RESTORING THE LOST WORLD OF CLASSICAL LEGAL
THOUGHT: THE PRESUMPTION IN FAVOR OF LIBERTY
OVER LAW AND THE COURT OVER THE CONSTITUTION

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INTRODUCTION

In 1998, legal historian William M. Wiecek published a book outlining the basic legal ideology that brought us the “Lochner era” in Supreme Court decision-making. It was fittingly entitled, The Lost World of Classical Legal Thought in America: Law and Ideology, 1886–1937. Wiecek demonstrated that the “classical” legal thought that generated the “libertarian” decision-making of the Lochner era, which occurred during the first third or so of the twentieth century, was the attempt to bring Lockean political principles directly to bear on the task of interpreting the 1787 Constitution in the post-Reconstruction era.1 In 2004, Professor Randy E. Barnett contends in his book, Restoring the Lost Constitution: The Presumption of Liberty, that, if “classical legal thought” has regrettably been lost, it embodies the true and legitimate Constitution that may yet be regained. To rediscover “classical legal thought”, he advocates discarding the “presumption of constitutionality” as the centerpiece of constitutional adjudication and imposing, instead, a “presumption of liberty” to implement the libertarian views held by the Constitution’s framers.2 This Article will attempt to show that Barnett’s

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1. E.g., WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937 10 (1998) [hereinafter WIECEK, CLASSICAL LEGAL THOUGHT] (classical lawyers conceived “liberty” as involving “negative liberty,” the freedom from “unwarranted state coercion”); id. (such lawyers stressed that the right of “individual liberty” derived “from the tradition of natural or higher law,” which existed “prior to the state,” “protected by the Constitution but not created by it”); id. at 11 (classical lawyers shared Madison’s concerns about “majority power,” even if they lacked his “confidence that structural limitations on majority rule could constrain the masses”); id. at 12 (classical lawyers believed in “universal principles of justice and moral order”); id. at 13 (classical lawyers sought to return to the “rule-of-law ideal”, confirming “its centrality in the American legal regime”); id. at 14 (classical lawyers tended to favor common law decision-making and to be wary of “legislative intervention”).

2. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 29 (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION] (“people do have rights prior to the formation of a legal system”); id. at 30 (“laws can bind the citizenry in conscience,” absent
analysis of the Constitution consistently mistakes the "ends" the founders sought to advance with the "means" they chose to advance them. The result of implementing Barnett's Lockean Constitution, however, would both undermine the rule of law and have the extremely deleterious effect of placing courts beyond the Constitution that judicial review was designed to interpret. 3

I. THE CONSTITUTION AND RIGHTS—END OR MEANS?

We must get the two-hundred-year-old story straight, in some way, in order to make sense of our own world. The Constitution, in all of its aspects and ramifications, is profoundly relevant. But it is more than that. The writing and ratifying of the Constitution, and the original debate over its meaning, are, quite simply, fascinating. The issues are subtle, the details are often puzzling and intriguing, the movement of events complex. And the actors are remarkable. 4

unanimous consent, only if "the lawmaking power of government" is "constitutionally limited"; id. at 44 (framers believed that the rights people "had independent of government were called 'inherent' or 'natural rights,'" which now are often "referred to as 'human rights' or 'background rights'"); id. at 46 (laws can be legitimated by unanimous consent or "procedural assurances that the rights of the nonconsenting persons on whom they are imposed have been protected"); id. at 51 (to "bind in conscience," laws "must be both necessary to the protection of the rights of others and proper insofar as it does not violate the rights of those upon whom it is imposed"); id. at 52 ("we should be looking for" requirements "that assure that enacted legislation does not violate the rights retained by the people"); we should be sure "this quality has gone in before the name law goes on a particular command"); id. at 53 ("natural rights as liberty rights"); id. at 54 ("enactments should not violate the inherent or 'natural' rights of those to whom they are directed"); these are rights "persons have independent of those they are granted by government"); id. at 57 (natural rights are "liberties or freedoms to believe or act in certain ways," but are not "positive claims on government"); id. at 59 (ratification debates reflect framers saw natural and inalienable rights as "innumerable" because literally "unlimited"); id. at 60 (Madison spoke of "retained" rights possessed prior to government, not rights "created by government"); id. at 63 (right to "protection of government" part of social contract theory, but refers to "positive civil rights"); id. at 325 (Thomas Cooley's "conception of the police power descended from the same Lockean political theory on which the rest of the Constitution was based;" government is essential, in Locke's words, "to restrain the partiality and violence of Men"); id. at 326 ("the inconveniences of the state of nature did not justify a Leviathan with unlimited power of the sort advocated by Hobbes"). Professor Barnett, like his classical counterparts, is consistent as well that "common law principles" manage to "provide the basic legal definitions of these natural rights." Randy E. Barnett, The Intersection of Natural Rights and Positive Constitutional Law, 25 CONN. L. REV. 853, 863 (1993) [hereinafter Barnett, The Intersection]. See also RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998); Randy E. Barnett, Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21.


A. Securing Rights as an "End" to be Pursued Through Constitutional Government

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."\(^5\)

SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. . . .

SEC. 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."\(^6\)

As is often stated, America's Declaration of Independence articulates the Lockean doctrine\(^7\) that the purpose of government is to secure rights.\(^8\) There is little question that the founding generation as a whole


7. According to Locke, people enter in to the social contract, and create government, to obtain "a secure enjoyment of their properties and a greater security against any that are not of it." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 95, at 54 (Thomas P. Peardon ed., 12th ed., The Liberal Arts Press 1952) (1690).

8. "According to the American Declaration [of Independence], the securing of natural rights is the only end or purpose of legitimate government." MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY 226 (2002) [hereinafter ZUCKERT, LAUNCHING LIBERALISM]. Accord SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 6 (1995) [hereinafter GERBER, TO SECURE THESE RIGHTS]
shared this general view.\footnote{To secure these rights, Jefferson writes in the Declaration of Independence, is the reason governments are instituted among men.}; id. at 40 (contending that the essential political premise of the American regime is that government exists to secure natural rights, not to cultivate virtue); id. at 61 (concluding that "[t]he preamble’s pledge to ‘establish justice’ is a reflection of the Framers' underlying premise that the fundamental purpose of the Constitution is to secure natural rights"). In another work, Professor Zuckert assures us that the overwhelmingly dominant "end" of government, according to the Declaration of Independence, is "the securing of rights." Michael P. Zuckert, Natural Rights and The New Republicanism 3 (1994). As we shall discover, however, even advocates of "Lockean" political thought often recognized that "securing" rights most centrally meant government officials preventing other individuals from invading them. Additionally, even if government’s most important end was securing rights, there was no universal agreement as to the "means" by which this securing of rights was most achievable. Moreover, central as securing rights was perceived to be, it is almost indisputable that other ends served by government were not only deemed important, but also helped define what it meant to secure rights. \textit{See infra} Part III.


nature; government is essential if the rights are to be meaningfully protected and secured. The rights to life, liberty, and the pursuit of happiness, to which the Declaration refers, are nothing more than valid moral entitlements, whether they are recognized and enforced in the positive law of a particular state or not. The rights asserted in the Declaration of Independence were derived "from divine or natural principles rather than from 'the consent of the governed.'" This is one reason the documents recognizing fundamental rights possessed by the people, as found in the state constitutions adopted in the wake of America's declaring its independence from England, were called "Declarations of Rights." According to their framers, these documents did not "create" or "generate" many of the rights they secured. Rather, they merely re-stated, or "declared," the rights that were the moral claims the people already possessed and were entitled to keep.

12. But cf. The Intersection, supra note 2, at 862 (asserting that natural rights "define the moral space within which persons must be free to make their own choices and live their own lives"); concluding that they "are rights insofar as they entail enforceable claims on other persons (including those who call themselves 'government officials'))" (second emphasis added).
13. ALAN DERSHOWITZ, AMERICA DECLARES INDEPENDENCE 85 (2003). In his book, as we shall see, Professor Barnett is an enthusiastic supporter—indeed, we could even say a "believer"—in Lockean natural rights. But the other half of the Declaration's equation (government by the "consent of the governed")—frequently asserted even by leading scholars on the life and thought of Jefferson to lie "at the foundation of the American republic," Merrill D. Peterson, Thomas Jefferson, the Founders, and Constitutional Change, in The American Founding: Essays on the Formation of the Constitution 275, 275 (J. Jackson Barlow, Leonard W. Levy & Ken Masugi eds., 1988)—does not receive the same endorsement at all. Indeed, the collective right of "the people" to "alter or abolish" their government served as the justification for declaring independence, and is identified as among the "inalienable" rights in critical founding-era documents, including the Declarations of Rights adopted in Pennsylvania and Virginia, the very state in which the author of the Declaration of Independence resided. See Thomas B. McAffee, Does the Federal Constitution Incorporate the Declaration of Independence?, 1 REV. L.J. 138, 146 (2001) [hereinafter McAffee, Declaration]. But for Professor Barnett the notion of consent by "We the People" is simply a "fiction" that cannot perform the task of giving legitimacy to constitutional government. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 30. In contrast to the views of the founders, the supposed right of the people to amend their constitution would presumably mean nothing to Professor Barnett if he deemed a particular amendment to conflict with the liberty rights individuals should have.
14. For the founding generation, humans had rights prepolitionally. Rights were not "granted by, resultants of, or held on sufferance of governments." ZUCKERT, LAUNCHING LIBERALISM, supra note 8, at 216. As Professor Nichol observed almost twenty years ago, setting down the people's rights on parchment "merely affirmed their existence[,] it did not create them." Gene R. Nichol, Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty, 1985 WIS. L. REV. 1305, 1311. "A people so fresh from revolution could not easily concede that legal rights existed only if confirmed by positive enactment." Id. (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, 291–95 (1969)). It may not have been easy, but in perceiving their own security as linked to the adoption of written constitutions, that is exactly what they did.
15. America's founders "believed the fundamental purpose of government was to protect individual rights, broadly conceived, and they believed those rights were conferred by nature, not by government." GERBER, TO SECURE THESE RIGHTS, supra note 8, at 25 n.4. In addition, government
Sometimes we fail to grasp the other half of this truth. The rights to which the Declaration of Independence referred were "clearly natural rights as opposed to legal or constitutional rights." These rights were not based on "existing positive legal enactments such as the Constitution or the Bill of Rights," and indeed the positive rights secured by the written Constitution and Bill of Rights are not "inalienable" in a legal sense.

The rights added in the Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments were secured by ordinary constitutional amendments pursuant to Article V. No one contended that these were preexisting legal rights, or claimed that adopting a constitutional amendment would be superfluous inasmuch as these were already "inalienable" constitutional rights, even without an amendment. Although it is frequently asserted that none of the rights secured in the original Bill of Rights has ever been undercut through amendment, it is clear that a number of these Amendments have dramatically altered our federal system, thereby adversely affecting the rights reserved to the states and people by the Ninth and Tenth Amendments. Someone like Barnett might well complain that the people's right to be governed by states, rather than the national government—if that was their choice in constructing, or amending, the Constitution—was not among the "inalienable" rights to which they are entitled; but the founders would have viewed the collective right to choose the level of government itself recognizes—and even "creates"—bona fide civil rights, some of which grow out of government's duty to "protect" people's natural rights.

16. ZUCKERT, LAUNCHING LIBERALISM, supra note 8, at 216. The fact that the same term, "right," refers simultaneously to moral claims, or assertions, as well as to legal entitlements, has produced no end of confusion—especially when the moral and the legal reference may well be to the same sort of claim or demand. It is noteworthy, however, that we often use "fudge" words to attempt to make the distinction—contested moral claims are sometimes called "imperfect" rights and, as Professor Barnett acknowledges, "they are often referred to as 'human rights' or 'background rights.'" BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 44.

17. DERSHOWITZ, supra note 13, at 85.

18. Rights found in written constitutions are not considered to be legally "'inalienable'—either in practice or in theory." Id. at 86. Even so, "perhaps the central myth of modern American constitutional history is the idea that the founders of the Constitution equated inalienable natural rights with legal and constitutional rights." Thomas B. Mcaffee, Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights, 36 WAKE FOREST L. REV. 747, 748 (2001) [hereinafter Mcaffee. Inalienable Rights]. Accord Mcaffee, Inherent Rights, supra note 10, at 17-24; Frost et al., supra note 3, at 354-59; Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907, 932 (1993); see infra notes 242, 257, 261-63 and accompanying texts. Even the oft-described "inalienable rights" clauses, commonly included in the early state constitutions, were "general statements of political principle not susceptible to judicial enforcement." G. ALAN TARR, UNDERSTANDING STATE constitutions 76 (1998). These were, if you will, the original "inkblot" amendments. See infra notes 372-78 and accompanying text.
empowered to make, and act on, decisions as itself an "inalienable" natural right.

One consequence, often neglected or forgotten, is that when the state constitutions made reference to "inherent" or "inalienable" natural rights, these statements of principle were taken to be just that. They were taken as widely accepted statements of political principle, but not as enforceable limits to government power. This is what enabled Alexander Hamilton to argue that expressly stating the doctrine of popular sovereignty, and thereby acknowledging the authority of the people to amend their constitutional system to better meet their needs and to secure their rights, "is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."20

Contrast this understanding—that the Declarations of Rights often restated widely accepted political principles—with the modern tendency to assume that if the purpose of government is to secure rights, and if those rights are really claims that preexist the creation of government, then constitutional government should be understood in a "rights-fundamentalist" fashion.22 Many who construe the Ninth Amendment23 as securing unenumerated fundamental rights

ultimately ground their reading in the view that, for the founding generation at least, the inalienable rights held an inherent constitutional status because they were rooted in a natural law that was binding over all positive law. The most fundamental rights were withheld from the government, not because the people made that decision, but because God


20. THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (JACOB COOKE ED., 1961). For useful treatments, see Frost et al., supra note 3, at 361; 360–62; West, supra note 9, at 73. Hamilton’s perspective reflected not only a skepticism of declarations of rights as mere "parchment barriers," but also a conviction that the people as the perpetual sovereign were empowered to amend the Constitution if government acted in ways that threatened rights. Cf. JAMES WILSON, SPEECH AT THE PENNSYLVANIA RATIFYING CONVENTION (NOV. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 383–84 ("We the People" is "tantamount to a volume and contains the essence of all the bills of rights that have been or can be devised"). See id. at 339, 348–49, 362.

21. See supra notes 4–7 and accompanying texts.


23. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.
or nature had decreed it, and because such rights were the very basis of the social contract.\textsuperscript{24}

Inasmuch as securing rights is the very purpose of government, it is deemed to follow that the rights to be secured through the practice of judicial review should not arbitrarily be limited to the particular rights included ("enumerated") in the written Constitution. Indeed, a recent argument is that those who insist that a right be "enumerated" prior to its being perceived as a limitation on government exhibit what is described as the "aesthetic fallacy"—the assumption that to read abstract normative provisions as securing unnamed rights, by making these rights legally enforceable, is to render all the specific, rights—protecting limitations on government found in the Constitution, such as those included in the Bill of Rights, as superfluous or redundant.\textsuperscript{25}

This sort of general understanding of Lockean political philosophy is combined with an acute awareness that America's founders were haunted by a "Whig" view of the human nature likely to prevail among government leaders.\textsuperscript{26} Left to their own devices, government leaders would inevitably view themselves as empowered to act inconsistently with the rights the people held and deserved.\textsuperscript{27} Among the factors leading to the Constitutional Convention in Philadelphia in 1787 was a

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\item \textsuperscript{24} McAfee, Critical Guide, supra note 22, at 91–92.
\item \textsuperscript{25} CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 111–117 (2001). Those fully captured by this fallacy are willing to assume that "since the Constitution is a grand political composition, we should read it in a way that makes every phrase meaningful," including accepting the idea that some great wisdom "lurks behind the decision to enumerate some rights but not others." \textit{id.} at 117. Related questions are addressed at THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 248 n.51 (2006) [hereinafter cited as POWERS RESERVED]. The alternative is to first determine whether a "provision is best understood as expressing an abstract moral or political principle," and, having determined that it is, the "judge's interpretation will inevitably vary with the theory of justice she constructs on the people's behalf," a matter that will "depend on the judge's own convictions about justice." CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 121 (2001). But Eisgruber's analysis begins with the assumption that any indeterminacy in the Ninth Amendment stems from its vagueness—a product of the provision's reliance on the ultimate abstract moral principle, the very concept of moral rights; but if any apparent indeterminacy is the product of ambiguity, as suggested \textit{infra} note 124, there is the possibility that it does not state an abstract moral principle at all, but simply retained all not granted by the Constitution's enumerated powers. Eisgruber's treatment does nothing to demonstrate that the amendment was designed to state an abstract moral principle. See \textit{infra} notes 372–72 and accompanying texts.
\item \textsuperscript{26} See generally BAILYN, IDEOLOGICAL ORIGINS, supra note 4, at 331 (Antifederalists were "haunted by the dangers that had been foreseen"); David N. Mayer, The English Radical Whig Origins of American Constitutionalism, 70 WASH. U. L.Q. 131 (1992); David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee, 16 S. ILL. U. L.J. 313, 320–23 (1992).
\item \textsuperscript{27} See, e.g., STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 36–43 (1998); BAILYN, IDEOLOGICAL ORIGINS, supra note 4, at 346 (quoting statement by George Mason referring to man's "lust of power"); \textit{id.} at 345–50 (citing statements by various opponents of the Constitution); McAfee, \textit{Inalienable Rights}, supra note 18, at 754–56.
\end{itemize}
growing recognition that many members of state legislatures viewed themselves as holding unlimited powers. There was in many quarters a perceived need to provide a meaningful check on the power of the state legislatures to run roughshod over the people's rights.

Even so, to begin a Lockean analysis of our constitutional order by assuming that its sole or overriding purpose is to protect people from government is simply to bypass critical elements of Lockean political theory.²⁸ In Lockean philosophy, people join civil society by entering into the social contract, by which they forego being the judge and executioner of their own rights claims against other individuals, in exchange for receiving the "protection" of the laws as the system of law enforcement is put in to effect.²⁹ As society's law-maker, a republican legislature, made up of representatives of the people, is charged with establishing positive laws that will, when enforced, protect the people in the exercise of their rights.³⁰ Under the social contract, the people also obtain the benefit of having the law applied by judges who stand independent of rights claims—or defenses. Government's central rationale—and the central "end" for which it exists—is to protect each individual's rights against their invasion by other individuals,³¹ and to protect the entire society from having the rights of its members robbed from them by another nation's war-launching invasion. James Madison

²⁸. It is also to be both unrealistic and utopian. When we simply assume that "the central purpose of the United States is to protect the liberties of individuals against the government of the United States, it oversimplifies political reality." Harry M. Clor, Reflections on the Bill of Rights, in OUR PECULIAR SECURITY: THE WRITTEN CONSTITUTION AND LIMITED GOVERNMENT 153, 153 (Eugene W. Hickok, Jr., Gary L. McDowell & Philip J. Costopoulos eds., 1993). Instead, the founders "sought to establish institutions that would effectively accommodate both the principle of majority rule, or the consent of the governed, and the principle that there are certain inalienable rights to which all individuals are equally endowed by nature." Id. at 155. Even so, "they did not entertain exaggerated notions or grand visions of either majority rule or individual rights." Id.

²⁹. It is also too easy to forget that even if "American constitutionalism is grounded in the principles of the Declaration of Independence," it is equally clear that "[t]hese principles do not dictate any specific constitutional design." West, supra note 9, at 72. Accord JAMES H. READ, POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON 6, 7 (2000) (the Declaration not only says "nothing about the appropriate distribution of power in a federated system," but "provides no guidance about how to reconcile liberty and power during times when revolution is not the appropriate remedy"); Dan Himmelfarb, Note, The Constitutional Relevance of the Second Sentence of the Declaration of Independence, 100 YALE L.J. 169, 187 (1990).

³⁰. As Professor Zuckert points out, "the mere declaration of rights does not entail their security," but requires "constructing a government that is strong and active enough to control the governed in the pursuit of supplying security of rights ... without infringing upon them." Michael P. Zuckert, Thomas Jefferson on Nature and Natural Rights, in THE FRAMERS AND FUNDAMENTAL RIGHTS 137, 165 (Robert A. Licht ed., 1991) [hereinafter Zuckert, Nature and Natural Rights]. This is why "the founders' constitutional science is a form of political science far more than it is a form of constitutional law." Id.

³¹. "Government secures the people's rights by protecting against 'the violence of the stronger.'" West, supra note 9, at 76.
had it just right when in The Federalist Papers he asserted that it is only after government has adequately exercised control over individuals to secure the basic rights of others that it must turn attention to ensuring that it also has the capacity to control itself.\textsuperscript{32}

The assertion that the people have valid moral rights to be protected by government was also the foundation of Locke's most audacious claim—that the people also have a "right of revolution." According to Locke—and as relied on in Jefferson's Declaration—the people as a collective whole have the right to "alter or abolish" the forms of government under which they have lived when they determine that their present government is "insufficient for the exigency of their affairs."\textsuperscript{33} Unquestionably, the American revolutionaries in 1776 perceived themselves as exercising the Lockean right of revolution, reluctantly concluding that their rights were in serious danger at the hands of the English government.\textsuperscript{34}

And though there is much to be said for the idea that in 1787 they did not conceive of themselves as leaving a state of nature in order to enter the social contract,\textsuperscript{35} little doubt remains that many of the 1787 Constitution's founders saw themselves as "altering," if not

\textsuperscript{32} Madison wrote:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable government to controul the governed; and in the next place, oblige it to controul itself.

\textsuperscript{33} Pauline Maier, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 87 (1997) (quoting 6 AMERICAN ARCHIVES 933 (Peter Force ed., 1833-1846)) (the assertion of the people's authority by a county in Maryland). This basic view of the people's authority was re-stated many times during the revolutionary era, as well as subsequently, including within several state Declarations of Rights. See, e.g., PA. CONST. of 1776 Declaration of Rights, § 5, reprinted in 5 STATE CONSTITUTIONS, supra note 6, at 3083 ("the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal"); VA. CONST., Bill of Rights, § 3, reprinted in 5 STATE CONSTITUTIONS, supra note 6, at 3813. For a useful general treatment of the centrality of popular sovereignty in the thinking of the founding generation, see Frost, et al., supra note 3, at 342-59.

\textsuperscript{34} Under Locke's political theory, it is clear that the supreme power of the people "can never take place till the government be dissolved." LOCKE, supra note 7, § 149, at 85.

\textsuperscript{35} At the Philadelphia Convention, Edmund Randolph reminded his colleagues that what was needed was not the "display of theory" appropriate to "the first formation of state governments," given that "we are not working on the natural rights of men not yet gathered into society." Edmund Randolph, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 137 (Max Farrand ed., 1966).
“abolishing,” the form of government under which they had lived for about a decade. Indeed, it may be said that the most important right held by the people, even today, remains their right to amend the Constitution whenever they decide that the government created thereby is inadequate to accomplish the goals set forth in its preamble. The centrality of popular sovereignty to the thinking of the founding generation is illustrated in Edward S. Corwin’s recognition that it was the Constitution’s “rootage in popular will” that “preserved the status of the Constitution as higher law.”

B. “End” and “Means” Under Lockean Political Philosophy and the Pre-1787 State Constitutions

[T]he entire revolutionary experience was one of increasing democratization. The Revolution was driven from below, by “the people out of doors,” as much as from above by a lawyerly elite, because as Carl Becker noted long ago, it was a contest over “who should rule at home” as well as over “home rule” (the contest with England). These concurrent struggles were not harmonious with each other. “Who should rule at home” involved more than power struggles among differing factions of local governing elites. In all the colonies, new popular groups, often representing frontier or artisan interests, contested the dominance of established coteries of political power. They rudely challenged the provincial political culture that for a century and a half had been based on the common people’s deference to social and political elites.

When Locke and Jefferson assert that the purpose of government is to secure natural rights, they appear to see our constitutional system as rights-foundationalist. But it is at least as clear that if for Locke the appropriate “end” of government is securing rights, the appropriate

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36. Given what Barnett does with Locke’s ideas, an irony is that Locke’s powerful influence is found in works justifying the break with England and in the drafting of new constitutions in the American states, while citations to Locke drop off dramatically in the 1780s. Professor Lutz thus observes that “Locke is profound on establishing a civil society and on opposing tyranny, but has relatively little to say about institutional design.” Donald S. Lutz, The Origins of American Constitutionalism 143–44 (1988). Yet while Barnett endorses what he takes to be the substantive implications of Lockean political theory, he rejects altogether the very basis of Locke’s profound influence in America: his emphasis on popular consent as the key element in legitimate government, including the rights of the popular sovereign to create or amend a political society’s constitution.


38. Wieck, Classical Legal Thought, supra note 1, at 23.
“means” to that end was a system of legislative supremacy.\textsuperscript{39} “Locke was committed to republican government and legislative supremacy that went hand in hand with his commitment to limited government and natural rights enforceable by the people’s inherent right of revolution.”\textsuperscript{40} As the American states declared their independence, the Continental Congress urged them to adopt state constitutions,\textsuperscript{41} which were passed in the attempt to implement government by the people in Lockeian constitutions.\textsuperscript{42}

These new American constitutions “created governments with real power lodged in state assemblies—the bastions of popular rights.”\textsuperscript{43} Unicameral legislatures were common, governors lacked the power to veto legislation, and state judiciaries tended to be elected by the people or appointed by the legislature for short terms of office.\textsuperscript{44} Moreover, the very wording of the state Declarations of Rights, as hortatory provisions rather than as commands or prohibitions,\textsuperscript{45} almost certainly reflected

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\textsuperscript{39} As Wilmoore Kendall observed long ago:

We live in a period in which things have happened to governed minorities and individuals which oblige us to give careful consideration to the problem of how they may be protected against “tyrannical” majorities. Locke, in contrast, had clearly been seized of that which in his day was happening to governed majorities at the hands of minorities and individuals, and it was in this form that the problem involved most readily presented itself to his mind.

\textbf{WILMOORE KENDALL, JOHN Locke AND THE DOCTRINE OF MAJORITY RULE 103} (1941).
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\textsuperscript{40} McAFFEE, INHERENT RIGHTS, supra note 10, at 4.

[Locke] embraces a strong form of majoritarianism, in the form a legislative sovereign subject only to a right of revolution in the case of severe abuse, and does not contemplate natural law adjudication at all. This hardly shows that the founders followed Locke on the issue at hand, but it certainly suggests that natural rights social contract theory and natural law adjudication have a contingent, rather than a necessary, relationship.

\textit{Thomas B. McAffee, Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists, 4 S. CAL. INTERDISC. L.J. 501, 518 n.54 (1995) [hereinafter McAffee, Utopian Vision]. Under Locke’s political philosophy, “the people have no constitutional instrument for curbing abuses of power by the delegated government short of asserting their right to dissolve the government.”}

\textit{POTTER, supra note 37, at 42.}

\textsuperscript{41} “Among the first items on the agenda of the new republic was the effort to put the political ideals of the Revolution into effect through the drafting of new forms of government for the various states.” \textit{McAFFEE, INHERENT RIGHTS, supra note 10, at 9. See also LUTZ, supra note 36, at 98–103. Eleven states adopted new constitutions in the first two years following independence, and one state, South Carolina, passed two. DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 15 (1990).}

\textsuperscript{42} See \textit{McAFFEE, INHERENT RIGHTS, supra note 10, at 9–27} (chapter entitled, \textit{State Constitutions in the Early American Republic: The Experiment with Republican Government}).


\textsuperscript{44} \textit{Id.}

\textsuperscript{45} McAffee, \textit{Immaterial Rights, supra note 18, at 769–71}.\end{flushleft}
both the existing “preference for popular control of government and suspicion of judicial power.” It is also clear that, under existing thoughts about the implications of Lockean theory for the drafting of constitutions, those who drafted the state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights.”

Constitutional reformers of the 1770s and 1780s contended against the degree of power granted to the legislative branches and the failure to provide satisfactory mechanisms for checking and limiting that power. It has been observed that “the lack of safeguards against the abuse of legislative power is the single most striking characteristic of the early state constitutions.” What emerged from these reform efforts were the executive veto power, bicameral legislatures, a renewed emphasis on checks and balances rather than “pure” separation of powers, and a strengthened advocacy for a power of judicial review. By the time of the debate over ratification of the federal Constitution, its defenders believed, based on the experience of the states, that the protection of rights depended on “public opinion, an extended republic, a pluralistic society of competing interests, and a free and limited government structured to prevent any interests from becoming an overbearing majority.”

