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**NATURAL RIGHTS AND THE NINTH  
AMENDMENT: HOW DOES LOCKEAN  
LEGAL THEORY ASSIST IN  
INTERPRETATION?**

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Some of the most contested questions for modern constitutional law stem from the decision of the First Congress to enumerate some—but necessarily not all—fundamental rights as part of our basic legal framework. I believe that Lockean social compact theory can help us to understand these provisions of the Constitution, and especially the Ninth and Tenth Amendments.<sup>1</sup>

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<sup>1</sup> I do not intend to wade into all of the many debates over these amendments in the academic literature or to analyze the entirety of the historical evidence bearing on them; such an undertaking would tax the patience of any audience. My purpose is narrower: to stress the connection between Lockean social compact theory and the structure of individual rights protection after the Bill of Rights. In particular, I do not address Professor Kurt Lash's argument that, in addition to its application to individual natural

According to Locke, natural rights are the rights human beings have in the state of nature, before the creation of civil or political society. “[E]very man,” Locke wrote, “has a property in his own person,” along with the products of his labor and that which he mixes with his labor.<sup>2</sup> Indeed, the state of nature is “a state of perfect freedom to order [one’s] actions and dispose of [one’s] possessions and persons as [each of us] sees fit . . . without asking leave or depending on the will of any other man” — up to the limits of the law of nature; which essentially means extending equal freedom to everyone else, that is, not infringing their rights of person, property, and liberty.<sup>3</sup> But it is important to stress that “natural rights,” so understood, are *not* the same as what today are often called “human rights,” that is, rights that must always and everywhere be respected by civil governments. On the contrary, because rights in the state of nature are insecure — lacking a common means of impartial adjudication and enforcement — human beings enter into a social compact in which they relinquish many of their natural rights in return for more secure protection of those they retain. Specifically, according to Locke, we give up our natural right to use private violence to punish transgressors, thus giving the state a monopoly on the legitimate use of force for punishment.<sup>4</sup> In addition — and this is a part that some persons of a libertarian leaning sometimes forget — each person “is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require.”<sup>5</sup>

Precisely how much is given up and how much is retained Locke deliberately does not spell out, for this is not a matter of logical inference. It is a political, or more precisely a constitutional, choice. The social compact is the instrument by which the *people* decide the boundary between governmental power and individual retained

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rights, the Ninth Amendment protected the people’s collective political right to enact policies at the state and local level. See KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008); cf. Randy Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008) (criticizing Lash’s position).

<sup>2</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

<sup>3</sup> See *id.* at 101.

<sup>4</sup> See *id.* at 156.

<sup>5</sup> *Id.*

rights. Some peoples will choose to create a broad and omnicompetent government—socialism, perhaps, or corporatism or mercantilism or theocracy. Others will jealously guard their natural rights and delegate only such powers as are absolutely essential for the purposes of securing liberty and civil peace. That is why the details of constitution-making matter, for there is no one—and certainly not judges—with authority to second-guess the sovereign act of the people in drawing that line between power and rights. As the delegates to the Constitutional Convention explained in their letter to Congress accompanying the proposed Constitution, “Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained.”<sup>6</sup>

After the Revolution, Americans understood the process of constitution-making, first at the state and then at the federal level, as creating a new social compact. That is why they took so seriously the content of the powers delegated and the rights reserved.

The serious work of specifying the powers delegated to the new federal government was conducted behind closed doors, by the Committee of Detail, without advance guidance from the Convention. The Convention itself had despaired of the project of enumerating powers, perhaps because of “doubts concerning its practicability.”<sup>7</sup> On July 16, John Rutledge moved to send the plan to a committee for the purpose of preparing a “specification of the powers” vested in the general government, but this motion was defeated by an evenly divided vote.<sup>8</sup> The Committee of Detail, however—chaired by none other than Rutledge—ignored the July 16 vote and instead produced a list of eighteen grants of power to Congress.<sup>9</sup> This gamble paid off; when the plan was presented to the Convention, no one objected to the decision to enumerate. Moreover, there was surprisingly little debate or disagreement

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<sup>6</sup> Letter to Congress (Sept. 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (Max Farrand ed., 1911) [hereinafter RECORDS].

<sup>7</sup> James Madison (May 31, 1787), in 1 RECORDS, *supra* note 6, at 53; *see also* Roger Sherman (July 17, 1787), in 2 RECORDS, *supra* note 6, at 25 (“[I]t would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left with the States.”).

<sup>8</sup> *See* 2 RECORDS, *supra* note 6, at 17.

