McConnell, *supra* note 12, at 99-100 (quoting ROY P. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 361 (1946)). McConnell concluded, correctly it seems, that Lincoln did not advocate judicial invalidation of slavery or the view that slavery was unconstitutional and illegal in 1859. Slavery was to be abolished by political will, not by legal argument. For a similar historical analysis of the views of leading nineteenth century jurists of the constitutional status of slavery by a professed "moral skeptic" who also embraced the modern reading of the Ninth Amendment, see Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 148-54 (1988); see also GOLDSTEIN, *supra* note 5, at 25-31.

On the other hand, while Professor Barber repeatedly asserted that the Constitution can appropriately be read, consistent with the Ninth Amendment and the preamble's declaration of its purpose to establish justice, only as embodying principles of actual justice, his treatment of Lincoln's constitutional thought failed to answer McConnell's argument. He relied, for example, on Lincoln's appeal for the Supreme Court to reverse the *Dred Scott* decision, so that slavery might be forbidden in the territories, concluding that Lincoln looked to "justice" in construing the Constitution rather than the framers' concrete intentions. Barber, *supra* note 53, at 118. But the negative pregnant in Barber's own example is precisely that Lincoln did not see the legal invalidation of all slavery as a plausible legal argument to assert notwithstanding his own belief that it violated the principle of equality in the Declaration of Independence.

Similarly, Stephen Macedo acknowledged Lincoln's historical view that the framers "knew no way to get rid of" slavery, but insisted that Lincoln nonetheless saw the Constitution as "aspirational" and "composed not just of positive rules, but also of certain ideals and moral principles to be strived to and progressively approached." Macedo, *supra* note 15, at 169; accord Barber, *supra* note 14, at 77. But Macedo rescued natural law constitutionalism at the price of acknowledging that judicial decisions embodying an "accommodation of slavery" were legitimate and represented valid law at the time of decision. Macedo, *supra* note 15, at 169. Indeed, whatever interpretive or jurisprudential differences there are between Macedo and McConnell—which are difficult to assess given the vagueness of Macedo's treatment of the occasions for accommodating convention versus implementing aspirational values—it is difficult to sum them up in terms of a distinction between natural law and positivist jurisprudence. The legal validity of slavery, as well as the decisions upholding it, are not, in Macedo's

C. Conclusions

Advocates of the view that the founders embraced an unwritten Constitution do in fact rely on what they take to be the implications of the principles the founders drew from their own natural law/natural right heritage. Skeptics of their thesis draw differing conclusions about the founders' understanding of the relationship between natural law and constitutional law. To suggest, however, that only the unwritten Constitution idea embraces the natural law background of the founders is simply to ignore the complex philosophical and historical connection between natural law and positive law in jurisprudential thought.

In fact, as we have seen, the debate as carried on is actually a debate from within a positive law jurisprudential framework as to the extent to which the Constitution was, or should be, understood as generally incorporating norms of natural right, or the very concept of natural right, beyond or, in a very few variations, even contrary to, the norms stated in the text of the Constitution. Only rarely is the argument for a natural law jurisprudence of judicial review couched in terms that do not purport to interpret the Constitution we actually have. Mortimer Adler, for example, argued that Judge Bork should have been rejected for his positivism alone, contending that it precluded him from judging correctly in "cases that come before the Supreme Court in which it is not unconstitutionality, but injustice—the violation of human rights and liberties—that calls for rectification and redress."⁶⁶ And to the extent that "constitutionality" is equated with "legality," even Adler's assertion contains an interesting tip of the hat to positivist jurisprudence—namely, the suggestion that legality/constitutionality and morality/injustice might be separated.

The unwritten constitutionalism debate, then, will not be won by attempting to attribute a particular label, "positivism" or "natural law," to the jurisprudence of the founders. By and large, they did not articulate, let alone elaborate, any such jurisprudential distinction in these terms, and they generally did not engage in the arguments of the twentieth century debate on the subject. The historical question can be addressed meaningfully only if we acknowledge that

scheme of things, determined immediately by reference to a substantive standard of natural law or simple justice.

66. Mortimer Adler, *Robert Bork: The Lessons to be Learned*, 84 *Nw. U. L. Rev.* 1121, 1124 (1990). Even Adler eventually advanced the standard justification that his natural law jurisprudence fits into the framework of the Constitution, *id.* at 1133-34, but he seems the most unequivocal of the natural law constitutionalists that his fundamental law jurisprudence does not rest on any decisions made in an American past.

it concerns the particular mix of institutional arrangement and positive law the founders used to realize the ends of justice and natural rights, and the extent to which they viewed these as fixing the constitutional limits on government or only as suggesting a vastly more open-ended system for implementing the idea of justice and natural rights.

II. NATURAL LAW AND CONSTITUTIONAL LAW: TAKING THE FOUNDERS SERIOUSLY

One of the inherent difficulties in translating the discourse of the founders is that they did not set out to address the precise terms of our debate and they did not use the language that we use. In the speeches and writings of the founding era, we learn of natural rights and written constitutions, but we do not encounter a clearly drawn distinction between positivist and natural law jurisprudence. While the founding generation displayed a deeper interest in political theory than the generation in which we live, these were also men of affairs who were more interested in the practical implications of their thought than in theoretical distinctions.

A. *Some Difficulties in Translation*

There is no question that the founding generation universally agreed that a constitution should secure the natural rights that were deemed inalienable by the dominant social contract theory of the day.⁶⁷ Moreover, during the revolutionary and constitution-building periods, legal terminology was employed on occasion in describing unwritten principles that were thought to be rooted in reason.⁶⁸

67. As Philip Hamburger explained, the founders viewed all the freedoms that individuals would enjoy in the absence of government as "natural rights." Under the standard formulations of social contract theory, however, many of these natural rights would be ceded up to government to better secure certain fundamental (inalienable) rights. Philip Hamburger, *Natural Rights and Positive Law: A Comment on Professor McAfee's Paper*, 16 S. ILL. U. L.J. 307, 308 (1992).

68. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1911) (Oliver Ellsworth, Aug. 22, 1787) (contending that all lawyers would say that "ex post facto laws were void of themselves") [hereinafter Farrand]. *But cf. id.* (H. Williamson) (responding that "[s]uch a prohibitory clause" should be adopted because "the Judges can take hold of it"). There is room for doubt as to whether Ellsworth's contention was a natural rights argument or was rooted in the traditional conception of fundamental law within the British constitutional tradition. Compare Sherry, *supra* note 4, at 1157 (arguing that delegates who spoke on the merits of the clause "explicitly or implicitly regarded an ex post facto law as a violation of natural law"), *with id.* at 1158 n. 137 (acknowledging that the "perceived flaw in ex post facto laws might have been a violation of natural rights of the individual, or it might have been a violation of more general fundamental law such as the principles of 'common right and reason'") and David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to*

At the same time, however, the founders also demonstrated an acute awareness that actual legal systems frequently fail to secure the natural rights,⁶⁹ and their statements about the rights that constitutions should secure often reveal anxiety about the possibility that their own Constitution might fail this central task.⁷⁰

In determining whether the founders' commitment to natural rights led them to the view that such rights were an inherent feature of republican constitutional order or to a "practical positivism," based on wariness of unchecked human institutions, their occasional use of legal terminology in describing the limits imposed by reason

Professor McAfee, 16 S. ILL. U. L.J. 313, 320 (1992) (stating that Ellsworth's comment reflected Federalist view that implied rights included not only natural rights, but also "certain well-established civil rights"). These views need not be a complete contradiction, inasmuch as the founders undoubtedly viewed many of the rights of British constitutionalism as ultimately rooted in reason and natural law. But even if reasoning from reason and nature impacted on the construction of their legal tradition, the congruence between actual claims of right and the perceived content of legal tradition leaves unanswered whether any among the founders equated constitutionalism with an open-ended commitment to natural law and natural rights.

69. Typifying this general awareness is Madison's characterization of the British constitution in his speech presenting his draft of the Bill of Rights to the first Congress. Madison observed that in the English bill of rights "the power of the Legislature is left altogether indefinite," and pointed out further that "freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution." 1 ANNALS OF CONGRESS 453 (Joseph Gales ed., 1789). While the people have claims to which they are entitled by nature, these rights are not necessarily secured by the constitution of states.

This sort of analysis was not restricted to the British constitution. The founders recognized that any form of government might fail to protect the natural rights: "It is possible that a 'republican form' of government may be built upon as absolute principles of despotism as any oriental monarchy ever yet possessed." 5 THE COMPLETE ANTI-FEDERALIST 179 (Herbert J. Storing ed., 1981) (The Impartial Examiner, Feb. 20, 1788).

70. For example, one opponent of the Constitution demanded a Bill of Rights on the rationale that the inalienable rights "ought not to be given up." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 153 (Jonathan Elliot ed., 1866) (Samuel Spencer, North Carolina Ratifying Convention, July 29, 1788) [hereinafter ELLIOT'S DEBATES]. Proceeding from the premise that the freedom of the press was an "unalienable" right, one Antifederalist contended that it should therefore be "previously secured as a constitutional" right and not "left to the precarious care of popular privileges which may or may not influence our rulers." Cincinnatus II: To James Wilson, Esquire, New York Journal, Nov. 8, 1787, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 11, 12 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter RATIFICATION OF THE CONSTITUTION]. But under the proposed Constitution, Congress had instead been granted "totally unlimited" power over the press. *Id.* at 11. These arguments are based on natural law, but they are also arguments as to the constitutional and legal consequences of failing to secure the natural rights in the positive law of the Constitution. These advocates might well have acknowledged that such laws would be "void in themselves," as violations of natural law, but perceived this theoretical point as less important than the reality that the positive legal order had nevertheless sanctioned these natural law violations in positive law.

can hardly be dispositive. As we have noted, this sort of usage was also employed by William Blackstone, but this confusing use of terminology did not prevent Blackstone from offering up a view of Parliamentary sovereignty that prompts modern scholars to characterize him as a legal positivist.⁷¹ It is clear historically that the founders spoke two different ways: their language could indicate the binding quality of natural rights, seemingly suggesting their inherent status in fundamental or constitutional law, and it could equally indicate that written constitutions were essential to secure liberty in law and that the fulfillment of this purpose depended on the diligence of those who drafted and ratified a particular constitution.⁷²

There are several ways of accounting for these founding-era statements that, at first blush at least, seem contradictory. An obvious possibility is that there were in fact conflicting views as to the constitutional status of fundamental natural rights under written constitutions. Certainly the Chase/Iredell debate itself lends some plausibility to this explanation.⁷³ A further possibility, not necessar-

71. See *supra* notes 39-40 and accompanying text. Professor Grey observed that "Blackstone resolved his equivocation [between the tradition of Coke and modern positivism] by giving the priority to legislative supremacy." Grey, *Original Understanding*, *supra* note 4, at 152. While Grey correctly described Blackstone's priorities, it might be a modern bias to suppose that his rejection of Cokean judicial review means that his commitment to natural law is equivocal; that natural law is viewed as superior to positive law need not resolve the question of what political actor is empowered to fix the positive law consistently with the duty to conform to the higher law. Many modern unwritten Constitution theorists would presumably contend that an implication of articles III and VI is that state courts are bound by the United States Supreme Court's determinations as to the content of the Constitution's unwritten principles, notwithstanding a state court's claim that it must be bound only by the natural law that is superior to a conflicting Supreme Court decision. Blackstone does not appear any more equivocal in his support of natural law than would such modern theorists.

72. Antifederalists contended that a central task of constitutional drafting is prescribing limits to government (a task as to which the drafters of the proposed Constitution had failed): "I presume that the liberty of the nation depends, not on planning the frame of government, which consists merely in fixing and delineating the powers thereof; but on prescribing due limits to those powers, and establishing them upon just principles." 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 179 (The Impartial Examiner, Feb. 20, 1788). If natural rights were viewed as invariably implicit in constitutions, no matter the content of the writing, there might still be value in formalizing the rights in writing, but it would hardly seem to be something on which the liberty of the nation depends.

73. Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), clearly conflicts with constitutional textualism in articulating the idea of judicial review on behalf of unwritten principles of law. There is more room for doubt whether Chase actually equated natural law and natural rights with constitutional law. While Iredell interpreted Chase's opinion as the invocation of natural law, and Chase did refer to "reason and justice" in his opinion, the limiting principles he articulated seem to be drawn more from Whig understandings of the British constitution than from doctrines of natural law and natural right; in upholding the challenged law, moreover, Chase construed the written Constitution and displayed little interest in pursuing the issue of

ily at odds with the first, is that the statements of inherent limiting principles and of the possibility that they will be lost if not included in the written Constitution, were harmonized by a conception of the Constitution as the set of rules and principles established by the sovereign people. As in the case of Blackstone, early Americans might have employed legal terminology in describing the limits imposed by natural law, including the idea that laws violating it are void, but without implying that these limits are implicit in the Constitution or are inherently part of the civil law to which courts might look in deciding cases.

These initial explanations could well go together, particularly if the American view of constitutionalism was in a state of flux, as it certainly was in the 1780s. Among the crucial developments in constitutional theory in the 1780s were the disassociation of legislative power from the power of the sovereign people, especially through the institution of popular conventions,⁷⁴ the emergence of the doctrine of judicial review as a device for limiting legislative power,⁷⁵ and the 1787 Constitution's identification of itself as supreme law that should control the decisions of judges.⁷⁶ Each of these developments reflected American experiences⁷⁷ that prompted not only a growing determination to make constitutions effective devices for limiting all exercises of government power, including legislative power reflecting the will of majorities, but also a tendency to define "the Constitution" as the written instrument employed to these ends. Taken together, these developments marked a shift from viewing a constitution as the principles distilled from custom and

whether it violated natural justice per se. In addition, Chase wrote against construing the general grant of legislative power as permitting arbitrary invasions of traditional private rights, but he did not clarify whether he would apply the principles he invoked even in the face of an express contrary provision in the Constitution.