46. MCAFFEE, INHERENT RIGHTS, supra note 10, at 50.

47. DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 60 (1980) [hereinafter LUTZ, POPULAR CONSENT]; accord Richard S. Kay, Book Review, 44 AM. J. LEGAL HIST. 430, 431 (2000). A consequence was that American constitutionalists became insistent that their constitutions include declarations of rights. Thus, when the people of Massachusetts declined to ratify the proposed 1778 constitution, partly because it lacked a bill of rights, Theophilus Parsons contended, in his Essex Result, that rights “ought to be settled and established, previous to the ratification of any constitution for the State.” See CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 422 (1953). In objecting to the same omission, the Reverend Jonas Clarke similarly contended that “it is of the highest importance . . . that said rights intended to be retained, at least those that are fundamental to the well-being of society and the liberty and safety of individuals, should be in the most explicit terms declared.” Id. (emphasis added). The result: the “plan and powers of government had to conform to the people’s own statement of the rights they were retaining.” Id. (emphasis added).

48. READ, supra note 29, at 8–9 (noting the significance for the framers of the “oppositional Whig tradition of thought,” with its emphasis on checking the power given to government as the key to retaining freedom).

49. MCAFFEE, INHERENT RIGHTS, supra note 10, at 26. For additional insight into the functioning of the state constitutions prior to 1787, see MCAFFEE, BYBEE & BRYANT, POWERS RESERVED, supra note 25, at 8–17.

50. MCAFFEE, INHERENT RIGHTS, supra note 10, at 46–48. See also BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 32–38; West, supra note 9, at 84–85.

And though Madison and other framers of the 1787 Constitution believed that one of the controls over state assemblies needed to prevent the factional abuse of individual liberties and property was a national power to veto state laws, the federal system was not created to enable any branch of government to curb state legislative power. Neither the New Jersey nor the Virginia plans, which were the alternatives considered by the Philadelphia Convention, “mentioned the rights of individual citizens.” Indeed, proponents of the Constitution observed that it was important to remember that civil society had long-since been formed, and that therefore “we are not working on the natural rights of men not yet gathered into society.” An effective federal power to curb state legislatures, and to prevent their abuse of individual liberty, did not arrive until the adoption of the Fourteenth Amendment. And since the Articles of Confederation granted to Congress “no authority over individuals,” the Articles “contained no Bill of Rights.” Indeed, the omission of a bill of rights is what prompted one of the central areas of debate during the struggle over ratification of the Constitution proposed in 1787. The Constitution’s proponents, the Federalists, justified the decision to omit a Bill of Rights from the proposed federal Constitution by a close analogy between the Constitution and the Articles of Confederation.

In The Federalist, for example, Madison posed the question: “Is a Bill of Rights essential to liberty?” He answered that the “Confederation has no Bill of Rights.” The basic idea was the simple one that if you have granted an enumerated set of limited powers, you have accomplished the

52. MCAFFEE, INHERENT RIGHTS, supra note 10, at 49.
53. “Before the Civil War, unless a state law violated one of the express prohibitions in the Constitution, it could not be challenged in federal court.” Barnett, The Police Power, supra note 9, at 433.
56. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 137–308 (1998) [hereinafter AMAR, THE BILL OF RIGHTS]. Thanks to the Fourteenth Amendment, “state governments no longer can claim a plenary power to restrict the liberties of the people subject only to their constitutions and any express restrictions in the original Constitution.” Barnett, The Police Power, supra note 9, at 434.
58. THE FEDERALIST NO. 38 (James Madison), supra note 20, at 247. Accord James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787). in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 493, 496 (“Is there any increase of risk, or rather are not the enumerated powers as well defined here, as in the present Articles of Confederation?”). See INalienable Rights, supra note 18, at 751–53.
same thing as if you had included a bill of rights. It is critical to realize that

the overriding purpose of the constitutional convention was to frame a government for the nation, not to reorganize or improve government at the state level. With respect to individual rights, consequently, the framers were primarily concerned to protect such rights against the new national government. And by insisting that the national government would exercise only the limited powers granted it, the framers believed they had effectively provided such protection. There was no need to list rights in the way state constitutions typically did because the authority conferred on the national government did not encompass the power to invade individual rights anyway.

Moreover, the state governments “were seen as the protectors of the people’s liberties.”

C. Judicial Review of Rights Protections in a Bill of Rights as the Most Fully Developed “Means” of Securing Rights in the 1787 Constitution

For many years it has been fashionable to view the Constitution as the conservative reversal of the idealism of the early years of the Revolution—a counterrevolution, a Thermidor. But it was not. It was much more complicated, much more subtle than that. The Constitution was written not by hard-nosed, conservative political bosses determined to reverse the meliorist enthusiasm of the early years, but by idealists, tempered idealists, who had come to recognize, reluctantly, the need to create the dangerous instruments of centralized power. . . . The possibility that the independent government they were creating might reproduce precisely the same dangers was never far from their minds, and in the ratification debate the powerful opposition was there to remind the Federalists of the dangers of excessive executive power, autocratic majoritarianism, military adventurism, the loss of civil liberties, and the emergence of oligarchic or aristocratic domination. It was to eliminate or closely control those dangers while creating an effective national

59. An assumption of such an argument was that the states were governments of plenary powers, subject only to being limited by the terms of the written state constitutions’ declarations of rights. See MCAFFEE, BYBEE & BRYANT, POWERS RESERVED, supra note 25, at 12, 30–35. By contrast, the Articles of Confederation both granted rather specific powers to the national government and expressly provided that each State retains “every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.” Act of Confederation of the United States of America (Nov. 15, 1777), reprinted in 1 RATIFICATION OF THE CONSTITUTION, supra note 10, at 86. Given the acknowledged sovereignty of the states, “it followed that all guarantees of freedom for the individual citizen would necessarily come from the state, not the Confederation.” RUTLAND, supra note 54, at 78.

60. SMITH, supra note 27, at 45–46.

61. BAILYN, IDEOLOGICAL ORIGINS, supra note 4, at 351.
government that the Federalists devised their complex tissue of compromises, balances, checks and cross-checks that make up the federal Constitution.62

1. Recognizing the Need for a Bill of Rights

In the “dying days of the Philadelphia Convention,” George Mason, author of the Virginia Declaration of Rights, demanded that the Constitution be prefaced with a bill of rights; but, of course, his proposal was “[r]equited roundly by the Federalist-controlled Convention.”63 In the months that followed, “Mason’s demand became the cornerstone of Antifederalist politics,”64 and they consistently invoked “the basic constitutional principle that rights and powers not expressly reserved by the people are thereby granted to government, implying that the Constitution granted out of existence the most basic rights of the people.”65 The Antifederalists were simply following what had become the general understanding of legislative power in the states, for in the states “bills of rights were accepted almost everywhere as a necessary adjunct of the fundamental law.”66

The Federalist advocates of ratification of the proposed 1787 Constitution strenuously defended the omission of a bill of rights on the ground that the Constitution created a government of extremely limited, and enumerated, powers.67 They believed that the system of enumerated powers raised an inference against government power and in favor of liberty. Almost immediately after the Philadelphia convention, on October 6, 1787, James Wilson explained:


64. Liensch, supra note 63, at 248.


Though it is seldom noted, the Antifederalist refrain that rights not “expressly reserved” were “granted” articulated the standard view of rights under the state constitutions. Clearly the state constitutions, as conceived by virtually every one in Philadelphia, did not create “islands of government powers in a sea of liberty.” Barnett, Restoring the Lost Constitution, supra note 2, at 1. Indeed as illustrated by James Wilson’s explanation, see infra note 68 and accompanying text, these constitutions were specifically understood as creating “islands of liberty rights in a sea of governmental powers.” Barnett, Restoring the Lost Constitution, supra note 2, at 1.

66. Rutland, supra note 54, at 79.

67. As Professor Clark observes, the Federalists focused “almost exclusively on the structure of the new federal government and the scope of its powers.” Clark, supra note 63, at 337.
When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdictions of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case [of the states] every thing which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and everything which is not given, is reserved.\(^{68}\)

Wilson articulated what had become a general understanding of the power granted to legislatures by their state constitutions:

Thus it was agreed that most state constitutions were properly interpreted as providing a general grant of legislative authority. In such cases it was reasonable to presume that no rights were immune from such broad state powers and some explicit reservation would be necessary. Even in that case, however, the uncertainty over the legal force of such rights caused the writers of early state constitutions to phrase their declarations of rights in hortatory terms in contrast to the mandatory language they used for their structural provisions.\(^{69}\)

A member of the Continental Congress, Nathaniel Gorham of Massachusetts, explained, prior to the transmittal of the proposed Constitution to the states for ratification, that “a bill of rights in state governments was intended to retain certain powers [in the people] as the legislatures had unlimited powers.”\(^ {70}\) This is why James Wilson, even after insisting that there was no need for a freedom of the press guarantee since Congress had not been granted any endangering power, could still clarify that if Congress had been granted the power “to regulate literary publications,” it would have been critical “to stipulate

\(^{68}\) James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 167–68. Compare McAfee, Inalienable Rights, supra note 18, at 751–53 (describing Wilson’s objection to a bill of rights as based on a fear that it could be used to create an inference of Congress as holding “general legislative powers,” subject only to the limitations found in the Bill of Rights), with Barnett, The Police Power, supra note 9, at 444–45 (construing Wilson, Iredell, and Pinckney not as fearing the evisceration of the structural protection of rights embodied in the enumerated powers scheme, but as fearing only an inference against “unenumerated rights”). But see infra note 317 (linking Pinckney’s and others’ statements to securing the enumerated powers scheme of the federal government); notes 304–21 and accompanying text.

\(^{69}\) Kay, supra note 47, at 431.

\(^{70}\) Nathaniel Gorham, Speech at the Pennsylvania Ratifying Convention (Sept. 27, 1787), in 1 RATIFICATION OF THE CONSTITUTION, supra note 10, at 335.
that the liberty of the press should be preserved inviolate.”\textsuperscript{71} Summarizing this whole line of argument in 1789, Madison said the Federalists had seen the Constitution as “a bill of powers, the great residuum being the rights of the people.”\textsuperscript{72}

In contending that the federal Constitution should be viewed as a “bill of powers,” the Federalists implicitly were arguing that the Antifederalists fundamentally misconceived the nature of the proposed Constitution. By insisting that the people’s rights had to be “expressly reserved,” or they would be treated as “granted,” the Antifederalists were ignoring that Congress would not be a legislature of “general” powers, limited only by the express reservations in a bill of rights—as the state legislatures had been—but was limited to exercising only the powers actually granted in Article I, Section 8. According to the Federalists, this misconception not only generated the illogical argument that a bill of rights was absolutely necessary, but also had the implication of being dangerous for the security of rights in the event that a bill of rights was adopted. This is the argument that Robert Whitehill, a prominent Pennsylvania Antifederalist, labeled the “argument of danger.”\textsuperscript{73}

A number of advocates of the unenumerated fundamental rights construction of the Ninth Amendment have suggested that Federalists

\textsuperscript{71} James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 167, 168. It would be difficult to identify a more articulate spokesperson for natural rights than James Wilson. See generally BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 56 (“an ardent adherent of natural rights”). But Wilson also knew the difference between legal analysis and moral analysis, as reflected in this statement.

\textsuperscript{72} A very similar example is provided by Madison’s response to an inquiry from Edmund Randolph as to the basis of the need for article VI’s prohibition on a “religious test” for holding office in the United States. The question raised was whether this very limitation implied that Congress “had power over religion.” Letter from Edmund Randolph to James Madison (Feb. 29, 1788), quoted in ROBERT J. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 141 (1988). According to Madison, absent this qualification, Congress was empowered to establish “the proper qualifications” for holding office under the Constitution, Letter from James Madison to Edmund Randolph (Apr. 10, 1788), in 9 RATIFICATION OF THE CONSTITUTION, supra note 10, at 730, 731, such that this was a necessary exception “to authority implicit in the granted powers, not exceptions to nonexistent or general powers that might give rise to an inference of new or extended powers to the detriment of the enumerated-powers scheme.” Thomas B. McAffee, The Federal System as Bill of Rights: Original Understandings, Modern Misreadings, 43 VILL. L. REV. 17, 94 (1998) [hereinafter McAffee, Federal System].

\textsuperscript{73} In this describing the Federalist position, Madison added that “a bill of rights cannot be necessary as if the residuum was thrown into the hands of the government.” Id. This is precisely why Madison could write to Jefferson that he favored a bill of rights “provided it be so framed as not to imply power not meant to be included in the enumeration.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 614, 615 (1971). For more insight into Madison’s use of similar arguments, see McAffee, Inherent Rights, supra note 10, at 93–96.

\textsuperscript{73} Robert Whitehill, Speech at the Pennsylvania Ratifying Convention (Nov. 30, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 425, 427.
relied on two very distinct, indeed unrelated, arguments that a bill of rights could actually prove dangerous. One danger perceived was the risk that stating the rights in a bill of rights could generate an inference of constructive power.\textsuperscript{74} The second was the independent problem that an imperfect enumeration of rights could lead to the exclusion of every right not enumerated. Professor Barnett embraces the “two dangers” position and contends that the first danger—that of “interpreting federal powers too expansively”—was ultimately addressed by the Tenth Amendment,\textsuperscript{75} while the second danger—that “any right excluded from an enumeration would be jeopardized”—was addressed by the Ninth Amendment.\textsuperscript{76} The concern that a bill of rights could yield constructive power he attributes especially to Alexander Hamilton’s formulation in The Federalist,\textsuperscript{77} and he attributes the “pivotal mistake” of many commentators to “their exclusive concentration on only one of two Federalist arguments”—Hamilton’s—which causes them to fail to “discern the distinct functions played by the Ninth and Tenth Amendments.”\textsuperscript{78}

Barnett completely misses, however, that the two potentially distinguishable “danger” arguments both flow from the same feared inference of inserting a bill of rights in to the Constitution; the fear was

\textsuperscript{74} For a description of the “danger” argument—whether formulated in terms of constructive power or the failure to retain rights not enumerated—as construing a Bill of Rights “in a manner that would undermine the principle of limited enumerated power,” see Kurt T. Lash, The Lost Original Meaning of the Ninth Amendment, 83 TEX. L. REV. 331, 348 (2004).

\textsuperscript{75} Randy E. Barnett, Reconceiving the Ninth Amendment, 74 CORNELL L. REV. 1, 10 (1988) [hereinafter Barnett, Reconceiving]; id. at 9 (“the theory that the federal government is one of limited and enumerated powers,” initially was “a response to the criticism made by opponents of ratification that the Constitution was dangerous because it lacked a bill of rights;” this theory was eventually “incorporated in the Tenth Amendment”); Randy E. Barnett, A Ninth Amendment for Today’s Constitution, 26 VAL. U. L. REV. 419, 420 (1991) (linking Hamilton’s Federalist No. 84 argument with the Constitution’s defenders’ contention that there was no necessity for a bill of rights; seeing it as being unrelated to the “danger” argument that led to the Ninth Amendment).

\textsuperscript{76} Barnett, Reconceiving, supra note 75, at 10. Barnett acknowledges that Madison initially drafted a provision “that ran together both of these concerns,” but contends that “[e]ventually the two ideas were unpacked.” Id.

\textsuperscript{77} THE FEDERALIST NO. 84 (Alexander Hamilton), supra note 20, at 579. Hamilton contended that a bill of rights was not only unnecessary, “but would even be dangerous.” Id. He continued:

[A bill of rights] would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.

\textit{Id.} (emphasis added).

\textsuperscript{78} Barnett, Reconceiving, supra note 75, at 9.
that a bill of rights could be construed as “reversing” the assumptions underlying the enumerated powers scheme—turning Congress into a legislature of “general” rather than “enumerated” powers.\textsuperscript{79} In the argument that Hamilton’s \textit{Federalist} 84 echoes, James Wilson first contended that, properly construed, Article I, Section 8, would not to permit Congress to in any way interfere with the press throughout the country.\textsuperscript{80} For this reason, a freedom of the press provision would be “merely nugatory”—unnecessary, superfluous, a waste of effort.\textsuperscript{81} Except for one thing: a provision guaranteeing a free press might actually prove dangerous, inasmuch as the “very declaration” of the right to a free press, “might have been construed to imply that some degree of power was given, since we undertook to define its extent.”\textsuperscript{82} Wilson’s argument, similar in nature to Hamilton’s, was that the very declaration of the right could be construed as based on an inference that Congress was not limited to exercising only powers granted by the Constitution, but apparently had a power, for example, to regulate the press—a power requiring a limiting provision to secure the right of a free press.

This is why a critic of Wilson’s October 6 argument related to freedom of the press construed Wilson as claiming that the “insertion of a bill of rights[] would be an argument against the present liberty of the people.”\textsuperscript{83} The Antifederalists took Wilson as contending that “[t]o have the rights of the people declared to them, would imply, that they had previously given them up, or were not in possession of them.”\textsuperscript{84} Contradicting Wilson, this Antifederalist author contended that it made sense for the people to specifically declare their right to what they already possessed. And underscoring that he understood Wilson’s argument as being based on the structural features of the federal Constitution, he nevertheless contended that the Constitution lacked the equivalent to Article II of the Articles of Confederation and, consequently, that there was a need to at least declare that what is “not

\textsuperscript{79} As Professor Clark perceptively observes, the “Federalists also argued that a Bill of Rights was \textit{dangerous} because it might suggest, contrary to the doctrine of enumerated federal powers, that Congress otherwise had implied power under the original Constitution to invade the rights singled out for protection.” Clark, \textit{supra} note 63, at 338.

\textsuperscript{80} James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, \textit{supra} note 10, at 167, 168.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} A Federal Republican, A Review of the Constitution (Nov. 28, 1787), in 14 RATIFICATION OF THE CONSTITUTION, \textit{supra} note 10, at 255, 274.

\textsuperscript{84} \textit{Id.} at 275.
decreed to Congress” is retained.85

Commentators have long recognized that Hamilton’s argument is uniquely related to the Federalist contention that there was no need for a bill of rights in light of the Constitution’s system of enumerated powers. It is clearly unrelated to the notion of securing limitations on the powers granted in the Constitution to secure fundamental rights in addition to the limitations enumerated in a bill of rights.86 So even though it was Wilson who once defined a bill of rights as “an enumeration of the powers reserved,”87 it remains unsurprising that several commentators have attempted to link Hamilton’s argument to the Tenth Amendment and not the Ninth.88 Although it is clear that Hamilton’s argument about the danger of constructive power contributes nothing to the argument for unenumerated fundamental rights, historically the Ninth Amendment has been linked to Hamilton’s arguments, not only by significant nineteenth-century commentators Joseph Story89 and Thomas Cooley90 but by modern commentators91 and the Supreme Court.92

The Federalist defenders of the proposed Constitution lost the debate over the omission of a bill of rights because the ratifiers were persuaded that the proposed Constitution sufficiently expanded the powers given the federal government to present a potential threat to fundamental

85. Id.

86. For analysis demonstrating that Hamilton’s argument reflected concern with preserving the Constitution’s original scheme of enumerated, limited powers, see McAfee, Original Meaning, supra note 65, at 1259–65.


88. For Professor Barnett’s arguments to this effect, see supra notes 75–76 and accompanying text. See also McAfee, Original Meaning, supra note 65, at 1260 n.174 (citing several other modern commentators as taking a similar view).

89. See, e.g., 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 304, at 277–78 (Fred B. Rothman & Co., 1991) (1833); 3 id. §§ 1855–62, at 715–21; § 1898, at 751–52. Story clearly traces the Ninth Amendment directly to Hamilton’s argument in The Federalist No. 84 and does not so much as hint that the goal was to secure rights that had not been included. It was fifteen years ago that the present author contended that “Story thus reads the final text of the [N]inth [A]mendment as a structural provision that secures residual rights by preserving the system of limited powers.” McAfee, Original Meaning, supra note 65, at 1312–13. This conclusion is also strongly supported by Story’s treatment of the danger of constructive powers as being based on dubious logic, whereas the parties that debated the necessity and merits of a bill of rights were in agreement “that an inference from a listing of rights that rights not enumerated were granted away was not a doubtful one with respect to a government of general legislative powers.” Id. at 1313 n.364. See Lash, supra note 74, at 350.


91. For citations to four modern commentators who rely on Hamilton’s argument in developing the fundamental rights construction of the Ninth Amendment, see McAfee, Original Meaning, supra note 65, at 1260 n.173.

rights. George Mason, the author of the Virginia bill of rights, rejected the argument that the states’ own declarations of rights would adequately secure their rights, observing that the federal Constitution, and all legislation enacted pursuant to it, would be the supreme law of the land. With “the Laws of the general Government being paramount to the Laws & Constitutions of the several States, the Declarations of Rights in the separate States are no Security.” Mason’s argument “became a standard objection to the Constitution.” The ratification debates demonstrate that “Mason and others viewed the Supremacy Clause as a real threat to their state constitutional rights, as well as to customary and natural rights they believed people should have against government.”

Those most responsible for bringing us the Bill of Rights would have rejected out-of-hand the proposition that there was no need for a bill of rights since all the rights being referred to were the natural rights “retained by the people” when they entered the social contract. Yet Professor Barnett strenuously objected to basing a construction of the Bill of Rights, as well as of the Ninth Amendment, on the views of those who opposed even including a bill of rights. At the same time, he completely ignores the views of those, like George Mason, who were most responsible for ensuring that we would have a bill of rights.

93. George Mason, Objections to the Constitution of the Government Formed by the Convention (Oct. 7, 1787), in 13 RATIFICATION OF THE CONSTITUTION, supra note 10, at 348. Mason is an especially significant voice, given that he drafted section 1 of the Virginia bill of rights, the provision that recognized “inherent rights”—indeed, the very provision on which Barnett claims Madison based the Ninth Amendment—and had been an effective spokesman for the concept of natural rights. See MCAFEE, INHERENT RIGHTS, supra note 10, at 61. But one does not need a physics degree to determine that Mason was a constitutional positivist who believed that the Supremacy Clause of the proposed Constitution meant that laws enacted pursuant to it would be “paramount” even to the rights individuals might have deemed “inherent,” or that Barnett claims were “retained” by the people. The Antifederalists believed that acts of Congress “would inevitably penetrate into the states and override state laws and state court decisions.” BAILYN, THE WORLD ANEW, supra note 62, at 109.


95. MCAFEE, INHERENT RIGHTS, supra note 10, at 129 & 154 nn.59–60. One Antifederalist critic of the Constitution suggested that his state’s declaration of rights would be in effect thrown out of court in federal courts and that individuals could not “plead...Locke, Sydney, or Montesquieu as authority,” nor “the authority of the English judges.” Essays by a Farmer (Feb.–Apr. 1788), in 5 THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981) [hereinafter THE COMPLETE ANTI-FEDERALIST].

96. Barnett, Reconciling, supra note 75, at 8. He does this notwithstanding that the draftsman and chief advocate of the federal Bill of Rights, James Madison, was among the most articulate opponents of even including a bill of rights—based not on the concept that the people automatically “retained” their rights, but on the view that they were secured by the grant of enumerated powers.
2. Madison as Father of an Enforceable Bill of Rights

Although Madison began the ratification debate process as among the most articulate defenders of the convention's decision to omit a bill of rights, he became the Congressman who drafted, and was the chief defender, of the proposed federal Bill of Rights. It is true that the "standard Federalist defense of the omission of a bill of rights boasted that the structural design of the federal Constitution effectively secured the people's rights by the granting of limited powers."\(^{97}\) The text of the Ninth Amendment refers to "others," meaning other rights "retained by the people,"\(^{98}\) but these "are not necessarily rights derived from sources beyond the text of the Constitution," given that rights "can be secured by the written Constitution itself without those rights being 'enumerated' in its text."\(^{99}\) In fact, the Federalist defenders of the Constitution contended that Article I of the Constitution, "by positively securing what is not expressly delegated," had the consequence of creating "an explicit reservation of every right and privilege which is nearest and most agreeable to the people."\(^{100}\)

The emphasis on the enumerated powers scheme, however, reflected a lack of confidence in the sorts of provisions that had made up the States' Declarations of Rights—and the view that these provisions were mere "parchment barriers" that did not serve as meaningful checks on power—as much as it revealed confidence in the structural scheme created by the Constitution.\(^{101}\) Well after Virginia's ratification convention, Madison expressed his skepticism about the value of a bill of rights in a letter to Thomas Jefferson:

"[E]xperience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment

\(^{97}\) McAfFee, Inalienable Rights, supra note 18, at 761 n.50. Accord Philip A. Hamburger, The Constitution's Accommodation of Social Change, 88 Mich. L. Rev. 239, 316 (1989) [hereinafter Hamburger, Social Change] (Constitution's proponents "insisted that the enumeration of federal powers provided a clear boundary between federal power and the people's rights and that an enumeration of rights would be used to imply the existence of congressional powers where rights were not mentioned"); Barnett, Reconsidering, supra note 75, at 4 (Federalists contended that there was no need for a bill of rights "because the Constitution granted the national government only enumerated powers").

\(^{98}\) U.S. Const. amend. 1X.

\(^{99}\) McAfFee, Critical Guide, supra note 22, at 68.

\(^{100}\) Dr. Charles Jarvis, Massachusetts Ratifying Convention (Feb. 4, 1788), in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 151, 153 (Jonathan Elliot ed., 2d ed. 1866) [hereinafter Elliot's Debates].

\(^{101}\) As Professor West observes, the framers' views on a Bill of Rights were "born of the harsh school of the 1780's," making it almost inevitable that Madison "spoke scornfully of the ineffectual 'parchment barriers' erected by state constitutions against state violations of the separation of powers." West, supra note 9, at 90.
barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.102

Considering that in Madison’s view the threat to rights came from the sovereign people themselves, who can hardly be “controled by the dread of an appeal to any other force within the community,”103 he was by no means certain that courts could be counted on to provide the needed “check,” and, consequently, managed to discuss the potential value of a bill of rights without even mentioning the possibility of judicial review.104 Several thoughtful scholars have deemed it extremely significant that, in response, Jefferson referred to the purpose “which has great weight with me, the legal check which it puts into the hands of the judiciary.”105

The consequence, in the view of several respected legal scholars, is that Madison made a point of drafting his proposed Bill of Rights in the hard language of commands and prohibitions, to the end of making its provisions legally enforceable.106 When Madison was done, we would at least not face the objection to rights provisions that logically they belonged in an ethics treatise rather than in a constitution of government.107 These were legal guarantees, provisions clearly designed to provide a direct limit to government power, at least to the

102. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 SCHWARTZ, supra note 72, at 614, 616.
103. Id.
104. Madison’s comments appear to have reflected not only his experience of state assemblies simply ignoring the declarations of rights, suggesting that judges would lack the political clout to invoke the Constitution to invalidate popularly-based laws, but perhaps as well a conception of declarations of rights “as in their nature statements of limiting principles rather than as legally enforceable commands and prohibitions.” McAfee, Inalienable Rights, supra note 18, at 765. See supra notes 13–16, 43–47 and accompanying text.
105. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 1 SCHWARTZ, supra note 72, at 620. It is interesting, and significant, that the author of the Declaration of Independence, and its reference to “inalienable” natural rights, saw it as absolutely critical to have a bill of rights. But Jefferson was not one who equated republican government with security to natural rights and, as an American whom the British constitution had failed, he had concluded that the absence of meaningful checks on power had yielded a system that violated the norms of tradition and natural law, such that even if unwritten natural law might provide a standard for judging positive law, it did not invariably have the status of positive law in a given legal system. See McAfee, Declaration, supra note 13, at 147.
106. For such views by scholars, see 1 SCHWARTZ, supra note 72, at 583; DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 150–55 (1999); WOOD, supra note 14, at 542–43; Lois G. Schwoerer, British Lineages and American Choices, in GOVERNMENT PROSCRIBED, supra note 19, at 1, 37. For a more complete treatment of the transition from the largely unenforceable state declarations of rights to Madison’s choice, apparently influenced by Jefferson, to draft the Bill of Rights in the legally enforceable language of commands and prohibitions, see McAfee, Inalienable Rights, supra note 18, at 762–71.
107. See supra note 20 and accompanying text.
extent that such a limit was needed.  

Moreover, Madison himself expressed the hope that courts “will consider themselves in a peculiar manner the guardians of those rights,” with the result that “they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution.”

There is today widespread agreement that “one of Madison’s most significant contributions was to draft his proposed amendments in the hard language of legal command, reflecting his growing awareness of a bill of rights as a source of meaningful legal limits on government power.”

3. Judicial Review and Limited Government

In many ways, Madison’s decision to draft the federal Bill of Rights as legally enforceable commands and prohibitions is a reflection of a growing recognition that a central check on government would necessarily be judicial review, an institutional practice which had developed in the states and which was designed to implement the decisions made by the sovereign people and embodied in their written constitutions.  

Though scholars are legitimately persuaded that Jefferson appeared to have a direct impact on Madison’s drafting of the Bill of Rights, Madison may well have learned the same lesson from his colleague in the fight for ratification, Alexander Hamilton. Hamilton had contended in *The Federalist Papers* that the “complete independence of the courts of justice is peculiarly essential in a limited

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108. For the view that the framers of the Constitution sought to create enforceable legal norms that needed to be implemented, not re-thought, see, e.g., SMITH, supra note 27, at 45–46 (citing other commentators).