<sup>9</sup> *See id.* at 181–82.

about the contents of the list. The floor debate over the content of the federal powers lasted only about three days and consisted mostly of tinkering with language.<sup>10</sup> A few additional powers were proposed and rejected—such as the power to enact sumptuary laws, to charter corporations, to dig canals, and to create a national university<sup>11</sup>—and there was an attempt to limit Congress’s power to pass navigation acts,<sup>12</sup> but the fundamentals were not changed. The current list of powers in Article I, Section 8 is pretty close to what was proposed by the Committee.<sup>13</sup> Evidently, the Committee confined itself to matters about which there was widespread agreement, at least among the remaining delegates to the convention.

Much the same was true of the list of constitutional rights proposed by the First Congress, which we call the Bill of Rights. The primary work here was done by the Select Committee, based on state bills of rights, proposed amendments by state conventions, and an initial draft prepared by Madison. Members of Congress engaged in an interesting debate about religious freedom,<sup>14</sup> two substantial debates about religious exemptions from compulsory militia service,<sup>15</sup> and a short debate about speech and assembly,<sup>16</sup> but most of the first eight amendments were adopted with surprisingly little discussion.<sup>17</sup> These were not particularly controversial; indeed it may be argued that the Federalist-dominated First Congress deliberately stuck to anodyne amendments to distract attention from more substantial

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<sup>10</sup> See *id.* at 304–33 (reporting the debates taking place between August 16 and August 18, 1787).

<sup>11</sup> See *id.* at 620.

<sup>12</sup> See *id.* at 449–53.

<sup>13</sup> Compare U.S. CONST. art. I, § 8 with Report of the Committee (Aug. 6, 1787), in 2 RECORDS, *supra* note 6, at 181–82.

<sup>14</sup> See 1 ANNALS OF CONG. 729–31 (Joseph Gales ed., 1834) (Aug. 15, 1789). Two printings exist of the first two volumes of the *Annals of Congress*, with different pagination. References herein are to the printing with the running head “History of Congress.” Readers using the other printing, with the running head “Gales & Seaton’s history of debates in Congress” can most easily locate citations by using the dates. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1427 n.84 (1990).

<sup>15</sup> See 1 ANNALS OF CONG. 749–51 (Joseph Gales ed., 1834) (Aug. 17, 1789); *id.* at 766–67 (Aug. 20, 1789).

<sup>16</sup> See *id.* at 731–33 (Aug. 15, 1789).

<sup>17</sup> See JAMES LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 230–31 (2006).

Anti-Federalist demands.<sup>18</sup> What was controversial, and much debated, were the numerous proposals to restrict the federal government's powers in various ways, especially with regard to taxation and the military, none of which were recommended by the Select Committee or adopted by the Congress.<sup>19</sup>

Participants in these debates were also concerned about the structural implications of the lists themselves. Only certain powers are enumerated: does that mean that other powers are denied to the federal government? Or was the Necessary and Proper Clause,<sup>20</sup> which its detractors called the "sweeping clause,"<sup>21</sup> a broad grant of additional authority? Only certain rights are enumerated—does that mean that other rights are denied to the people? These issues were addressed by means of what we now call the Ninth and Tenth Amendments, which adopt opposite rules of construction. Under the Tenth, the enumeration of powers is deemed to be a denial of all other powers, which are left to the states or to the people.<sup>22</sup> Under the Ninth, the enumeration of rights is deemed not to be a denial of other rights, which are left intact.<sup>23</sup>

The precise language of these provisions, unlike that of most of the amendments, was seriously debated, especially the Tenth, which Anti-Federalists valiantly attempted three times to strengthen by an insistence on strict construction, each time to be rebuffed.<sup>24</sup> So controversial were these amendments in some quarters

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<sup>18</sup> Compare the Bill of Rights to the robust amendments proposed by the Anti-Federalist-dominated ratifying conventions in Virginia and New York. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION: 1786-1870, at 196-203 (U.S. Dept. of State ed., 1894) (New York); 1 THE FOUNDERS' CONSTITUTION 472-74 (Philip B. Kurland & Ralph Lerner eds., 1987) (Virginia).

<sup>19</sup> See 1 ANNALS OF CONG. 751-52 (Joseph Gales ed., 1834) (Aug. 17, 1789) (standing army); *id.* at 773-77 (Aug. 22, 1789) (taxation); *see also id.* at 768-73 (Aug. 21, 1789) (congressional power to determine time, place, and manner of federal elections).

<sup>20</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>21</sup> *See, e.g.,* THE FEDERALIST No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>22</sup> U.S. CONST. amend. X.

<sup>23</sup> U.S. CONST. amend. XI.

<sup>24</sup> See 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1834) (Aug. 18, 1789); *id.* at 767-68 (Aug. 21, 1789); *id.* at 789-90, 797 (Aug. 27, 1789) (Aug. 29, 1789); *see also* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 663-705 (Neil H. Cogan ed., 1997).

that the State of Virginia held up ratification of the Bill of Rights for two years in dissatisfaction with the wording.<sup>25</sup>

My thesis here is that the language and meaning of these amendments can only be understood against the backdrop of Lockean natural rights theory and that such terms as “rights,” “denied or disparaged,” and “retained” had meanings rather different from what they might be thought to impart today.