74. See, e.g., Thomas G. West, *The Rule of Law in "The Federalist"*, in *SAVING THE REVOLUTION* 150, 155 (Charles R. Kesler ed., 1987); Goldstein, *Origins of Judicial Review*, *supra* note 5, at 61.

75. See Goldstein, *Origins of Judicial Review*, *supra* note 5, at 61. For a brief discussion of judicial review, see *infra* notes 191-206 and accompanying text.

76. For an insightful treatment of this development, see Sherry, *supra* note 4, at 1147-50.

77. By 1787, many thoughtful Americans felt twice-betrayed—first by the revolutionary experience in having their invocation of the rights of Englishmen mean nothing to an English Parliament bent on imposing the prerogatives of Parliamentary sovereignty, and second by their experience with the abuses of fundamental rights by the state legislative bodies that saw themselves as the voice of the sovereign people. Thus, for example, Madison referred to such abuses "by overbearing majorities in every State." Letter from Madison to Jefferson (Oct. 17, 1788), in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 614, 616 (1971).

practice, reflecting an ancient wisdom validated by a rational process, to a supreme enactment of the sovereign people.

As a net result of these developments, in contrast with the American invocation of the British constitution as a limit on Parliament in the 1770s, in the 1780s Americans could argue that England suffered “[f]rom the want of a Constitution,”⁷⁸ or at least lacked, in Madison’s more precise wording, a “constitution paramount to the government.”⁷⁹ By contrast, America had developed the understanding of “a constitution established by the people, and unalterable by the government.”⁸⁰ If rights obtain the status of being “paramount” to government and “unalterable” within the legal order by virtue of being found in a constitution established by the people, rather than because they are inherent natural rights long associated with the fundamental law of the state, as in England, it becomes possible to speak of natural law and void statutes without implying that such principles are inherent in any given constitution or the civil law thereby established. At the same time, of course, in such a period of evolution others might continue to employ language referring to the “constitution” in the former sense, and indeed may see advantage in combining the two conceptions in some way.⁸¹

A third possibility, of course, is that the founders hardly thought through the full implications of their own rhetoric and were capable of embracing one or another form of argument according to the needs of the situation at hand without in every case realizing that there was an intellectual tension to be resolved.⁸² Indeed, this pos-

78. Thomas Paine, *Rights of Man*, in *THE SELECTED WORKS OF TOM PAINE* 218 (H. Fast ed., 1945).

79. *THE FEDERALIST* No. 53, at 359, 361 (James Madison) (Jacob E. Cooke ed., 1961). Madison explained that in England, despite talk of “the rights of the constitution,” it was maintained “that the authority of the parliament is transcendent and uncontrollable, as well with regard to the constitution, as the ordinary objects of legislative provision.” *Id.*

80. *Id.* at 360. Alexander Hamilton was undoubtedly invoking this same contrast between the British constitution and the American Constitution when he initiated his own justification of judicial review from the premise of “a limited constitution,” which he defined as “one which contains certain specified exceptions to the legislative authority.” *THE FEDERALIST* No. 78, *supra* note 79, at 521, 524.

81. Indeed, this is essentially the thesis offered by Professor Sherry, who contended, first, that the federal Constitution presents us with the transition from a constitution as centrally a declaration of “first principles” consisting of “indubitable truths and time-tested customs,” Sherry, *supra* note 4, at 1146, to a constitution as positive law, *id.* at 1147; but, second, that “the invented Constitution was intended merely to complement, not to replace, the earlier [unwritten constitution] tradition.” *Id.* at 1157.

82. Professor Grey has thus suggested that the outcome of the clash between the possibilities of unwritten constitutionalism and legislative supremacy subject to written limitations “was in fact not a choice of one over the other, but a confusing attempt to

sibility seems all the more plausible if it is true, as suggested above, that constitutional thought was in a state of change during this period of time.

Even with the potential for intellectual confusion, however, it may be possible to discern the substance of a particular thinker's views, as in the case of Blackstone, if we are willing to carefully attend to the entirety of the argument employed without imposing our own presuppositions about the "logical" implications of natural law theory. There is little question, for example, that some of the most thoughtful among the founders cogently addressed issues of relevance to the modern dispute. If we are to objectively weigh the historical evidence it is critical that we allow them to speak for themselves.

It is my view that advocates of the unwritten Constitution thesis have tended to sift the historical record for confirming evidence of their thesis while shortshrifting the powerful evidence suggesting that alternative views were widely and carefully articulated at the time of the ratification of the Constitution. Only on this basis do we encounter the claim that the unwritten Constitution idea was clearly predominant—or, indeed, was the only view—at the time of ratification of the Constitution, followed by suggestive treatments of when it was in the nation's history that the "positivist" constitutional vision emerged.⁸³ But if one thing is clearly established by the historical record, it is that all the intellectual foundations for the insistence

have it both ways, an ambivalence within our constitutional tradition that has lasted to our own day." Grey, *The Original Understanding*, *supra* note 4, at 157; *see also id.* at 168 (stating that on the issue of the constitutional status of unwritten norms, as debated between Chase and Iredell in 1798, "perhaps the deepest original understanding was that the question was debatable").

83. *See, e.g.*, Mayer, *supra* note 68, at 326 (concluding that natural law "was not vitiated by positivism in the decade of the 1780s," but questioning whether positivism supplanted natural law "in the nineteenth century, accompanying the rise of legal formalism" or in the twentieth century "with the rise of legal realism"); Sherry, *supra* note 4, at 1176 (contending that the natural law understanding of American constitutionalism reigned until approximately 1820 and that it was this "nineteenth century rejection of the notions of natural rights that has most influenced modern constitutional law").

Even Professor Grey in spite of his own suggestion that two possibilities presented themselves, and that we perhaps wound up with a muddle, *see supra* note 4, nonetheless suggested that in 1787 no one was "ready to articulate" the textualist position defended by Justice Iredell in 1798. Grey, *Original Understanding*, *supra* note 4, at 159; *see also id.* at 168 (suggesting that Iredell's 1798 position was "unusual" and suggesting that it was nevertheless "latent in a newly emerging constitutional consensus that combined belief in popular sovereignty with distrust of discretion in the hands of a conservative and nationalizing judiciary"; acknowledging, however, that in its early stages judicial review theory was generally unformed and volatile).

on a text-centered constitutionalism are found in the discourse related to the drafting and ratification of the Constitution.

While the more sophisticated modern commentators do not offer the stark claim that the founders' commitment to the ideas of natural law and natural rights of themselves resolve the historical issue as to their constitutional jurisprudence, they frequently bring the essence of this assumption to the historical materials. For example, Professor Mayer acknowledged the "seemingly 'positivist' arguments made in the ratification debates," but concluded that these arguments are "misleading and do not negate the considerable body of evidence that Americans of the Founders' generation still believed in higher law principles, among them the theory of natural rights."⁸⁴ While Mayer further developed the argument, notice that his initial premise is that "positivist arguments," as opposed to only seemingly positivist arguments, would be irreconcilable with a body of evidence that the founding generation believed in higher law principles and natural rights.

Mayer objected to my suggestion that the decision to omit an express natural rights provision from the Bill of Rights indicated that Madison and others saw such language as stating "background principles" rather than "enforceable constitutional commands."⁸⁵

84. Mayer, *supra* note 68, at 313; *see also id.* at 319 (contending that "the evidence suggests that the concept of higher law was at least as firmly rooted in early American constitutionalism as the concept of positivism"). Mayer's latter statement, of course, could be both true and completely consistent with constitutional textualism; his apparent assumption to the contrary also trades on a presumed irreconcilable dichotomy between natural law and positivist jurisprudence.

85. *Id.* at 322 n.37. I do not make the claim that Madison and others would have used this terminology, nor that they saw the natural rights as unimportant because merely "background." My point, more fully defended elsewhere, is simply that the decision to omit an express natural rights provision from the Bill of Rights reflected other developments—Madison's contention before Congress that a Bill of Rights could be enforced in the courts and his drafting of its provisions in the hard language of legal command, rather than in the softer language of principle and obligation. *See* McAfee, *Social Contract Theory*, *supra* note 5, at 302-04. A number of Bill of Rights scholars, including Professor Schwartz (a noted advocate of unwritten constitutionalism), have perceived these occurrences as watersheds in the development of our civil liberties heritage. *See id.* at 303 n.102; SCHWARTZ, *supra* note 77, at 1008-09.

Madison had proposed such a provision, to be included as a prefix to the Constitution, in the language of obligation and as a statement of purpose, knowing that preambles are not considered part of the law, and even this language was eventually rejected. McAfee, *Social Contract Theory*, *supra* note 5, at 300-03. Given that the founders almost certainly did not intend to repudiate the general ideas of Madison's proposed language, my suggestion was that they did not see the need for such a provision in light of the specific limitations embodied in the written Constitution as amended; in this sense, that ideas in Madison's rejected proposal were viewed as "background principles" that informed the drafting, but not as "enforceable commands" along the lines of the provisions that were included.

Mayer argued that it is "far from clear" that early Americans, who were "imbued with higher law thinking from a variety of sources," would have recognized such a distinction.⁸⁶ He observed that, to the founders, violations of natural rights "were illegitimate acts of government" and "abuses of governmental power," and he appears to conclude from this that they could not have held the view that such natural law violations might nevertheless be constitutional acts.⁸⁷ For Mayer this is the clear implication to be drawn from the "Revolutionary-era understanding that written law was not the source of rights, but merely affirmed preexistent rights, in order to provide added security."⁸⁸

Mayer thus joined other unwritten Constitution advocates who have contended that fundamental elements of social contract political theory, including the concept of inalienable rights as limits on legitimate government power, were viewed as implicit in the republican constitutions of the founding era.⁸⁹ Mayer suggested that the founders' belief that individuals have natural rights which exist independently of government, and which constitutions merely "declare" or "affirm," establishes that such rights have an inherent status in the Constitution as the fundamental law of the state.

The problem with this way of summing up the implications of the idea of preexisting or inherent rights is that it assumes what must be proved—namely, that the founders equated social contract theory with constitutional theory and thus identified the rights they held inherently as requirements implicit in their constitutions. The result has been that the pervasive Antifederalist arguments against the proposed federal Constitution, which clearly rested on constitutional and legal theory that contradicts the view that natural rights are implicit constitutional rights, have been ignored,⁹⁰ misde-

86. Mayer, *supra* note 68, at 322 n. 37. *But see infra* note 124 (summarizing conflicting evidence).

87. Mayer, *supra* note 68, at 322 n.37.

88. *Id.* at 322; *see also* Sherry, *supra* note 4, at 1133.

89. *E.g.*, RICHARDS, *supra* note 4, at 220; Mayer, *supra* note 68, at 322; Sherry, *supra* note 4, at 1134.

90. *E.g.*, Sherry, *supra* note 4, at 1161-65 (treating ratification debate over omission of Bill of Rights and Federalist concerns about the danger posed by inserting one without mentioning nature of Antifederalist arguments as to the strict necessity for its inclusion); *id.* at 1161 n. 154 (justifying shortshifting of ratification debates on ground that they "are essentially irrelevant" to the unwritten Constitution debate inasmuch as the Antifederalists were "anti-nationalists" and debate centered on "allocation of power between federal and state governments"; concluding that the "source of limitation on either government was not particularly at issue"). Professor Sherry shares this tendency to basically ignore the underpinnings of the Antifederalist arguments in demanding a Bill of Rights with virtually all modern advocates of the unwritten Constitution understanding of the Ninth Amendment.

scribed,⁹¹ or denigrated. They have been denigrated both by being interpreted as arguments based exclusively on fear of illegal abuse of power and by being dismissed as products of the heated political exchange of the ratification struggle. The sections which follow take up each of these arguments to show that they are rooted in presuppositions about natural rights theory rather than serious grappling with the thinking of the Antifederalists.

B. Interpreting the Arguments that a Bill of Rights was Necessary as Expressions of Fear of Unlawful Abuse of Power

The Antifederalists uniformly contended that the people are deemed to grant to government all rights and powers that they do not expressly reserve to themselves, and they unequivocally applied this dictum to the so-called inalienable natural rights.⁹² These arguments formed the basis of their claim that a Bill of Rights was an

91. On occasion the Antifederalist commitment to natural rights is underscored, while their insistence that the rights are granted to government unless reserved in the Constitution goes unmentioned. *E.g.*, Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 Nw. U. L. Rev. 39, 70-71 (1989) (contending that Antifederalist conception of natural rights justifies "enlarging the sphere of liberty currently protected by the Ninth Amendment" without acknowledging the nature of their constitutional theory). The natural rights emphasis is combined with a characterization of Antifederalist arguments that leaves them equivocal as to the constitutional legitimacy of the outcomes feared by the failure to specify rights. *See* Levinson, *supra* note 43, at 140 (stressing that Antifederalists elaborated "one or another version of natural rights" while noting their "fear that the failure adequately to recognize the limits upon government would serve as a future warrant for the aggrandizement of governmental power"; equivocal as to whether such fears concerned the potential abuses of powers actually granted or to potential for constitutionally illegitimate arguments that might be advanced because of the lack of clarity in setting forth boundaries).

Finally, it has been intimated that the argument that a bill of rights is strictly necessary was only one argument among others. Thus while a review of the ratification debates confirms Professor Kaminski's conclusion that "all Antifederalists agreed that natural rights had to be protected by a bill of rights," John P. Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *THE BILL OF RIGHTS, A LIVELY HERITAGE* 141, 145 (Jon Kukla ed., 1987), Professor Grey acknowledged only that "some of the Antifederalists" adopted the view that legislative power "encompassed everything within the scope of the grant that was not explicitly withheld." Grey, *The Original Understanding*, *supra* note 4, at 164.