110. McAfee, *Inalienable Rights*, supra note 18, at 769. The significance of Madison’s deliberate shift from the language of obligation to command and prohibition is reflected as well in his deletion of the reference to “inherent” rights and his proposal that the provision recognizing that government’s purpose was to benefit the people and to secure their basic rights and interests should be included in a refashioned preamble. See infra notes 292–313 and accompanying text.

111. For evidence of the pre-*Marbury* recognition of the power of judicial review, particularly among the highest courts of the states, see Frost et al., supra note 3, at 343–45.

112. For the centrality of the written Constitution, and its embodiment of the will of the popular sovereign, in justifying the practice of judicial review, see McAFFEE, INHERENT RIGHTS, supra note 10, at 50, 60–65, 72–73; Wilmarth, Jr., supra note 9, at 142–44; Thomas B. McAfee, *The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?*, 80 OR. L. REV. 1245, 1251–56, 1276–84 (2001) [hereinafter McAfee, Consent].
Constitution.”113 For Hamilton, a “limited Constitution” was defined as “one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no \textit{ex post facto} laws, and the like.”114 Recognizing the need for such “exceptions” to legislative power, Hamilton argued that it followed that there was a judicial duty “to declare all acts contrary to the manifest tenor of the constitution void.”115

An important modern commentator, George Carey, underscores that Hamilton’s case for the practice of judicial review did not contemplate a central or creative role for courts. He notes that Hamilton advances the doctrine of judicial review as a device to enforce the “specified exceptions to the legislative authority” marked out in the Constitution. That this is a narrow or restricted scope for judicial review is attested to by the examples he offers: prohibitions on “bills of attainder \ldots \textit{ex-post-facto} laws and the like.” Both restrictions are easily definable and, what is more, both are designed to prevent practices which, in the course of the common law tradition, have come to be regarded as the hallmarks of arbitrary and tyrannical governments. And when he writes, “and the like,” we may assume that he is referring to provisions of an equivalent category or type—an assumption that seems entirely warranted when he declares immediately thereafter that the courts’ “duty \ldots must be to declare all acts contrary to the \textit{manifest tenor} of the Constitution void.”116

Madison’s plea for courts to serve as “the guardians of those rights” should also serve as a reminder that the “words of the Constitution are not authoritative for fetishistic reasons, but because they are the verbal embodiment of certain collective decisions made by the people.”117

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113. \textit{The Federalist} No. 78 (Alexander Hamilton), \textit{supra} note 20, at 524.
114. \textit{Id.}
115. \textit{Id.} Professor Wilmuth underscores that Hamilton “agreed with Iredell’s and Marshall’s text-based concept of judicial review.” Wilmarth, Jr., \textit{supra} note 9, at 143. All three’s advocacy “minimized the discretion that judges could exercise in interpreting the Constitution.” \textit{Id.} at 144.
116. \textit{George W. Carey}, \textit{The Federalist: Design for a Constitutional Republic} 142 (1989). Carey says that Publius thought the doctrine of judicial review “should be highly circumscribed.” \textit{Id.} at 141 (quoting \textit{The Federalist} No. 78, at 466) (emphasis added). If courts exercised will rather than judgment it “would be to encroach upon the legislative domain—a usurpation of functions that could lead to the judicial supremacy that was so much feared by certain of the Antifederalists.” \textit{Id.}
II. HISTORY AND BARNETT’S CONSTITUTION

Now the goal of the initiators of change was the creation, not the destruction, of national power—the construction of what could properly be seen, and feared, as a Machstaat, a central national power that involved armed force, the aggressive management of international relations, and, potentially at least, the regulation of vital aspects of everyday life by a government dominant over all other, lesser governments. The background experiences of constitution writing in the states were informative—they were constantly referred to in the Philadelphia convention and in the ratifying debates—but the central issue of 1787–88 was different in its nature . . . and diametrically opposite to the goals of the pre-Revolutionary years. Yet the pre-Revolutionary ideology was fundamental to all their beliefs. How could it be reconciled with present needs? 118

The framers of the Constitution did indeed accept the essentials of the Lockean understanding: government is an artificial construction, created in a presocial state of nature by individuals who are equally free, independent, and possessed of the natural rights to life, liberty, and property. The government the framers constituted was meant to perform the function assigned by the Declaration of Independence: to secure these rights. But the Bill of Rights is no list of natural rights. (There could hardly be any natural right to due process of law or to petition the government for redress of grievances.) It is a summary of civil liberties that (taken in conjunction with the original Constitution) define a relationship between government and citizen that is in accord with the philosophy of natural rights. 119

In 1988, Professor Barnett suggested that it “would require nothing short of a comprehensive theory of the Constitution” to provide “a complete analysis of the rights ‘retained by the people.’” 120 His book, Restoring the Lost Constitution, seeks to supply the “comprehensive theory” required to understand the source and nature of the unenumerated fundamental rights secured by the Ninth Amendment. A comparison between the founders’ view of rights and Professor Barnett’s should enable us to understand the nature of the rights “retained” by the people.

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118. BAILYN, IDEOLOGICAL ORIGINS, supra note 4, at 325.
119. Clor, supra note 28, at 172.
120. Barnett, Reconceiving, supra note 75, at 4. His 1988 article was “in no way intended” to address all the issues required for a “complete defense of allowing the Ninth Amendment a real constitutional function.” Id. at 3–4.
A. Of “Rights” and “Powers”: Radical Distinction or the Interweaving of Closely-Related, but Distinguishable, Ideas?

[The] Constitution is not a singular document; it is two documents, one creating the powers necessary for survival, the other expressing enlightened aspirations. It is a bill of powers and a bill of rights combined, and in its amended, complete form it reflects precisely the creative tension between idealism and realism in American public life.121

Barnett is deeply committed to the idea that there truly are innumerable natural rights, and that the founders held such a view.122 What is more, the Ninth Amendment commands us not to “deny or disparage” the other rights “retained by the people.”123 If the language itself were not plain enough,124 Barnett would add to the seeming clarity of the language the view that advocates of more restrictive readings of the amendment reflect a “modern philosophical skepticism about rights.”125 The best evidence, we are informed, of the need for “a more fruitful and faithful interpretation” of the amendment’s language is Justice Reed’s 1947 reference to the “rights, reserved by the Ninth and Tenth Amendments,” which equates the rights “retained” by the Ninth Amendment with the powers “reserved” by the Tenth.126 “The Tenth

122. See, e.g., Barnett, RESTORING THE LOST CONSTITUTION, supra note 2, at 53–86.
123. U.S. CONST. amend. IX.
124. The view commonly held by those who read the Ninth Amendment as Barnett does is that “[t]he starting points for interpreting the Ninth Amendment are the text itself and the rule of construction which holds that if a plain meaning exists, it should be followed.” Levy, BILL OF RIGHTS, supra note 51, at 244. Barnett, RESTORING THE LOST CONSTITUTION, supra note 2, at 235 (arguing that history supports “the most obvious textual meaning”). For documentation of this as the predominant view, see McAfee, ORIGINAL MEANING, supra note 65, at 1217–18, 1239 nn.94–97. For a treatment demonstrating that the text is not vague and general, but only ambiguous, and questioning whether its meaning is “plain” to any one who is thoughtful at all about the history, see McAfee, Consent, supra note 112, at 1267. Indeed, while John Hart Ely “suggested that constitutional interpretation should at least begin with the text,” Ninth Amendment commentators “have ended there as well, bringing their conclusions about the text to the contextual materials bearing on the amendment’s meaning.” McAfee, ORIGINAL MEANING, supra note 65, at 1247.
125. Barnett, Reconcepting, supra note 75, at 3.
126. Id. at 2, 5, citing United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). For Barnett, the other problem is that Justice Reed’s approach concedes that rights enumerated in the first eight amendments “are judicially enforceable power-constraints,” while the “others” secured by the Ninth Amendment are defined by reference to the powers and thus are denied or disparaged by comparison to the “enumerated” rights in direct contradiction to the amendment’s text. Barnett, Reconcepting, supra note 75, at 21. For the argument, still unanswered after fifteen years, that this contention simply begs the question, see McAfee, ORIGINAL MEANING, supra note 65, at 1247 n.131. If a “right” invariably refers to a “power-constraint,” moreover, one also has to wonder how it would be that the Tenth Amendment was not only included in what became known as the Bill of Rights, but was understood almost universally as rights-protective. Id. at 1243–45. Indeed, the Tenth Amendment is the single provision that was proposed by every state ratifying convention that proposed amendments. Amar, THE BILL OF RIGHTS, supra note...
Amendment does not speak of rights, of course, but of reserved 'powers.'”\(^{127}\)

1. The Ninth and Tenth Amendments: Do They Both Belong in the Bill of Rights?

Professor Barnett contends that if the Ninth Amendment rights the people hold are defined by reference to what remains after the powers are explicated, and their scope determined—what Barnett has called “the ‘rights-powers’ conception of constitutional rights”\(^{128}\)—it means that the Ninth Amendment is denied “any role in the constitutional structure,”\(^{129}\) in direct contradiction to a long and well-established anti-redundancy presumption going back to John Marshall’s opinion in Marbury v. Madison.\(^{130}\) The problem, says Professor Barnett, is that reading the Ninth Amendment consistently with “the ‘rights-powers’ conception” is to construe it “to mean nothing more than what is stated in the Tenth.”\(^{131}\) It is interesting, and significant, that Barnett would place such weight on the supposed redundancy between the traditional reading of the Ninth Amendment and the Tenth Amendment. For one thing, modern constitutional law scholars have underscored that the “anti-redundancy” presumption should be formulated as an “anti-nullity” presumption,\(^{132}\) recognizing that “redundancy in legal documents is not particularly odd,” especially when “the drafting history of the Bill of Rights explains the presence of both provisions.”\(^{133}\)

In this case, as we have seen, the Federalist proponents of the Constitution had articulated a feared danger that stating limits on government to secure rights might generate an inference that the national government was thought to be, like the states, a government of “general” legislative powers, subject only to the limits on powers stated in the bill

\(^{56}\), at 123. Antifederalist advocates of the Bill of Rights, as well as Federalist skeptics, saw the value of reserving to the states all not granted to the national government.

127. Barnett, Reconciling, supra note 75, at 6. Barnett elsewhere acknowledges that the debate over the omission of a bill of rights is filled with references to powers, and indeed at one point Wilson defined a bill of rights as “an enumeration of the powers reserved.” James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787) in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 387, 388.

129. Id.
130. Id. at 1. (citing 5 U.S. (1 Cranch) 137, 174 (1803)).
131. Id. at 6.
of rights. Simultaneously, the Antifederalists had countered with two separate arguments: (1) if a bill of rights, as a partial statement of rights, created a danger of constructive power, the Constitution’s inclusion of some specific limits to power to secure rights raised the same problem, and that (2) the people could not count on the idea that all not granted was reserved, considering that the proposed Constitution had omitted a provision containing the substance of Article II of the Articles of Confederation—the provision stating that each state “retains . . . every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States.”

Samuel Adams went so far as to assert that Article II supplied “a summary of a bill of rights, which gentlemen are anxious to obtain.” And George Mason, the draftsman of the Virginia Bill of Rights, argued that without Article II’s general reservation of power to the states “many valuable and important rights would be concluded to be given up by implication.” It is important to remember that to the founders, “federalism was a liberty of the people.” The only way to satisfy leading Antifederalists, like Patrick Henry, as well as key Federalist defenders of the proposed Constitution, was not only to add a bill of rights, but to include both the equivalent of Article II, to “reserve” to the states all not granted to the federal government, and to “retain” for the people as “rights” the entire residue from the granted powers. The consequence was that Madison drafted the Ninth Amendment “to guarantee that the first eight would not be dangerous, and the Tenth

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134. See supra notes 67–70 and accompanying text.
135. McAffee, Federal System, supra note 71, at 92–97, 102–04. For an especially effective description of the devastating effect of this Antifederalist table-turning argument, see LEVY, BILL OF RIGHTS, supra note 51, at 245–46. See also Lash, supra note 74, at 349; Wilmart, Jr., supra note 9, at 173.
136. Act of Confederation of the United States of America (Nov. 15, 1777), in 1 RATIFICATION OF THE CONSTITUTION, supra note 10, at 86. Early in the ratification struggle, Jefferson expressed doubts about Wilson’s argument based on enumerated powers, observing that although “the second section of the Articles of Confederation had assured to each state the retention of its sovereignty and jurisdiction in all cases where specific powers had not been delegated to the central government, no such assurance was found in the proposed Constitution.” RUTLAND, supra note 54, at 129. See Lash, supra note 74, at 356; Wilmart, Jr., supra note 9, at 174–75.
137. Samuel Adams, Massachusetts State Ratifying Convention (Feb. 1, 1788), in 2 ELLIOT’S DEBATES, supra note 100, at 130, 131.
138. George Mason, Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT’S DEBATES, supra note 100, at 444.
139. Lash, supra note 74, at 395.
140. Henry, like many Antifederalists, hardly distinguished at all the need to better secure the rights of both the people and the States. He contended that “a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government.” Patrick Henry, Virginia Ratifying Convention (June 14, 1788), in 3 ELLIOT’S DEBATES, supra note 100, at 150.
declared them to be unnecessary.”

It is significant that Samuel Adams and George Mason clearly saw a general reservation to the States—of “every power, jurisdiction, and right,” following Article II—as protective of the “rights” that the people “retain” under the proposed Constitution. Their arguments are powerful evidence that “modern commentators’ dichotomy between power-allocative and rights-protective provisions is foreign to the thinking of the founders.”

Professor Lash powerfully observes that “[f]or most of our history, bench and bar shared Madison’s federalist reading of the Ninth and Tenth Amendments and recognized their dual role in guarding the states from federal interference.”

Virginia’s seventeenth proposed amendment, from which Madison drafted the Ninth Amendment, focused on retaining the residue of the powers as the rights of the people, while New York combined what became the Ninth and Tenth Amendments, in a single proposal:

[T]hat every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for the greater caution.


142. Both Adams and Mason saw the proposed reservation under an Article II provision as preventing the loss of the people’s rights—notwithstanding that both specifically referred to what was reserved by “the states” or “the several states.” Samuel Adams, Massachusetts Ratifying Convention, (June 14, 1788) in 2 Elliot’s Debates, supra note 100, at 130, 131; George Mason, Virginia Ratifying Convention, (June 14, 1788) in 3 id. at 150. The frequent complaints about the omission of a general reservation of power to the states became the demand for a “clause reserving powers” that would “help to define and limit federal power.” Hamburger, Social Change, supra note 97, at 315.

143. McAffee, Original Meaning, supra note 65, at 1245 n.120. One establishes such a false dichotomy, for example, in asserting that “[t]he Tenth Amendment does not speak of rights, of course, but of reserved ‘powers.’” Barnett, Reconceiving, supra note 75, at 6.

144. Lash, supra note 74, at 427.

145. Virginia’s seventeenth proposed amendment read as follows:

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; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

2 Schwartz, supra note 72, at 844.

146. 2 Schwartz, supra note 72, at 911–12. For a treatment of North Carolina’s “even more
Little wonder that a leading modern commentator on the Bill of Rights refers to the Ninth and Tenth Amendments as “the reservation amendments.”

If it were true, however, that the core values of legitimate government, the rights people “retain” as they enter the social contract, are ipso facto secured by a republican constitution, whether those values are reduced to written, positive law, or not, one would want to know why those same values would not equally limit the powers of the state governments. After all, the theoretical understanding of the Ninth Amendment reservation, even for Professor Barnett, is to “vest these rights in the people, rather than in any government.” Professor Barnett is clear enough in briefly recounting the history and the case that decided the question against applying the federal Bill of Rights generally to limit state governments.

The Supreme Court’s decision, in Barron v. Mayor of Baltimore, refused to apply the Bill of Rights to constrain the states. The reason is not just that the fears generating the demand for a Bill of Rights related to the exercise of national power. One also ought to know that the “historical record establishes that the Bill of Rights was originally intended to protect the states and their respective citizens from undue federal interference.” Five of the amendments had features designed

specific” prohibition of “the implied expansion of federal power,” see Lash, supra note 74, at 357.

147. Kenneth R. Bowling, Overshadowed by States’ Rights: Ratification of the Federal Bill of Rights, in GOVERNMENT PROSCRIBED, supra note 19, at 95. Or that Professor Hamburger would describe the amendment as arising from Federalist objections to a bill of rights, “but like the tenth amendment it was perceived as a means of clarifying federal power.” Hamburger, Social Change, supra note 97, at 315.

148. Now it is true the Article I, Section 10 of the federal Constitution, does supply a few specific restrictions on the exercise of state government power. But if the whole point of the Ninth Amendment was to clarify that enumerating some rights is not properly taken as not securing other retained rights, one still might wonder why the original meaning of the text would not apply to all levels of government.


150. See BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 320–21.


to protect state autonomy interests.\textsuperscript{154} Most of the framers, moreover, "concluded that the protection of citizen rights was a matter to be governed by state constitutional law."\textsuperscript{155} Although Barnett observes that the Court in \textit{Barron} refused to apply even generally worded limits to restrict state power, notwithstanding that "the text of some of the first ten amendments contains no such limitation,"\textsuperscript{156} he shows no interest in "restoring" the lost retained rights, and indeed, whether based exclusively on precedent or partly on history, what is more important for Barnett is that with Reconstruction "the constitutional structure changed."\textsuperscript{157}

Still, a host of other scholars, a couple of whom Barnett cites in his book, have "read the Ninth Amendment as applying by its own terms to limiting the powers of the states."\textsuperscript{158} Barnett's readers are entitled to an explanation as to why a provision that merely "declares"\textsuperscript{159} (rather than "enacts") that there are additional rights held by the people because they were "retained," in part because they \textit{could not be} surrendered (because they're "inalienable"), is construed as having no application jurisdictionally to limiting state governments. Now it is clearly true that if there is already a wedge between the judicial role contemplated by Barnett's reading of the Ninth Amendment and the views held by Thomas Jefferson,\textsuperscript{160} the application of Barnett's open-ended Ninth Amendment to the states would generate an unbridgeable gulf.\textsuperscript{161} But when the goal is to promote one's own idea of constitutional legitimacy, not the intended meaning of the text, it becomes especially difficult to justify the expediency of deferring to historical practice or thinking.

\textsuperscript{154} \textit{Id.} at 1296–97. Professor Wilmarth demonstrates how various limits on national power reinforced state autonomy. \textit{Id.}

\textsuperscript{155} \textit{Id.} at 1292. Small wonder, then, that in the midst of one of the first grand debates over the scope of federal power—the one over Congress's power to create a national bank—James Madison, an opponent of the bank, did not argue that "chartering a bank violated an individual right," but only that "the collective rights of the people of the several states" were threatened by the bank bill. Lash, \textit{supra} note 74, at 388.

\textsuperscript{156} Barnett, RESTORING THE LOST CONSTITUTION, \textit{supra} note 2, at 320.

\textsuperscript{157} \textit{Id.}


\textsuperscript{159} See, e.g., John C. Yoo, Our Declaratory Ninth Amendment, 42 Emory L.J. 967 (1993).

\textsuperscript{160} See Lash, \textit{supra} note 74 and accompanying text.

\textsuperscript{161} McAffee, Declaration, \textit{supra} note 13, at 152 n.64 (outlining Jefferson's very strong stand in favor of states' rights, even when it conflicted with what could be described as human rights).
2. The Rights-Powers Conception of Individual Rights and the Ninth Amendment

Professor Barnett freely acknowledges that what he dubs the “rights-powers conception” of the rights protected by the Ninth Amendment—the one he would reject—"can be traced to a Federalist argument against the addition of any bill of rights."[162] Their argument, says Barnett, was that there was no need for a bill of rights “because the Constitution granted the national government only enumerated powers.”[163] A bill of rights, then, “would be redundant and therefore unnecessary.”[164] This “rights-powers conception” of Ninth Amendment rights, based on the Federalist argument against the necessity of a bill of rights, enables modern judges to avoid “the need to directly address the substance of unenumerated rights,” and supplies “a practical way of interpreting the otherwise open-ended Ninth Amendment.”[165] So the only thing the “rights-powers conception” has going for it, we learn, is that it supplies skeptical—or cowardly—judges with an “easy out.”

Yet even putting other problems to one side,[166] the “rights-powers conception,” were it correct, “must apply to the rights enumerated in the Constitution in the same manner as it does to the unenumerated rights referred to in the Ninth Amendment.”[167] The result would be that even an enumerated right could never serve to constrain the exercise of an enumerated power.[168] Particularly when one considers that the “rights-powers conception reflects a losing argument against enumerating any constitutional rights,” it comes to seem “odd indeed to insist that the best interpretation of the Bill of Rights is based on the theory used by its most vociferous opponents.”[169]

What is even odder, however, is to suggest that the original Federalist argument against a Bill of Rights was truly based on the “rights-powers conception” of rights—a position that Professor Barnett takes on rare

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163. Id.
164. Id.
165. Id. at 5.
166. The most significant being that it renders the Ninth Amendment redundant and worthless. The argument is described and critiqued supra notes 126–136 and accompanying text.
168. Id. There is no room for doubt that the Federalists relied on the Constitution’s enumerated powers scheme in defending the omission of a bill of rights. But I have never seen anyone, let alone a Federalist participant in the ratification-era debates, articulate or defend a general “rights-powers conception” of constitutional rights, let alone seek to apply it to enumerated rights. If you sense a straw man lurking around here, your senses are on the mark.
169. Id. at 8.
occasions, but far more consistently effectively denies. The argument against a strict necessity of a bill of rights, based on the enumerated powers scheme—and therefore based on the “rights-powers conception” of rights, according to Barnett—was eventually, we are told, “incorporated in the Tenth Amendment.” At the same time, says Barnett, the quite independent danger that unenumerated rights might be viewed as relinquished if a bill of rights were inserted—an argument, says Barnett, that is based in part on the Federalist conviction that there are “innumerable” rights—is what lead to the adoption of the Ninth Amendment. But if the people have “retained” innumerable rights as they entered civil society, and such rights are implicitly contained in their state constitutions, notwithstanding their frequent inclusions of declarations of rights, why in the world would the adoption of a federal bill of rights endanger at the state level the others “retained by the people”? One could devour Barnett’s book, and his many law journal articles, and obtain not a clue.

While the Federalist defenders of the Constitution relied on the enumerated powers scheme to help justify the omission of a bill of rights, at various stages of the debate the Federalists “acknowledged

170. Barnett claims that the “confusion” reflected in Justice Reed’s Mitchell opinion (see supra note 25 and accompanying text) was the consequence of “exclusive concentration on only one of two Federalist arguments,” their claim that a bill of rights was not necessary in light of the enumerated powers scheme. Barnett, Reconceiving, supra note 75, at 9.

171. Id.

172. See BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 57 (citing James Iredell).

173. The only reason that even the Federalists acknowledged that a bill of rights would not be dangerous to include in a state constitution is because, though it would implicitly concede what was not expressly reserved, it would be essential because the people were conceived in general as granting whatever they had not expressly reserved. As James Hutson has observed, it was this general understanding that enabled Rufus King and Nathaniel Gorham to contend against both the necessity and the propriety of a bill of rights:

> When the constitution vests in the Legislature ‘full power & authority,’ ... a Declaration or Bill of Rights seems proper. But when the powers vested are explicitly defined both as to quantity & the manner of their Exercise,” a bill of rights “is certainly unnecessary & improper.


174. At the Philadelphia Convention itself, in arguing against the inclusion of a free press provision, Roger Sherman contended that it was “unnecessary” because “[t]he power of Congress does not extend to the Press.” 2 MADISON, DEBATES OF 1787, supra note 9, at 565. Sherman’s argument became a Federalist theme from the time that James Wilson, three weeks after the Convention, distinguished the Constitution’s grant of enumerated powers from the state constitutions’ grant of “every right and authority which they did not in explicit terms reserve.” James Wilson, Speech in the State House Yard (October 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 167. Wilson’s speech “drove the debate over ratification from that time on.” Michael Liensch,
not only that the people might relinquitish rights that were deemed fundamental, but that they might do so through the use of generally worded grants of powers, as opposed to provisions expressly relinquitishing specific rights.”

Given that “the goal of adequately empowering government served the end of liberty as much as it served the end of meeting needs for national security and strength,” prominent framers, such as Roger Sherman and Oliver Ellsworth, observed that the Convention’s purpose had been “to provide for the energy of government on the one hand, and suitable checks on the other hand, to secure the rights of the particular states, and the liberties and properties of the citizens.”

More than seven years ago, I outlined at some length Federalist arguments defending the omission of proffered rights from the Constitution that not only did not rely on the enumerated powers scheme, but implicitly acknowledged that the Constitution’s framers had deliberately left such matters to the discretion of the Congress. Professor Barnett has failed to even note this complete refutation of the idea that the “rights-powers conception” presented what the Federalists conceived as a comprehensive answer to the relative lack of rights provisions in the proposed Constitution. The evidence is overwhelmingly clear that the Federalists did not conceive of the enumerated powers scheme as supplying everything that a bill of rights might provide; nor did they assert that a scheme of limited powers could operate as a total substitute for any and all provisions specifically constraining the exercise of the enumerated powers.

Reinterpreting Rights: Antifederalists and the Bill of Rights, in GOVERNMENT PROSCRIBED, supra note 19, at 245, 252 [hereinafter Lienesch, Reinterpreting Rights].

175. McAffee, Federal System, supra note 71, at 84. See id. at 84–92; supra note 64 and accompanying text.


177. Letter from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), in 13 RATIFICATION OF THE CONSTITUTION, supra note 10, at 471, 471. Sherman argued, in fact, not only from limited powers, but also contended that the “only real security you can have for all your important rights must be in nature of your government,” and that the real “check on the Congress” was “in the self-interest of the legislators,” given the fact that legislation could impact equally on members of the national legislature as on ordinary citizens. RUTLAND, supra note 54, at 143 (quoting ESSAYS ON THE CONSTITUTION 218 (Paul L. Ford ed., 1892)). Sherman is not a good candidate for advocating or drafting a provision securing enforceable unenumerated human rights. See infra notes 296–305 and accompanying texts.


179. In fact, Federalist efforts to defend and justify the enumerated powers scheme as an adequate method for restraining the exercise of federal power included frank acknowledgments that particular limits on power included in the proposed Constitution were necessary, as well as hypothetical examples of specific power grants that would require limiting provisions. See, e.g., id. at 88–97. There was not so much as a hint that such limits on power were already implicit because of “retained” rights or based on
The classic example was the defense of the decision to omit the right to trial by jury in civil cases. Federalist defenses of the omission of the right "rested on justifications for not restricting legislative discretion, as well as on the mechanisms that would prevent serious abuses from the discretion actually granted."180 It was virtually indisputable that Congress' authority to establish federal trial courts, with jurisdiction in civil suits between citizens of different states, would include the power to decide on the mode of trial—including whether a jury would be required. Article III of the proposed Constitution already included an explicit provision for a jury trial right in criminal cases. The highly regarded author of Letters From the Federal Farmer, to use one prominent example, contended that the combination of requiring jury trials in criminal cases, and omitting such a provision as to civil cases, established that the people "mean to relinquish" such rights, "or at least feel indifferent about them."181 His arguments went basically unanswered, and the responses given did not include a "rights-powers conception" of rights or the argument that the right to civil juries was already "retained" by the people or that legislation authorizing nonjury trials would be insufficiently necessary or proper.182

3. The Danger Presented by a Bill of Rights

Professor Barnett accurately perceives that the enumerated powers scheme stands at the center of the Federalist defense of the omission of a bill of rights. Indeed, though Federalists sometimes expressed doubts about whether bills of rights did not present mere "parchment barriers" that could not effectively "check" governmental power, they often acknowledged that bills of rights made a certain sense under the constitutions of the states, given that state legislatures held general

180. Id. at 104.


182. For a review of the arguments that were made, see McAffee, Federal System, supra note 71, at 105–110. Notwithstanding that the powerful Antifederalist arguments carried the day, as the advocates of a Bill of Rights successfully proposed including a right to trial by jury in civil cases, modern advocates of unenumerated fundamental rights—advancing constitutional analysis largely endorsed by Professor Barnett—have claimed that the unamended Constitution already included an unenumerated right to trial by jury in civil cases. See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Reading of the Sweeping Clause, 43 DUKE L.J. 267, 320–21 (1993) [hereinafter Lawson & Granger, Sweeping Clause] ("Congress, under the original Constitution, could not abolish jury trials in civil cases . . . ."). It seems "odd indeed to insist that the best interpretation of the Bill of Rights," rests on arguments not advanced by a single party to the debate over ratification. Barnett, Reconceiving, supra note 75, at 8.
powers.\footnote{See, e.g., \textit{supra} notes 68--71, 101--106, and accompanying texts.} Professor Barnett, however, misunderstands the Federalist argument that it would be “absurd” and “dangerous” to include a bill of rights in the proposed Constitution. Although it varied in the degree of generality that was employed, occasionally referring to the larger enterprise of including in the Constitution a “comprehensive” bill of rights,\footnote{The problem was that the very attempt to supply a “complete” bill of rights would shift the presumption to favoring power rather than rights: “[W]hen general legislative powers are given, then the people part with their authority, and on the gentleman’s principle of government, retain nothing. But in a government like the proposed one, there can be no necessity for a bill of rights. For, on my principle, the people never part with their power.” James Wilson, Speech at the Pennsylvania Ratifying Convention (Dec. 4, 1787), \textit{in 2 RATIFICATION OF THE CONSTITUTION, supra} note 10, at 470 (emphasis added). By contrast, says Wilson, to attempt to limit the federal government by stating a whole set of limits on the power granted “would throw all implied power into the scale of government.” \textit{Id.} at 388. \textit{Cf. POPULAR CONSENT, supra} note 47 (noting Reverend Clarke’s insistence on the need for an explicit declaration of the “rights retained” for the “liberty and safety of individuals” under a state constitution) (emphasis added).} and sometimes referring to a particular proposed right to be included,\footnote{At a more specific or concrete level, James Wilson argued in Pennsylvania that the inclusion of a free press guarantee would be “merely nugatory” inasmuch as no power to regulate the press had been granted to Congress. But more than that, it might actually prove dangerous because it could be construed “to imply that some degree of power was given, since we undertook to define its extent.” James Wilson, Speech at the Pennsylvania Ratifying Convention (November 28, 1787), \textit{in 2 RATIFICATION OF THE CONSTITUTION, supra} note 10, at 168.} the objection to including a bill of rights—the one offered by James Wilson, Alexander Hamilton, and James Madison—were all variations on a single theme.