Let us turn, then, to the fall of 1787 and the summer of 1789, when representatives of the American people adopted the Bill of Rights. The Constitution as it emerged from the Philadelphia Convention in September 1787 did not contain a bill of rights. This was not because of any theoretical or jurisprudential opposition to the idea of a bill of rights. That emerged later. It was simply for lack of time and attention. No one at the Constitutional Convention in 1787 thought to propose a bill of rights until September 12—three and a half months after the Convention began its work, at a time when the delegates were desperately putting the finishing touches on an agreed-upon plan of government.<sup>26</sup> At that late date, the delegates were anxious to get home, anxious to begin the difficult process of securing ratification, and unwilling to open what could be a Pandora’s box of conflicting ideas about fundamental rights.

Not all the delegates were so uninterested or so pessimistic about the difficulty of the drafting project. Col. George Mason, Washington’s next-door neighbor along the Potomac in Virginia and the principal drafter of Virginia’s acclaimed Declaration of Rights, urged the Convention to preface the plan with a bill of rights, which, he told them “would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.”<sup>27</sup> No doubt he was imagining that the Convention would simply draw upon his own accomplishment in Virginia. Other delegates were not so sanguine. They voted down the proposal by a thunderous margin of zero states to ten.<sup>28</sup>

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<sup>25</sup> See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 371–393 (2004) (quoting numerous primary sources expressing Virginia’s dissatisfaction with the Ninth and Tenth Amendments).

<sup>26</sup> See 2 RECORDS, *supra* note 6, at 587.

<sup>27</sup> *Id.* at 587–88.

<sup>28</sup> See *id.* at 588.

The Convention's rejection of the proposal to include a bill of rights within the Constitution turned out to be the Anti-Federalists' most potent issue during debates over ratification.<sup>29</sup> The opponents of the Constitution hoped to send the document back to a second convention for a round of amendments—and the lack of a bill of rights was the most popular reason for doing so.<sup>30</sup> As so often happens in politics, this demand for a bill of rights stimulated a response: reasons why a bill of rights might be a bad idea. Defenders of a constitution lacking a bill of rights argued, in the words of Alexander Hamilton in *The Federalist No. 84*, that a bill of rights would be “not only unnecessary . . . but . . . dangerous.”<sup>31</sup> Unnecessary, because the Constitution had already protected against abuse by its careful enumeration of powers. Although the new federal government was given important powers, such as to regulate foreign and interstate commerce, to raise and support armies, and the like, it was given no power to regulate or license the press, to establish a national religion, or to do most of the other things that were feared. In light of the enumeration of powers, there was no need for a bill of rights. Indeed, as Hamilton said, “the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”<sup>32</sup> That meant it was *unnecessary*. The addition of a bill of rights would be *dangerous* because it was impossible to compose a complete, satisfactory, and compendious list of all the rights of the people, and an incomplete enumeration would imply that items left off the list were no longer recognized as rights.<sup>33</sup>

Now, the first argument, while interesting, was clearly wrong—even if Hamilton did make it. The enumerated powers of the federal government might be confined to essential and innocuous matters, but the Necessary and Proper Clause gave Congress discretion

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<sup>29</sup> See, e.g., Brutus, *Essay of Brutus II* (Nov. 1, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 372–377 (Herbert J. Storing ed., 1981); Letter from The Federal Farmer, (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 323–30 (Letter XVI).

<sup>30</sup> Brutus, *supra* note 29; The Federal Farmer, *supra* note 29.

<sup>31</sup> THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>32</sup> *Id.* at 515.

<sup>33</sup> *Id.* at 513–14.

as to the *means* of effectuating those powers.<sup>34</sup> It requires little imagination to see how important individual rights could be abridged in the course of carrying out the limited and enumerated powers of the new national government. In the Virginia ratifying convention, George Mason offered the following example:

Among the enumerated powers, Congress are to lay and collect taxes, duties, imposts, and excises, and to pay the debts, and to provide for the general welfare and common defense; and by that clause (so often called the *sweeping clause*), they are to make all laws necessary to execute those laws. Now suppose oppressions should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press?<sup>35</sup>

In a similar vein, Madison noted that the federal government might employ “general warrants” for the purpose of collection of

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<sup>34</sup> Gary Lawson and Patricia Granger present evidence that the term “proper” in the Necessary and Proper Clause was understood by at least some members of the founding generation as prohibiting the federal government from violating retained rights in the course of executing delegated powers. Gary Lawson & Patricia Granger, *The “Proper” Scope of Federal Judicial Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). It is difficult to know how widespread this interpretation was at the time. Those who defended the Constitution without a bill of rights did not take advantage of this argument or refute adversaries who interpreted the Necessary and Proper Clause solely as an expansion of federal power. Hamilton, for example, insisted that the Necessary and Proper Clause would not allow the federal government to overreach its delegated powers at the expense of the states, but he did not mention individual retained rights. See THE FEDERALIST No. 33 (Alexander Hamilton), *supra* note 21. If Lawson and Granger are correct, the Necessary and Proper Clause would provide no protection for retained rights against enumerated powers, but only against extensions of power justified under the Necessary and Proper Clause. That is not an intuitive interpretation.