92. These arguments are documented and explained in McAfee, *Original Meaning*, *supra* note 5, at 1229, 1244-45; McAfee, *Social Contract Theory*, *supra* note 5, at 276-81. The Antifederalists contended that it was fundamental constitutional doctrine that whatever the people did not expressly reserve to themselves would be construed as having been granted to government—hence the absolute necessity of having a Bill of Rights. *E.g.*, 3 ELLIOT'S DEBATES, *supra* note 70, at 410, 445 (Patrick Henry, Virginia Ratifying Convention, June 14, 1788) (contending "that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers").

absolute necessity and that its omission from the proposed Constitution foretold despotic government.

Professor Mayer acknowledged that the Antifederalists saw the provisions to be contained within a Bill of Rights as "necessary safeguards" based on their "profound distrust of political power," and he acknowledged that their arguments therefore seem positivist in nature.⁹³ According to Mayer, though, the declarations of rights found in the state constitutions reflected only "that Americans realized the necessity of guarding against the inevitable 'conspiracy' of those who hold office."⁹⁴ The related fear, he suggested, is that "written constitutions would be used as a pretext for invading individual rights."⁹⁵ Mayer apparently concluded that these feared conspiracies of power must be illegal conspiracies, given that Americans "had not departed from their Revolutionary-era understanding that written law was not the source of rights."⁹⁶

In fact, while the Antifederalists expressed their distrust of power, their arguments did not refer to illegal conspiracies or pretextual uses of the written Constitution. Rather, they offered legal arguments as to the effect of the proposed Constitution if it were ratified without amendments. Among other contentions, the Antifederalists argued about the breadth of the powers granted the federal government,⁹⁷ especially as supplemented by the General Welfare and Necessary and Proper Clauses,⁹⁸ the legal implications of the

93. Mayer, *supra* note 68, at 320.

94. *Id.* at 321.

95. *Id.* at 320.

96. *Id.* at 322. Notice that Mayer's analysis once again merely assumed that there is an inconsistency between the insistence that the natural rights will not be viewed as binding within a legal order, based on distrust of power, and the claim that nature, not written law, is the source of these rights. But if natural rights are not being equated with legal rights within a real or proposed constitutional order, these statements are completely consistent.

The inalienable natural rights make claims that predate, and indeed help to justify, government; natural rights theory holds that these rights are not mere grants from government, but that legitimate government must protect them. These conclusions, moreover, have important implications for normative constitutional theory—if the legal order established by the constitution is to have real force, it must embody these principles. Even so, these rights are not implicit within every constitution, even republican ones, because one of the purposes of the Constitution is to establish and secure these natural rights as legal rights.

97. See McAfee, *Original Meaning*, *supra* note 5, at 1228-29. One author concluded that Congress's powers "extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to freemen, but what is within its power." 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 363, 365 (Essays of Brutus, Oct. 18, 1787).

98. As Professor Mayer acknowledged, the Antifederalists were particularly concerned that the General Welfare and Necessary and Proper Clauses were "potential sources of undefined and unlimited powers which would accrue to the national

Supremacy Clause,⁹⁹ and the legal effect of the omission of language expressly reserving all rights, powers, and jurisdiction not granted to the federal government.¹⁰⁰

At the center of Antifederalist legal argument was the claim that natural rights would enjoy the status of legal rights in the legal order established by the Constitution only if they were secured by the language of the written Constitution. In the well-known *Letters of Agrippa*, for example, the author concluded that “a constitution does not in itself imply any more than a declaration of the relation which the different parts of the government have to each other, but does not imply security to the rights of individuals.”¹⁰¹ Similarly, one Antifederalist posed the following rhetorical question: “If a citizen of Maryland can have no benefit of his own bill of rights in the confederal courts, and there is no bill of rights of the United States—how could he take advantage of a natural right founded in reason, could he plead it and produce Locke, Sydney, or Montesquieu as authority?”¹⁰² The argument implicit in this rhetorical question is precisely that the great natural law thinkers who so influenced the revolutionary generation are not legal authorities; natural rights are not *ipso facto* constitutional rights, or rights within the civil law. They must be secured in positive law.

There may well have been founding-era views contrary to the ones expressed by the Antifederalists during the ratification debate.

government in the absence of a bill of rights.” Mayer, *supra* note 68, at 315. Indeed, the Antifederalist author cited by Mayer referred to the above-referenced clauses and concluded: “it is therefore evident, that the legislature under this constitution may pass any law which they may think proper.” *Id.* at 388, 389 (Essays of Brutus, Dec. 13, 1787). Brutus even considered the argument that he was construing these provisions too broadly, contending that his interpretation was the “most natural and easy” construction of the language, which is the construction to which interpreters are properly bound. *Id.*

99. A typical argument was that the Supremacy Clause implied “that the constitutions and laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution.” 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 363, 365 (Essays of Brutus Oct. 18, 1787).

100. The Antifederalists contended that the omission of such language from the Constitution would be construed as implying that a government of general powers was intended, particularly since such language had been included in article II of the Articles of Confederation. *E.g.*, 14 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 346 (Centinel V, Philadelphia Independent Gazetteer, Dec. 4, 1787). *See generally* McAfee, *Original Meaning*, *supra* note 5, at 1229, 1244-45.

101. 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 108 (Letters of Agrippa, Jan. 9, 1788). The same author contended that since “the whole power resides in the whole body of the nation,” it followed that “when a people appoint certain persons to govern them, they delegate their whole power” unless they reserve power in the Constitution. *Id.* at 109 (Letters of Agrippa, Feb. 5, 1788). He concluded “that a constitution is not itself a bill or rights.” *Id.*

102. 5 *id.* at 13 (Essays by a Farmer, Feb. 15, 1788).

And perhaps some of these very spokesmen may even have thought that, in some important sense, natural law was the true and binding law, so that the proposed federal Constitution was properly read as denying inalienable rights and was to that extent an "illegal" Constitution. But such views would be essentially beside the point for purposes of understanding and resolving the debate over the founders' intentions as to the Ninth Amendment and the notion of an unwritten Constitution. The question of importance to the ratifiers of the Constitution was whether this Constitution secured the natural rights. The Constitution's opponents argued that it did not; its defenders contended that it did, but not by reference to the argument that such rights are legally binding within the legal order notwithstanding what the written Constitution says.¹⁰³

B. Dismissing Textualist Arguments as "Partisan Statements"

As the materials above suggest, to construe the Antifederalist argument for the necessity of a Bill of Rights as non-legal, and only seemingly positivist in nature, is simply to ignore the language that was so carefully employed by the contestants themselves. Indeed, notwithstanding his suggestion that the Antifederalists should be viewed as only referring to potential abuses of the written Constitution, Professor Mayer implicitly conceded that these arguments are actually legal in form when he insisted that reliance on them "is highly misleading" because they are "partisan statements . . . raised during the debate over ratification of the Constitution" which "by themselves are not reliable evidence of the intent of the Framers."¹⁰⁴ The Antifederalists offered legal arguments, but these ar-

103. See *infra* notes 146-49 and accompanying text.

104. Mayer, *supra* note 68, at 319. In support of this view, Mayer contended that "for every Antifederalist warning that the failure to protect rights explicitly in the Constitution would result in their loss, one can find a Federalist comment to the effect that enumeration of fundamental rights was unnecessary because these rights were so well known and, in the case of natural rights, inalienable." *Id.* In turn, Mayer dismissed the statements by leading Federalists admitting the force of the Antifederalist arguments for bills of rights as to the existing state constitutions, but distinguishing the proposed Constitution based on the security for rights provided by the limited grants of power to the national government. According to Mayer, these arguments were partisan attempts to exaggerate the need for bills of rights under the state constitutions. *Id.* at 322-23.

As a preliminary point, as one who has carefully reviewed the materials related to the Bill of Rights debate during the ratification struggle, I can state with confidence that there are a great many more Antifederalist statements as to the absolute necessity of a Bill of Rights than there are Federalist statements even arguably suggesting that inalienable rights are inherent in the Constitution. Subsequently Mayer virtually conceded this point when he suggested that the Federalists did not, by and large, rely upon the "inherent constitutional status" of the natural rights because they realized that "such a response would not appease the Antifederalists' strong skepticism about the

guments should not be credited because of the political context in which they were offered. But these arguments are viewed suspiciously by Professor Mayer primarily because they depart from his presuppositions about the logical implications of natural rights theory.¹⁰⁵

It is difficult to grapple with the assertion that these arguments reflected the partisanship of the ratification debate without seeing a more detailed elaboration of how these arguments presented a self-interested change in position.¹⁰⁶ An initial problem, however, is that the Antifederalist consensus over the basic idea that natural rights must be secured by the written Constitution reflected views that had been commonly held for years. For example, in an important work on the early state constitutions, Professor Lutz observed that the people responsible for those constitutions "assumed that

various ways in which rights could be endangered." Mayer, *supra* note 68, at 320. Moreover, several of the statements which Mayer relied upon are equivocal—in arguing against the need to state the self-evident, these spokesmen may have been arguing that these rights held "inherent constitutional status," but they could also have been expressing confidence that long-recognized principles would be honored even in the absence of a legal check or relying upon the well-known Federalist skepticism about the value of "parchment barriers." For some additional commentary on such statements in the ratification debate, see McAfee, *Social Contract Theory*, *supra* note 5, at 289 n.54.

Finally, Mayer did not explain why one set of Federalist statements should be honored and another dismissed as partisan argument. The handful of Federalist statements disputing the need to specify principles limiting government, upon which Mayer relied, ran against the grain of state constitutional practice and arguably reflected in part the defensive posture of the Federalists in the Bill of Rights debate. They were also statements that failed to persuade the largest number of the audience for whom they were intended. While the Federalist argument relying upon the limited powers scheme as a substitute for a Bill of Rights also failed to persuade the people to forego a Bill of Rights, the premise it shared with the Antifederalist attack (that the natural rights need to be secured by the written constitution) appears to have been the view reflected in the decision to add a Bill of Rights to the Constitution. Moreover, even if both groups viewed the natural rights as having an inherent status in "law," their debate revolved around how to ensure that these rights were recognized by the system of positive law established by the Constitution.

105. As the balance of this section seeks to demonstrate, the suggestion that these arguments reflected mere expedience and presented political campaign hyperbole is unfounded. Rather, they reflected powerful and enduring themes of early American constitutional and political thought. This is not to say, however, that setting is irrelevant. Individuals genuinely fearful of the new order established by the Constitution would have been likely to emphasize the real possibility of establishing arbitrary government. Once adopted, individuals with similar interests may have had more reason to look for arguments justifying an interpretation of the Constitution as including implied limitations on power to the same end of preventing the exercise of abusive power.

106. To the extent that the point is developed at all, a response is found *supra* note 104. In fairness, Professor Mayer's comments are found in a paper that presented a commentary on a larger paper at a Bill of Rights symposium. It is possible that he could advance more supporting arguments and evidence than he has proffered thus far.

government had all power except for specific prohibitions contained in a bill of rights."¹⁰⁷ This was the assumption notwithstanding the revolutionary-era commitment to natural law and natural rights, and it is the same premise relied upon in opposing the Constitution by the Antifederalist leaders who were largely the same people who had drafted those state constitutions.

The argument from the necessity to expressly reserve rights was therefore not a disingenuous argument trucked out for purposes of opposing the proposed Constitution, but a restatement of a widely held view. Moreover, as suggested above, this insistence on written guarantees reflected the founders' revolutionary experience, and the conclusion they eventually reached that England lacked a meaningful constitution because its system of laws did not effectively limit the powers of Parliament.¹⁰⁸ As early as the debate over the Virginia declaration of rights in 1776, it was apparent that the participants saw themselves as determining the constitutional limits on government by specifying customary and natural law rules and principles by which legislative enactments would be judged. Consequently the parties involved debated the merits of a proposed bill of attainder clause, which was rejected,¹⁰⁹ and carefully formulated the

107. DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL* 60 (1980).

108. See *supra* 78-79 and accompanying text; McAfee, *Social Contract Theory*, *supra* note 5, at 274 n.15. The founding generation could hardly have doubted that Englishmen equally proclaimed allegiance to natural law and natural rights, but this did not prevent them from contending that the English failed to implement the principles in their form of government and law. This alone suggests that they would not have presumed that natural law theory was simply implicit in every constitution, written or unwritten.

109. For a brief treatment of the debate over the proposed bill of attainder clause, see McAfee, *Social Contract Theory*, *supra* note 5, at 294. Patrick Henry, the chief opponent of such a limiting provision, subsequently instigated a bill of attainder against an unpopular Tory. *Id.* In light of these Virginia developments, it is noteworthy that Professor Sherry not only construed the objection of some framers at the Philadelphia convention that an ex post facto clause was unnecessary as an argument that such a limitation is implicit in the Constitution, see Sherry, *supra* note 4, at 1157, but also concluded that the omission of such an argument as to a bill of attainder clause reflected that the framers viewed it as a positive right (rather than a natural right) as to which the written provision would be changing the law. *Id.* at 1157. At the very least, Sherry's observations point up the scant help the natural law category of analysis is in the absence of consensus and the effective securing of rights deserving protection.