As George W. Carey taught us, the concern “goes beyond the obvious one that a complete listing of rights is impossible and that a listing of some rights would create a presumption that government can infringe upon those not listed.”\footnote{\textit{CAREY, supra} note 116, at 148.} Rather, the concern is that a doctrine of “constructive powers” could be used “to give the government authority over the very concerns that rights were designed to protect.”\footnote{\textit{Id. Accord, Clark, supra} note 63, at 341 (Federalists believed that a bill of rights “would actually undermine such rights by unintentionally enlarging the scope of federal power by implication”).} In each case there eventually comes the fear that a bill of rights could reverse the presumption of the enumerated powers scheme, making Congress subject \textit{only} to the limits imposed by the “exceptions” to power contained in bill of rights provisions. Federalists were concerned that a bill of rights “\textit{would at least imply} that nothing more was left with the people than the rights defined and secured in such bill of rights.”\footnote{Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), \textit{in 3 RATIFICATION OF THE CONSTITUTION, supra} note 10, at 569 (emphasis added).}

When Professor Barnett and others rely on statements about the harms
that would flow from an "imperfect,"\textsuperscript{189} "not complete,"\textsuperscript{190} or "not safe"\textsuperscript{191} enumeration of rights, the statements describe the precise effect that Federalists believed bills of rights actually had under the state constitutions. This is why Edmund Pendleton could contend against including the proffered rights for jury trials and liberty of the press: "[I]t not Safer to trust the two first rights to the Broad \& Sure ground of this Principle—that the people being Established in the Grant itself as the \textit{Fountain} of Power, retain every thing which is not granted?"\textsuperscript{192}

When Federalists complained about the prospect of facing an implication "that every thing omitted is given to the general government,"\textsuperscript{193} they contrasted that concern with the assertion that under the unamended Constitution "every thing not granted is reserved."\textsuperscript{194} Since participants in the debate over ratification "could not agree whether liberty would be best protected by limiting powers or enumerating rights, they ultimately adopted both mechanisms."\textsuperscript{195}

This is why they were able to argue that "a bill of rights would have been improperly \textit{annexed to the federal plan} inasmuch as "it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution."\textsuperscript{196} As long ago as 1987, a prominent commentator asserted that "\textit{it is generally recognized} that the ninth amendment was proposed by James Madison in response to fears that a specific enumeration of rights in the form of a Bill of Rights might someday be interpreted so as to defeat or belittle rights not included in the enumeration."\textsuperscript{197} But just three years later, I observed that such a claim was "literally untrue inasmuch as there is no such general recognition among students of the amendment."\textsuperscript{198} You can slice it and

\textsuperscript{189} James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, \textit{supra} note 10, at 387, 388.

\textsuperscript{190} James Madison, Virginia Ratifying Convention (June 24, 1788), in 3 ELLIOT'S DEBATES, \textit{supra} note 100, at 626.

\textsuperscript{191} \textit{Id}.


\textsuperscript{193} James Madison, Virginia Ratifying Convention (June 24, 1788), in 3 ELLIOT'S DEBATES, \textit{supra} note 100, at 620.

\textsuperscript{194} \textit{Id}.


\textsuperscript{196} James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, \textit{supra} note 10, at 391 (emphasis added).


\textsuperscript{198} McAfee, \textit{Original Meaning}, \textit{supra} note 65, at 1250 n.139. For a careful review of the drafting history, from the Virginia Ratifying Convention through the debate in the Virginia assembly, see \textit{Id} at 1277–1305.
dice it all the way from 1987 to eternity, but the Federalist objection to a bill of rights was always cast in terms that a bill of rights could endanger the Constitution's structural protection of rights.\(^{199}\)

When the proposed amendment that became the Ninth Amendment was considered for ratification by the Virginia assembly, Edmund Randolph objected to the allusion to the rights "retained by people," contending that this language protected "rights reducible [sic] to no definitive certainty."\(^{200}\) Randolph preferred the Virginia Ratifying Convention's seventeenth proposed amendment, which had prohibited interpreting power-limiting constitutional provisions "in any manner whatsoever, to extend the powers of Congress."\(^{201}\) According to Assemblyman Burnley, Randolph's objection reflected his belief that the amendment was drafted as a "reservation against constructive power."\(^{202}\) Federalists supporting the Constitution had frequently expressed a concern that stating limits on, or exceptions to, the exercise of granted powers could create an inference of granted power.\(^{203}\)

Although both Burnley and Madison rejected Randolph's criticism of the proposed amendment, neither objected to his characterization of its intended purpose as a "reservation against constructive power."\(^{204}\) Indeed, both equated the two provisions.\(^{205}\) Burnley offered that he did

\(^{199}\) At one point, Wilson goes so far as to say that "an imperfect enumeration would throw all implied power into the scale of the government." James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 388 (emphasis added). Thus "instead of lessening the powers of Congress, such a Bill would actually enlarge them—for instead of the Constitution's being the limits or boundary line of Congress, the Bill of Rights only would be the sacred barrier, or mark not to be exceeded." Letter from Silas Lee to George Thatcher (Jan. 23, 1788), in 5 RATIFICATION OF THE CONSTITUTION, supra note 10, at 780, 781.

\(^{200}\) Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 2 SCHWARTZ, supra note 72, at 1188.

\(^{201}\) 2 SCHWARTZ, supra note 72, at 844. For the complete text of Virginia's seventeenth proposed amendment, see supra note 145 and accompanying text. As Professor Lash observes, several states, as well as Virginia, proposed "explanatory declarations" designed to prevent the expansion of federal power. Lash, supra note 74, at 358–59.

\(^{202}\) 2 SCHWARTZ, supra note 72, at 1188.

\(^{203}\) Exemplary was Wilson's contention that a free press guarantee could "imply that some degree of power was given, since we undertook to define its extent." James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 168. And the possibility of constructive power being inferred from the inclusion of explicit limitations on power became an Antifederalist fear as well. See McAFFEE, INHERENT RIGHTS, supra note 10, at 142 (noting that the highly regarded author of Letters from a Federal Farmer, suggested that constructive power might be the result of Article I, Section 9's prohibition on granting titles of nobility).

\(^{204}\) See 2 SCHWARTZ, supra note 72, at 1188 (Burnley); id. at 1189, 1190 (James Madison).

\(^{205}\) Professor Barnett underscores "how similar Randolph's alternative proposal is to McAffee's interpretation of the Ninth Amendment—the provision to which Randolph is objecting." BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 250 n.99. Professor Hamburger confirms, however, that "Randolph's alternative version indicates that Randolph shared the traditional understanding of the amendment's purpose, even if he thought the language inadequate." Hamburger,
not see "the force of the distinction" suggested by Randolph, given that "by preventing an extension of power in that body from which danger is apprehended safety will be insured if [Congress's] powers are not too extensive already." An important question, of course, is whether purporting to secure the other rights "retained by the people" adequately relates to ensuring safety and preventing an extension of power; but Burnley's conclusion that there is an adequate connection only if Congress's powers "are not too extensive already" fits in perfectly with Madison's suggestion that the Constitution is a bill of powers as to which the people's rights are "the great residuum."207

Madison stated even more clearly that, in his mind, the distinction proposed by Randolph was "altogether fanciful."208 He concluded: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured . . . by declaring that they shall [not be abridged] or that the former shall not be extended."209 How would it be possible to "draw a line" between the "powers granted and the rights retained"? Madison here aligns himself with the sentiments of the best known, and most thoughtful, Antifederalist spokesman, The Federal Farmer, who stated the view that the only circumstances in which he would rely on the enumeration of powers would be if he could "suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved."210 Notice that both Burnley and Madison speak hypothetically: If Congress' powers are not "too extensive already," and if a line can be drawn between "the powers granted and the rights

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206. Id. at 1188 (emphasis added). Burnley is equally clear if "an improper extension of power" is "prevented & safety made equally certain," the net result would be "protecting the rights of the people & of the States." 2 SCHWARTZ, supra note 72, at 1188 (emphasis added). Accord Lash, supra note 74, at 394. Burnley's equation of the rights of the people and the states underscores that the powers are the source of the definition of the rights, not vice versa. His statement also revisits a veritable theme of Antifederalist rhetoric, which clearly goes beyond desiring greater security for individual rights. E.g., Letter from An Officer of the Late Continental Army (Nov. 6, 1787), 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 210, 211 (reciting Antifederalist complaint that "the liberties of the states and the people are not secured by a bill or Declaration of Rights") (emphasis added).


208. 2 SCHWARTZ, supra note 72, at 1188.

209. Id. Professor Lash is clearly correct in concluding that “[t]he best understanding of Madison’s letter was that he read the Ninth as an interpretive rule limiting the construction of federal power.” Lash, supra note 74, at 393.

210. Letter from the Federalist Farmer XVI, in 2 THE COMPLETE ANTI-FEDERALIST, supra note 95, at 324.
retained,” we should be fine, whether we secure other rights or prohibit constructive power. The clear assumption of the speaker is that we are referring to residual rights—the rights defined by reference to enumerated powers. 211

By contrast, if the speaker were contemplating that the granted powers would be construed through a filter of inherent rights—so they simply never could be construed to permit an intrusion on a “retained right”—he would not speak hypothetically at all. If that were the clear result wherever “inherent” rights are implicated, it would be utterly incoherent to contend that the enumerated powers system makes a bill of rights “unnecessary.” In such circumstances, it would not be the enumerated powers scheme operating, but the inherent rights themselves. This is the only reason it made perfect sense for Wilson to contend that if Congress were given the power to regulate literary publications, it would be essential to include a freedom of the press. 212 Otherwise, the freedom of the press would not be viewed as an “exception” to a granted power, in favor of a right. The possibility of rights-defeating “constructive power”—something feared by both Federalists and Antifederalists—was answered not only by the Ninth Amendment, but also the functional equivalent of Article II of the Articles of Confederation, the Tenth Amendment. But under Barnett’s scheme of things, such a result would be unthinkable, inasmuch as all power would be construed—contrary to the views of Federalists and Antifederalists alike—as subject to, and limited by, the rights “retained” by the people.

4. What Are the “Others” Retained by the People?

Professor Barnett often writes as though the key word in the Ninth Amendment is “retained.” This year, for example, he is insistent that when Madison chose language referring to rights “retained” by the people, he was alluding to rights possessed by individuals “prior to government,” not rights “created by government.” 213 Barnett thus at

211. Professor Hamburger concluded that the reason that Ninth Amendment was not “perceived as vague” was “because the unenumerated rights to which it referred were defined by the enumeration of congressional powers.” Hamburger, Social Change, supra note 97, at 316.

212. James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 Ratification of the Constitution, supra note 10, at 168. Accord McAffee, Federal System, supra note 71, at 94–97 (describing especially Madison’s justification of Article VI’s prohibition on a “religious test” for holding federal office based on Congress’s implicit power to establish qualifications for offices it must fill).

213. Barnett, Restoring the Lost Constitution, supra note 2, at 60. At one point, Professor Barnett makes a point of assuring us that “people do have rights prior to the formation of a legal
times seems to join those who contend that Madison’s choice of the word “retained” in the Ninth Amendment reflected deliberate use of a “term of art” drawn from social contract political theory.\textsuperscript{214} The rights “retained,” on this view, referred uniquely to the particular rights the people kept when they left the state of nature and entered in to the social contract.\textsuperscript{215}

But if Barnett often stresses that Ninth Amendment rights are those that pre-existed the formation of government—the natural “liberty rights” that are “retained” on entry in to civil society\textsuperscript{216}—he has also acknowledged they are also the “others” retained by the people. This is a term that seems to invite a comparison with the rights already “enumerated,” as well as to suggest that a right that is “enumerated” is also “retained.”\textsuperscript{217} Moreover, in his initial foray, Barnett suggested that, given that “the Ninth Amendment was intended to remove the need to enumerate every right retained by the people,”\textsuperscript{218} the failure to include a proposed right in the enumeration “does not support a strong negative implication.”\textsuperscript{219}


\textsuperscript{215} For a critical reaction to this reading of the Ninth Amendment, see Thomas B. McAffee, The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People, 16 S. ILL.U. L.J. 267, 296–305 (1992) [hereinafter McAffee, Social Contract Theory].

\textsuperscript{216} In one article, Barnett even went so far as to assert that inalienable natural rights might be secured by the text, “for greater caution,” but that limitations designed to secure positive rights would have the character of being an “actual limitation.” Randy E. Barnett, Necessary and Proper, 44 UCLA L. REV. 745, 780–81 n.127 (1997) [hereinafter Barnett, Necessary and Proper]. But, says Professor Barnett, to say that a provision is there “for greater caution” is to assert that it would be “equally protected whether it has been enumerated or not.” Id. Inasmuch as Barnett has now repudiated the single example he used to illustrate the lack of protection unenumerated “positive rights” would ordinarily receive, it is difficult to know precisely how open-ended a model of unenumerated fundamental right he is now operating. See infra notes 241–48 and accompanying texts.

\textsuperscript{217} Professor Lash is correct in asserting that emphasizing the rights kept in entering civil society “unduly limits the scope of the Ninth Amendment,” considering that “[a]ll retained rights, natural or otherwise, were protected from denial or disparagement.” Lash, supra note 74, at 399. He observes that neither “the text nor the purpose of the Ninth Amendment was limited to protecting a subcategory of retained rights.” Id.

\textsuperscript{218} Barnett, Reconceiving, supra note 75, at 31.

\textsuperscript{219} Id.
In fact, in his original article seeking to “reconceive” the Ninth Amendment, Professor Barnett stated unequivocally: “Certainly rights retained against state governments were not surrendered to the general government.”220 (One assumes that rights are “retained” against state governments any time they are included within the state’s Declaration of Rights.) But the rights explicitly “retained” in a Declaration of Rights like Virginia’s, to use an obvious example, included a right not to compete for hereditary offices, a right not to receive “emoluments” if not in consideration for public service, and a number of purely procedural rights relating to fair trials, such as rather uniquely English right of trial by jury—a list that goes well beyond those that would have pre-existed government.221 Originally, Barnett described the search for rights widely accepted at the time of the ratification of the Constitution as an “originalist” method for determining unenumerated rights.222 But even in his 2004 book, Professor Barnett confirms that genuine historical research—that would appropriately include “the lengthy lists of proposed amendments sent to Congress by several state ratifying conventions,”223 as well as “the rights expressly stipulated by state constitutions at the time of the Constitution’s ratification”224—should enable modern judges to discover additional fundamental rights.225

It is unthinkable, however, that the framers intended to empower judges to re-visit the decisions they made as to whether or not to include a limit on power to secure rights. Even though several state constitutions had recognized a constitutional right to claim the status of being a “conscientious objector,”226 Congress refused to adopt a proposed right to avoid military service. Clearly, this was an instance in which a right “retained against state governments” was “surrendered to the national government.”227 Even though such a right arguably flowed from the freedom of conscience that many took to be an “inalienable” natural right, Congress apparently accepted the view that members of society have a duty to defend it.228 Congress’ decision not to include an

220. Id.
221. VA. Const. of 1776, Bill of Rights, §§ 1-16, reprinted in 7 STATE CONSTITUTIONS, supra note 6, at 3813–14.
222. The general approach is outlined in Barnett, Reconceiving, supra note 75, at 30–32.
223. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 255.
224. Id. at 256.
225. Id. at 255–59.
227. See supra note 220 and accompanying text for Barnett’s denial that such rights were ever surrendered to the general government.
228. The arguments advanced on both sides are summarized at McAfee, Federal System, supra
anti-monopoly guarantee229 or a right to instruct the people’s representatives,230 were also deliberate decisions that were not intended to be given to the judiciary to re-think.

B. Judicial Enforcement of Inherent Rights: Substituting “Ends” for “Means”

The American founders may be said to have taken a middle ground between these two perspectives [Edmund Burke & Thomas Paine]. While the doctrine of natural rights provided the philosophic and ethical basis of their constitutional system, they hardly made that doctrine a pervasive or obtrusive presence in the written Constitution. Natural rights remain, as it were, in the background. And it is not true of principles in the Bill of Rights that every one is traceable, more or less directly, to some natural right of the individual. Some of the civil rights serve principally to maintain the conditions of a republican polity—a consideration neglected in Paine’s rather elementary formulations of the relations between civil and natural rights. And, as we have seen, the framers did successfully oppose the incorporation into the Constitution of such rights as would deny government the necessary discretion in circumstances that call for the prudent judgment of the statesman. They were not unaware of the importance of that practical or prudential wisdom which Burke was to stress so heavily in his case against the rights of man. On the other hand, the American founders decisively rejected the traditional idea, advanced by Burke, that public authority must be independent of the popular will in order to restrain the popular passions. They found ways to make political institutions representative of the will of the people but not so immediately responsive to it as to be disabled from the exercise of authority.231

In assuming that the people, more or less automatically, “retain” rights, understood as legal restrictions on government power, because they are implicit in the very existence of the social contract that a republican constitution embodies,232 Barnett adopts a view of

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note 71, at 114–16. That many did not accept the idea that religious objection to military service constituted an inalienable natural right played a role mainly in the determination that it was a matter fit for the exercise of legislative discretion. Again, however, there is no reason to think that this was conceived by any as a question to be addressed again by judges.

229. Id. at 116–18.
230. Id. at 118–20.
232. In the very title of the second chapter of his book, Professor Barnett sets forth what he deems to be essential to “Constitutional Legitimacy without Consent: Protecting the Rights Retained by the People.” BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 32. See also id. at 36, 39, 52, 53 (title of chapter three). Barnett thus mis-uses the text of the Ninth Amendment, assuming without argument or analysis, that the “rights retained by the people” refers not to the rights the people “chose”
constitutional rights under American constitutions that conflicted with American understandings in 1787–1788, and ever since, and that was rejected by both groups that participated in the intense debate over whether the Constitution proposed in 1787 should be ratified.233

I. Under the State Constitutions

As I have noted, in 1787 the states were governments of “general” or “plenary” legislative powers.234 The state assemblies were viewed by most as “representatives of the sovereign people,” and consequently they held “all powers not constitutionally forbidden them.”235 Considering that this was the understanding brought to the task of drafting the state constitutions,236 it is not at all surprising that this was the overwhelmingly predominant view articulated during the debate over ratification of the Constitution.237 Indeed, this view remains the standard hornbook law description of state legislative power,238 often reiterated by the highest courts in the states,239 and has been

to “retain”—that, after all, would involve merely “the fiction of popular sovereignty,”—but to the valid moral claims that the people could not have given up even if they had wanted to: the inalienable natural rights. Id. But it is overwhelmingly clear that governments with legislatures having “general” powers did indeed give up any limits on government power, including those designed to secure natural rights, unless such a “limit” or “exception” were specified in the written constitution’s Declaration of Rights. See supra note 47 and accompanying text. This analysis applied to natural rights deemed “inalienable” as well as to others. See supra notes 13–18 and accompanying texts.

233. For a similar analysis of the rights “retained by the people,” as reflected in the usage of those who participated in the debate over ratification of the Constitution, see Clark, supra note 63, at 322, 335.

234. See supra notes 43–51 and accompanying texts.

235. McDonald, Unnecessary and Pernicious, in GOVERNMENT PROSCRIBED, supra note 19, at 387, 388. Accord MCAFEE, INHERENT RIGHTS, supra note 10, at 135 (“The Federalists thus concurred with the Antifederalist assumption that the state constitutions granted limitless legislative power unless the people reserved power in a bill of rights”); Frost et al., supra note 3, at 338–40; MCAFEE, Inalienable Rights, supra note 18, at 749, 751–53.

236. LUTZ, POPULAR CONSENT, supra note 47, at 60 (state constitution drafters “assumed that government had all power except for specific prohibitions contained in a bill of rights”).

237. The classic and oft-quoted statement was offered by James Wilson just a couple of weeks after the constitutional convention in Philadelphia. James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 167 (quoted at text accompanying supra note 68). Similar statements are legion.

238. See, e.g., MCAFEE, Inalienable Rights, supra note 18, at 776 (“This standard distinction between state and federal constitutions, and the difference it makes in understanding the people’s rights, is recognized even today”); TARR, supra note 18, at 7 (“[S]tate governments have historically been understood to possess plenary legislative powers”); Louis Karl Bonham, Note, Unenumerated Rights Clauses in State Constitutions, 63 Tex. L. Rev. 1321, 1333 (1985) (“[S]tate governments are considered to be governments of plenary power”); Robert F. Williams, State Constitutional Law Processes, 24 WM. & MARY L. Rev. 169, 178 (1983) (“State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power”).

239. For representative samplings of state courts recognizing the doctrine described in text, see MCAFEE, Inalienable Rights, supra note 18, at 776–77 nn.112–14; Frost et al., supra note 3, at 339 n.24.
acknowledged to have been the standard and accepted view even by advocates of the fundamental unenumerated rights interpretation of the Ninth Amendment. 240

In concluding that the Ninth Amendment's reference to the "rights retained by the people" alluded to inalienable natural rights, however, Barnett takes it as a given that affirmative legal limits on government power are simply implicit in the granting of power to any constitutional government. 241 Given that the rights are inherent and inalienable, they are "retained" as a matter of course, whether the government under consideration is conceived to be one of "general" legislative powers or

240. See, e.g., McAfee, Inherent Rights, supra note 10, at 149 n.32 (observing that Professor Massey acknowledges that "state governments under those constitutions were 'universally' regarded as 'possessing all powers except those explicitly denied them in their constitutive documents,'" and concluding that "it follows that the whole idea of inherent and implied limitations on government was foreign to the state constitutional systems", (citing Massey, supra note 158, at 87)); Frost et al., supra note 3, at 347 n.63 (citing Professor Grey's acknowledgment of historical understandings in recognizing that Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798)) "apparently concluded that 'this plenary legislative power was not so plenary after all,'", (citing Thomas C. Grey, The Original Understanding and the Unwritten Constitution, in Toward a More Perfect Union: Six Essays on the Constitution 145, 148 (Neil L. York ed., 1988)); McAfee, Federal System, supra note 71, at 17, 21 & n.16 (observing that Massey admits "'that the dominant motivation' for adopting the Ninth Amendment was 'to prevent the argument that enumeration of certain rights carried with it the implication that the federal government...[possesses] unenumerated powers to invade rights'" and thereby to cabin "'implied governmental powers'," (citing Massey, supra 158, at 93)).

Strangely enough, though he attempts in various ways to deny the meaning and implications of this traditional way of seeing state legislative power, even Barnett verges on acknowledging the reality. At one point, for example, Barnett asserts that, because of the Fourteenth Amendment, "state governments no longer can claim a plenary power to restrict the liberties of the people subject only to their own constitutions and any express restrictions in the original Constitution." Barnett, Restoring the Lost Constitution, supra note 2, at 321. But if the rights secured by the Ninth Amendment are those "retained by the people" as they enter the social contract, those rights would be just as "retained by the people" under the social contract they entered at the state level; under such a system, state legislative power could hardly be described as "plenary." At another point, Barnett acknowledges that the very term, "police powers," "is almost completely open-ended." Id. at 323. Notice as well that, although it is offered as a criticism, Barnett's complaining of Judge Bork's "ironically" extolling the "open-ended police powers," even while "shunning unenumerated rights," id. at 325 n.20, is combined with a quotation, Robert H. Bork, The Tempting of America 44-45 (The Free Press 1990) ("The better view of state legislative power is that...it encompasses the power to make any enactment whatever that is not forbidden by a provision of a constitution"), that could have been taken from almost countless state court decisions. Cf. Frost et al., supra note 3, at 339 n.24, 350 n.81.

241. In a chapter entitled "Natural Rights as Liberty Rights: Retained Rights, Privileges, or Immunities," Barnett asserts that "legitimate legal commands" can only result if there is "a procedural assurance" that such commands "do not violate the rights of the persons on whom they are imposed and that their requirements are necessary to protect the rights of others." Barnett, Restoring the Lost Constitution, supra note 2, at 53. We have already seen that Barnett believes that the very existence of "rights" entails "enforceable claims on other persons," including in particular government officials. Barnett, The Intersection, supra note 2, at 862 (quoted at supra note 2). For Barnett, then, "retained rights" refers to what are deemed to be (1) authentic moral requirements for just government that are therefore (2) legally enforceable.
"enumerated" legislative powers. Yet the history is clear that when a constitution for Massachusetts was proposed in 1778, and omitted a bill of rights, a town meeting in Lexington concluded that the "[r]ights intended to be retained (at least those that are fundamental to the well-being of Society and the Liberty and Safety of Individuals) should be, in the most explicit Terms, declared." Contrast this historical treatment with the modern view, defended by Professor Barnett and others, that would treat natural rights as automatically "retained."

One of the most thoughtful and highly educated people to ever sit on the Supreme Court, Joseph Story, published a commentary on the Constitution in 1833. In that work, he asserted that "[b]efore the constitution of the United States was adopted, every state, unless prohibited by its own constitution, might pass a bill of attainder, or ex post facto law, as a general result of its sovereign legislative power."

242. Modern advocates of unenumerated fundamental rights tend to see these issues through a different lens than many of the founding generation. Compare Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. CHI. L. REV. 1127, 1134 (1987) (state constitution structural provisions were in general perceived as "evolving fundamental law," while their declarations of rights stated "the inherent natural rights which formed an integral and unalterable part of the broader fundamental law"); id. at 1132–34, 1135, 1145–46, 1158 n.137 (contending that the state constitutions consisted of (1) definitive, but alterable, provisions about government structure and allocation of authority, as well as (2) absolute limits on behalf of individual rights); id. at 1157–58 (viewing the prohibition on ex post facto laws in Article I, Sections 9 and 10 as describing a violation of natural law and rights that would have been preserved whether or not embodied in the Constitution's text, and distinguishing the ban on bills of attainder as involving a "positive right," inasmuch as a couple of bills of attainder had been enacted in the 1770s), with MCAFEE, INHERENT RIGHTS, supra note 10, at 20, 19–24 (Sherry's "dichotomy" is unsupportable, given that "rights" provisions were often protecting large groups, as well as individuals, and often secured rights structurally; considering that individual liberty and collective rights and interests "were placed on the same footing," it followed that rights and structural provisions were equally amendable); id. at 120–27 (setting forth the history supporting that the founders viewed the written Constitution as setting forth the supreme law of the popular sovereign and as stating what were considered to be "permanent and unchanging" norms that could still be "altered" to meet the needs of the people); id. at 124–25 (viewing skeptical the attempt to draw a line between the ex post facto law clause, as a natural rights provision, and the prohibition on bills of attainder as a mere positive right—especially in light of their similarities of purpose).


244. Though Barnett brings his natural rights assumptions to the historical materials relating to the founding, to some degree his assertions about what is "retained" as against state governments is based on a theory of the "original meaning" of the Fourteenth Amendment. See, e.g., BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 328. For an alternative interpretation of the Fourteenth Amendment, that emphasizes the requirement of equal laws, see McAfee, Inalienable Rights, supra note 18, at 783–94.