But Sherry's analysis doesn't seem to fit. It seems more likely that particular framers thought they could contend that American legislatures would honor the widely held view that ex post facto laws are improper, but saw that it was less plausible, in light of the Virginia experience, to contend against the need for a bill of attainder clause. It is, in any event, extremely implausible to think that individuals such as Gouverneur Morris and James Wilson, who offered such arguments, perceived that ex post facto laws violated natural law while bills of attainder did not. In the Federalist Papers, Madison lumped the two together and described them as "contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST No. 44, *supra* note 79, at 301 (James Madison).

language of the "natural equality" provision so as to preclude an argument that slavery was unconstitutional.¹¹⁰

It is undoubtedly tempting to see all of this language as reflecting concern with securing, as well as perhaps disagreement over the content of, the natural rights, but as somehow reconcilable with the view of inalienable rights as inherent constitutional rights. After all, the founders continually described the rights as "inalienable," which literally means that they cannot be transferred away, and stated their agreement that a purpose of constitutions is to implement the very social contract theory that includes this concept as an element. But we ought to be wary of assuming the historical predominance of a particular formulation without listening carefully to

Indeed, Professor Grey relied on Madison's further contention that such legislative acts "are prohibited by the spirit and scope of [the state constitutions]," *id.*, as further evidence of the idea of implied constitutional limitations. See Grey, *The Original Understanding*, *supra* note 4, at 164. Grey pointed to Madison's reference to the clauses in question as "additional fences against these dangers" as confirmation of the implied constitutional limitations reading. *Id.* (emphasis added); see THE FEDERALIST NO. 44, *supra* note 79, at 301. Grey's analysis, however, may push Madison's statements further than they were intended to go. While Madison clearly emphasized that these prohibitions embody widely shared principles, rather than radical innovations, he also stressed that "[o]ur own experience has taught us" that such provisions "ought not to be omitted." *Id.* This apparent allusion to the Virginia experience fits nicely with Madison's failure to clarify whether his claim that such legislative actions would violate the "spirit and scope" of the state constitutions amounted to saying that they were strictly prohibited by the state constitutions.

Madison could easily have been genuinely ambivalent: on the one hand, he would have known that a bill of attainder clause was considered and rejected in Virginia; on the other hand, as Edmund Randolph would argue before the Virginia Ratifying Convention, bills of attainder threaten the personal security government is intended to protect and presuppose denial of trial by jury, confrontation of accusers and witnesses, and the other guarantees associated with due process of law. 3 ELLIOT'S DEBATES, *supra* note 70, at 66-67; LEVY, *supra* note 4, at 154-55. From these perspectives, the precise legal effect of the omission of these specific prohibitions was at least debatable. At any rate, despite Madison's allusion to the need for "additional fences" in the federal Constitution, with the apparent implication that some "fence" is already in place, he immediately concluded: "Very properly therefore have the Convention added this constitutional bulwark in favor of personal security and private rights." THE FEDERALIST No. 44, *supra* note 79, at 301 (James Madison) (emphasis added). The implication is that there was not previously such a constitutional bulwark, or at least not one that would not be subject to dispute.

110. Section 1 of the Virginia Declaration was redrafted to 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." 7 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTION 3813 (Virginia Declaration of Rights § 1) (emphasis added). The italicized language was included precisely to exclude the Black race from the scope of the provision, on the premise that the slaves had not entered into the state of society in Virginia. See Warren M. Billings, "That All Men Are Born Equally Free and Independent": *Virginians and the Origins of the Bill of Rights*, in THE BILL OF RIGHTS AND THE STATES 335, 339-40 (Patrick T. Conley & John P. Kaminski eds., 1992).

the founders, who write thoughtfully of social contract theory within the framework of the insistence that the rights must be expressly reserved.

Consider these two examples. First, the Impartial Examiner, an Antifederalist essayist who opposed the Constitution and objected to its omission of a bill of rights, wrote eloquently of the connection between social contract theory and constitutionalism. In classic Lockean fashion, the Examiner explained that we need government because the "inherent rights pertaining to all mankind in a state of natural liberty" are not sufficiently secure "in that state."¹¹¹ While the people are required to sacrifice "some portion of" the natural rights to obtain the advantages of civil society,¹¹² they should retain the inalienable rights and, indeed, "ought to give up no greater share [of the mass of natural rights] than what is understood to be absolutely necessary."¹¹³

Notwithstanding these basic principles of social contract theory, however, the Examiner insisted that the individual who enters society is "presumed" to give up to government his power to act freely unless he reserves particular powers.¹¹⁴ In the absence of express reservations, "the universality of the grant" will "include every power of acting, and every claim of possessing or obtaining any thing."¹¹⁵ The Examiner quickly acknowledged, of course, that such unqualified grants of power would establish arbitrary government, and the people who adopt such a constitution thereby "subject themselves" to what is not a "free government."¹¹⁶ It is precisely because this is a result to be avoided, but which the sovereign people may nonetheless choose, that it is a "necessity" to have "an express stipulation for all such rights as are intended to be exempted from the civil authority."¹¹⁷

Now it is by no means clear that the Impartial Examiner articulated the only, or even the standard, formulation of social contract

111. 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 175 (Feb. 20, 1788).

112. *Id.* at 176.

113. *Id.*

114. *Id.* at 177.

115. *Id.* Similarly, the Examiner had previously argued that it is a "universally acknowledged" maxim "that when men establish a system of government, in granting the powers therein they are always understood to surrender whatever they do not so expressly reserve." *Id.* at 176.

116. *Id.* at 177.

117. *Id.* The author further contended that the combination of the Supremacy Clause and the absence of a bill of rights meant that the natural rights were directly threatened by the proposed Constitution inasmuch as they were no longer expressly stipulated. *Id.* at 177-79.

theory and its relation to constitutionalism.¹¹⁸ Nor is it clear that he adequately explained precisely why it is that the absence of express reservations of itself implies a general grant of all rights and powers. What is clear is that the Examiner was a natural rights/social contract theorist who was deeply committed to securing natural rights and, indeed, was opposing the Constitution because it failed to do so adequately. Moreover, he combined this commitment with a view that clearly rejected the understanding that social contract theory implies that inalienable rights are constitutional rights.

Similarly, the author of *Letters from a Federal Farmer*, summarized all the basic elements of social contract theory, including the doctrine of inalienable rights.¹¹⁹ But the same author was equally emphatic that these natural rights obtain no protection from the legal order if they are not expressly secured within the written constitution. According to the *Federal Farmer*, even though the people cannot “deprive themselves” of these natural rights, they nevertheless might, as a matter of law, “resign” these rights “to those who govern.”¹²⁰

118. For example, at least some Antifederalists disputed the validity of a broad, general premise along these lines and, indeed, contended that since the supreme power resided in the people, “they reserve all powers not expressly delegated by them to those who govern.” 2 *id.* at 323 (*Letters from a Federal Farmer*, Jan. 20, 1788). But these spokesmen made it emphatically clear that this did not create any presumption or implication against delegating sufficient power to invade natural rights, and indeed this difference in formulation did not change their assessment of the state or federal constitutions. It was thus acknowledged that “the people to adopt the shortest way often give general powers, indeed all powers, to the government, in some general words, and then, by a particular enumeration, take back, or rather say they however reserve certain rights as sacred, and which no laws shall be made to violate: hence the idea that all powers are given which are not reserved.” *Id.* at 324. The author was thus not insistent, as others were, that express reservations are essential in every case—as, for example, in the case of the limited delegation of authority in the Articles of Confederation—even while he concurred that whatever powers are granted are not subject to a body of implied constitutional limitations. In short, he agreed that a Bill of Rights was a strict legal necessity by a slightly different reasoning process. See *infra* notes 120-22 and accompanying text.

119. The Federal Farmer contended that declarations of rights do not “change the nature of things, or create new truths,” but “establish in the minds of people truths and principles which they might not otherwise have thought of, or soon forgot.” 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 324. He stated further that the natural rights are those “of which even the people cannot deprive themselves.” *Id.* at 261. For the Federal Farmer, these natural rights arguments had clear implications for our constitutional order. The “unalienable and fundamental rights explicitly ascertained and fixed,” *id.* at 231, and “the national laws ought to yield to unalienable and fundamental rights.” *Id.* at 247 (emphasis added). Such statements, though, underscore not only the Federal Farmer’s natural rights ideology, but also the positivist thrust of his arguments. While the national laws ought to yield to natural rights, this “will not be the case with the laws of Congress” because the framers had failed to adequately limit the grants of power to the national government. *Id.*

120. *Id.* at 231.

Therefore, even though "a free and enlightened people" will not give up these rights,¹²¹ it remains equally true that "[t]he people, who can annihilate or alter [their state] constitutions," may "annihilate or limit" a basic natural right such as the right to freedom of the press.¹²²

If anything is clear from the historical record, it is that the author of *Letters from a Federal Farmer* was perhaps the most cogent and sophisticated of the opponents of the Constitution. Although his rhetoric might confuse modern thinkers, we assume at our peril that the confusion is his, rather than our own. Despite Professor Mayer's inclination to discount these arguments based on his apparent presumption against the idea that the founders "meant to contradict natural rights theory,"¹²³ it is clear that these authors simply under-

121. *Id.*

122. *Id.* at 329. If it seems contradictory to contend both that (1) the people cannot deprive themselves of the natural rights, and that (2) they can "resign" these same rights to government in the Constitution—a perception which has undoubtedly prompted commentators like Professor Mayer to discount one of these strands of thought—two mediating factors help to harmonize them. First, all constitutional theories must ultimately confront fundamental issues about the locus of power within the legal and political order; even unwritten Constitution theorists, for example, must grapple with the issue raised as to the legal and constitutional status of a Supreme Court decision that effectively denies a fundamental natural right, if natural rights are conceived as implicit in the Constitution or secured by the Ninth Amendment. One cogent position is that the Supreme Court has finality in construing the Constitution and that its decision establishes the law (even though the debate on substance might continue). Just as the Supreme Court is not given authority to violate natural rights, but has (on this theory) the final word in elaborating and applying them, the people may be conceived to lack moral authority to violate natural rights but as politically empowered to determine which (if any) alleged rights will be protected by the Constitution. For evidence that the framers of the Constitution held this sort of view of popular sovereignty, see McAfee, *Social Contract Theory*, *supra* note 5, at 274-76.

Second, once we have resolved an issue of political and legal authority, as in the illustrations above, it becomes possible to speak accurately while referring both to the political actor's authority to act in a particular way as well as of the actor's lack of authority, depending upon whether one is looking at the question jurisdictionally in terms of the legal power to decide, or as a matter of the legitimacy of the substance of the decision. Modern legal positivists would, by and large, contend that the people's legal power to grant away the natural rights implies that the people (or their Constitution) become the source of the law, and natural rights thereby become moral rights rather than legal rights (that may or may not be translated into legal rights). But even if we insist on viewing the natural rights as belonging in a jurisprudential category—as being a species of "law" of some kind—the doctrine of popular sovereignty, as described above, at least posits that the people hold the power to grant government authority to violate the natural rights (or expressly require such violations), even though the people might act wrongly, and even "illegally," in so doing.

123. Mayer, *supra* note 68, at 322.

stood the implications of "natural rights theory" differently than Mayer.¹²⁴

III. NATURAL RIGHTS, CUSTOMARY RIGHTS, AND SOME UNRESOLVED TENSIONS IN UNWRITTEN CONSTITUTION THEORY

A. *Natural Rights and Customary Rights*

Beyond the claim that natural rights were considered implied constitutional limitations by the founders, advocates of the unwritten Constitution have contended that the common law limitations of the English constitution were considered to be implicit in the constitutions framed in revolutionary America. There can be no question that certain common law rights, such as the right to trial by jury, were thought of as fundamental among Americans as well as Englishmen in the eighteenth century. Indeed, Professor Reid observed that, despite the movement in England toward Parliamentary sovereignty by the 1770s, even common law lawyers might have equivocated as to Parliament's authority to abolish jury trials because of "the sacrosanct centrality of jury trial in British constitutional thought during the age of the American Revolution."¹²⁵ This heritage of common law rights shows the unwritten constitutionalism of the British constitution and raises the question whether Americans would have viewed such limitations as implicit in their own constitutional project.

Advocates of the unwritten Constitution have noted the tendency of early Americans to identify their long-held customary rights with the requirements of reason and nature,¹²⁶ and have therefore tended to treat these potential sources of fundamental law as largely indistinguishable for purposes of constitutional analysis.¹²⁷ My own review of the historical materials suggests, however, that the cases

124. Indeed, it seems rather clear that, under a regime in which the people had granted away all their rights and powers as they might under the Examiner's analysis, natural rights would become "background principles" establishing what the government ought properly to do; the Examiner is certainly clear that they would not be "constitutional commands." See *supra* notes 111-17 and accompanying text. The Examiner thus expressed precisely the sort of view that Mayer suggested early Americans would not even have recognized. Mayer, *supra* note 68, at 322 n.37.

125. REID, *supra* note 34, at 48.

126. See generally Whitman, *supra* note 41.

127. See, e.g., Sherry, *supra* note 4, at 1133 (assimilating the 1689 English Bill of Rights' declaration of "true, ancient, and indubitable rights and liberties" of Englishmen with the state constitutions' declarations of "'natural,' 'inherent,' 'essential,' or 'inalienable' rights;" concluding that an implication of these rights being "declared" rather than conferred was that the declarations of rights represented an unalterable body of fundamental law); Mayer, *supra* note 68, at 319 (arguing that

for natural and customary rights as fundamental law that was understood to be implicit in American constitutions are not necessarily identical. Each has its own strengths and weaknesses.

Thus if American constitutions are properly viewed as incorporating all the elements of social contract theory, including the doctrine of inalienable rights, one implication might be that these are inherent constitutional rights because they are beyond the reach even of the sovereign people.¹²⁸ It seems somewhat clearer that no such argument is available to shield the customary rights of Englishmen,¹²⁹ at least to the extent that such rights are not the simple embodiment of fundamental natural rights.¹³⁰ If the rights of Englishmen were implicit in American constitutions it would be because they were assumed rather than because those constitutions could not in theory be constructed otherwise.

On the other hand, the traditional rights of Englishmen were so well known and sufficiently taken for granted that some of them seem like logical candidates to be implied constitutional rights. British constitutional rhetoric seems to lend support to alternative conceptualizations of the continuing status of these rights under American constitutions. British constitutional rights were "inherent" and "indefeasible," rather than mere grants from the King,¹³¹ and they were viewed as rooted in "changeless time," or a "timeless infinity, a frozen history without origin, without transmission."¹³² One wonders how a people who were heirs to such rights would be viewed as forfeiting them merely by breaking political ties with England.

Federalists contended that "enumeration of fundamental rights was unnecessary because these rights were so well known and, in the case of natural rights, inalienable").

128. As previously noted, *supra* note 119, formulations within the social contract tradition deny that even the people are empowered to deprive individuals of their inalienable rights; the issue, of course, is whether such a limitation was viewed as an operative constitutional limitation within the legal system in light of the traditional conception of sovereignty as entailing ultimate authority to establish the law within a particular legal order.

129. As the Antifederalist Federal Farmer stated as to the common law procedural guarantees that had been included in most of the state constitutions: "These rights are not necessarily reserved, they are established or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American law." 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 328 (Letters from a Federal Farmer). See generally McAfee, *Social Contract Theory*, *supra* note 5, at 276-78.

130. Professor Reid observed that "few British civil rights fit any of the eighteenth century definitions of natural law," REID, *supra* note 34, at 89, and he concluded that "the revolutionary controversy was concerned with positive constitutional rights, not abstract natural rights." *Id.* at 90.

131. *Id.* at 67-68.

132. *Id.* at 73.

In other formulations, though, theorists grounded the rights of Englishmen in a postulated "original contract," under which the government's powers and limits were established in a "National Covenant."¹³³ While many understood this concept to be fiction used to ground the rights outside of, and hence beyond, the grants of government, the contract idea suggests that the rights are "stipulated"¹³⁴ and, moreover, might be renegotiated in a new contract under circumstances in which new governments were required to be formed. In fact, skeptical opponents of the proposed Constitution contended precisely that it would be the last great contract and that therefore wherever any part of it was incompatible with "the ancient customs, rights, the laws or the constitutions heretofore established," the Constitution would prevail.¹³⁵ An underlying issue, once again, concerns the extent to which the American conception of constitutionalism was in the process of change in the 1780s.

In any event, at least British constitutional rights, in the American scheme of thought, had been viewed as civil law rights. This is not obviously true of the natural rights standing alone. Advocates of a natural rights unwritten Constitution need to address the counterargument that natural rights as such were viewed as "imperfect" rights, which meant they were not considered rights within the legal system until they were incorporated in constitutions or statutes.¹³⁶ The foremost scholar on the constitutional history of the American revolution, Professor Reid, concluded that "[t]here was little support among eighteenth-century legal theorists for the proposition that nature could be authority for converting natural rights into positive rights."¹³⁷

133. *Id.* at 137. On the original contract generally, see *id.* at 132-38.

134. See *supra* note 129.

135. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 246 (Letters from a Federal Farmer, Oct. 12, 1787). For discussion of the argument of the Antifederalists that the proposed Constitution would override traditional rights, see McAfee, *Social Contract Theory*, *supra* note 5, at 277-78. While this was the view universally endorsed by the Constitution's opponents, it was not universally embraced after ratification of the Constitution, as courts occasionally invoked magna carta and the immemorial rights of Englishmen in cases where the written constitution of a state failed to include a time-honored right. *E.g.*, *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (1792). For somewhat divergent assessments of South Carolina's treatment of unwritten principles and constitutional text, see GOLDSTEIN, *supra* note 5, at 82-83; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 212-21 (1992).

136. Hamburger, *supra* note 67, at 308 n.6.

137. REID, *supra* note 34, at 90; see also Andrzej Rapczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 187 (1988) (stating that he would find it "extremely surprising" to discover that the founders' commitment to "the independent validity of basic rights (natural or otherwise)," implied "that the basic rights so understood were legally self-executing, to the point of not needing any further support as authority in the courts of law").

If the case for implied customary rights is stronger than the one for natural rights standing alone, a further issue of real importance is raised. Professor Reid observed that the customary basis for the rights of Englishmen places them on a very different "theoretical base" than "today's idea of personal rights."¹³⁸ As contrasted with the modern rights-talk, the "changeless" constitution of the eighteenth century "was torn between the ideal of freeing human subjectivity and the reality of confining human subjectivity within the mores of a customary society."¹³⁹ Even if there is some historical basis for the idea of an unwritten Constitution based on principles of common law, it is not at all clear that the history lends any support to the project of transforming the constitutional project into open ended search for an evolving idea of human rights. One senses that modern advocates have rediscovered this history to find freedom from the constraint of constitutional text rather than to implement the purposes of the founders.

B. Natural Rights, Customary Rights, and the Ninth Amendment

To the extent that modern scholars link the British constitutional past to the United States Constitution by reference to the Ninth Amendment, a preliminary question, which has not yet been addressed by unwritten Constitution theorists, is whether such a view can be reconciled with recent arguments for a "natural rights" reading of the amendment. Several scholars have recently attempted to explain the Ninth Amendment's reference to other rights "retained by the people" as an explicit incorporation, and indeed a singularly unique reference to, the social contract principle that the people "retain" certain inalienable natural rights as they leave the state of nature and enter in to civil society.¹⁴⁰ While some of these same scholars appear to assume that the amendment also incorporates positive law or customary rights,¹⁴¹ it is difficult to see how both of these views can be sustained.

If the rights "retained by the people" uniquely refers to the social contract idea of natural rights which are not ceded to government upon entering civil society, rights such as the right to trial by jury do not appear to qualify. Founding-era thinkers clearly separated the

138. REID, *supra* note 34, at 73.

139. *Id.*; see also Grey, *Origins*, *supra* note 4, at 892 (observing that those most likely to invoke implied restraints rooted in British fundamental law concepts were "identified with the conservative forces in American society").

140. Barnett, *supra* note 4, at 7 n.16; Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee*, 16 S. ILL. U. L.J. 327, 332-34 (1992); Rosen, *supra* note 41, at 1073.

141. *E.g.*, Barnett, *supra* note 4, at 13; Mayer, *supra* note 68, at 320.

rights possessed in nature from positive rights, including the right to trial by jury, that may facilitate the security of the natural rights.¹⁴² While both retained natural rights and positive law rights designed to secure them more effectively were thought of as fundamental rights that society ought to protect, the two categories were frequently acknowledged, but not amalgamated, by thoughtful writers. Indeed, the natural rights that were deemed inalienable—the rights always to be “retained” under typical formulations of social contract theory—consisted of a very short list of rights in the mind of most founding era theorists.¹⁴³

C. Fundamental Rights and the Federalist Argument from Limited Powers—Some Unresolved Tensions

Unwritten Constitution theorists have yet to acknowledge the conflict among their attempt to confront a central question concerning the relationship between the notion of implied fundamental rights, whether customary or natural, and Federalist arguments against a Bill of Rights based on the powers granted to the national government. Modern Ninth Amendment theorists contend that the other rights retained by the people were the natural and common law rights that Antifederalists feared might be lost if omitted from the proposed Bill of Rights.¹⁴⁴ By many modern accounts, the Ninth Amendment was to prevent the implication that these preexisting rights forfeited their inherent constitutional status by virtue of their exclusion from the enumeration of rights in the Bill of Rights.¹⁴⁵ A clear implication of the argument that these rights held

142. Madison explained to Congress that bills of rights secure retained natural rights and “specify positive rights, which may seem to result from the nature of the compact.” 1 ANNALS OF CONGRESS, *supra* note 69, at col. 454. He explained that trial by jury “cannot be considered as a natural right,” but it was “as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” *Id.*; see also 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 69, at 261 (distinguishing among “natural and inalienable” rights, “constitutional or fundamental” rights, and “common or mere legal rights”; trial by jury in the second category); *id.* at 327-28.

143. *E.g.*, LUTZ, *supra* note 44, at 30; Rosen, *supra* note 41, at 1080. Modern commentators do not concur as to precisely which rights were deemed inalienable, but perhaps as qualified in nature, and which were considered alienable. But the declarations of rights themselves name very few rights as among the inalienable natural rights.

144. *E.g.*, Barnett, *supra* note 4, at 7 n.16, 12-14; Mayer, *supra* note 68, at 319-23; Sherry, *supra* note 4, at 1162-65.

145. *E.g.*, Barnett, *supra* note 4, at 13-14 (contending that Federalists who expressed concerns leading to the Ninth Amendment shared “the then-prevailing beliefs in rights antecedent to government,” and concluding that they did not view these as “mere ‘theoretical’ or ‘philosophical’ rights,” but as rights that may not be abrogated by municipal law); Mayer, *supra* note 68, at 320 (stating that Federalists held to view that “natural rights were ‘inalienable’ and therefore held inherent constitutional status”);

an inherent constitutional status that would be lost as an inference from the Bill of Rights is that these rights would have served as limitations on federal powers in the absence of the Bill of Rights.

An immediate problem for this view is that the Federalist response to the Antifederalist insistence on the necessity of a Bill of Rights was the argument that the people's fundamental rights were secured by the Constitution's limited powers scheme. By contrast to the state constitutions, where the people "had invested their representatives with every right and authority which they did not in explicit terms reserve,"¹⁴⁶ the federal Constitution reserved "everything which is not given."¹⁴⁷ They insisted that the people originally possessed all power and had retained their fundamental rights in the sovereign act of granting defined powers to the national government.

The Federalist attempt to distinguish the federal Constitution from the state constitutions in this fashion suggests the possibility that the rights of the people threatened by the Bill of Rights, and hence protected by the Ninth Amendment, were simply the "great residuum" from the Constitution's "bill of powers"—article I's enumeration of specific powers—which Madison called "the rights of the people" under the unamended Constitution.¹⁴⁸ If so, the Ninth Amendment might be read as simply prohibiting an inference from the enumerated rights that the federal government was empowered to invade these residual rights. This reading of the arguments leads to the traditional, "residual rights" reading of the Ninth Amendment, which links the amendment to preserving the scheme of enumerated powers to the end of preserving the rights reserved by that system.¹⁴⁹

Sherry, *supra* note 4, at 1164 (arguing that purpose of Ninth Amendment was to avoid negative implication that unenumerated inherent rights were "not protected"). For what appears to be a nonstandard account in which the Ninth Amendment serves to secure unenumerated rights threatened by the apparent implications of the original constitutional text itself (even without a bill of rights), see *infra* notes 182-84 and accompanying text.

Advocates of this view have not attempted to explain why various framers would not fear that the legal status of an "inherent constitutional right" was threatened by virtue of being omitted from the written constitution, but would see that status as jeopardized by being excluded from an enumeration of rights in the Bill of Rights.

146. 2 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 167, 167 (James Wilson, Speech in the State House Yard, Oct. 6, 1787).

147. *Id.* at 167-68.

148. 1 ANNALS OF CONGRESS, *supra* note 69, at col. 455.

149. This traditional understanding of the Ninth Amendment is the one defended at length in McAfee, *Original Meaning*, *supra* note 5.

Unwritten Constitution theorists have offered two main explanations for squaring the Federalist arguments that the people had retained their rights in positive law as a by-product of the limited powers scheme with the view that the Ninth Amendment adds to the limitations on delegated power found in the Constitution and Bill of Rights. One approach is to contend that the Federalist argument from limited powers was in large part an implied limitations argument in disguise.¹⁵⁰ If we knew their language, this argument runs, we would understand that the rhetoric of limited powers clothed an underlying conception of inherent individual rights limitations on government—what one scholar referred to as “means constraints”¹⁵¹—which served at once to define or delimit the granted powers even as they restricted them.¹⁵² On this view, the Federalist

150. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 380-81 (1990) (arguing that the Federalists “expected these grants of power to be read against the background of accepted assumptions about natural rights” and hence conceived them as “subject to inherent limitations”); Grey, *The Original Understanding*, *supra* note 4, at 163 (interpreting Federalist arguments to the effect that no power had been given to Congress to invade fundamental rights as articulating inherent limits by keying in on the word “proper” under the Necessary and Proper Clause). A similar view seems implicit in the analysis of the language of rights and powers by the Federalists in Sager, *supra* note 45, at 247-50. See McAfee, *Original Meaning*, *supra* note 5, at 1255-57 (critiquing Sager’s analysis).

151. See Randy E. Barnett, *Forward: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 615, 638 (1991).

152. A classic example of this sort of move in redescribing rights retained by the delegation of powers is the argument that the traditional formulation that emphasizes that the Ninth Amendment “refers to the rights retained by the sovereign people when they delegate powers to a government” is consistent with the natural rights reading because “the [natural] rights retained in entering society [in natural law/social contract theory] and those retained when granting legislative powers were the same rights.” Heyman, *supra* note 140, at 334. The implication is that the powers delegated in a constitution, however broadly formulated, cannot be read to empower invasion of the natural rights because the rights are (by definition) “retained.”

An analogous approach to enumerated powers seems to be embodied in a recent construction of Madison’s 1791 argument in Congress against the bill proposing a national bank. Professors Barnett and Mayer contend that Madison’s argument that the power to incorporate a bank could not be found in the Constitution, even when granted powers were read in light of the Necessary and Proper Clause, implemented a strategy of construing the power-granting provisions consistently with the limiting principles constituting the unenumerated rights retained by the people. Barnett, *supra* note 151, at 635-37; Mayer, *supra* note 68, at 318-19. In particular, they found that Madison relied upon the bank bill’s use of a “monopoly,” which violated “the equal rights of every citizen,” as a ground for avoiding a “latitude of interpretation” as to federal powers. Barnett, *supra* note 151, at 636; Mayer, *supra* note 68, at 318. For Madison’s speech, see 2 ANNALS OF CONG., *supra* note 69, at cols. 1944-52 (Gales & Seaton eds., 1834) (Statement of Rep. Madison, Feb. 2, 1791). For criticism of their reading of Madison see *infra* note 175.