245. 3 STORY, supra note 89, § 1367, at 238–39; accord Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 17–18 (1800) (upholding power of Georgia legislature to determine that an individual is guilty of treason, concluding that "the power of attainder, banishment, and confiscation" exists "under every constitution, unless it is expressly excluded"). Though Story fully acknowledged that during the revolutionary war, "bills of attainder and ex post facto acts of confiscation were passed," he underscored
The question raised is clear: why weren’t the rights not to be criminally tried by a legislature and not to have an “innocent” act subsequently “declared” a crime, as well as the right to be tried by a jury, as required by article III of the federal Constitution, not “retained by the people” in the states?  

The basic answer is that constitutionalism is an exercise in self-government, not simply an exercise in the application of Lockeian natural rights. To use a simple example, in seeking to explicate a “Lockean theory” of state police powers, Professor Barnett tells us that Locke set forth “three defects” that justified moving to civil society:

(1) “the want of an establish’d, settled, known, Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them” (§ 124);
(2) the want of “a known and indifferent Judge, with Authority to determine all differences according to the established Law” (§ 125); and
(3) the want of the “Power to back and support the Sentence when right, and to give it due Execution” (§ 126).

As an exercise in true Lockean theory, a duly elected and representative legislature’s adoption of an applicable rule of law, would, as Locke puts it, generate, as well as reflect, “the Standard of Right and Wrong,” and the election of that legislature by the people, as their representatives, would generate the “common measure.” Even under the constitutions in effect at the time of the adoption of the federal Bill of Rights, the legislature would be presumed to be the most adequate representative of the sovereign people, so unless the act of the legislature was “contrary to the tenor of the commission under which it is exercised,” and was therefore “void,” it would be a court’s duty to implement it.

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that Americans had realized “in times of more cool reflection” that their evils had “outweighed any imagined good.” STORY, supra note 89, § 1367, at 239.

246. The simple and straightforward response is that the rights were “retained” in the states only as they were stated as limitations to granted power in the state’s Declaration of Rights. In Virginia, for example, there was proposed a ban on bills of attainder, and when Patrick Henry offered a powerful speech in opposition, it was defeated. Edmund Randolph, Essay on the Revolutionary History of Virginia, reprinted in 1 SCHWARTZ, supra note 72, at 246, 249. Cf. LEVY, BILL OF RIGHTS, supra note 51, at 9 (finding it “inexplicable[ly]” that Virginia’s constitutional convention could vote down the ban on bills of attainder). “And subsequently the Virginia legislature actually enacted a bill of attainder against an unpopular Tory at the instigation of Governor Patrick Henry.” McAfee, Social Contract Theory, supra note 215, at 294.

247. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 327.

248. THE FEDERALIST NO. 78 (Alexander Hamilton), supra note 20, at 524, quoted in BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2 at 140–41. Most of the statements confirming the power of judicial review—and the power to nullify unconstitutional laws—on which Barnett relies, carry the negative pregnant, with the implication that if the law does not violate the Constitution’s terms, it will be upheld: “[i]f a law should be made inconsistent with those powers vested by this instrument . . ., the judges . . . will declare such law to be null and void.” BARNETT, RESTORING THE LOST
Now in Barnett’s mind, any law, state or federal, that affects the exercise of “rightful liberties”—acts not prohibited by the common law “of contract, property, tort, . . .”—gives rise to a government burden “of proving that a rights infringement is both necessary and proper.” 249 We are to understand, moreover, that, whether the law in question is adopted by the city council, the state legislature, or Congress, “a neutral magistrate must adjudicate the claim,” remembering that such laws “do not justify the use of coercion against that person unless it is shown that such exercises of power are necessary and proper.” 250 It really does not matter that constitutions do not purport to condition the duty to obey laws on their compliance with unwritten, let alone utterly vague, requirements, nor even that most constitutions do not purport to secure the open-ended body of rights that Barnett tells us are “retained by the people.” 251

2. Under the Federal Constitution

In turn, of course, Professor Barnett claims that the same assumptions are properly read in to the Necessary and Proper Clause, found in Article I, Section 8 of the unamended Constitution. Courts may invalidate federal legislation as “improper,” and therefore unconstitutional, if judges conclude that Congress chose “means” to accomplish the “ends” that Congress may pursue under Article I, Section 8, that manifest “impropriety.” 252 Strikingly, for Barnett this represents a rather dramatic change in position, and, at least as importantly, a largely unexplained one. When Barnett first addressed the Ninth Amendment, in 1988, he concluded that “the Necessary and Proper Clause exacerbates the means-end problem within a scheme of delegated powers.” 253

CONSTITUTION supra note 2, at 131–47; e.g., James Wilson, Pennsylvania State Ratifying Convention (Dec. 4, 1787), in 2 ELLIOT’S DEBATES, supra note 100, at 415, 489, cited in BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 135.

249. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 262–64; Barnett, The Intersection, supra note 2, at 863–64.


251. At one point in his book, Barnett does acknowledge that he has “borrowed the standard of ‘necessary and proper’ from the Constitution itself,” and admits that “I am not claiming that the original meaning of this clause is identical to the meaning I contend is the prerequisite of constitutional legitimacy.” Barnett, Restoring the Lost Constitution, supra note 2, at 47.

252. Id. at 186–87.

253. Barnett, Reconceiving, supra note 75, at 13. In reaching this conclusion, Barnett joined ranks with other advocates of the fundamental unenumerated rights reading of the Ninth Amendment. E.g., LEVY, BILL OF RIGHTS, supra note 51, at 35 (even a government of “limited powers” might “abuse its discretion as to its choice of means under the necessary and proper clause,” as in authorizing the use of
And at that point, he observed that Madison, though a proponent of the Necessary and Proper Clause, “acknowledged that it was susceptible to abuse,” with the result that constitutional rights were needed “to constrain the means chosen by the general government.”

254. Indeed, as Barnett noted, Madison relied on the specific example that the Necessary and Proper Clause would enable Congress to authorize the use of search warrants to enforce its revenue collection laws, thereby creating the need for what became the Fourth Amendment. Madison said: “If there was reason for restraining State Governments from exercising this power [of authorizing the use of general search warrants], there is like reason for restraining the Federal Government.”

255. Even after discovering the Necessary and Proper Clause as a significant “limiting” provision that enabled courts to determine that Congress had “improperly” invaded the “rights retained by the people,” Barnett initially attempted to reconcile that view with his oft-repeated claim that the rights “retained by the people” were restricted to the “rights that the people had before forming a government.” The only laws sufficiently “improper” to run afoul of the Necessary and Proper Clause were those that intruded on “inalienable” natural rights, the Ninth Amendment rights “retained by the people.” The Fourth Amendment right, Barnett explained, was “a ‘positive’ constitutional right to be free from general [search] warrants.”

256. Madison’s speech general search warrants).

257. Barnett, Reconciling, supra note 75, at 13. Madison’s argument here, moreover, was consistent with Federalist recognition and acknowledgment that enumerated powers did not generate a comprehensive solution to the problem of securing rights. See supra notes 167–172 and accompanying texts. But see infra note 261 and accompanying text (Barnett recognizing judicial authority to find government actions and law “improper” and therefore unconstitutional, quite apart from whether the text prohibits them).

258. E.g., Lawson & Granger, Sweeping Clause, supra note 182; Barnett, The Intersection, supra note 2.


260. Barnett, Necessary and Proper, supra note 216, at 780. See McAfee, Federal System, supra note 71, at 91 n.270. In his presentation to Congress, Madison had been quite clear that the right to trial
defending the need for the Fourth Amendment, moreover, reflected his belief that "general warrants would have to be expressly prohibited to be improper."\textsuperscript{261}

Now, however, Barnett has concluded that, even if Congress believed general search warrants were "necessary," they would still be "improper" and therefore unconstitutional—with or without a Fourth Amendment.\textsuperscript{262} In the debate over ratification, defenders of the Constitution rejected the contention that the Necessary and Proper Clause suggested unlimited powers; they contended, instead, that the clause presented merely the "necessary and unavoidable implication from the very act of constituting a Federal Government."\textsuperscript{263} Even today, it is widely thought that these words stand as a free-standing font of plenary or virtually plenary legislative power, and that this reading of these words draws support from Marshall's landmark opinion in \textit{McCulloch v. Maryland}. But nothing could be further from the truth.\textsuperscript{264}

At the same time, there is not a hint or a suggestion in any of the ratification-era defenses of the clause that it would in fact serve an important function in restraining the exercise of federal power—partly for the purpose of securing unenumerated fundamental rights.\textsuperscript{265}

\hspace{1cm} by jury, for example, was only a "positive right." James Madison, Debates in the House of Representatives (June 8, 1789), \textit{in CREATING THE BILL OF RIGHTS}, \textit{supra} note 109, at 63, 67. Under his prior analysis, then, Barnett would have been at odds with Lawson & Granger, \textit{Sweeping Clause, supra} note 182, at 320–21 ("Congress, under the original Constitution, could not abolish jury trials in civil cases"). Yet Barnett's 1997 analysis would have comported with Madison's own characterization of civil juries as a positive right, as well as the ratification-era debate in which Federalist defenders of the Constitution sought to demonstrate that there was ample justification for including a right to trial by jury in criminal cases but omitting the same right as to civil juries. See McAfee, \textit{Federal System, supra} note 71, at 105–110.

\hspace{1cm} 261. Barnett, \textit{Necessary and Proper, supra} note 216, at 780. Barnett's initial approach also enabled him to insist that positive rights, such as the right to jury trials or to be free from general search warrants, were "actual limitations" on granted powers, in contrast to those "inserted merely for greater caution," a phrase that he says referred to the inherent rights that were secured whether "enumerated" or not. See \textit{Barnett, RESTORING THE LOST CONSTITUTION, supra} note 2, at 238 (natural rights included in a bill of rights are there "for greater caution," though they would be "retained" whether placed in the enumeration or not).

\hspace{1cm} 262. Barnett, \textit{RESTORING THE LOST CONSTITUTION, supra} note 2, at 187. For Barnett, that a law intrudes upon the rights "retained by the people"—even if there is not a textual equivalent of our Ninth Amendment, nor even texts purporting to "retain" some rights—means that government is obligated to justify the intrusive law by showing that it is both "necessary" and "proper."

\hspace{1cm} 263. \textit{The Federalist No. 33} (Alexander Hamilton), \textit{supra} note 20, at 204.

\hspace{1cm} 264. Amar, \textit{supra} note 132, at 7.

\hspace{1cm} 265. For defenses of the clause that do not suggest that it is a source of limits to power, see \textit{The Federalist No. 33} (Alexander Hamilton), \textit{supra} note 20, at 205–06 (clause was introduced "for greater caution, and to guard against all caviling refinements in those who might heretofore feel a disposition to curtail and evade the legitimate authorities of the Union"); \textit{The Federalist No. 44} (James Madison), \textit{supra} note 20, at 305 (clause was included to remove "a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union").
it was suggested that the clause was to serve an important restraining function, in the oral argument in *McCulloch v. Maryland*, it received a withering criticism from Justice Marshall. It is not a coincidence that, had a constitutionalist prior to the 1990s searched for the use of the words “necessary” and “proper” to describe analysis of constitutional freedom, she would have searched in vain. One of our leading authorities on the Bill of Rights, Professor Amar, almost echoed Justice Marshall’s reaction, concluding that

if the Necessary and Proper Clause had truly been designed to shrink the natural breadth of the previous enumerations, its Federalist friends would have drafted and explained it as an obvious shrinkage clause (because in order to win ratification of the Constitution, they needed to ease fears of states’ rightists). But they neither drafted it nor defended it as a shrinkage clause.

And, of course, if the Necessary and Proper Clause was drafted to secure fundamental rights, enumerated or not, “one would expect calls for a Bill of Rights to be met with the claim that the document already incorporated such protections.” Surely an argument for “limits” to power in favor of rights, built on a text, would have been preferred to what Professor Barnett calls the “rights-powers conception.” But such arguments were not made, and, instead, “proponents of the Constitution made the less reassuring argument that Congress had been given no power to undermine cherished individual freedoms, such as freedom of speech.”

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266. 17 U.S. (4 Wheat.) 316 (1819).

267. *Id.* at 419–20. Moreover, as the debate over the decision in *McCulloch* heated up, one of the strongest denials that the Necessary and Proper Clause was designed to impose substantial limits on federal authority was offered by none other than states’ rights advocate, Spencer Roane. Roane contended that the clause did not belong in Article I, Section 9, and that it would have been wrong to have placed [these terms] among the prohibitions, as they are not pretended to prohibit any thing to the general government: it is only contended that they create no enlargement of the powers previously given. In what place, therefore, could these words have been so properly inserted.


268. Amar, supra note 132, at 8.

269. J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 638. And when Madison offered his proposed amendments in the first Congress, he suggested that they would be fittingly included in Article I, Section 9, the section stating specific limits on congressional powers. McAfee, *Federal System*, supra note 71, at 74 n.217. It would be odd indeed for a provision found in Article I, Section 8, the section setting forth the powers of Congress, to be the basis for securing unenumerated rights.

There is a reason that, in explicating the phrase, Barnett mainly points to the work of others, and, despite devoting a law review article and a chapter in his book, does almost no heavy lifting in analyzing the text of the Necessary and Proper Clause or its intended meaning. The words "necessary and proper" are used in the attempt to fulfill Barnett's own theory of constitutional legitimacy. The historically intended meaning of the phrase does not have much to do with it. If the canon against redundancy, however, is properly read as an "anti-nullity" maxim, rather than as a rule against any sort of repetition, as suggested by Professor Amar, the clause can quite readily be understood as "a declaratory or clarifying provision designed to remove all doubts."

3. Securing Rights Before and After the Bill of Rights

Both groups, the Federalist proponents of the Constitution and the Antifederalist opponents, insisted that a right had to be secured by the written Constitution to be legally and constitutionally effective. Those who drafted and sought the ratification of the Constitution believed that rights could be "retained" either by (1) stating specific limitations on, or "exceptions" to, the powers granted by the Constitution, or by (2) an initial grant of only limited, and "enumerated," powers. This meant, in their minds, that the people could choose the appropriate powers to grant to government, as well the precise limits to impose on those powers, as part of their "inalienable" right collectively to decide on the form of their government, and to determine when it

271. E.g., Lawson & Granger, Sweeping Clause, supra note 182.

272. For Barnett's treatment of the Necessary and Proper Clause, see Barnett, Restoring the Lost Constitution, supra note 2, at 153–190; Randy E. Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183 (2003). The comment on the lack of heavy lifting reflects that Barnett's treatment adds little to that of Lawson & Granger, Sweeping Clause, supra note 182, and leaves almost completely unaddressed the host of objections to that treatment offered in a fairly elaborate critique. See McCaffee, Inherent Rights, supra note 10, at 83–102; McCaffee, Federal System, supra note 71, at 46–140.


274. Id. at 9.

275. See, e.g., McCaffee, Inherent Rights, supra note 10, at 134–43.

276. It was in recognition of these alternative methods of securing rights that the Virginia proposal from which Madison drafted the Ninth Amendment provided

[i]that those clauses which declare that Congress shall not exercise certain powers, be interpreted, in any manner whatsoever, to extend the powers of Congress; but that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

2 Schwartz, supra note 72, at 844. See supra note 146 and accompanying text (New York's equivalent proposal and its linkage to both the Ninth and Tenth Amendments).
needed to be “altered” or “abolished.”\(^{277}\) The rights thus “retained” or “reserved” were not those “discovered” or “invented” by an activist judiciary, but those reserved by the written Constitution itself: “The rights the people retained under a constitution, including the natural rights they retained, were the rights they reserved to themselves by means of the constitution.”\(^{278}\)

As we have seen, in the very remarks in which Wilson underscored the adequacy of the enumerated powers as the means of securing the natural rights, he distinguished the plenary powers held by state legislatures from the enumerated powers held by Congress under the proposed Constitution.\(^{279}\) Note also that when the Court embarked upon the period generally agreed to involve its most illegitimate decision-making, at least one prominent modern commentator has characterized the Court as engaged in “the incessant quest for the judicial holy grail,” the attempt to discover “a clause that lets us strike down any law we do not like.”\(^{280}\) When it did that, late in the nineteenth century, the Court began to refer to “implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.”\(^{281}\)

And by the end of the Reconstruction era, “the Court had begun to treat the states as though they too had only enumerated powers—to enact measures ‘fairly adapted’ to the protection of public safety, health, morals and order”\(^{282}\)—what traditionally were known as the police powers. So when the period of illegitimate activism did come, it came centrally by a mis-use and abuse of the “rights/powers conception” of rights. By then the handwriting was on the wall, and, despite the Court’s ability to examine laws with considerable deference for presumed

\(^{277}\) It was almost standard in early state constitutions’ Declarations of Rights to state that “the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.” PENN. CONST. of 1776, Declaration of Rights § 5, reprinted in 5 STATE CONSTITUTIONS, supra note 6, at 3081, 3083; VIRGINIA CONST. of 1776, Declaration of Rights § 3, reprinted in, 7 STATE CONSTITUTIONS, supra note 6, at 3813. See Mcafee, Inalienable Rights, supra note 18, at 780–83.

\(^{278}\) Philip A. Hamburger, Natural Rights and Positive Law: A Comment on Professor Mcafee’s Paper, 16 S. Ill. U. L.J. 307, 312 (1992). Accord Mcafee, Original Meaning, supra note 65, at 1247 (“If the ninth amendment played a meaningful role in ensuring that the national government was limited to the originally granted powers, Federalists and Antifederalists together would have felt quite comfortable in asserting it thereby protected retained rights.”). Modern Americans have difficulty accepting the historical reality that “the enumerated powers strategy” was “the framers’ principal method for protecting individual rights.” SMITH, supra note 27, at 45.

\(^{279}\) See supra note 64 and accompanying text.


\(^{281}\) Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874).

\(^{282}\) Currie, supra note 280, at 376–77.
legislative prerogatives, it still managed to articulate the view that if the facts showed that a particular law "has no real or substantial relation" to legitimate police power ends, "it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." But even if the substantive due process era was forthcoming, and the Court did not learn the lesson that "[t]hose who fail to take the tide at its flood commonly end up missing the boat," the history on balance does not suggest that a purpose of the Civil War amendments was to enable the Court to seek "the judicial holy grail." 

When John Bingham, the principle draftsman of the Fourteenth Amendment, argued for incorporation of the Bill of Rights, he described the "privileges and immunities of citizens of the United States" as "chiefly defined in the first eight amendments to the Constitution of the United States." Similarly, Senator Jacob Howard said the phrase included "the personal rights guaranteed and secured by the first eight amendments of the Constitution." Indeed, Professor Amar confirms that "both Bingham and Howard seemed to redefine 'the Bill of Rights' as encompassing only the first eight rather than ten amendments, presumably because they saw the Ninth and Tenth Amendments as federalism provisions." But their approach cannot be surprising. As Professor Levinson has observed, even radical abolitionist lawyers, whom one would expect to have "the greatest incentive to do so," did not rely on the Ninth Amendment as a restriction on the power to protect slavery.

During the original debate over ratification of the Constitution, Wilson had illustrated the critical difference that enumerated powers made with the example of freedom of the press. To Wilson it was clear that if Congress "had been granted a power to regulate literary publications," it would have been essential "to stipulate that the liberty

283. Mugler v. Kansas, 123 U.S. 623, 661 (1887). Though Professor Barnett begins as a critic of the "rights/powers conception" of constitutional rights—the notion that one "defines" the rights by determining whether government had acted within one of its grants of power—he winds up, as any good Lochnerian would, by "defining" the rights retained by the people by reference to whether government had acted in a "necessary and proper" manner to accomplish one of the morally legitimate "ends" of the police power.


289. See, e.g., Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 Chi.-Kent L. Rev. 131, 144 (1988).
of the press shall be preserved inviolate.” 290 Yet freedom of the press is among the quintessential examples of what was almost universally considered to be an “inalienable” natural right. But Wilson’s statement is hardly surprising, inasmuch as Antifederalist critics of the proposed Constitution, such as Judge Samuel Spencer of North Carolina, contended that there was a need for a bill of rights to secure “those unalienable rights which ought not to be given up.” 291 The clear implication, often enough stated expressly, was that the rights deemed “inalienable” in the Declaration of Independence, were those considered so fundamental that it would be a huge mistake if the sovereign people surrendered them to government. Even the strongest advocates of such rights, however, acknowledged the authority of the people to decide whether it was essential for a given right to be retained or not.

4. Retaining “Inherent” and “Inalienable” Rights

This is what explains the “inherent” or “inalienable” rights provisions of early American state constitutions being stated as “general statements of political principle not susceptible to judicial enforcement.” 292 As the leading modern commentator on state constitutional law has put it:

[T]he insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people’s representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power. 293

Considering that Madison was singularly responsible for drafting the federal Bill of Rights in the legally enforceable language of commands and prohibitions 294—as a means to bring more effective checks on government power—it should not be surprising that he would elect simultaneously to (1) reaffirm that government exists for the people and their benefit, including promoting the enjoyment of their rights, and to (2) state the principles associated with popular sovereignty, including the people’s right to “alter” their form of government and to take steps

290. James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 168. See also notes 53–57 and accompanying text.
291. Samuel Spencer, North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT’S DEBATES, supra note 100, at 106, 137 (emphasis added).
292. TARK, supra note 18, at 76.
293. Id. at 78. For a description of the judicial treatment of inalienable rights clauses of state constitutions, see Frost et al., supra note 3, at 360–62.
294. See supra notes 92–105 and accompanying text.
designed to ensure that the purposes of government are fulfilled, to be added to the preamble in language that did not lend itself to legal enforceability—of what would not be an individual right in the classic sense, in any event.\textsuperscript{295}

Consider this noteworthy effort by Madison to strike the balance between reminding the people of important first principles, on the one hand, while reserving the status of operative constitutional provisions to the enforceable limitations on power found in the Constitution’s Bill of Rights, on the other. By contrast, compare it to Professor Barnett’s reliance, previously noted,\textsuperscript{296} on the use of the word “retained” by James Madison and others in referring to natural and inalienable rights. Barnett and others contend that Madison used “retained” as a “term of art” drawn from social contract political theory,\textsuperscript{297} thereby asserting the enforceability of natural rights on grounds they are “retained” by the people. On this view, Ninth Amendment rights are those the people “retained” when they left the state of nature and entered in to the social contract.\textsuperscript{298}

In response to Madison’s June 8, 1789, speech proposing the Bill of Rights, the House appointed a select committee to draft the amendments to make up the Bill of Rights. A member of that committee, Roger

\textsuperscript{295} See James Madison, Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech, \textit{in} The Rights Retained by the People, supra note 149, at 51, 54. Madison’s first proposal:

That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people. That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

\textit{Id.}

\textsuperscript{296} See notes 213–15 and accompanying text. Rosen, \textit{supra} note 214, at 1075 (the term “retained” refers to “natural rights ‘retained’ during the transition from the state of nature to civil society”).

\textsuperscript{297} See James Madison, Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech, \textit{in} 1 The Rights Retained by the People, \textit{supra} note 149, at 51, 57 (bills of rights often “specify those rights which are retained when particular powers are given up to be exercised by the Legislature,” and in “other instances” they “specify positive rights, which may seem to result from the nature of the compact”) (emphasis added); Madison’s Notes for Amendments Speech, 1789, \textit{in} 1 The Rights Retained by the People, \textit{supra} note 149, at 64 (listing “Contents of Bill of Rights,” and including, third, “natural rights retained as speech [illegible],” and, fourth, “positive rights resulting. as trial by jury”). Accord Levy, Bill of Rights, \textit{supra} note 51, at 251–57. For a relatively complete analysis of the argument based on Madison’s use of the word “retained” in the Ninth Amendment, as a basis for concluding the he would support an unenumerated fundamental rights interpretation, see McAfee, Social Contract Theory, \textit{supra} note 215, at 296–305.

\textsuperscript{298} \textit{E.g.}, Barnett, Restoring the Lost Constitution, \textit{supra} note 2, at 54–55.
Sherman, held among his papers a potential Bill of Rights, and his draft was found in the 1980s among Madison’s papers. Sherman’s second proposed amendment provides that “[t]he people have certain natural rights which are retained by them when they enter into Society.”

According to Barnett, “Sherman’s proposal demonstrates that the term ‘retained’ was used to refer to natural rights by a member of the same committee that drafted the Ninth Amendment.” Sherman was initially opposed to the adoption of a Bill of Rights. As Barnett fully acknowledges, however, Sherman’s proposed amendment tracks very closely with proposals by the Virginia and North Carolina ratifying conventions, and those proposals were rather obviously inspired by

299. Id. 55. As Professor Lash observes, however, there is some question whether this draft reflects the views of Sherman himself or is simply his report as secretary of the congressional committee. Lash, supra note 74, at 363 n.141 (citing Christopher Collier, The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights, 76 CONN. B.J. 1, 63 (2002)).

300. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 55 (quoting Roger Sherman’s Draft of the Bill of Rights, in 1 THE RIGHTS RETAINED BY THE PEOPLE, supra note 149, at 351). The complete proposal follows:

The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and pursuing happiness & Safety; of Speaking, writing, and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.

Id.

301. Id. at 247. In turn, Barnett insists that “[b]etter historical evidence of original meaning is hard to come by,” and that only the assumption “that Madison used the term in some different and idiosyncratic manner” could prompt a different conclusion. Id. Given these assertions, though, it is interesting that, despite the conclusion that “Sherman’s draft is significant,” Professor Barnett had just completed insisting that he had focused on Sherman’s draft, “rather than on the North Carolina and Virginia proposals,” simply to deprive “Ninth Amendment skeptics of the argument that ‘retained’ was a term of art that referred only to state-law rights (Russel Caplan’s thesis) or to those which were reserved residually by the enumeration (McAffee’s thesis), and not to natural rights.” Id. One wonders, though, if the unique focus on Sherman’s draft was not, instead, a rather striking reflection on the fact that the ratifying convention proposals, as well as section 1 of the Virginia Bill of Rights, simply do not use the word “retained.” Particularly in light of Sherman’s use of the word “retained” in both his “natural rights” proposal, his second proposed amendment, and the proposal that Barnett acknowledges to track closely with the Tenth Amendment, his eleventh proposed amendment, it becomes especially difficult to conclude that Sherman used that word as a “term of art” in social contract political theory, referring only to natural rights.

302. LEVY, BILL OF RIGHTS, supra note 51, at 103.

303. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 246. The North Carolina proposal read: “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” 1 THE RIGHTS RETAINED BY THE PEOPLE, supra note 149, at 364. Virginia’s proposal read: “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty . . . and pursuing and obtaining happiness and safety.” Id. at 380.
section 1 of the Virginia Constitution's bill of rights. The question raised is this: if Sherman's proposal was rather clearly incited by Section 1 of the Virginia Bill of Rights, and the amendments proposed by several state ratifying conventions, how likely is it that Madison and others would perceive it as having a different purpose from Madison's proposed addition to the preamble setting forth what had been described in Section 1 as "inherent" rights? It is striking, and very likely significant, that Madison summarized the gist of what had been referred to as "inherent" rights without referring to the specific interests (life, liberty, property, happiness and safety) with that term, or any other underscoring that they are natural rights.

Although Barnett seeks to make much of Sherman's use of the word "retained," it is overwhelmingly clear that the terms "retained" and "reserved" permeated the debate over the ratification of the Constitution, and the Ninth and Tenth Amendments both reflect that the people, as the popular sovereign, granted powers and retained, or reserved, all not granted. Even when contestants used the word "retained" with reference to "rights," such as the Antifederalist writer, "Old Whig," they frequently argued that "we ought carefully to guard ourselves by a Bill of Rights, against the invasion of those liberties which it is essential

304. Section 1 reads:

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

VA. CONST. of 1776, Bill of Rights § 1, reprinted in 7 STATE CONSTITUTIONS, supra note 6, at 3813.

305. The importance of Madison's proposal for an equivalent of Virginia's "inherent" rights provision, to be included in a prefix to the Constitution, has been emphasized before. See McAfee, Inalienable Rights, supra note 18, at 769–71; McAfee, Social Contract Theory, supra note 215, at 300–05. For useful commentary, see HERBERT J. STORING, The Constitution and the Bill of Rights, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 15, 32–33 n.50 (Robert A. Goldwin & William A. Schabman eds., 1985) (contending that Madison's proposal shifted the Virginia Bill of Rights "in the direction of supporting government," the proposal uses society as the starting point and converts inherent rights to the idea of government being for the "benefit of the people").