Barnett and Mayer do not offer the explicit claim that Madison or others adhered to this conception of the federal powers scheme during the debate over ratification, but it is difficult not to see such a claim as implicit in their argument. Considering that the

fear was that a set of enumerated, express limitations on granted powers might be taken as excluding any other, implied limitations; enumerated powers would then be taken to be plenary and would no longer be understood by reference to this individual rights vision.

A second approach is to contend that the Federalist argument about the force of the limited powers scheme actually presented a straightforward argument based on ordinary rules of construction, and not based on strict construction in favor of implied rights, but that this argument was simply wrong. Accordingly, Madison and others came to see this as they accepted the necessity for the Bill of Rights. The Ninth Amendment was therefore drafted to ensure that all the rights that required greater protection than the powers scheme could provide, both the ones enumerated in the Bill of Rights and those which might be omitted, were adequately secured.¹⁵³

Until now both these explanations have been offered without it being noted that they are mutually exclusive, and unwritten Constitution theorists face the task of clearly embracing and defending one of these competing visions. Each explanation has its own appeal and problems, and each warrants careful consideration. Thus far, however, they have not been carefully separated and analyzed, and a

language of the Ninth Amendment does not purport to create new rights, or even to establish them in law, but rather to hold them harmless against a negative inference based on the enumeration of other rights, the above-described interpretation of Madison's approach to construing enumerated powers under the Ninth Amendment should apply equally well in the absence of any Bill of Rights. This point seems reinforced by the fact that Madison's reliance on the Ninth Amendment in his 1791 speech against the bank bill treated the Amendment as a rule of construction for interpreting and applying the Necessary and Proper Clause rather than as the source of the limitations which Barnett and Mayer understood him to rely upon. *See also* Heyman, *supra* note 140, at 336 (contending that a natural rights/fundamental rights approach to construing enumerated powers—particularly under the Ninth Amendment—would enable a court to argue that a general grant of power to pass revenue laws should not be interpreted to authorize Congress to infringe the right to be free from general search warrants; notice, however, that Madison argued to opposite effect about the implications of the omission of a bill of rights, see *infra* note 169, which is a position difficult to square with this limiting construction approach).

153. Advocates of this view might contend that, while the limited powers argument was not itself an implied rights argument, Federalists believed there were implied rights limitations on the powers given the government and not merely a residuum from the granted powers that would be endangered by a Bill of Rights. Such commentators ignore or downplay the centrality of the limited powers scheme in the Federalist argument and their general acknowledgment that but for the enumerated powers the need for a Bill of Rights would be established. For an example, see *supra* note 104 (discussing Professor Mayer's contention that the Federalist contrast between the federal Constitution and its state counterparts exaggerated the differences to aid their strategy opposing a bill of rights).

number of authors appear to have adopted both explanations at once without acknowledging or confronting either set of problems, let alone perceiving that both cannot be true at once. If the Federalists' argument from limited powers rested on the assumption that powers are properly defined by reference to implied individual rights limitations, we would have a better explanation of why they seemed so confident in their argument against the need for a Bill of Rights despite the obvious breadth of wording of some grants of powers and the Necessary and Proper Clause.¹⁵⁴ This understanding of the Federalist argument would also help us understand their expressed fear that a Bill of Rights might be construed to enlarge the powers of the national government,¹⁵⁵ as well as the decision of the state ratifying conventions to draft their proposed Ninth Amendment provisions as prohibitions on a construction of new or extended powers.¹⁵⁶ In reality, both the expressed fear and the proposed remedy referred to concerns for the implied individual rights limitations that happened to be expressed in "powers" language.¹⁵⁷

At the same time, however, the limiting construction reading of the Federalists' argument from delegated powers appears to generate more problems than it solves. On its face, the Federalist argument appeared as a contention that the proposed Constitution

154. For example, Professors Farber and Sherry at one point suggested that the standard Federalist argument relying upon limited powers "was an implicit renunciation of the doctrine of implied powers." See FARBER & SHERRY, *supra* note 150, at 224. But if the Federalists presumed implied limitations as part of construing the enumerated powers, as Farber and Sherry elsewhere suggest, *supra* note 150, they could have maintained a liberal approach to implied powers subject to the implied limitations, and their statements emphasizing the limited scope of what had been "expressly" granted could have encompassed both ideas.

155. This reading would give new meaning to Madison's observation 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." James Madison to Thomas Jefferson, in 1 SCHWARTZ, *supra* note 77, at 614, 615 (Oct. 17, 1788). Madison's concern becomes a statement that the Bill of Rights should be drafted to avoid an inference against the implied limitations by which delegated powers are given limiting constructions in favor of fundamental rights.

156. The Virginia proposal stated: "That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress." 2 SCHWARTZ, *supra* note 77, at 844. New York's proposal similarly prohibited an inference of "any Powers not given by the said Constitution" from clauses that declared "that Congress shall not have or exercise certain Power." *Id.* at 911-12.

157. This construction of the Federalist argument would also explain why Madison's initial draft of the Ninth Amendment retained a focus on avoiding a construction of enumerated "exceptions" to powers so as "to enlarge the powers delegated by the Constitution." 1 ANNALS OF CONG., *supra* note 69, at col. 435. Once again, the concern is that express "exceptions" to the delegated powers might cut against the existence of implied exceptions.

differed from the constitutions of the states in a way that obviated the need to secure fundamental rights in a Bill of Rights.¹⁵⁸ In forming a government designed to accomplish specific national objectives, the framers had drafted the delegated powers to serve the same purpose that the bills of rights served in the state constitutions.¹⁵⁹ If the linchpin in this limited powers argument were the assumption that an underlying conception of implied rights limitations would be read into the powers, the powers scheme as such adds virtually nothing to the security given the rights.¹⁶⁰ Indeed, it is difficult to conceive of why implied individual rights limitations might not be as easily read into the construction of general legislative powers granted in the state constitutions as they would be in the construction of delegated powers under the federal Constitution.¹⁶¹

The notion that the Federalists relied on an argument from a limiting construction of delegated powers seems even more puzzling given their suggestion that the powers could be subjected to scrutiny by examining the text of the Constitution itself. Thus James

158. This point is underscored by the evidence that the Antifederalists viewed this argument as based on the unique nature of the proposed Constitution. Thus one Antifederalist acknowledged that, under a constitution drafted like the Articles of Confederation, the narrow grants of power would obviate the need for specific limitations on powers in a bill of rights; but this sort of model cannot suffice, he argued, if "the powers which are *expressly given* to Congress are *too large*." 13 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 399-400 (An Old Whig II, Philadelphia Independent Gazetteer, Oct. 17, 1787).

159. One Federalist explained that the limited delegation of powers to the national government "amounts in fact to a bill of rights." 2 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 411, 412 (Thomas McKean, Pennsylvania Ratifying Convention, Nov. 28, 1787). For additional evidence that the Federalists presented the argument in this fashion, see McAfee, *Original Meaning*, *supra* note 5, at 1230-32, 1246-47 n.123. This would be a strange argument if it amounted merely to saying that the powers were delegated with an implicit reservation in favor of rights.

160. Professor Mayer offered this explanation as to why the leading Federalists did not present a straightforward argument based on fundamental rights: "[A]lthough logic might have prompted the Federalists to remind the Antifederalists that natural rights were 'inalienable' and therefore held inherent constitutional status, . . . clearly such a response would not appease the Antifederalists' strong skepticism about the various ways in which rights could be endangered." Mayer, *supra* note 68, at 320. But if Mayer is correct that the Federalists knew their opponents would not be satisfied with an inherent rights argument, it seems odd that they would offer up what amounted only to a slightly less direct version of the same argument.

161. In making an argument for just such a construction of the federal powers scheme, Professor Heyman relied on Justice Chase's opinion in *Calder v. Bull*, which purported to find implied limits on what state legislatures might do based on "certain vital principles in our free Republican governments." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798), *quoted in* Heyman, *supra* note 140, at 335 n.26. By contrast, the Federalists repeatedly acknowledged that the general delegations of power under the state constitutions were limited only by the provisions of the state declarations of rights. See *supra* notes 146-49.

Wilson asked: “[W]hat part of this system puts it in the power of Congress to attack [the rights of conscience]?”¹⁶² Edmund Randolph inquired: “Where is the page where [freedom of the press] is restrained? . . . I again ask for the particular clause which gives liberty to destroy the freedom of the press.”¹⁶³ If delegated powers were to be construed as inherently limited by customary and natural rights limitations, these were nonsensical questions indeed, for the apparent thrust of any particular power-granting clause was understood, according to that theory, as containing implicitly what these spokesmen were insisting would be seen by a simple examination of the text. Wilson and Randolph were demanding a showing which the Federalists had previously stipulated as impossible because of a ground rule that precluded powers from being read to permit the invasion of fundamental rights.

Along similar lines, the Federalists offered answers to their own questions that appear to belie that an assumption of implied limitations was implicit in their argument. Within a few weeks of the Philadelphia Convention, Wilson stated clearly that the Constitution would have required a liberty of the press provision if the national government had been granted power “to regulate literary publications.”¹⁶⁴ Under the implied limitations reading of the Federalist argument, however, a power “to regulate literary publications” would be interpreted as permitting only regulations that did not abridge the preexisting right to a free press. In a more general vein, James Iredell answered the charge that the Constitution lacked clear “fences” or “boundaries” to prevent the violation of the natural rights by arguing that the text of the Constitution included “such a definition of authority as would leave no doubt” so “any person by inspecting [the Constitution] may see if the power claimed be enumerated.”¹⁶⁵ Iredell was arguing for the adequacy of delegated powers in providing the demanded boundary, but his argument becomes quixotic if it really amounts to saying that implied limitations on the delegated powers, based on the rights the people fear losing,

162. 2 ELLIOT'S DEBATES, *supra* note 70, at 455 (Pennsylvania Ratifying Convention, Dec. 4, 1787).

163. 3 *id.* at 469 (Gov. Edmund Randolph, Virginia Ratifying Convention, June 15, 1788).

164. 2 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 168 (James Wilson, Speech in the State House Yard, Oct. 6, 1787).

165. 4 ELLIOT'S DEBATES, *supra* note 70, at 171 (North Carolina Ratifying Convention, July 29, 1788).

are themselves what constitute the clearly marked "boundaries" of government power.¹⁶⁶

A more straightforward understanding of the limited powers argument is powerfully reinforced as well by the Federalist admission that the Constitution granted power to regulate and even to omit the right to a jury trial in a civil case. In fact, a number of Federalists insisted, at once, that although they remained committed to the importance of the right to trial by jury in civil cases, and did not intend to abolish that right, congressional power to regulate the courts included the power to control whether jury trials would be permitted or required in civil cases.¹⁶⁷ If the fundamental common law rights were conceived as implicit within the granted powers, congressional power to regulate the courts should have been construed as limited by the jury trial right.¹⁶⁸ But all of the contestants over ratification, Federalist and Antifederalist, concurred that this was not the case.

Most importantly, if means constraints on powers were implicit in the powers granted by the Constitution, and were indeed the object of concern in the drafting of the Ninth Amendment, lest these means constraints be lost by implication, it should be explained why it is that Madison appears to have repudiated the existence of these means restraints in his recapitulation of the Bill of Rights debate before the first Congress. In presenting his draft of the Bill of Rights, Madison acknowledged that the granted powers included power "with respect to means, which may admit of abuse to a certain extent, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent."¹⁶⁹ Specifically, Madison acknowledged that Congress might, pursuant to its power to collect revenues, enact a law permitting the issuing of

166. These sorts of arguments prompted Professor Hamburger, in an important work on the thinking of the founders, to conclude that the Federalists believed that the precise "enumeration of federal powers provided a clear boundary between federal power and the people's rights." Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315-16 (1989).

167. See McAfee, *Social Contract Theory*, *supra* note 5, at 293.

168. Thus Professor Sherry included the right to trial by jury among the rights which were part of the fundamental law regardless of whether they were enumerated in the written Constitution. Sherry, *supra* note 4, at 1139-41.

169. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD OF THE FIRST FEDERAL CONGRESS 82 (Helen E. Veit et al. eds., 1991). Notice that in presenting this argument Madison fully acknowledged once again the validity of the Antifederalist contention that governments of general powers may act abusively by means of their constitutional authority unless they are constrained by a Bill of Rights. Along similar lines, Madison went on to compare the discretion of the federal government in selecting means under the Necessary and Proper Clause with the discretion of state governments to enact "improper laws" in "fulfilling the more extended objects of those governments." *Id.*

general search warrants as a means of enforcing its revenue laws.¹⁷⁰ In making this argument that, despite Federalist claims to the contrary, there was at least some need for a Bill of Rights, Madison's initial premise was precisely that the powers of Congress were to be understood by a natural construction of the grants of power, read together with the Necessary and Proper Clause, without any imported presumptions against governmental power.¹⁷¹

The significance of Madison's argument has not been lost on unwritten Constitution advocates who construe the Federalist limited powers argument as a straightforward reliance on the specification of powers in the Constitution's text. Madison's argument suggests, said one, that the adoption of the Bill of Rights "implied a rejection of the Federalist argument that rights were adequately secured by the structure of enumerated powers."¹⁷² Indeed, according to these scholars, Madison's critique of the limited powers scheme suggests that the Ninth Amendment should be read "within the context of the Bill of Rights as a whole, rather than within the framework of Federalist logic," so that the unenumerated rights are understood as

170. *Id.* at 82-83.

171. While Madison thus acknowledged the need for a Bill of Rights because some of the delegated powers might be construed expansively enough to threaten fundamental rights, it is clear that he continued to see the scheme of delegated powers as an important safeguard of individual rights. See, e.g., Madison's Report on the Virginia Resolutions, 4 ELLIOT'S DEBATES, *supra* note 70, at 546, 571-72 (Madison summarizing his own argument that Alien and Sedition Acts were unconstitutional not only because of the First Amendment, but also because "no power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them").