306. Article II of the Articles of Confederation expressly provided that each state "retains . . . every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States." Act of Confederation of the United States of America (Nov. 15, 1777), reprinted in 1 RATIFICATION OF THE CONSTITUTION, supra note 10, at 86 (emphasis added). In the very speech Professor Barnett relies on for the view that the use of "retained" supplies a unique reference to natural rights, Madison explained the initial omission of a bill of rights from the Constitution by relying on the enumerated powers scheme. According to Madison, in view of the Constitution's limited grant of powers "it follows, that all that are not granted by the Constitution are retained; that the Constitution is a bill of powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government." 1 ANNALS OF CONG. 438 (Joseph Gales ed., 1789), quoted in McAfee, Social Contract Theory, supra note 215, at 268 n.4, reprinted in 1 THE RIGHTS RETAINED BY THE PEOPLE, supra note 149, at 59 (emphasis added).
As this statement demonstrates, the word “retained” was not used uniquely only to refer to rights automatically “retained” as an implication of one’s joining the social contract. For one thing, it was widely understood that the proposed Constitution constituted an “altering” of the people’s form of government and therefore did not involve the people leaving a state of nature to join the social contract.

It is not a coincidence that Article II of the Articles of Confederation, the provision widely identified as the one that served as the forerunner to the Tenth Amendment, was in some respects more closely tied to the language of the Ninth Amendment. It provided that each state “retains... every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States.” At the North Carolina Ratifying Convention, Archibald Maclaine, a Federalist proponent of the Constitution, analogized to Article II when he contended that the people “retain all of those rights which we have not given away to the general government.” Yet it is universally acknowledged that Article II generated no limitations on the powers actually granted by the Articles of Confederation, whether to secure rights or for some other purpose. And Article II was written in favor

307. Essays of an Old Whig, in 3 THE COMPLETE ANTI-FEDERALIST, supra note 95, at 17, 34 (emphasis added). The same author clarified that “[o]ne of these rights are said to be unalienable, such as the rights of conscience: yet even these have been often invaded, where they have not been carefully secured by express and solemn bills and declarations in their favor.” Id. For an especially insightful treatment of the Antifederalist position, as well as the transition that occurred during the debate over a Bill of Rights, see Lienesch, supra note 63, at 245, 252–71.

308. It is also not a coincidence that in the first debate over the meaning of the proposed eleventh amendment (our Ninth), Edmund Randolph stated a preference for a provision patterned after the “1st & 17th amendments proposed by Virginia,”—the provisions that tracked the Ninth and Tenth Amendments. 2 SCHWARTZ, supra note 72, at 1188; see supra notes 200–211 and accompanying text. The first of those amendments, tracking the Articles of Confederation’s Article II, used the word “retained.”

309. Act of Confederation of the United States of America (Nov. 15, 1777), reprinted in 1 RATIFICATION OF THE CONSTITUTION, supra note 10, at 79, 86 (emphasis added). That the Ninth Amendment “speaks of the people’s retained rights does not establish the character (collective or individual) of the rights so retained. Nor does the fact that many Founders believed in natural rights conflict with a federalist reading of the rights retained under the Ninth.” Lash, supra note 74, at 364.

310. North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT’S DEBATES, supra note 100, at 106, 141 (emphasis added). The North Carolina Ratifying Convention proposed a natural rights provision similar to the one in Sherman’s papers as well as a proposed amendment assuring that “each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States.” Amendment Proposed by the North Carolina Convention (Aug. 1, 1788), in 1 THE RIGHTS RETAINED BY THE PEOPLE, supra note 149, at 364, 366–67 (emphasis added), quoted in Lash, supra note 74, at 363.

311. Similarly, President Washington explained in a letter that there was no need for a bill of rights because the people “retained every thing which they did not in express terms give up.” Letter from George Washington to Lafayette, in 29 THE WRITINGS OF GEORGE WASHINGTON FROM THE
of the states that made up the Articles’ union—the functional equivalent of “the people” who ordained and established the Constitution.312

The founding generation would have agreed, almost universally, that the reference in the Virginia Declaration of Rights to “inalienable” rights meant simply that these were rights that “ought not to be given up.”313 Yet Patrick Henry spoke for all of the Constitution’s Antifederalist

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312. In a couple of prior articles, I suggested not only that Sherman’s natural rights proposal was much closer in substance to Madison’s proposed addition to the preamble than to the text of the Ninth Amendment, but also that Sherman’s eleventh proposed amendment was actually quite reminiscent of New York’s proposed amendment that combined together the thrust of what became the Ninth and Tenth Amendments. See McAfee, Social Contract Theory, supra note 215, at 301–02; McAfee, Original Meaning, supra note 65, at 1303 n.333. Professor Barnett assures us that he is utterly mystified how I read into Sherman’s Tenth Amendment equivalent anything related to rights. Barnett, RESTORING THE LOST CONSTITUTION, supra note 2, at 248.

Of course, Sherman’s proposal forbids construing some provision “to imply the contrary,” of retaining state powers—but Barnett is not certain what provision Sherman is referring to. In addition to obviously omitted words, there is also a reference to “instances here in enumerated by way of caution.” 1 The Rights Retained by the People, supra note 149, at 351, 352. On at least two different occasions, Professor Barnett has assured us that a limiting provision, to protect a right, but inserted “for greater caution,” means that a particular right would be “retained,” and presumably protected and enforced, even if it had not been enumerated. See id. at 238 (natural rights included in a bill of rights are there “for greater caution,” though they would be “retained” whether placed in the enumeration or not); Barnett, Necessary and Proper, supra note 216, at 780 n.127. Compare Lash, supra note 74, at 365–67; Yoo, supra note 159, at 993. Lash concludes that Sherman’s draft “supports Madison’s argument that securing rights amounted to the same thing as limiting the constructive enlargement of power.” Lash, supra note 74, at 367 n.168.

313. In addition to the statement by Samuel Spencer, quoted at text accompanying note 291 above, see also Plain Truth: Reply to an Officer of the Late Continental Army (Nov. 10, 1787), in 2 Ratification of the Constitution, supra note 10, at 216, 219 (“Congress can only have the defined powers given, it was needless to say anything about liberty of the press, liberty of conscience, or any other liberty that a freeman ought never to be deprived of.”) (emphasis added); Patrick Henry, Virginia Ratifying Convention (June 14, 1788), in 3 Elliot’s Debates, supra note 100, at 410, 445 (“If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights.”) (emphasis added); Essays by the Impartial Examiner (Feb. 20, 1788), in 5 The Complete Anti-Federalist, supra note 95, at 172, 177 (legal rights are claims on others, without which public power can never be restrained; hence “results the necessity of an express stipulation for all such rights as are intended to be exempted from the civil authority”). See Essays of an Old Whig, supra note 307. It was precisely because they perceived the idea of enumerated powers and retained rights—the rights “retained” by the enumerated powers scheme itself—as wholly inadequate, that Antifederalist opponents of the Constitution summed up their opposition to this system by characterizing this purely residual protection as “the only security that we have to preserve our natural rights.” A Democratic Federalist (Oct. 17, 1787), in 2 Ratification of the Constitution, supra note 10, at 193. This meant, as far as they were concerned, that “[f]there is no check but the people.” Id. at 382, 386 (John Smilie, Pennsylvania Ratifying Convention (Nov. 28, 1787)).
opponents when he insisted that ratifying the Constitution without amendment would be “an abdication ‘without check, limitation, or control.’” As Professor Kay has observed, the historical evidence demonstrates that the inalienable natural rights “were profoundly important to the founders but that they agreed that the critical issue on which their protection turned was the character of the new national government.” After all, “[t]here would have been little point in such a debate, nor in the particular resolution chosen, had those rights been understood to be directly enforceable by the courts.”

5. Retaining Rights Through Enumerated Powers

During the debate over ratification, the Federalist proponents of the Constitution justified their omission of a bill of rights with unusual emphasis on separating the proposed federal Constitution from the constitutions establishing and regulating the governments of the states. They contended that the Constitution created a national legislature, Congress, with “enumerated” powers designed to accomplish uniquely national goals. The states, moreover, need not fear the national government, they believed, because “distinction between their jurisdictions will be [s]o obvious, that there will be no danger of interference.” By contrast, given that states were governments of

314. Lienesch, supra note 63, at 245, 267.
315. Kay, supra note 47, at 431.
316. Id. This is not a matter of thinking that the founders “had lost their Lockean and revolutionary ardor for natural rights in favor of a more conservative Blackstonian positivism that favored legislative supremacy.” BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 56 n.9. (Indeed, this is a view I have never seen articulated, let alone documented or defended. Even those inclined toward favoring legislative supremacy did not repudiate their commitment to natural rights; rather, they believed that the people themselves could become the champions of individual rights as well as effective advocates of “popular control” of government. Though Barnett is a self-professed Lockeian, it is abundantly clear that virtually all the eighteenth century constitutions that took their inspiration directly from Locke—including basically all the state constitutions adopted in the 1770s and 1780s—do not meet Barnett’s requirements for legitimacy.) The crucial question for the founders was how to make effective the commitment to the moral claims of individuals in a constitutional order; but this was a question that did not have clear and obvious answers.
317. Roger Sherman (Dec. 8, 1787), in 14 RATIFICATION OF THE CONSTITUTION, supra note 10, at 386, 387. Among the statements in the ratification debates illustrating the Federalist emphasis on distinction between a national government with a legislature of enumerated powers and one of general legislative powers, see 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 382, 388 (as to “a government possessed of enumerated powers,” a bill of rights “would be not only unnecessary, but preposterous and dangerous”) (emphasis added); Charles Pinckney, South Carolina Ratifying Convention (Jan. 18, 1788), in 4 ELLIOT’S DEBATES, supra note 100, at 300, 316 (Jan. 18, 1788) (a bill of rights was omitted because “it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated”) (emphasis added); Edmund Randolph, Virginia Ratifying Convention (June 15, 1788), in 3 ELLIOT’S DEBATES, supra note 100, at 452, 467 (distinguishing a “compact” in which the legislature is granted “certain delineated powers”)...
"general" legislative powers, state legislative power would only be restricted by specific limiting provisions, such as those typically found in the state constitutions' declarations of rights.\(^{318}\)

The Constitution's opponents generally conceded that the granting of limited powers to the federal government might well be a device used to secure important individual rights,\(^{319}\) but contended simultaneously that (1) the proposed Constitution's actual grant of powers was insufficiently defined to supply a "fence" against unjustly intrusive exercises of power and therefore would permit the national government to threaten basic rights\(^ {320}\); (2) the proposed Constitution did not supply the equivalent of

from an "ordinary legislature" with "no limitation to their powers;" acknowledging that a bill of rights might be necessary in the case of the ordinary legislature, but insisting that the "best security" in a compact "is the express enumeration of its powers") (emphasis added); James Iredell, North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, supra note 100, at 106, 149 (concluding that as to "a general legislature, with undefined powers," a bill of rights would be not only proper, but necessary;" such provisions could operate "as an exception to the legislative authority in such particulars;" but as to government with "expressly defined" powers, such a bill would be "not only unnecessary, but would be absurd and dangerous") (emphasis added). Accord James Madison, 1 ANNALS OF CONG., col. 439, reprinted as Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech, in 1 THE RIGHTS RETAINED BY THE PEOPLE, supra note 149, at 51, 60 (noting that it had been objected in "enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in the enumeration; and it might follow, by implication, that those rights which were not placed in the enumeration, were intended to be assigned in to the hands of the General Government, and were consequently insecure.") (emphasis added).

318. See supra notes 47–50 and accompanying texts.

319. If not, they would have directly contradicted prominent framers, including James Wilson, who stated that a "bill of rights annexed to a constitution is an enumeration of the powers reserved." James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 387, 388; cf. Barnett, Restoring the Lost Constitution, supra note 2, at 56 (quoting Wilson). But cf. Barnett, Reconciling, supra note 75, at 6 (criticizing the Supreme Court's reference to rights reserved by the Ninth and Tenth Amendments on the ground that "[t]he Tenth Amendment does not speak of rights, of course, but of reserved 'powers'.") As with some related issues, however, it is not at all clear that Barnett would make the same argument today. Compare, Barnett, Necessary and Proper, supra note 216, at 776–77, 786 n.149 (defending unenumerated rights by reliance on limiting constructions of federal power that are lent support by both the Ninth and Tenth Amendments).

Indeed, a number of the proposed Constitution's critics took the position that a reservation of all the powers not granted by the Constitution would be an adequate alternative to a bill of rights. McCaffee, INHERENT RIGHTS, supra note 10, at 84 & n.12; 87–88; 128–29, 132–34; McCaffee, Federal System, supra note 71, at 78–81. That such arguments could be made, based on a straightforward reading of the grants of power to Congress, reflects that such an Antifederalist position was not rooted in reading federal powers through the lens of "inherent" rights assumptions.

320. "The extent of the federal government's power was inferred not only from the broad language of the specific grants of power and the potentially far-reaching necessary and proper clause, but also from the lack of any limiting language as to the supremacy of national treaties." McCaffee, Original Meaning, supra note 65, at 1229 n.51 (citing Letters from a Federal Farmer (Oct. 12, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, supra note 95, at 245, 246–47).

Compare James Iredell, North Carolina Ratifying Convention (July 29, 1788), in 4 ELLIOT'S DEBATES, supra note 100, at 170, 171–72 (lack of need for a bill of rights is illustrated by referring to the grants of power themselves—contending that they include "such a definition of authority as would
the "retained" rights and powers guarantee found in Article II of the Articles of Confederation, the provision that stated that each state "retains... every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States;"

321 (3) the proposed Constitution included unique grants of power to the national government, particularly as exemplified in the Necessary and Proper Clause, that, in light of the Supremacy Clause in particular, threatened the people's rights.

It was precisely the risk that a bill of rights could generate a misconstruction of the Constitution as creating a national legislative body of "general" powers, subject only to the specific limitations imposed by the bill of rights, that prompted some of the Constitution's Federalist proponents to contend that a Bill of Rights would be dangerous:

leave no doubt," such that "any person inspecting [the Constitution] may see if the power claimed be enumerated"), with Samuel Spencer, North Carolina Ratifying Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, supra note 100, at 137 (contending that there was a need for "express terms and bounds" to assure that "government [stays] within its proper boundaries"); Samuel Spencer, North Carolina Ratifying Convention (July 29, 1788), in 4 ELLIOT'S DEBATES, supra note 100, at 168 (contending that there is "no express negative—no fence against [the rights] being trampled upon"; if "a boundary were set up, when the boundary is passed, the people would take notice of it immediately"). As demonstrated elsewhere, the persistent Federalist arguments demanding to be shown how the proposed Constitution empowered the invasion of basic rights, such as freedom of religion or a free press, become implausible and incoherent if one begins with an "inherent rights" assumption as the key to understanding the grants of federal powers. See McAfee, Federal System, supra note 71, at 81-89; Lienesch, Reinterpreting Rights, in GOVERNMENT PROSCRIBED, supra note 19, at 268-69.

321. The text of Article II is found at 1 RATIFICATION OF THE CONSTITUTION, supra note 10, at 86. In December of 1787, Jefferson objected to Wilson’s reliance on the slogan that all was reserved that was not granted, partly based on "strong inferences from the body of the instrument" [the Necessary and Proper Clause?] and partly on "the omission of the clause of our present confederation which had declared that in express terms." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 SCHWARTZ, supra note 72, at 606-07. The significance of the omission of Article II, in the minds of Antifederalists, is documented at McAfee, INHERENT RIGHTS, supra note 10, at 87-88, 92-95, 99-100; McAfee, Original Meaning, supra note 65, at 1241-45; Russell Caplan, The History and Meaning of the Ninth Amendment, 69 VA. L. REV. 223, 235-36, 246-47 (1983).

322. See McAfee, Federal System, supra note 71, at 46-47.

323. A theme that "linked the guarantee of personal liberty to the preservation of state authority was the claim that the supremacy clause (and the Constitution generally) empowered Congress to enact laws that would override all state law, including the basic rights of the people as embodied in the state constitutions' declarations of rights." McAfee, Original Meaning, supra note 65, at 1242 n.111. The Federalist assumption that Antifederalists simply misperceived the Constitution is illustrated in James Wilson's characterization of a bill of rights as "an enumeration of the powers reserved." James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 387, 388. Wilson was beginning with the assumption that, inasmuch as state governments held general legislative powers, it was only through a bill of rights that you could enumerate "the powers reserved." Id. The federal Constitution, by contrast, need not "enumerate" the powers reserved since it enumerated the powers granted.
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 [proposed] 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.\textsuperscript{324}

The real purpose of the Ninth Amendment was to prevent this feared illegitimate inference and to clarify that the Constitution secured rights both by stating specific limits on, or “exceptions” to, the exercise of granted powers, as well as by declining to grant some powers to the national government and legislature.\textsuperscript{325}

\textsuperscript{324} James Iredell, North Carolina Ratifying Convention (July 28, 1788), \textit{in 4 Elliot’s Debates}, supra note 100, at 149. \textit{Compare} the several quotations included, supra note 313. The pervasive Federalist reliance on the nature of state legislatures, and the central role of this argument to understanding the original meaning of the Ninth Amendment, is set forth in McAfee, \textit{Social Contract Theory}, supra note 215, at 285–89.

\textsuperscript{325} The significance in particular of Iredell’s statement in North Carolina has been fully articulated previously:

If the Federalists feared that the decision to enumerate rights would lead to the loss of unwritten affirmative limitations on governmental powers rather than the loss of the system of enumerated powers and reserved rights, the “danger” argument would have been cast as a general argument against all bills of rights and would have applied equally to state constitutions that granted legislatures general powers and the proposed federal Constitution with its carefully limited grants of power to Congress. The fear of an unintended positivist inference against implied rights logically would apply to the attempt to enumerate rights in any constitution. But Iredell’s statement is unequivocally to the contrary, stating that a bill of rights is both “necessary” and “proper” as to a government of general powers, but “unnecessary” and “dangerous” where a government is granted “powers of a particular nature.” Iredell’s endorsement of the propriety of bills of rights in that states suggests that his fear is not the loss of implied affirmative rights. Rather, if the danger is only present under the federal scheme, it can only be because Iredell fears the evisceration of the residual rights secured by the limited grants of power rather than the loss of implied affirmative limitations.

McAfee, \textit{Original Meaning}, supra note 65, at 1254. Compare McAfee, \textit{Inalienable Rights}, supra note 18, at 771–83 (confronting history showing that Ninth Amendment was “unique” and did not track analogous provisions in state constitutions, and analyzing the historical significance of the adoption of similar provisions in nineteenth century state constitutions).
III. PURSUING THE PUBLIC WELFARE THROUGH THE CONSENT OF THE GOVERNED: POPULAR SOVEREIGNTY, GOOD GOVERNMENT, AND NATURAL RIGHTS

[The] philosophy of the Constitution upholds both "personal liberty" and "political freedom." In fact, its very aspiration and genius is to repudiate the dichotomy and even the tension as much as possible in order that the virtues of each might be sustained. ... [I]n late eighteenth-century Anglo-America the personal liberty ideal was the fresher and more explicit one. As articulated by Locke, "the English Cato," James Burgh, Samuel Adams, Thomas Paine, and a host of other "Radical Whig" writers on both sides of the Atlantic, the exaltation of personal liberties was a new and exciting political goal. As such it is a crucial, indispensable part of the philosophy of the Constitution, and particularly of the Bill of Rights.

... But the civic republican tradition that emphasized "political freedom" still had a powerful hold on the minds of Madison and his colleagues.... [A]s John Adams put it in 1776, "a positive passion for the public good... established in the Minds of the People." Without this, Adams declared, "there can be no Republican Government, nor any real Liberty." The focus was entirely on the "political freedom" to take part in a thoughtful and public-spirited way in the affairs of one's political community. Although this "civic republican" outlook would be increasingly overshadowed by the "modern" liberalism of Locke, Adam Smith, and J.S. Mill, in 1787–1791 it was still prevalent enough to make political freedom in the classical sense a crucial objective in the founding documents.326

We have already noted that Professor Barnett fully accepts the substantive personal liberty rights of Lockean political philosophy. The "lost" Constitution that he would "restore" thus consists of the full-blown Lockean natural and inalienable rights scheme—one that includes a host of unenumerated fundamental rights. As enthusiastically as he endorses a Lockean natural rights theory, however, Barnett utterly rejects the idea that the legitimacy of government is related to the "consent of the governed."327 Indeed, it is precisely because of his arguments that consent is simply not a means of promoting or assuring constitutional legitimacy that Professor Barnett devotes an entire chapter


327. See supra notes 13 and 36 for documentation of the point. Barnett supplies careful and thoughtful analysis that seeks to demonstrate that consent cannot contribute to political legitimacy. But see infra note 395 (noting the tension between all this analysis and Barnett's apparent acceptance of the collective right recognized in § 3 of the Virginia Bill of Rights).
to showing how to obtain constitutional legitimacy without consent—by protecting unenumerated fundamental rights. 328 An important question raised by these arguments is whether one can really understand, let alone be committed to, American constitutionalism without embracing the founding generation’s commitment to self-government and popular sovereignty as central parts of the constitutional experiment.329

A. Self-Government and The Political System’s Constitutional Legitimacy

More complex, and more difficult to translate into the ethos and language of our day, is the equally important idea implanted in the Constitution of ‘positive liberty,’ or the liberty of the citizens of a self-governing society to participate and act for the public good and to use their government to seek, in Aristotle's words, ‘not merely life alone, but the good life.’ Sustained in the civic republican tradition revived in Renaissance Italy and articulated vicariously by neo-classical English theorists, this positive idea of freedom remained at hand when the American framers had to build, rather than pull down, government. 330

The social connections among the people united by a common mission add a positive cast and a communal purpose to a compact that for Hobbes was motivated primarily by fear and for Locke was a product of individual calculation. Still, even for Publius, the positive connections represent only half of the bond that cements the compact; fear and calculation are also involved.331

The popular right to “consent” to the enactment of laws by which the people would be governed became a central element in colonial arguments against all forms of legislation based on theories of virtual

328. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 32–52 (Chapter entitled, Constitutional Legitimacy Without Consent: Protecting the Rights Retained by the People).

329. We have noted Professor Barnett's rejection of the idea that the legitimacy of government stems from the consent of the governed—what is essential, according to Barnett, is a process of judicial review to determine if particular laws are sufficiently “necessary and proper” to generate at least a prima facie moral duty of obedience. See BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 12–31, 44–52. If popular sovereignty is a fiction that does nothing to contribute to governmental legitimacy, however, Barnett should explain why he considers among the unenumerated rights "retained by the people" the right recognized in § 3 of the 1776 Virginia Bill of Rights—the collective right of the people to alter the form of their government to promote the public weal. See 7 STATE CONSTITUTIONS, supra note 6, at 3812, 3813. For Barnett's apparent endorsement of the recognition of the "right" to alter or abolish a form of government, see BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 257–58. Barnett concludes that "[n]o originalist of any stripe should accept less than the protection of all these liberties," including the above right. Id. at 258.

330. KETCHAM, supra note 326, at 40.

331. POTTER, supra note 37, at 35.
representation. Whereas the people’s sovereignty under the political philosophy of Locke only occurred in “those climactic moments when government was overthrown by the people in a last final effort to defend their rights,” increasingly Americans were thinking that “consent was a continuous, everyday process” rather than merely “an ultimate check on government.” Representation was increasingly seen as “a substitute for legislation by direct action of the people.” By the year 1776, Americans identified government by consent with meaningful government by representation. So when Jefferson’s Declaration of Independence invoked the consent of the governed, Americans would have identified with the cause of republican government far more than with the idea the every member of society must assent to every particular law to be enacted, or even to the form of government that they would live under.

While the founding generation became increasingly demanding that government act consistently with the liberal rights of individuals, it is also true that

[the six substantial phrases in the preamble—“form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of liberty”—reveal both a sense of public good aspired to and the dangers to be avoided.

In the Federalist Paper’s classic defense of the Constitution during the debate over its ratification, Madison paraphrased the Declaration of Independence, and then asserted that “forms ought to give way to

332. BAILYN, IDEOLOGICAL ORIGINS, supra note 4, at 161–75. The American colonists held an “obsession with the principle of consent.” ROSSITER, supra note 47, at 407.
333. BAILYN, IDEOLOGICAL ORIGINS, supra note 4, at 173.
334. Id.
335. Id. at 174 (quoting, Wilson on Blackstone, in ANDREW C. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 83–84 (1932)).
336. Little wonder that the modern historian, Gordon Wood, would conclude that the idea of popular sovereignty “was at the heart of the Anglo-American argument that led to the Revolution.” WOOD, supra note 14, at 345. Underscoring that the doctrine of popular sovereignty embodied a collective right of the people as a whole, Professor Griffin observes that “[w]hatever one thinks of this theory of legitimacy by individual consent, it clearly has nothing to do with the normative reasons why the Constitution was accepted as legitimate in the eighteenth century.” Steven M. Griffin, Barnett and the Constitution We Have Lost, 42 SAN DIEGO L. REV. 283, 288 (2005).
337. Thus, when Madison recommended to Jefferson the scholars that would most aid the political education of students at the University of Virginia, he emphasized the works of John Locke and Algernon Sidney, on the ground that their writings were “admirably calculated to impress on young minds the right of Nations to establish their own Governments.” GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING 109 (1999) (quoting Letter from James Madison to Thomas Jefferson (Feb. 8, 1825)).
338. KETCHAM, supra note 326, at 53.
substance,” inasmuch as to over-emphasize the particular form of government is to “render nominal or nugatory” the “transcendent and precious right of the people to ‘abolish or alter their governments as to them seem most likely to effect their safety and happiness.”

Before the Pennsylvania Ratifying Convention, Wilson underscored the same principle:

[T]he supreme power of government was the inalienable and inherent right of the people, and the system before us opens with a practical declaration of that principle. Here, sir it is expressly announced, “We the people of the United States do ordain, constitute and establish,” and those who ordain and establish may certainly repeal or annul the work of government, which, in the hands of the people, is like clay in the hands of the potter and may be molded into any shape they please.

Section three of the 1776 Virginia Bill of Rights referred to the right to “alter or abolish” government as an “indubitable, inalienable, and indefeasible” right, and the collective right of popular sovereignty was the foundation for defending the people’s right to establish a new Constitution in 1787. Considering that each individual’s natural rights reflect that all “participate in one common nature,” it follows that “[n]o reason can be assigned why one man should exercise any power, or pre-eminence over his fellow creatures more than another; unless they have voluntarily vested him with it.” In the minds of the authors of The Federalist, to deny the rights given by nature—including

339. THE FEDERALIST NO. 40 (James Madison), supra note 20, at 265. As Professor Barnett freely acknowledges, President Washington stated that “[t]he basis of our political system is the right of the people to make and to alter their constitutions of government,” something which “presupposes the duty of every individual to obey the established government.” BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 13 (emphasis added) (citing George Washington, Farewell Address, in DOCUMENTS IN AMERICAN HISTORY 172 (Henry Steele Commager ed., 6th ed. 1958).


341. VA. CONST. of 1776, Bill of Rights § 3, in 7 STATE CONSTITUTIONS, supra note 6, at 3813. To the extent that the form of government created by a constitution is found by a “majority of the community” not to secure the “common benefit, protection, and security of the people,” they can change it “in such manner as shall be judged most conducive to the public weal.”


344. Id.
the right of popular sovereignty—"will not be less absurd, than to deny the plainest axioms."345 It would be the equivalent of denying manifest truth,346 "an echo of Locke's notion of self-evident or intuitive truth," reflecting the "rationalism that still remained in Locke's generally empiricistic philosophy."347

In the minds of proponents of ratification of the proposed Constitution, it was critical to understand the relationship between the Constitution and "We, the People of the United States," who ordained it.348 The power to reject—and to replace—the Articles of Confederation was implicit in the people's sovereignty understood in the classic sense: "In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal and which is therefore called absolute, supreme, and uncontrollable."349 One implication is that the people "may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government."350 The Federalists thus appealed not only to the authority of the people to ordain and establish their Constitution—an authority recognized as much by Locke as by the Constitution's framers—but equally their authority to change it. James Iredell, who eventually would sit on the Supreme Court, contended that "[t]hose in power are [the people's] servants and agents; and the people, without their consent, may new-model their government whenever they think proper."351

345. Id. at 88–89.
347. Id. at 5. The framers as a group agreed that "sovereignty constitutes the most basic right of all." CAREY, supra note 116, at 153.
348. James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 382, 383. The federal Constitution tracked with the 1780 Massachusetts Constitution, the first constitution "to be submitted directly to the people for ratification," as well as the first to use the "We... the people" formulation. POTTER, supra note 37, at 26–27.
349. Alexander J. Dallas, Wilson's Speech at the Pennsylvania Ratifying Convention (Nov. 24, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 340, 348. Considering that the people's authority to change the constitution is "inalienable" in nature, it is one of "which no positive institution can ever deprive them." Id. at 349, 362. The popular sovereignty roots of the preamble's underscoring that the Constitution is ordained by "We, the people," are the same roots that yielded both the Ninth and Tenth Amendments. See AMAR, THE BILL OF RIGHTS, supra note 56, at 64.
350. Alexander J. Dallas, Wilson's Speech at the Pennsylvania Ratifying Convention (Nov. 24, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 449 (Dec. 1, 1787). As Gordon Wood has observed, Wilson's argument was not the traditional one "that all governmental power was derived from the people," but embraced the further conclusion "that all government was only a temporary and limited agency of the people—out, so to speak, on a short-term, always recallable loan." Gordon S. Wood, The Political Ideology of the Founders, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 7, 22 (Neil L. York ed., 1988).
351. James Iredell, North Carolina Ratifying Convention (July 24, 1788), in 4 ELLIOT'S DEBATES,
As Professor Ketcham observes, the goal of the Constitution for the founding generation was as much to obtain "political freedom" as it was to secure "personal liberty." The framers took enormous pride in the idea, as Hamilton put it, that "it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." For those who framed the federal Constitution, "human institutions take on a broader role than in earlier natural rights theories." Consequently, although the authors of The Federalist Papers defend a model of government "that might be considered a step down from the ideals of the ancients," clearly "it is also a step up from the materialism of the natural rights theorists."