Madison's belief in the enumerated powers scheme is further illustrated by his defense of the decision to finalize the text of the Ninth Amendment as a safeguard of the other rights retained by the people rather than according to its original language prohibiting an inference of enlarged powers from the exceptions to powers included in a Bill of Rights. Madison stated his view that the attempt to see the provisions as different was "altogether fanciful," explaining that "[i]f a line can be drawn between the powers granted and the rights retained," either form of the provision would have sufficed, but that if "no line can be drawn, a declaration in either form would amount to nothing." 2 SCHWARTZ, *supra* note 77, at 1189, 1190 (Letter from Madison to President Washington, Dec. 5, 1789). Madison here clarified that the purpose of the Ninth Amendment was to secure the rights retained by the enumerated powers scheme against a negative inference from their omission from the enumeration of rights in the Bill of Rights, and, in addition, confirmed that the Amendment's significance turned on whether the delegated powers meaningfully limited the national government so that a line could be drawn between the delegated powers and the retained rights.

172. Heyman, *supra* note 140, at 331. This is true, of course, but only in part. See *supra* note 171. Professor Heyman did not explain, however, why Madison's explanation of the need for the Bill of Rights to prevent the abuse of discretion granted to Congress does not equally imply the endorsement of the Antifederalist position that express limitations are absolutely necessary and the rejection of any notion of inherent constitutional rights that would have raised doubts about the need for a Bill of Rights.

affirmative limitations on the powers granted the federal government analogous to the limitations specified in the Bill of Rights.¹⁷³ That framework, of course, rested on the assumption that the rights would not be adequately secured unless protected by the terms of the written Constitution.

At least some advocates of this reading of the Federalist argument from limited powers have yet to face the task of reconciling this position with other arguments they have advanced. For example, Professors Barnett and Mayer both have contended that Madison opposed the national bank in 1791 because the Necessary and Proper Clause, read within the framework of the Ninth Amendment, embodied implied "means constraints" as inherent limits on the scope of national powers.¹⁷⁴ Hence Madison contended that the national government lacked the power to incorporate a bank, but this construction of federal power was based, according to Barnett and Mayer, at least in part on the unenumerated right of the people to be free from the imposition of economic monopolies.¹⁷⁵

173. Heyman, *supra* note 140, at 331. Advocates of this view, then, are as likely to rely upon Madison's invocation of the potential for abusive use of general warrants under the enumerated powers scheme as are those who defend the traditional reading of the Ninth Amendment.

174. This construction of Madison's argument against the bank bill is summarized at *supra* note 152.

175. This at least is the interpretation given Madison's argument by Barnett and Mayer. In my view, Madison's argument is a much more straightforward construction of the enumerated powers scheme and the Necessary and Proper Clause than Barnett and Mayer allow. Madison was contending that the power to incorporate a bank was not sufficiently connected to the enumerated powers relied upon by its proponents to be deemed a "necessary" means to accomplishing legitimate governmental ends. A part of this argument proceeded on the premise that the more independent and important the power, the less likely it would have been viewed as an appropriate "means" to achieving delegated ends. See 2 ANNALS OF CONG., *supra* note 69, at col. 1949 (Statement of Rep. Madison, Feb. 2, 1791) (stating that nature of powers granted "condemn the exercise of any power, particularly a great and improper power, which is not evidently and necessarily involved in an express power"; undeniable "that the power proposed to be exercised is an important power").

The significance of the bank's status as a monopoly was the suggestion that such a power should not lightly be inferred, given its important implications for the equal rights of all citizens. See *id.* at 1950 (advancing point that bank would create a monopoly together with other evidence of the importance of the contemplated power—the legislative nature of the proposed bank's power to make by-laws, the power granted the bank to purchase and hold real property, and the support the bank would receive from penal regulations; various factors point up that "the power of incorporation exercised in the bill" could not "be deemed an accessory or subaltern power, to be deduced by implication, as a means of executing another power"). One implication of this contention, and an assumption of Madison's entire argument, is precisely that such a power could have been delegated to the national government; Madison's only point was that such power was not delegated and was too important to be read in by implication. If Madison had viewed all business monopolies as inherently unconstitutional, there

But if the right to be free from economic monopoly were among the rights that the Ninth Amendment was intended to protect against the threat posed by the addition of a Bill of Rights, the apparent implication of the Barnett/Mayer construction of Madison's bank bill argument is that Madison would have perceived this same implied limitation within the Necessary and Proper Clause even without a Bill of Rights.¹⁷⁶ If this explication of their construction of Madison's argument is correct, it appears that Barnett and Mayer are in the position of contending in effect that Madison construed federal powers within the framework of implied rights limitations during the ratification debate of 1787-88 and in the 1791 bank bill debate, but construed federal powers by reference to the *prima facie* grant as set forth in constitutional language when justifying the Bill of Rights to Congress in 1789.¹⁷⁷ Needless to say, it seems implausible to think that Madison flip-flopped on this issue twice in three years.

Of greater concern for advocates of the straightforward reading of the limited powers argument is that Madison's argument that Congress could authorize general search warrants, on which Barnett and Mayer relied, provides a direct challenge to the claim that Madison viewed unwritten fundamental rights as inherent in the Constitution. Madison's argument rested on the premise that, if the enumerated powers scheme and Necessary and Proper Clause grant

would have been no point in discussing whether the bank was sufficiently related to the government's express powers.

176. At least it is difficult to conceive of how the Ninth Amendment yields a power-limiting construction that would not have been valid even without a Bill of Rights. Barnett and Mayer each adopted the standard view that the Ninth Amendment grew out of the Federalist concern that the listing of rights in a Bill of Rights might be read as precluding rights that would have been deemed implicit in the constitutional order in the absence of a Bill of Rights. Barnett, *supra* note 4, at 12-13; Mayer, *supra* note 68, at 317 (stating that Ninth Amendment was intended to confront two dangers posed by a Bill of Rights, one of which was "the loss of rights not included in the enumeration"); *see id.* at 322-23 (arguing that Americans did not view fundamental rights as lost if not explicitly protected in their state constitutions). Since the anti-monopoly right is presumably among these preexisting rights which the Ninth Amendment by its terms merely holds harmless against an adverse inference from the enumeration of rights in the Constitution, the argument that the enumerated powers scheme is subject to a limiting construction by virtue of this right should have been equally applicable under the unamended Constitution. *See* Mayer, *supra* note 68, at 319 n.21 (suggesting that anti-monopoly right was a preexisting right, of which Madison was aware, that presumably would have been implicit without a bill of rights).

177. As previously suggested, *supra* note 17, the solution is to realize that Madison did not offer an implied limitations view at any of these junctures. It was Madison, after all, who, at the Philadelphia Convention, proposed to insert into the Constitution a general power of incorporation where the nation's interests required it—a proposal that almost certainly would have included a power to incorporate a national bank. 2 Farrand, *supra* note 68, at 615 (Sept. 14, 1787).

discretion to invade a fundamental right, only a specific legal limitation will secure the right in law. In thus confirming the standard Federalist position that the Antifederalist arguments were persuasive except to the extent that the federal Constitution's enumerated powers scheme itself provided an effective legal check, Madison clarified that the debate had never been over the existence of implied limitations, but the adequacy of the proposed Constitution in protecting natural rights.¹⁷⁸

While those who read Madison as confirming the straightforward nature of the Federalist argument from limited powers continue to pay lip service to the relationship between the Ninth Amendment and the Federalist argument that a Bill of Rights would be dangerous, it is difficult to see how they can maintain this position. According to this view, both the Bill of Rights and the Ninth Amendment were drafted, as Professor Barnett suggested, as a "way to police abuses" of the discretion granted by the Necessary and Proper Clause.¹⁷⁹ But if this is true, the natural rights logically would have been just as endangered by being omitted from the Constitution as they are by being omitted from the Bill of Rights.¹⁸⁰

178. It might be contended that Madison was speaking only to the effect of the limited powers scheme and was simply not addressing the issue of implied limitations based on inherent (unwritten) constitutional rights. Madison's argument did begin with a construction of the Federalist argument from limited powers as a straightforward claim about the grants themselves, and he did not suggest that the powers are to be interpreted by reference to limiting principles. At the same time, it seems unlikely that Madison would have described a granted power according its *prima facie* elements, and asserted that it effectively granted this kind of discretion in the absence of a Bill of Rights, without qualifying his claim by referring to an implied legal limitation on that power had he thought such a limitation was already in force.

179. Barnett, *supra* note 151, at 636 n.74. Barnett contended that the Ninth Amendment should be read consistently with the outcome of the Bill of Rights debate. Barnett, *supra* note 4, at 10 (traditional view of Ninth Amendment, focusing on limited powers scheme, "reflects a losing argument against enumerating any constitutional rights"). The Bill of Rights was adopted, according to Barnett, because of the recognition that, given the open-ended nature of the Necessary and Proper Clause, "some regulation of the means employed to achieve enumerated government ends must supplement the device of enumerating powers." *Id.* at 16. For Barnett, the Ninth Amendment merely extends the logic of this necessity for regulating the means employed by government so that it is inclusive of all the means-constraints (or rights) that the Framers believed in, not just those actually listed in the document.

180. Since the purpose of enumerated constitutional rights is to complement the limits imposed by the delegated powers as to ends, it follows for Barnett that the other rights retained by the people would serve this same function as means-constraints as to delegated powers. Barnett thus perceived that the Federalist "redundancy" argument was "ultimately rejected," but seems to miss that his own "redundancy" argument (that the natural rights held inherent constitutional status) was apparently rejected as well. If the Necessary and Proper Clause grants unchecked power to government, which generates the need for constitutional provisions to serve "as actual limitations of such powers," Barnett, *supra* note 4, at 17 (quoting Madison, 1 ANNALS OF CONGRESS, *supra*

Indeed, even if the founders saw natural rights as, in some important sense, implied limits on government, Barnett's own argument clarified that the Bill of Rights debate concerned how to secure them in the positive law of the Constitution. The omission of a natural right from a Bill of Rights obviously could not alter its status as a natural right; and if the Bill of Rights was essential to secure it as a legal right, given the potential for abuse of the Necessary and Proper Clause, a Bill of Rights could hardly endanger such a right merely by omitting it.¹⁸¹

If some attempt to have it both ways in attempting to confirm both the Antifederalist recognition of the need for a Bill of Rights as well as the Federalist fears of it, at least one recent commentator has seen more clearly the implication of acknowledging the necessity for a Bill of Rights and perceiving the Ninth Amendment as a supplementary safeguard against abuse of implied powers. Professor Heyman has forthrightly suggested that it is "doubtful that the Ninth Amendment was designed to meet these Federalist concerns" as to either the "necessity or dangerousness of a bill of rights"¹⁸² Heyman accurately perceived that if the Ninth Amendment reflects a "converted" Madison's attempt to extend essential constitutional protection to all rights, whether expressly listed or not, an implication is that the Amendment was therefore not a response to a claim that a bill of rights would be dangerous inasmuch as something im-

note 69, at col. 452), an implication is that natural rights were not of themselves conceived as "actual limitations" on the constitutional powers.

181. The Federalists clearly understood that the danger posed by a Bill of Rights was tied directly to the lack of necessity for one. As James Iredell argued:

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

4 ELLIOT'S DEBATES, *supra* note 70, at 149 (July 28, 1788). According to Iredell, if the rights limitations in a bill of rights are essential to effectively safeguard against abuse of power, as it clearly is with a government of general powers, a bill of rights is not dangerous precisely because it is necessary. The threat posed by a Bill of Rights was that it might be taken to be the sole means of limiting federal power and thus endanger rights intended to be secured by the limited powers scheme but omitted from the Bill of Rights. See, e.g., 2 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 387-88 (James Wilson, Pennsylvania Ratifying Convention, Nov. 28, 1787) (arguing that "[a] proposition to adopt a measure that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at, in that house, with the greatest indignation").

182. Heyman, *supra* note 140, at 330 n.8.

portant might well be sacrificed by its inclusion in the Constitution. Heyman's analysis acknowledges that if an inadequate scheme of delegated powers requires the supplementation of means-constraints—rights provisions—to prevent abuses of the powers, the omission of the required supplement would obviously be more dangerous than the mere possibility that the supplement provided would turn out to be incomplete.

On this reading, the Ninth Amendment is not a response to a unique danger presented by a Bill of Rights, but basically an extension of the Bill of Rights so as to incorporate any other rights insufficiently protected within the Constitution. It is, in short, a simple catch-all provision.¹⁸³ Strikingly, this approach appears to present the Ninth Amendment as establishing constitutionalism based on unwritten principles by stipulation, rather than as a mere restatement of a general jurisprudential assumption that rights within our natural and fundamental law heritage were implicit elements of our constitutional law.¹⁸⁴ What Professor Heyman has not explained is why the amendment was drafted as a rule of construction prohibiting a particular inference from the enumeration of rights rather than as a straightforward incorporation of additional rights along these lines: "In addition to the rights enumerated in the Constitution, the people retain all their fundamental natural and common law rights." Under his explanation for the amendment, after all, the concern for the unenumerated rights actually stems from their omission from the Constitution rather than from the inclusion of other rights in the Constitution.

183. While such a thesis is an interesting one, it should be noted that it clearly opposes the near-universal historical consensus, embraced by Joseph Story and supported by Madison himself, that the Ninth Amendment grew directly from the ratification-era arguments opposing the Bill of Rights as imposing a unique danger. See 1 ANNALS OF CONG., *supra* note 69, at col. 439; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752, n.2 (1833) (reprinted ed., 1970). For an extended treatment that attempts to show that the Federalist fear was that their own scheme for securing rights—the limited powers of article I—would be undermined by a Bill of Rights, viewed as an exclusive method of stating the limits on the national government, see McAfee, *Original Meaning*, *supra* note 5, at 1248-77.

184. This contrasting view is clearly the one set forth by Professor Sherry, *supra* note 4. Moreover, even unwritten Constitution advocates who emphasize the inadequacy of the limited powers scheme, and the apparent need for a Bill of Rights, typically claim that the natural and common law rights would have been viewed as constitutional limitations even in the absence of a Bill or Rights. A point of this section, however, is precisely that these scholars' reliance on natural rights as implied constitutional rights does not square well with their own use of Madison's adoption of the Antifederalist arguments establishing the need for the constitutional safeguards of a Bill of Rights, arguments which countered the Federalist objections that relied on limited powers to fill the presumed need.

As the debate over unwritten constitutionalism comes of age, hopefully its advocates will confront the reality that there is more than one theory of the unwritten Constitution as reflected in competing theories of the Ninth Amendment history in terms of that tradition. They might see, moreover, that these competing theories conflict with each other in their interpretation of the historical materials virtually to the same extent as they do with traditional textualist understandings of our constitutional founding. At the least, scholarly advocates of unenumerated rights might then begin to confront the conflicts and problems within their own renderings of a complex historical picture. As they ponder the differing interpretations that separate them, advocates of the unwritten Constitution may even gain greater appreciation of the strength of the position that separates natural and constitutional rights and understands the Ninth Amendment as part of the design for securing the natural (and other fundamental) rights within the design of the written Constitution.¹⁸⁵

IV. THE UNWRITTEN CONSTITUTION AND JUDICIAL REVIEW

In its classic statements, the modern theory of the founders' unwritten Constitution included the claim that the founders not only believed in unwritten rights, but saw them as judicially enforceable

185. The traditional reading of the Ninth Amendment explains all the historical and textual data that scholars have attempted to explain by reading their Federalists' limited powers defense of the Constitution as an argument assuming implied limitations on government. The Federalists contended that article I's enumerated powers scheme itself constituted a bill of rights or, as Madison put it, a bill of powers, which effectively secured the people's rights. See McAfee, *Original Meaning*, *supra* note 5, at 1246. Their fear was precisely that "any other bill of rights [than the limited powers scheme] would be dangerous, as it would at least imply that nothing more was left the people than the rights defined and secured in such bill of rights." 3 RATIFICATION OF THE CONSTITUTION, *supra* note 70, at 569, 569 (Samuel Holden Parsons to William Cushing, Jan. 11, 1788).

The apprehended danger was articulated alternatively as a feared expansion of federal power (if the rights enumerated were taken to be the exclusive limits on federal powers), or as a feared loss of the rights retained by the limited powers scheme; and, unsurprisingly, Madison and other leading Federalists referred to both sorts of formulations as constituting a single contention that a Bill of Rights would be dangerous. Finally, the evolution from the state proposals drafted as prohibitions of new or enlarged powers, with no reference to "rights" by the use of that term at all, to the Ninth Amendment's final text, framed to prevent the loss of the retained rights but omitting any reference to a feared expansion of federal power, is explained most plausibly by the fact that either form of the provision spoke simultaneously to securing residual rights and preventing a radical construction of federal power by prohibiting an inference that the Bill of Rights constituted the sole device for limiting national power to the end of securing rights. For a complete defense of these claims, see McAfee, *Original Meaning*, *supra* note 5, at 1248-1305.

limitations on government power.¹⁸⁶ Professor Mayer has recently suggested, however, that there is a "critical distinction between constitutional limitations, generally, and judicial enforcement of constitutional limitations through the power of judicial review."¹⁸⁷ Mayer concluded that the constitutional status of the unwritten rights is fairly established, but that the question whether the founders expected the courts "to enforce unwritten rights" has not been adequately answered by scholars.¹⁸⁸ While Mayer expressed doubt whether judicial supremacy was firmly established as of the ratification debates, he cited evidence suggesting that the founders intended judicial review of higher law principles.¹⁸⁹

Mayer is correct in observing that the question concerning judicial review of unwritten rights is a central issue in the unwritten Constitution debate. At a practical level, the unwritten Constitution idea will have little use to modern commentators if the historical evidence reveals that the framers distinguished between judicial review of written and unwritten law. Even so, the real issue is not simply judicial review. If, for example, the acceptance and flourishing of judicial review under our Constitution was an aspect of the development of a new conception of constitutionalism, in which the Constitution came to be associated with the limiting norms established by the people in the written document, a decision against judicial review on behalf of unwritten norms would represent a signal that unwritten norms, including British constitutional norms, were not conceived of as constitutional limitations.

It is important, then, not to go too quickly in assuming that the issues are unrelated, even if they are obviously separable. If the only real question is whether the founders intended judicial review in the modern sense, as to written or unwritten rights, as Mayer seems to imply, it becomes tempting to argue that the watershed issue of judicial review is now firmly resolved and there is no reason to distinguish between judicial review of written or unwritten constitutional principle.¹⁹⁰ But it is not at all clear that this move works.

186. Grey, *The Original Understanding*, *supra* note 4, at 166-67; Sherry, *supra* note 4, at 1227.

187. Mayer, *supra* note 68, at 323.

188. *Id.*

189. *Id.* at 324-25. The only evidence cited by Mayer to raise doubt about judicial supremacy concerned Madison's views that the state legislatures would be important institutions for policing constitutional limitations on federal power. *Id.* at 324. Mayer did not clarify, however, how this commitment to a multiplicity of constitutional interpreters is necessarily at odds with judicial finality (and thus supremacy in some sense); it could reflect only that Madison did not have high expectations with regard to the intestinal fortitude of judges.

190. See ELY, *supra* note 42.

Historically the issue of judicial review was never far removed from the issue of sovereignty in the mind of legal theorists. We have already seen that Blackstone embraced the dictum of natural law, including the traditional formulation that true law conforms to natural law, but that he nevertheless embraced the doctrine of Parliamentary sovereignty and thus rejected the notion of judicial power to give effect to higher law over the law enacted by Parliament.¹⁹¹ While this formulation can theoretically be reconciled with the idea that Parliament remained bound by the terms of the unwritten British constitution,¹⁹² over time the absence of any meaningful check on Parliamentary authority has been translated into the notion of the absence of any (even theoretical) legal restraint.

Despite the American rejection of Parliamentary sovereignty, the question of the locus of sovereignty became an important issue in American political theory in the 1770s and 1780s. The revolutionary state constitutions were not drafted with judicial review in mind, and the exercise of this power by state courts, beginning in the 1780s, was virtually always met with strong resistance.¹⁹³ Notwithstanding the idea of constitutional limitations, popular legislatures were viewed by many as the sovereign people in assembly; judicial review, by contrast, struck many as the equivalent of oligarchy, or rule by the few.¹⁹⁴ Thus thoughtful judges who were skeptical of judicial review leaned on Blackstone's dictum that recognition of such a power would "set the judicial above the legislative, which would be subversive of all government."¹⁹⁵

While one form of justification of judicial review looked back to Lord Coke's dictum in *Dr. Bonham's Case*,¹⁹⁶ that justification did not confront the sovereignty question nor the fear of oligarchy. The

191. See *supra* notes 39-40.

192. It has been observed that the English people continue to see the British constitution as embodying fixed principles of a fundamental nature, which Parliament is (in some sense) obligated to observe, notwithstanding the doctrine of legislative sovereignty that still controls there. J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 174-91 (1985).

193. See, e.g., Leonard W. Levy, *Judicial Review, History, and Democracy*, in *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 24, 30-31 (1972).

194. Despite this opposition, Professor Sherry contended that early American commitment to judicial review on behalf of both written and unwritten constitutions is demonstrated by state court decisions of the 1780s. See Sherry, *supra* note 4, at 1134-46. These precedents will be examined more fully in a subsequent work. For a reading that differs from Sherry's, see Michael, *supra* note 5, at 448-57.

195. This language is from the judicial opinion in *Rutgers v. Waddington*, which (though unreported) is recorded at I *THE LAW PRACTICE OF ALEXANDER HAMILTON* 392, 415 (Julius Goebel Jr., ed., 1964). The quoted statement paraphrases Blackstone. I *BLACKSTONE*, *supra* note 38, at 91.

196. 8 Coke Rep. 107, 118a (1610).

classic response to these concerns was provided by what became the standard justification of judicial review—the arguments set forth by Alexander Hamilton in *The Federalist* No. 78 and reiterated in *Marbury v. Madison*.¹⁹⁷ According to Hamilton, judicial review does not place the judiciary above the legislature precisely because courts exercising this power are giving effect to the supreme will of the sovereign people as expressed in the written Constitution.¹⁹⁸

At the end of his classic work on the higher law background of the American Constitution, Professor Corwin offered this perceptive summary of the importance of an evolving doctrine of popular sovereignty and the written Constitution in overcoming any American tendency toward legislative sovereignty:

Why, then did not legislative sovereignty finally establish itself in our constitutional system? In the first place, in the American written Constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a statute emanating from the sovereign people. Once the binding force of higher law was transferred to this new basis, the notion of sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a sovereign law-making body which is subordinate to another law-making body.¹⁹⁹

If Corwin's analysis is correct, it suggests at least that the argument for judicial review on behalf of unwritten principles, viewed apart from any tether such rights may have in the Ninth Amendment, is a separate and inherently more controversial argument than the one justifying judicial review of the principles set forth in the written Constitution. Indeed, this very rationale for judicial review appears to reflect and confirm the shift from the idea of unwritten fundamental law, in the tradition of British constitutionalism, to an identification of the fundamental law of the Constitution with the writing ratified by the sovereign people.

Given the weight attached to popular sovereignty and the written Constitution in the thinking of the founders, it will not suffice to acknowledge uncertainty about the status of judicial review in 1787, but then to lump together the issues concerning the legitimacy of judicial review as defended in *Marbury v. Madison* and judicial review on behalf of principles never ratified by the sovereign people and

197. *THE FEDERALIST* No. 78, *supra* note 79, at 521.

198. *Id.* at 525.

199. Edward Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 *HARV. L. REV.* 365, 409 (1929). For a recent exposition of a similar thesis, see GOLDSTEIN, *supra* note 5, at 76-83.

placed in their written Constitution. Indeed, this is perhaps the main reason why the Ninth Amendment has loomed so large in the debate over the unwritten Constitution. If the Ninth Amendment was drafted as a savings clause for natural rights limitations on the powers granted to the national government, it becomes plausible to argue that the unenumerated fundamental rights are secured by the written Constitution and have in effect been ratified by the sovereign people; the rationale of *Marbury* arguably applies to the unenumerated rights as much as to those specified in the text.

Unwritten Constitution theorists are thus enabled to argue that to deny judicial review on behalf of the unenumerated fundamental rights is to "deny or disparage" those rights relative to the enumerated rights in violation of the strict terms of the Ninth Amendment.²⁰⁰ Such arguments, of course, necessarily rise or fall depending on the original meaning of the Ninth Amendment itself; if the rights held harmless by the Amendment are those previously secured by the enumerated powers scheme, judicial review is available, but not in service of the fundamental rights agenda of modern constitutional theorists. Without seeking here to engage that important debate, it is at least striking to note that both Jefferson and Madison spoke of judicial review on behalf of individual rights as one of the fruits of stipulating affirmative limitations on government in a Bill of Rights.

In March of 1789 Jefferson responded to reflections of Madison on the uses of a Bill of Rights that omitted mention of a purpose "which has great weight with me, the legal check which it puts into the hands of the judiciary."²⁰¹ Jefferson's formulation comports well with the view that the founders understood the Constitution as the document ratified by the people, and reflects that he perceived the omission of the limiting provisions of a Bill of Rights as the failure to provide a legal check on power. Jefferson's argument thus appears to rest on the assumption that, at least prior to a Bill of Rights, the rights to which the people are entitled to against government would not be legally secured. It also appears that for Jefferson the power of judicial review was linked to the provision of a legal check in the written Constitution.

Similarly, Madison argued before Congress that courts would become the guardians of the people's rights "[i]f they are incorporated into the constitution."²⁰² Madison stated further that courts "will

200. *E.g.*, Barnett, *supra* note 4, at 25; Massey, *supra* note 4, at 323 n.97.

201. 1 SCHWARTZ, *supra* note 77, at 620 (Letter from Jefferson to Madison, Mar. 15, 1789) (emphasis added).

202. 1 ANNALS OF CONG., *supra* note 69, at col. 457.

be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."²⁰³ According to one theorist, Madison's choice of language reflected that he was dwelling on the benefits of including an enumeration of expressly stipulated rights in the Bill of Rights without addressing the unenumerated rights one way or another.²⁰⁴ Another contended that the unenumerated rights are "expressly stipulated for" by virtue of the Ninth Amendment so that Madison's statement reveals no bias in favor of the enumerated rights.²⁰⁵ That Madison was herein seeking to justify the addition of a list of specific limitations on the national government suggests that rights "expressly stipulated for" did not include the unenumerated rights; and while it is true that Madison did not clearly address the implications of these comments for the unenumerated rights, these comments fit nicely with Jefferson's suggestion that rights become enforceable legal checks when they are stipulated for in the written Constitution.²⁰⁶ This is not language, in short, reflecting the consensus about the constitutional status of unwritten norms of fundamental law which modern commentators insist underlies the Ninth Amendment itself.

203. *Id.*

204. Barnett, *supra* note 4, at 23-24.

205. Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention,"* 74 GEO. L.J. 1719, 1740 (1986).

206. This linking of legal enforceability to inclusion of a written stipulation in the Constitution was not a novel view. When members of the Philadelphia Convention objected to the proposed Ex Post Facto Clause as unnecessary, and as resting on either a presumption of ignorance of first principles or on an undue suspicion of the legislature, one response was precisely that a written provision had the advantage of giving the judges something to "take hold of." 2 Farrand, *supra* note 68, at 376 (H. Williamson, Aug. 22, 1787).