In the years leading to the Philadelphia Convention, the republican governments in the states had often run roughshod over the people's rights. As Professor Ketcham persuasively observes, however,

Madison's response to the problem, though, far from being one of despair or rejection of republicanism, was to seek restraining or mitigating factors. He thought that a refining of popular sentiments through sometimes layered or indirect processes of elections (the electoral college, for example) might "extract from the mass of the society the purest and noblest characters which it contains."

Madison and the other framers were well aware that "popular government has a bad reputation which it has fully earned by its history of instability, injustice, and failure." It was precisely because the

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352. For Ketcham's insight, see supra note 326 and accompanying text. The concept of "consent" was an element of the idea of contract, but both the consent exercised by the people and the terms of the social contract had normative dimensions to them from the beginning. The social contract "was the logical justification rather than historical explanation of the existence and authority of the political community," and the question as to the authority that government should exercise was answered by reference to "the authority that free and reasonable men consent to its exercising." ROSSITER, supra note 47, at 408.

353. THE FEDERALIST NO. 1 (Alexander Hamilton), supra note 20, at 3. For additional comment, see KETCHAM, supra note 326, at 24.

354. POTTER, supra note 37, at 72.

355. Id. It seems apparent, then, that Madison, and other crucial framers, embraced an "amalgam of 'modern' and 'neoclassical' elements, combining liberalism and the tradition of civic humanism." ROSEN, supra note 337, at 5. Madison, moreover, recognized that "consent and wisdom must come together in some fashion in the establishment of a constitution." Id. at 112.


357. EPSTEIN, supra note 342, at 5. See CAREY, supra note 116, at 8–9 (Publius advocates
founding generation so valued political freedom and self-government, and knew that the people in America did, that the framers of the Constitution sought "to improve the republican form rather than [to] abandon[ it]." The goal became to supply "republican remedies" for the "diseases" of republicanism. Madison worked so that "none of the proposed rights would be such as to deprive the government of its necessary strength or stability." There was a felt need to "make the revisal a moderate one."

Numerous advocates of our constitutional order were convinced that "[i]t is in such structural elements of a well-modeled government and not in the parchment's careful listing of powers that the people must find safety," for it is the structure that can "preserve that necessary energy while discouraging its unnecessary use or abuse." Careful students of the debate over ratification have noted "the constant linkage of the 'personal liberty issue' with the larger question of the nature and structure of government." This is why many of the Federalist supporters of the Constitution believed that the real task of preventing arbitrary government lay in other directions than in the attempt to specify enforceable constitutional limitations. For example, Alexander Hamilton contended that "whatever fine declarations may be inserted in any constitution respecting [liberty of the press], must altogether depend on public opinion, and on the general spirit of the

"ordered liberty," which he contrasts with "uncertainty and anxiety" over laws' interpretation and application); THE FEDERALIST NO. 10 (James Madison), supra note 20, at 56–58, 64–65. Advocates of the Constitution remained convinced, however, that only a "strictly republican" form of government "can make the Constitution 'defensible.'" EPSTEIN, supra note 342, at 5. See THE FEDERALIST NO. 39 (James Madison), supra note 20, at 250 (only a republican form of government "would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.").

358. EPSTEIN, supra note 342, at 6.

359. E.g., THE FEDERALIST NO. 10 (James Madison), supra note 20, at 65. It has been observed that "Publius acknowledges that the Constitution itself contains flaws, that certain of its provisions are novel, and that a number of provisions are experimental because there are no positive models from history to imitate." POTTER, supra note 37, at 8. As Professor Ketcham observes, crucial framers, like the Virginia judge, Edmund Pendleton, sought "[t]o retain the benefits of constitutional rule," relying on "fixed laws" enacted by state assemblies, while at the same time "avoiding popular, demagogue-ridden excesses." KETCHAM, supra note 326, at 31.

360. Clor, supra note 28, at 158.

361. Id. at 158 (quoting James Madison, in 2 SCHWARTZ, supra note 72, at 1025).

362. EPSTEIN, supra note 342, at 49.

363. KETCHAM, supra note 326, at 105.

364. Even James Madison's chief purpose "in proposing limitations on government to protect natural rights, was to strengthen its support and thus its power to act on behalf of the public good." Id. at 99.
people and of the government."\footnote{365} This general right of the people to chart their own course, and to determine the powers and limits to powers that should be imposed, continues to be reflected in the persistent commitment even of so-called nonoriginalists to being bound by a relatively contemporaneous amendment to the Constitution.\footnote{366}

If government exists to protect society’s members against the abuses of their fellow citizens, without visiting worse abuses on them by government, we need the capacity to limit government and to bind our collective selves to settled rules and principles.\footnote{367} Traditionally, it has been thought that the existence of an extended republic, representation, enumerated powers, federalism, checks and balances, separation of powers, and bicameralism would all operate to make the American constitutional system more deliberative and restrained.\footnote{368} These institutional checks on the exercise of power “were the constitutional instruments chiefly relied upon by the framers for ‘the preservation of liberty.’”\footnote{369} Beyond the procedural and institutional safeguards, the American colonists became convinced that one of their problems stemmed from reliance on an unwritten constitution, which lent itself to a process of avoidance of the substantive values Americans thought were embodied in the English system of constitutional government.\footnote{370}

Americans resolved to establish American constitutions with fixed rules

\footnote{365. The Federalist No. 84 (Alexander Hamilton), supra note 20, at 580.}

\footnote{366. E.g., Laurence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 96–97 (1985) (concluding that a Supreme Court nominee who held the view that the Court could ignore a recent amendment to the Constitution would be properly rejected); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 228–29 (1980) (contemporary courts are bound by relatively recent constitutional amendments).}

\footnote{367. Professor Tribe long ago suggested that constitutionalism is the rough equivalent of experiments in which pigeons were trained to exercise impulse control by making self-limiting decisions that ultimately yielded greater rewards. Laurence H. Tribe, American Constitutional Law 10–11 (2d ed. 1987). See McAfee, Utopian Vision, supra note 40, at 533. Constitutionalism seeks to enable a community to enhance its life by establishing self-limiting rules.}

\footnote{368. For modern commentators who have underscored various of these elements as central to the founders’ efforts to provide for limited government that would secure rights, see, among others, Potter, supra note 37, at 175 n.4; Wood, supra note 14, at 547–62; Carey, supra note 116, at 7–17; Terence Sandalow, Social Justice and Fundamental Law: A Comment on Sager’s Constitution, 88 Nw. U. L. Rev. 461, 465 (1993); Jennifer Nedelsky, The Protection of Property in the Origins and Development of the American Constitution, in to Form a More Perfect Union: The Critical Ideas of the American Constitution 38, 61–65 (Herman Belz et al. eds., 1992); Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 Chi.—Kent L. Rev. 89, 106 (1988).}

\footnote{369. Sandalow, supra note 368, at 465.}

\footnote{370. McAfee, Social Contract Theory, supra note 215, at 273–74. Though modern advocates would have us believe otherwise, embracing an unwritten constitution today would also lend itself to avoiding the substantive values embodied in our written Constitution. See infra notes 378–78; 450–54 and accompanying texts.}
and principles essential to preserving liberty and organizing power.\textsuperscript{371}

Open-ended fundamental rights analysis, seemingly given us by the Ninth Amendment, the Necessary and Proper Clause, or the Privileges or Immunities Clause, establishes this “agreement” at such a high level of generality that it constitutes virtually no agreement at all.\textsuperscript{372} If the written Constitution does not define or establish, or disestablish, particular rights, the goal of having a written Constitution is almost completely defeated. Commentators such as Professor Barnett appear to be bargaining for “more”—more rights, more justice, more substance, more limits—but they wind up with little more than judicial discretion and less secure limits on potentially arbitrary government.\textsuperscript{373} The paralysis that so recently confronted the nation about Senate filibusters of judicial appointments may reflect the lengths to which both parties will go when they are convinced that the ideological and political views of federal judges are to be the supreme consideration.

Professor Barnett has consistently joined the legal scholars who have basically ridiculed Robert Bork’s suggestion that the apparent reference to unenumerated rights in the Ninth Amendment was the rough equivalent of an “inkblot” following the words “Congress shall make no . . . “—something that prevented an “interpretation” of particular individual rights.\textsuperscript{374} The intriguing reality, however, is that Bork was hardly the first to employ analysis that viewed a constitutional provision as being of a nature not to warrant constitutional interpretation. In fact, the standard interpretation of the “inalienable rights” provisions analogous to section 1 of the Virginia Bill of Rights, embraced by state courts throughout the nation, is that they articulate widely-shared convictions, but do not state enforceable limitations on government

\textsuperscript{371} As Professor Ketcham observes, the founders understood that true liberty was “profoundly dependent on the kind of government any society has.” KETCHAM, supra note 326, at 60. “The press gangs, the storm troopers, the secret police, the lynch mobs, and the concentration camps of history leave little doubt about what the blessings of liberty are—or about the critical impact of good or bad government can have on our lives.” Id.

\textsuperscript{372} “While the Constitution has long been thought to be ‘open ended’ to a certain degree by virtue of the vagueness and generality of crucial texts, the brand of natural law constitutionalism under discussion necessarily constitutes ‘open-endedness per se.’” McAffee, Utopian Vision, supra note 40, at 511 (quoting McConnell, supra note 368, at 91).

\textsuperscript{373} See McAffee, Utopian Vision, supra note 40, at 510–13.

A leading modern commentator on state constitutions states:

[T]he insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people's representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power.

The "inalienable rights" clause of Section 1 of the 1776 Virginia Bill of Rights was the very provision that directly inspired the North Carolina and Virginia state ratifying conventions to propose "natural rights" amendments to the federal Constitution. It was also the provision, according to Professor Barnett, that yielded the Ninth Amendment. Yet despite the tendency of state constitutions to include equivalents of the federal Ninth Amendment, provisions that have co-existed with the "inalienable rights" clauses, it was not a state court, but the United States Supreme Court—and not until 1965—that finally invoked the Ninth Amendment to help justify the imposition of an unenumerated fundamental right. As illustrated in the work of Keith Whittington, there is much to be said for the view that a completely open-ended invocation of rights—in a provision that does not purport to limit powers or to state the circumstances in which any limit will apply—fails to impose "obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another." Whether understood as mere statements of principle rather than as "limiting" provisions, or characterized as "inkblots," such provisions remain "too general to be made the basis of judicial decisions in specific cases."

375. See Frost et al., supra note 3, at 360–62; McAfee, Inalienable Rights, supra note 18, at 754–55, 777–78.
376. TARR, supra note 18, at 78.
377. These proposals are outlined in Barnett, Restoring the Lost Constitution, supra note 2, at 246–48.
378. For confirmation that Barnett equates the rights secured by the Ninth Amendment with the "inherent" rights referred to in Section 1 of the Virginia Bill of Rights, see id. at 54–60.
379. See McAfee, Inalienable Rights, supra note 18, at 771–92. Of course, the Court had previously recognized unenumerated fundamental rights as a matter of substantive due process. See, e.g., Frost et al., supra note 3, at 371–92.
381. Schwartz, supra note 380, at 424. Given that human fallibility will mean that courts will not invariably follow "reason" in establishing rights, the necessity of final decisions sets up "one big battle between will and reason." Larry Alexander, Book Review, 7 Const. Comm. 396, 400 (1990) (reviewing
B. Popular Sovereignty and the Law’s Moral Legitimacy

The mark of hypocrisy must not be stamped too impetuously upon the philosophers of the Revolution, for slavery was an inherited fact of infinite complexity that most of them looked forward confidently to ending in a generation or two. Indeed, the intense popularity of natural law and rights accelerated the movement toward abolition of slavery, or at least suppression of the slave trade, to a noticeable degree. Most petitions, letters, and pamphlets that demanded emancipation labeled slavery “the most shocking violation of the law of nature” and called blunt attention to the moral inconsistency of legislatures that proclaimed natural rights yet failed to repeal their slave codes. The moral case against slavery had more appeal than the practical or economic in this decade of concern for liberty and equality. An anonymous author spoke for tens of thousands of colonists when he wrote in Rind’s Virginia Gazette:

As freedom is unquestionably the birthright of all mankind, Africans as well as Europeans, to keep the former in a state of slavery is a constant violation of that right, and therefore of justice.382

It appears that Professor Barnett understands that the founding generation’s commitment to popular sovereignty was based on the view that the “consent of the governed” is necessary as well as sufficient to generate a prima facie moral duty to obey the law.383 Though Barnett concedes that “genuine consent” would be sufficient to generate such an

382. ROSSITER, supra note 47, at 438 (quoting VIRGINIA GAZETTE, Mar. 10, 1767).

383. Barnett begins with the assumption that “constitutional legitimacy” refers to the capacity of the Constitution to morally obligate citizens to obey laws enacted under it. BARNETT, RESTORING THE LOST CONSTITUTION, supra note 2, at 2 (given that the Constitution is “held sacred and regarded as authoritative by so much of the public,” a fundamental question concerns whether “the commands issued by persons who claim to be authorized by the Constitution” are properly viewed as giving a powerful reason to obey); id. at 3 (laws “bind in conscience if the constitution that governs their making . . .” includes “adequate procedures to assure that restrictions imposed on nonconsenting persons are just (or not unjust)”; id. at 4 (moral legitimacy requires “a theory of justice by which to assess the adequacy of lawmaker procedures”); id. at 5 (treating it “as an open question whether the U.S. Constitution—either as written or as actually applied—is in fact legitimate”); id. at 9 (“a constitutional regime is legitimate only if it provides sufficient assurances that the laws it produces are ‘necessary and proper’—the standard for acts of Congress specified in the Constitution itself,” to ensure that laws are justified such that “these qualities go in before the name ‘law’ goes on”: in effect, it should be recognized that “constitutional legitimacy is procedural, not consensual”).

It may well be, however, that the concept of constitutional legitimacy is more complex than Barnett acknowledges. See, e.g., Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 HARV. L. REV. 1787, 1793 (2005) (suggesting that constitutional law “does not rest on a single rock of legitimacy, as many appear to assume, but on sometimes shifting sands”).
obligation to obey the law, he contends that "the conditions necessary for the governed actually to consent to anything like the Constitution have never existed and could never exist." If anything, modern legal theorists would often go even further than Barnett in asserting that "consent or commitment to follow rules simply does not create a moral obligation to follow rules in particular cases," for "[t]he intrinsic value of the practice of promising" simply does not apply "when the promised act is not a matter of moral indifference but a moral wrong."

There are reasons to think, however, that the principle of consent was conceived by the founders as "necessary," but hardly "sufficient," to generate a moral obligation to obey the law, and that the people's consent that gave legitimacy to government was to be associated with the republican form of government rather than the idea of universal acceptance and assent. From the moment that men gather in society, Locke assures us, "the whole power of the community naturally" rests in the hands of the "majority." Considering that the American founders would have been well aware that the unanimous consent sometimes viewed by political philosophers as a requirement for leaving the state of nature and to join civil society was a fiction, it is unlikely that most equated the universal consent that some advocated—the "supreme power" of the state "is composed of the powers of each individual

384. As noted below, it is, and should be, a dubious justification to rely on consent to warrant law-obedience if the act required or permitted by law would constitute a moral wrong. See infra note 386 and accompanying text. Even Professor Barnett's chief positive example—consent to comply with the regulations of a private property association, Barnett, Restoring the Lost Constitution, supra note 2, at 40–43—becomes increasingly questionable the more pervasive such regulations become and the less meaningful the choices that potential owners confront. See David Strof, The Diminishing Consent to Waivers of Inalienable Rights: Re-Evaluating Overly Restrictive Conditions, Covenants, and Restrictions (2005) (unpublished article, on file with the author).

385. Barnett, Restoring the Lost Constitution, supra note 2, at 9. As observed above, even though the founders sometimes linked governmental legitimacy to the personal consent of each subject, if such consent were essential to establishing the collective right to govern, it would follow that proponents of such a view could not "tolerate the supposition that the current generation is subject to the law because it enjoyed the consent of the population living two hundred years ago." Joseph Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 162 (Larry Alexander ed., 1998).

386. Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 75 (2001). As Alexander and Sherwin observe, "if it would otherwise be wrong to follow a rule in particular circumstances, prior consent or commitment does not change this conclusion." Id. Accord Raz, supra note 385, at 163 (contending that "it would be impossible to base authority on consent that is misguided and ill-founded," and observing that "I know of no consent-based account of authority that does not assume that the reasons for the consent are cogent and adequate.").

387. Locke, supra note 7, § 132, at 73. Although it does not appear that Locke himself ever used the word "sovereign" or "sovereignty," it is clear that he did speak of the "supreme power of the people," which may have meant something akin to popular sovereignty. Potter, supra note 37, at 19. One modern commentator thus concludes that "Locke grounds sovereignty in the compact." Id.
collected together, and VOLUNTARILY parted with by him”—with what was essential to justify representative government. Notwithstanding such rhetorical uses of the concept of unanimous consent, from the earliest days of the American republic it was clear to most Americans that “the values, interests, and rights of the community are superior to those of an individual or a portion of the community” and that the “majority speaks for the community.” When Americans complained bitterly at the duties imposed by the Townshend Revenue act of 1767, they used the metaphor of slavery, and in the Continental Congress John Dickinson contended, referring to similar measures, that “persons who were taxed without their consent were in ‘a state of the most abject slavery.’”

Little wonder that, in defending the American Constitution in 1833, Joseph Story observed:

Every state, however organized, embraces many persons in it, who have never assented to its form of government; and many, who are deemed incapable of such assent, and yet who are held bound by its fundamental institutions and laws. Infants, minors, married women, persons insane, and many others, are deemed subjects of a country, and bound by its laws; although they have never assented thereto, and may by those very laws be disabled from such an act.

388. Theophilus Parsons, The Essex Result (1788), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 487–88 (Charles S. Hyneman & Donald S. Luzi eds., 1983). Truthfully enough, some confusion may be involved in the tendency of many to invoke popular political power and to identify it with “freedom”—meaning collective self-determination—and the contrasting tendency to identify “natural liberty” with private autonomy and choice. E.g., Richard Price, Observations on the Nature of Civil Liberty, in THE GENERAL INTRODUCTION TO THE TWO TRACTS ON CIVIL LIBERTY, THE WAR WITH AMERICA, AND THE FINANCES OF THE KINGDOM 11 (1778), quoted in Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment, 39 U.C. Davis L. Rev. 1773, 1781 n.23 (2006) (“In general to be free is to be guided by one’s own will; and to be guided by the will of another is the characteristic of Servitude.”).

389. LUTZ, supra note 36, at 95. Professor Griffin observes that, although his “starting point” was the traditional view that legitimacy is “founded on the consent of the governed,” Barnett never acknowledges that American acceptance of government by consent “does not mean that they accept Barnett’s theory of government by unanimous consent.” Griffin, supra note 336, at 289. Indeed, Griffin concludes that “no one in the eighteenth century advocated Barnett’s theory.” Id.

390. Tsesis, supra note 388, at 1782 (citing Philadelphia Grand Jury, BOSTON EVENING-POST, Nov. 5, 1770, at 4 (equating “slavery” with a people governed by laws not of their own making)).

391. Id. at 1782 (quoting John Dickinson, Letters from a Farmer in Pennsylvania, Nov. 5, 1770, at 4.). In an early exchange with Jefferson, Madison explicitly invoked the “doctrine that a tacit assent may be given to established Governments and laws.” ROSEN, supra note 337, at 133 (quoting Madison). One suggestion is that Madison came to stress “the substantive rather than the procedural aspects of Locke’s political thought,” so that the real question became whether government proved itself as capable of securing the ends of the social compact. Id. at 134. Neither Rosen nor the commentators he relies upon perceive Madison as embracing a “procedural” protection in the form of judicial review of unenumerated substantive rights.

392. 1 STORY, supra note 89, § 327, at 296–97. Story concludes that American governments...
Story reminded his readers that even the Declaration of Independence “was not the act of the whole American people,” and that “the will of the majority of the people is absolute and sovereign, limited only by its means and power to make its will effectual.” Despite the Declaration’s invocation of the “Consent of the Governed,” Story was absolutely correct that the decision to declare independence—embodying the Lockean “Right of the people to alter or abolish” their government—was hardly universally endorsed, and the resulting provision of the Virginia bill of rights stated that “a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish [government], in such manner as shall be judged most conducive to the public weal.”

The experience in Virginia—embodied in Sections 1 and 3 of the 1776 Virginia Bill of Rights—reflects and illustrates both points made above: (1) that thoughtful Americans both equated popular “consent” with representative government—not unanimity—and (2) may well generally “have been formed without the consent, express or implied, of the whole people,” and that they “owe their existence and authority to the simple will of the majority of the qualified voters.” Id. § 328, at 297.

393. Id. § 330, at 299–300. One modern scholar contends that there is no reason “why someone who believes that the Constitution was made legitimate through popular sovereignty and ratification by constitutional conventions” should feel any obligation to base legitimacy on Barnett’s “radically individualistic account of consent.” Griffin, supra note 336, at 289.

394. See note 6 and accompanying text. A modern commentator, moreover, concludes that the Declaration suggests that “the Americans viewed themselves as a single united people, rather than an accumulation of separate peoples.” Potter, supra note 37, at 23. This is a claim that is almost indisputable when referring to those who accepted the 1787 Constitution; the matter would be more debatable as to those who rejected it.

395. Va. Const. of 1776, Bill of Rights § 3, reprinted in 7 STATE CONSTITUTIONS, supra note 6, at 3813 (emphasis added). Leslie Goldstein observed that “eight of the fourteen state constitutions adopted between 1776 and 1780 included paraphrases of the notion of the people’s right to ‘alter or abolish’ their ‘form’ of government.” McAffee, Declaration, supra note 13, at 151 n.61 (citing LESLIE FRIEDMAN GOULDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 73–74 (1991)). Barnett manages to both completely reject the doctrine of popular sovereignty and to embrace the “natural right” to alter or abolish government. Compare supra notes 13, 36 with supra note 329 and accompanying text.

396. Though it is clear that ratification of the Constitution was viewed by its framers as “consent,” it is also true that this was not “assent” of individuals of the nation, but as people “composing the distinct and independent States to which they respectively belong.” The Federalist No. 39 (James Madison), supra note 20, at 254. “The act therefore establishing the Constitution, will not be a national but a federal act.” Id. For a confirming discussion that both ratification and the article V amendment process showed “the general advantages of reflection and deliberation of a supermajority process,” which “added the practical and normative virtues of broad consensus as the predicate for the formation of a new political community,” see LAWRENCE G. SAGER, JUSTICE IN PLAIN CLOTHES—A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 177 (2004). Despite acknowledging “we might believe that the consent of each new member is not required to form our political community,” Professor Sager still contends that a strong virtue of a broad consensus for ratification and amendment is that it “points in the direction of theoretical unanimity.” Id.
have not deemed popular consent as sufficient of itself to generate a strong moral obligation to obey the law. When George Mason proposed that Section 1 provide "[t]hat all men are by nature equally free and independent, and have certain inherent rights," a number of those in attendance feared that such a provision could make slavery unconstitutional. The provision was agreed to only when those who have "inherent rights" were identified, and limited, to those who "enter into society"—so as "to clarify that the fundamental rights that people retain as they enter civil society did not apply to the Black race because the slaves had never entered into a state of civil society in Virginia." The adoption of Section 1 of the Virginia Bill of Rights represented an especially dramatic, not to mention ironic, display of the commitment of the American revolutionary generation to the high ideals of natural law and natural rights, and its willingness simultaneously to sink to legalizing, if not to justifying, the institution of human slavery.

The Virginia founders would unquestionably have viewed the decision to declare independence as adequately based upon the consent of the governed, and the adoption of the 1776 Virginia Constitution quite sufficient for the people as a whole to, in the words of the Declaration of Independence, "institute new Government." Just eleven years later, the founders of the federal Constitution engaged only somewhat less explicitly in a deliberate decision to compromise on the issue of slavery, leaving its positive law status to be determined, from time to time, on a state by state basis. Even though the word "slavery" does not even appear in the Constitution until the Thirteenth Amendment, various constitutional provisions "directly or indirectly accommodated the peculiar institution." They sacrificed "the

397. VA. CONST. OF 1776, BILL OF RIGHTS § 1, reprinted in 7 STATE CONSTITUTIONS, supra note 6, 3813.


399. As Professor Finkelman notes, "the generation of 1776 fought to preserve its liberty—including the liberty to enslave others." Finkelman, supra note 259, at 391. This is an issue I've addressed before. See, e.g., McAffee, INHERENT RIGHTS, supra note 10, at 3; McAffee, Declaration, supra note 13, at 149–50, 152 & n.65, 155–59; McAffee, Inalienable Rights, supra note 18, at 790; Thomas B. McAffee, Prolegomena to a Meaningful Debate of the Unwritten Constitution Thesis, 61 U. Cin. L. Rev. 107, 119–26 (1992) [hereinafter McAffee, Prolegomena].

400. See supra note 5 and accompanying text.


402. William M. Wiecek, SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–
Lockean ideal of human equality to establish the union they saw as vital to the development of the nation. It is thus almost certainly no coincidence that, when Madison proposed the inclusion in his proposed amendments the substance of Section 1 of the Virginia Bill of Rights, the provision that referred to "inherent" rights, secured because "all men are by nature equally free and independent," he did not use the word "inherent" (let alone "equal"), or in any way suggest that the interests to be secured were "natural" or "inalienable" rights. In fact, he proposed that essentially the same interests "ought to be" secured "for the benefit of the people," and recommended its inclusion in a proposed "prefix" to the Constitution. Madison's choice to use the "softer," hortatory language ("ought to be" secured), in direct contrast to his otherwise pervasive use of the language of prohibition and command, "is suggestive that he was seeking to avoid legally undermining slavery even while paying appropriate lip service to the basic principle of equal rights."

No matter how one evaluates and assesses the founders' treatment of the issues of principle and prudence involved in the slavery issue, it

1848, at 62–63 (1977), quoted in Finkelman, supra note 401, at 190 n.7.

403. McAfee, Declaration, supra note 13, at 159.

404. VIRGINIA DECLARATION OF RIGHTS § 1, reprinted in 7 STATE CONSTITUTIONS, supra note 6, at 3813.

405. Madison's proposal is discussed supra notes 295–300 and accompanying text.

406. Madison Resolution (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS, supra note 109, at 11.

407. See supra notes 96–107 and accompanying text.

408. McAfee, Declaration, supra note 13, at 156–57.

409. For the somewhat optimistic assessment that the founders "appropriately traded the immediate abolition of slavery for acquiescence of the slave states in a stronger national government by which slavery was placed on the road to extinction," see McAfee, Prolegomena, supra note 399, at 124 (citing Harry V. Jaffa, What Were the "Original Intentions" of the Framers of the Constitution of the United States, 10 Puget Sound L. Rev. 351, 371 (1987)). See also Edward J. Erler, Natural Right in the American Founding, in THE AMERICAN FOUNDING—ESSAYS ON THE FORMATION OF THE CONSTITUTION 197–98 (J. Jackson Barlow et al. eds., 1988) (seeing the founders' Constitution as "incomplete" because it permitted the continuing existence of slavery, but viewing a more radical position on slavery as likely to have ensured the defeat of the cause of strengthening the union). For an attempt to demonstrate that the founders recognized the contradiction between slavery and natural law and rights, but perceived a necessity to accept the institution for the sake of union, see THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA xiii (1997); GOLDWIN, supra note 32, at 10–15.

For critical treatments of the slavery compromise, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (2000); Tsesis, supra note 388, at 8 (quoting DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770–1823, at 286 (1975) ("during the Revolutionary War most white founders advocated freedom only for themselves and those of their own propertyed class"); even "[r]evolutionary liberals 'may well have agreed that Negro slavery had no place in a free society. But their domestic views, like those of the majority of patriot lawyers and political leaders, were moderated by a concern for public order, for property rights, and for southern
seems inconceivable that at least the leading founders would not have fully recognized that slavery could be upheld only as a matter of positive law and that it stood in direct contradiction of their expressed commitment to natural law and natural rights.\footnote{410} At least one modern commentator has concluded that virtually all the delegates to the Philadelphia constitutional convention fully understood, even as they effected the compromise, that “slavery was a flat contradiction of the principles of the Declaration of Independence.”\footnote{411} At least five separate provisions explicitly sanctioned slavery, leading an important modern commentator to characterize the Constitution as giving “special treatment” to the South’s “peculiar institution.”\footnote{412} The large issue of freedom and slavery had animated the revolutionary fervor of American colonists—the frequent use of that very language during the revolutionary struggle could not have been lost on any thoughtful American.\footnote{413} “Every leading Founder,” Professor West informs us, “acknowledged that slavery was wrong.”\footnote{414} Little wonder that they would eliminate direct and explicit reference to natural rights or human equality in the Constitution and Bill of Rights.\footnote{415}

It is therefore also not a coincidence that leading abolitionist opponents of slavery did not read the federal Constitution as protecting natural and inalienable rights or as making slavery—or the various

\footnote{410} Even some who are strongly critical of the founders fully acknowledge “the shift in American colonial conscience during the 1760’s and 1770’s from an almost universal complacency about slavery to a widespread antagonism toward the institution.” Tsesis, supra note 388, at 8. Professor West insists that “the ground for the eventual total abolition of slavery was laid in the establishment of the equality principle at the center of the American polity by Jefferson, Madison, Franklin, Hamilton, Adams, Washington, and other leading Founders.” West, supra note 409, at xiii.

\footnote{411} Goldwin, supra note 32, at 11.

\footnote{412} Finkelman, supra note 401, at 190–91, 191.

\footnote{413} See, e.g., Ideological Origins, supra note 4, at 232–46. It is unmistakable that it was a “horrible contradiction” that many Revolutionary leaders were in fact slaveholders. Finkelman, supra note 259, at 391. As Professor Tsesis only somewhat wryly notes, “[t]he founders’ definition of tyrannical oppression was unmistakably applicable to chattel slavery.” Tsesis, supra note 388, at 8.

\footnote{414} West, supra note 409, at xiii.

\footnote{415} The federal Bill of Rights, it is fair to say, was affected by “the taint of America’s greatest evil, race slavery.” Eigruber, supra note 25, at 117. Eigruber contends that the omission of an equality provision, of the right to vote, the right to travel, and the right to choose a vocation may all be related to slavery. Id. He is at least right that the perceived need to accommodate slavery “implicated the entirety of thought about what was fundamental in government.” McAfee, Declaration, supra note 13, at 159. Strangely enough, Eigruber manages to assert simultaneously that the same people who excluded provisions that might negatively affect the slavery institution also included the Ninth Amendment in the Bill of Rights to enable modern judges adequately to pursue justice. Eigruber, supra note 25, at 121 (“a judge’s interpretation of the provision [raised by open-ended abstract provisions] will inevitably vary with the theory of justice she constructs on the people’s behalf”).
federal constitutional provisions that assumed, acknowledged, and sometimes supported, the institution—unconstitutional. It would take the Civil War, and the ratification of the Thirteenth and Fourteenth Amendments, before America would begin to seriously confront the fairly obvious contradiction between the nation's revolutionary and constitutional ideals and the institution of human slavery. It is extremely unlikely in this setting that the founders would have been anxious to supply a "procedural guarantee" that all laws enacted by the United States would invariably be just and protective of people's natural and inalienable rights.

C. The Goals of Promoting the Public Good and Securing Individual Rights

Although the framers were attracted by the benefits of limited government, of an "open" society, and a lack of restraint on individuals (the burgeoning "liberal tradition"), they were also still deeply attracted to the ancient idea of the substantial freedom achieved only by citizens participating in government. The U.S. Constitution, then, gains some of its effectiveness and creative ambiguity because the framers were, so to speak, of two minds: they were both modern, liberal advocates of freedom from government and devotees of the classical ideal of public-spirited citizens participating freely and responsibly in their own government. . . . Publius had warned in his opening Federalist Paper that "a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government." Although by no means neglectful of the rights of the people understood as limitations on government, Publius was at least as concerned with enabling the exercise of positive freedom to seek the public good. Thus he asserted that "the great body" of the people in the country were determined to balance "the inviolable attention due to liberty" from excessive power with the freedom to use power for their own benefit. He further declared energy in government "essential to the steady administration of the laws . . . and to


417. See generally Robert J. Reinstein, Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment, 66 TEMP. L. REV. 361 (1993). This remains true whether one is harshly critical of the founders for too anxiously accommodating slavery and not insisting on more "give" on the part of southern slave owners in reaching the initial compromise, or if one would stress the departure from established principle in the founding era, with the reconstruction era being represented as a kind of "restoration" or "fulfillment." See, e.g., WEST, supra note 409; Michael W. McConnell, The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?, 25 LOY. L.A. L. REV. 1159 (1992); GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 11 (1989).
the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy."418

Some have focused on Jefferson’s emphasis in the Declaration of Independence on the centrality of government’s role in securing rights, and take him as asserting that securing rights was the only reason for government’s existence. But this was not the view of the framers. As Publius put it in *The Federalist Papers:*

The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one is such a limitation of the term of appointments, as will maintain a proper responsibility to the people.419

Some enthusiastic Lockeans—for example, the individual who promoted the idea of revolution to the colonists, Thomas Paine—have been tempted to see government as little more than a “necessary evil.”420 But the founders understood that government not only protected national security, prevented injustice, and promoted trade, but that these “did not exhaust the possibilities for moving toward ‘the good life’ of the political community as a whole.”421

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418. KETCHAM, supra note 326, at 44–45 (quoting THE FEDERALIST NO. 1 (Alexander Hamilton), supra note 20, at 6); THE FEDERALIST NO. 37 (James Madison), supra note 20, at 233; THE FEDERALIST NO. 70 (Alexander Hamilton), supra note 20, at 471).

419. THE FEDERALIST NO. 57 (James Madison), supra note 20, at 384. Justice Story thus reminded us that the preamble of the 1780 Massachusetts Constitution stated that all “shall be governed by certain laws for the common good.” STORY, supra note 89, § 326, at 295. And John Adams contended that government is a scheme of powers “for a certain end, namely,—the good of the whole community.” ROSSITER, supra note 47, at 410 (quoting III JOHN ADAMS, THE WORKS OF JOHN ADAMS 479 (C.F. Adams ed., 1856)).

420. Paine specifically asserted that “Government even in its best state is but a necessary evil[.]” KETCHAM, supra note 326, at 63. This tendency of thought sometimes has stemmed from underscoring only “the Lockean emphasis on limited government,” while ignoring that “Americans of the founding era . . . also accepted Aristotle’s argument that ‘a state exists for the sake of the good life, and not for the sake of life only.’” Id. at 47 (quoting ARISTOTLE, POLITICS, BOOK III, at 142, 144 (Modern Library ed., 1943)).

421. Id. James Wilson concluded that “the happiness of the society is the first law of every government.” ROSSITER, supra note 47, at 411 (quoting 2 THE WORKS OF JAMES WILSON 206, 213 (James De Witt Andrews ed., 1896) [hereinafter WORKS OF WILSON]); id. (quoting James Iredell, in 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL 217, 246 (1857) (“The object of all government is, or ought to be, the happiness of the people governed”)).
Government exists, asserted devoted constitutionalist John Adams, to accomplish ends in addition to the securing of rights:

We ought to consider what is the end of government, before we determine which is the best form. Upon this point all speculative politicians will agree, that the happiness of society is the end of government, as all divines and moral philosophers will agree that the happiness of the individual is the end of man. From this principle it will follow, that the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best.\(^{422}\)

The founders were, of course, all too aware that “a faultless plan was not to be expected.”\(^{423}\) They held a genuinely realistic view of human nature rather than an idealistic one.\(^{424}\) They understood that man’s nature “is such as to make free government possible but far from inevitable,” humans being “a composite of good and evil, of ennobling excellencies and degrading imperfections.”\(^{425}\) But even if it is true that “colonial spokesmen had no vision of the welfare or insurance state, neither did they subscribe to the concept of government as ‘anarchy plus a street constable.’”\(^{426}\) The goal of seeking to promote the good of society is hopeful without being perfectionistic. “The most crucial feature of the Constitution, in this traditional way of seeing, is the system of deliberative democracy it establishes—a system that not only helps secure rights, but also furthers the fundamental value of collective self-determination.”\(^{427}\) The goal is to strike the balance “between liberty and authority,” with each individual surrendering “enough control over his original rights to permit government to maintain an organized, stable, peaceful pattern of human relations.”\(^{428}\)

A fundamental question, with which at least some of the framers wrestled, concerned how “to reconcile the power of government with the liberty of citizens.”\(^{429}\) It is critical to realize that several of our most prominent framers, including James Wilson and James Madison, “challenged in different ways the widely held assumption that all governments tend to augment their power at the expense of liberty”—the

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422.ROSSITER, supra note 47, at 414 (quoting ADAMS, supra note 419, at 193).
423. THE FEDERALIST NO. 37 (James Madison), supra note 20, at 232.
424. POTTER, supra note 37, at 155.
425. ROSSITER, supra note 47, at 441. A consequence is that even though founding era liberalism “does not take the cultivation of virtue to be its end,” it “must look to certain human excellences if it is to create political regimes that can endure.” ROSEN, supra note 337, at 5.
426. ROSSITER, supra note 47, at 413.
427. McAfee, Utopian Vision, supra note 40, at 504.
428. ROSSITER, supra note 47, at 443, 442.
429. READ, supra note 29, at 4.
assumption, held and articulated by Thomas Jefferson, that “energetic government” is “always oppressive,” and that “[f]ree government is founded in jealousy.”\footnote{430} It was Wilson, for example, who placed popular sovereignty “at the center of the Federalist case for the Constitution.”\footnote{431} Indeed, it has been observed that “[p]robably no Founder gave greater attention to the theories of popular sovereignty and judicial review than James Wilson.”\footnote{432}

What is sometimes not recognized, however, is that Wilson was simultaneously “as democratic as Jefferson and as nationalist as Hamilton.”\footnote{433} As Madison noted, Wilson “was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible.”\footnote{434} Despite his commitment to the idea of personal liberty, Wilson “believed that the idea of the sovereignty of the people, if properly understood and developed, contained the answer to all the important political and constitutional questions.”\footnote{435} Wilson believed that if one utterly rejected Blackstonian Parliamentary sovereignty, institutionalized the ideal of direct and participatory democracy, and gave this direct democracy a national form—recognizing the power of the people of the United States as one collective whole—it would be possible to reconcile authority and liberty.\footnote{436}

For Wilson the principle of popular sovereignty would enable American government to be based on “equality and consent,” in that the people of the nation were “the pure source of equality and justice.”\footnote{437} To place sovereignty in the hands of “governments or states,” by contrast, “is to set up some human beings as superior to others and thereby destroy liberty at its source.”\footnote{438} The key to harmonizing liberty and government power, according to Wilson, was to “regard the

\footnote{430}{\textit{Id.}} at 2, 1, 4; \textit{see also id.} at 90. 
\footnote{431}{\textit{Id.}} at 5. 
\footnote{432}{Wilmarth, Jr., \textit{supra} note 9, at 144.} 
\footnote{433}{READ, \textit{supra} note 29, at 2. Thus, at the Philadelphia Convention Wilson was almost the sole advocate of popular election of both houses of Congress as well as the presidency, and he opposed basing voting rights solely on the possession of property. \textit{Id.}} at 92. 
\footnote{435}{READ, \textit{supra} note 29, at 18. As one scholar has put it, Wilson’s view of suffrage “put it in an almost mystical light.” \textit{Seed, supra note 434}, at 22–23.} 
\footnote{436}{READ, \textit{supra} note 29, at 100–07.} 
\footnote{437}{\textit{Id.} at 107.} 
\footnote{438}{\textit{Id.}}
government as their servant, not their master. Properly understood and implemented, Wilson did not perceive an energetic national government as a threat to the people’s sovereignty, as did, for example, Thomas Jefferson.

Given Wilson’s commitment to a meaningful concept of perpetual popular sovereignty, he believed in the people’s sovereign power to abolish prior forms and to create new forms of government. For Wilson the “supreme, absolute, and uncontrollable authority remains with the people.” A consequence of this theory of popular sovereignty, in the mind of Wilson, was that the executive and judicial branches could just as readily be viewed as agents of the popular sovereign as the legislative body was. Thus Wilson could “reject completely the Blackstonian conception of sovereignty as inhering in Parliament (or any other governing body).”

In Wilson’s mind, then, there was not only no perceived tension between natural rights and popular sovereignty, but also no ground for fearing a conflict between securing rights and pursuing the public good. As Professor Wilmarth notes, Wilson’s belief was that “good and wise” government would invariably enlarge the natural liberty of the people. According to Wilson, even though “by the municipal law some things may be prohibited, which are not prohibited by the law of nature,” under wise government “every citizen will gain more liberty than he can lose by these prohibitions.”

439. Id. at 108.
440. See, e.g., id. at 89.
441. Wood, supra note 350, at 22 (Wilson did not argue that all governmental power was derived from the people—as people had argued for ages—but that “government was only a temporary and limited agency of the people—out, so to speak, on a short-term, always recallable loan”).
442. Wilmarth, Jr., supra note 9, at 152.
443. Id. (quoting 2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 467, 472). It was thus clear that, for Wilson, this was the inalienable natural right implicit in the very idea of a written Constitution:

[T]he supreme power of government was the inalienable and inherent right of the people, and the system before us opens with a practical declaration of that principle. Here, sir, it is expressly announced, “We the people of the United States do ordain, constitute and establish,” and those who ordain and establish may certainly repeal or annul the work of the government, which, in the hands of the people, is like clay, in the hands of the potter and may be molded into any shape they please.

2 RATIFICATION OF THE CONSTITUTION, supra note 10, at 382–83, quoted in Wilmarth, Jr., supra note 9, at 152. For further insight in to the relevance and significance of Wilson’s argument, see supra note 20 and accompanying text.
444. READ, supra note 29, at 98.
445. Wilmarth, Jr., supra note 9, at 157–58.
446. James Wilson, Of the Natural Rights of Individuals, in 2 WORKS OF WILSON, supra note 419, at 300.
in recognizing that Madison brings a much greater political realism to bear on the task of seeking to harmonize political liberty with personal liberty.

At least one modern commentator has concluded that "Wilson had a fairly expansive conception of the scope of liberty protected by natural law," and it is true that Wilson cited approvingly Coke's fairly expansive decision on behalf of common law judicial review in *Dr. Bonham's Case.* But these formulations run in tension with Wilson's rather clear acknowledgments of at least the potential for conflict between granted government powers under a constitution and natural rights. The really big problem, though, is that Wilson himself gives us almost no help as to how he would reconcile his rather unqualified commitments to popular sovereignty and natural rights. As James H. Read has observed:

But one looks in vain in Wilson's writings for any recognition of the problem of reconciling civil liberties with the principle of popular sovereignty. What Madison had to say about freedom of the press and freedom of religion is interesting precisely because he recognized a tension between majority rule and civil liberties that must somehow be bridged. Wilson's remarks on civil liberties, on the other hand, are for the most part flat and dogmatic. He declared for liberty but would hardly be likely to persuade someone who disagreed. One would not suspect from reading Wilson that there were any important battles left to be fought over civil liberties.

By contrast, it is almost undeniable that Madison's acknowledgment that the power granted by the Necessary and Proper Clause could logically be used by Congress to threaten time-honored personal rights—an acknowledgment that all but admits that the Federalist argument had been stated too absolutely—reflects that he "recognized in Wilson a tendency to take a good idea too far." Recognizing

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450. *Read, supra* note 29, at 113. Read observes that Wilson "seems not to have believed that majority rule would pose a serious threat to individual rights." *Id.* at 114.

451. *See supra* notes 257–60 and accompanying text.

452. *Read, supra* note 29, at 114. Madison affirmed that, even though he had largely accepted Wilson's argument from enumerated powers, he had never accepted it to "the extent argued by Mr. Wilson." *Id.* (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 The PAPERS OF JAMES MADISON 297 (William T. Hutchinson et al. eds., 1962)). There has been noted a "perfectionist strain in Wilson's thinking," an element that "contained ominous hints of a coercive
Madison’s acceptance of the risk of majoritarian factions, and his commitment to an extended republic as a partial answer, does not alter the reality that Madison’s advocacy of a national power to veto state laws was rejected in convention, and his efforts to impose exceptions to the power of the states in the federal Bill of Rights were as effectively rejected. And, of course, Madison supported ratification of the Constitution even without the addition of a Bill of Rights.

CONCLUSIONS

As we have seen, Madison’s commitment to the concept of natural rights—as strong when he helped draft The Federalist Papers as when he drafted a proposed Bill of Rights—was virtually unrelated to the content of the Ninth Amendment he drafted, a provision designed to ensure that the Constitution’s structural protection of rights would not be undermined by the adoption of the federal Bill of Rights. The tendency—one almost writes “temptation”—to construe the Ninth Amendment as a guarantee of unenumerated fundamental rights is a natural enough reaction of those who fear that majoritarian democracy may present a threat to individual rights. The ultimate solution to the problem of rights being seen as a fruit of popular will—a “dangerous” thought unless one carefully considers the task of establishing limiting rules that are to apply to one’s friends, in and out of government, as much as to one’s enemies—is to see them as an “abstract” commitment to the moral legitimacy of government being based on an open-ended commitment to natural rights as they are explicated by courts. A number of modern thinkers, all committed to “higher law” produced by the “reason” of thoughtful Supreme Court justices, share Professor Barnett’s belief that the Ninth Amendment supplies the ticket to “rights nirvana.” But others advocate reliance on the Fourteenth Amendment’s Due Process, Equal Protection, or Privileges or Immunities Clauses.453 The concern of commentators with views analogous to Professor Barnett’s is precisely that it opens the door to giving decisive weight to judges’ views of “the fundamental laws of England,” the ‘law of nations,’ Magna Carta, common right and reason,’ ‘unalienable rights,’

and ‘natural justice.’”\(^{454}\) It enables us “to read the text of the Constitution we have as a grant of power to judges to enforce ideas of justice and natural rights without the limitations or restrictions that some would read from the text.”\(^{455}\)

There is only one problem: it is impossible to reconcile this view of constitutionalism with America’s history and constitutional practice. For one thing, the “freedom” we thereby grant to courts is as likely to lead to injustice and the denial of basic rights as it is to advance those goals.\(^{456}\) If Professor Barnett had properly construed particular key provisions he relies on—perhaps especially the Ninth Amendment—it would raise serious doubts about the wisdom of the framers in deliberately granting so much power to the judiciary. To use just one area of decision-making that Barnett’s book does not especially underscore\(^{457}\)—the same Court that, to Barnett’s dismay, “elevated” the “presumption of constitutionality” over his favored “presumption of liberty,” also gave us the decisions in *Dred Scott v. Sandford*\(^{458}\) and *Plessy v. Ferguson*.\(^{459}\) Indeed, another modern commentator has reminded us that the “federal judiciary’s complicity in the turn-of-the-century’s system of racial oppression should serve as a warning of the political possibilities once an unwavering focus on the Constitution’s terms and purposes is lost.”\(^{460}\) And Professor Amar observed that “judges generally underenforced the document-supported rights of blacks and women while overenforcing various nondocumentarian claims of rich and powerful interests.”\(^{461}\) In a great many respects, the


\(^{455}\) McAfee, *Consent*, supra note 112, at 1258.

\(^{456}\) *Id.* at 1259 (concluding that “the ‘freedom given to judges by unwritten constitutionalism could as easily lead to judicial decisions undercutting our freedoms as it could to decisions expanding that freedom’”). The point is illustrated by the Supreme Court’s decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). See Thomas B. McAfee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 281–87 (1986).

\(^{457}\) Professor Barnett dedicated his book to James Madison, the principal draftsman of the federal Bill of Rights, and the Ninth Amendment, and to abolitionist, Lysander Spooner. So one might imagine a real concern about the Court’s confrontation with constitutional issues relating to race.

\(^{458}\) 60 U.S. (19 How.) 393 (1856).

\(^{459}\) 163 U.S. 537 (1896).

\(^{460}\) WHITTINGTON, supra note 380, at 174. Professor Kaczorowski observes that the Court “diminished the scope of the Fourteenth and Fifteenth Amendments’ guarantees of fundamental rights, of Congress’ power to enforce the rights they secured, and of Congress’s power to remedy their violation.” Robert J. Kaczorowski, *Popular Constitutionalism versus Justice In Plain Clothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1436 (2005). In the process, the Court “undermined the justice-seeking and rights-protecting Constitution” and “thus created a moral anomaly in the American system of constitutional law.” *Id.* at 1437.

\(^{461}\) Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 38 (2000). Similarly, any one who has experienced a post 9/11 America could easily testify that nothing is
Warren Court era represented perhaps America’s first truly significant effort at “restoring” what had been a lost Constitution. Justice Marshall built the case for judicial review in Marbury by emphasizing the expertise of judges in declaring the law. In many ways, the Constitution itself, as well as the Bill of Rights, affirms “that this is to be a government conducted and directed by general rules—a lawful (sometimes even a legalistic) government.” But this does not suggest that lawyers or judges are to be our rulers. Although some modern thinkers perceive judges as possessing a rare form of impartiality, enabling them to resolve difficult and abstract moral issues, others “do not want our lawyers and judges pretending that they are somehow specially suited to engage in deliberations about morality and principle for the rest of us.” That the framers of the federal Constitution, or the Fourteenth Amendment, were deep and profound believers in a moral reality from which we might derive fundamental rights, does not tell us whether they intended to convey to judges authority to engage in an open-ended search for enforceable natural rights that were nowhere enumerated. An important voice for incorporation of the federal Bill of Rights as among the “privileges or immunities” to be secured by Section 1 of the Fourteenth Amendment, Chief Justice Henry Lumpkin, of the Supreme Court of Georgia, was among those who have come to be known as Barron contrarians.

Despite his forward-looking advocacy, however, Judge Lumpkin frankly

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as threatening to the security of individual rights as the nation perceiving itself as acting in “an emergency.” For insight into how and why this is not a recent development, but part of a much older pattern of behavior, by courts as well as other branches, see Forrest McDonald, Unnecessary and Pernicious, in GOVERNMENT PROSCRIBED, supra note 19, at 407–420.


463. And as Dean Kramer states:

There is nothing wrong with this. We expect and want our courts to be technical and legalistic. Laymen and first-year law students sometimes bridle at law’s technicality, angrily resisting it as an effort to mystify and confuse them. But of course, it is not. There are good reasons for most of law’s complexity, reasons that explain why we need a body of lawyers and judges with the necessary experience and training to run the age-old machinery of the law.


466. Kramer, supra note 463, at 1356. Accord Steven D. Smith, Book Review, 10 CONST. COMMENTARY 489, 492 (1993) (reviewing NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992)) (we have no special reason, however, to conclude that judges are "especially good at discerning and following moral truth").

467. The Barron contrarians, described by Professor AMAR, supra note 56, at 145–49, were dissenters from the Supreme Court’s decision in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), holding that the federal Bill of Rights did not limit the states.
acknowledged that we should not send judges on an open-ended search for natural rights because it might well give judges "freedom to make, rather than find, natural law,"\textsuperscript{468} considering that "our ideas of natural justice are vague and uncertain."\textsuperscript{469} By contrast, argued Judge Lumpkin, "there is nothing indefinite" as "to questions arising under these amendments," the Bill of Rights, inasmuch as they have "recorded permanently" the principles embraced by the people.\textsuperscript{470}

It has now been almost fifty years since Judge Learned Hand uttered his famous quip that he would not want to be ruled by a bevy of Platonic Guardians, even if he were empowered to choose them.\textsuperscript{471} As Professor O’Fallon observed more than twenty years ago,\textsuperscript{472} Hand’s concern went beyond a lack of confidence that he would know how to choose such rulers. "If they were in charge," Hand wrote, "I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."\textsuperscript{473} As one who had been "raised" (so to speak) professionally by confronting the fruits of the Lochner era of decision-making on the Supreme Court, Judge Hand is a fitting person to close this reaction to Professor Barnett’s book. As a legal and moral philosopher who once clerked for Judge Hand, Professor Dworkin has come to symbolize the pluses and minuses of a "moral reading" of the American Constitution. Professors Farber and Sherry offer these insights of relevance to his ambitious project:

If we take constitutionalism in its broadest sense, as the development of a basic framework for protecting liberty, we must recognize that this task has not been left purely in the hands of the courts. It is Dworkin’s effort to preempt this task on behalf of the justices that leaves him most open to Hand’s gibe about rule by Platonic guardians.

\textsuperscript{468} Amar, The Bill of Rights, supra note 56, at 155 (citing Campbell v. State, 11 Ga. 353, 371 (1852)).

\textsuperscript{469} Campbell, 11 Ga. at 371.

\textsuperscript{470} Id. at 372. Compare Wynehamer v. New York, 13 N.Y. 378 (1856), where Judge George F. Comstock invalidated a state liquor prohibition statute to the extent that it utterly destroyed property rights. But note that Judge Comstock altogether rejected "theories of natural rights unattached to some specific constitutional clause as mischievous, ‘by giving private opinion and speculation a license to oppose themselves to the just and legitimate powers of government.’" Id. at 385, quoted in Wieck, Classical Legal Thought, supra note 1, at 50.

\textsuperscript{471} See Learned Hand, The Bill of Rights 73 (1958). The present author has been prompted once before to discuss Hand’s famous statement. Mcafee, Utopian Vision, supra note 40, at 531–32. It was clear in my view that "[t]he wholesale rejection of popular authority over issues of political morality in favor of an unrestrained judicial role would in the long run only ‘debase and impoverish republican government.’" Id. at 532 (quoting Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 Chi.-Kent L. Rev. 89, 108 (1988)).

\textsuperscript{472} James M. O’Fallon, Skepticism and Politics in the Domain of Rights, 8 U. Dayton L. Rev. 713, 716 (1983).

\textsuperscript{473} Hand, supra note 471, at 73.
Hand would also, we suspect, have been disturbed by another feature of Dworkin's thought, upon which others have remarked. Dworkin is remarkably confident that difficult moral dilemmas have clear-cut answers, so that those who fail to accept his argument must be wrongheaded or perhaps a bit dense. He is not alone in this unqualified intellectual confidence. Each of the scholars on whom we have focused in this book believes that he, and he alone, has uncovered the key to understanding the Constitution. Whatever else may be wrong with their theories, none can be accused of a lack of self-esteem.

For ourselves, we prefer Hand's admonition that the spirit of liberty is that spirit that is none too sure it is right. As we noted earlier, the Supreme Court has recently reminded us that "[l]iberty finds no refuge in a jurisprudence of doubt." True enough, and Dworkin is right to think Hand would have done well to remember this. But another observation must also be made: democracy finds no refuge in a jurisprudence of certainty. Between the two must be found our salvation.474

Judge Hand would have been appropriately concerned about the degree of confidence exhibited in Professor Dworkin's arguments—sometimes suggesting that our most difficult moral dilemmas have "clear-cut answers." Undoubtedly modern courts and commentators conjure up the image of "Platonic guardians," as in Professor Barnett's efforts to restore the lost Constitution by securing a whole system of substantive rights, enumerated or not. One sometimes encounters the intimation that Professor Dworkin's work "reads" more like that of a philosopher than a lawyer, a gibe that "fits in" nicely with Judge Hand's Platonic guardians quip. But Dworkin's reliance on the Fourteenth Amendment, and in fact on the Equal Protection Clause, has the lawyer-like advantage of focusing on the era when the framers and ratifiers in fact used highly abstract moral rhetoric, and were motivated in part by the heritage of the abolitionist movement. The very fact that the Fourteenth Amendment framers attempted to write in to the Constitution the requirement of equal treatment under law, without supplying much substantive help in constitutional text as to what this "equal treatment" requirement would actually mean, at least seems to invite the rather speculative efforts that Dworkin, and others, bring to bear.475 Although Dworkin can be fairly charged with articulating his own preferred "substantive" equal protection, the most direct and fairest charge is that Dworkin's Fourteenth Amendment theory displays a "lack of" the


requisite humility that would give democratic decision-making its
due. With Barnett the charge is plainer: his “restoration” of the
Constitution is in fact a “re-construction” that quite simply ignores the
intentions and purposes of those who framed the 1787 Constitution.

476. See, e.g., McConnell, supra note 117.