<sup>35</sup> Col. George Mason, Speech at the Virginia Ratifying Convention (June 14, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 24, at 650.



revenues.<sup>36</sup> Patrick Henry was particularly inventive in conjuring up ways in which the new government could abuse its powers to the injury of the rights of the people.<sup>37</sup>

On reflection, it is evident that enumerating the powers, or *ends*, of government would not protect against abusive *means* of carrying those powers into effect. So it was not persuasive to argue a bill of rights was *unnecessary*. Moreover, as the Federal Farmer (an Anti-Federalist writer, probably New York's Melancton Smith) pointed out, a number of rights important in the Anglo-American legal tradition, such as the right to trial by jury, are not natural rights and indeed are not recognized in most of the world. Unless these "stipulated rights," as he called them, were enumerated, there would be no legal basis for invoking them.<sup>38</sup>

The Federalists' second argument carried more weight. Here is how it was expressed by James Iredell in the North Carolina ratifying convention:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.<sup>39</sup>

But why would this be dangerous, rather than just incomplete? Isn't an incomplete list of rights better than none at all? What harm could it do? Would it, as Patrick Henry asked, "take too much paper?"<sup>40</sup>

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<sup>36</sup> 1 ANNALS OF CONG. 438 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>37</sup> E.g., Patrick Henry, Speech at the Virginia Ratifying Convention (June 16, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 249, *supra* note 29.

<sup>38</sup> See The Federal Farmer, *supra* note 29, at 328.

<sup>39</sup> North Carolina Ratification Debates (Jul. 29, 1788), in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 167 (Jonathan Elliot ed., 1836) [hereinafter DEBATES].

<sup>40</sup> Henry, *supra* note 37.

An incomplete list of rights was not as harmless as Henry implied. Legal instruments, then as now, are interpreted in light of a canon of interpretation, known by its Latin name *expressio unius est exclusio alterius*. To express one thing is to exclude others. This is the way Madison put it:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.<sup>41</sup>

For example, Article III provided for trial in criminal cases to be by jury. Critics worried that this amounted to an elimination of trial by jury in civil cases.<sup>42</sup> Hence the need for the Seventh Amendment. There were only a few rights-protecting provisions in the original constitution, and thus little opportunity for arguments of this sort. Once many more rights were spelled out, the *expressio unius* problem would become much more severe.

*Expressio unius* was not a partisan or one-sided concern; the concern was shared across the political spectrum and north to south. The Federal Farmer stated: "Further, the people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them."<sup>43</sup> James Wilson at the Pennsylvania ratifying convention stated: "A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that

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<sup>41</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>42</sup> Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 595-96 (2001) ("This led to even greater complaints that Article III effectively abolished the right to trial by jury in civil cases, because it left open the possibility that the Court could set aside decisions of state (or federal) court juries based on its own reassessment of the facts.").

<sup>43</sup> The Federal Farmer, *supra* note 29, at 327.

is not enumerated is presumed to be given.”<sup>44</sup> Charles Cotesworth Pinckney, Federalist leader at the South Carolina convention, stated: “[W]e had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted the enumeration of some of our rights, 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 . . . .”<sup>45</sup> Representative James Jackson observed: “unless you expect every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.”<sup>46</sup>

Note the verbs these gentlemen used. They did not say that the unenumerated rights would be left to the vagaries of future interpretation. They said that the unmentioned rights would be “assigned into the hands of the General Government,” in Madison’s words, or “relinquish[ed],” to use the Federal Farmer’s language, or “given,” according to Wilson, or “delegated,” according to Pinckney, or “resigned,” according to Jackson.

This was the language of Lockean social compact theory. As already noted, at the time of the social compact—which for late eighteenth century Americans meant the time of constitution-making—the people make an authoritative decision regarding which powers to delegate to the government and which rights to retain. The essence of the Lockean social compact is that we relinquish certain of our natural rights and we receive, in return, more effectual protection of other natural rights, plus the enjoyment of positive rights, that is, rights created by the action of political society.<sup>47</sup> As articulated by the New York Anti-Federalist writing as “Brutus”:

The common good, therefore, is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved: how great

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<sup>44</sup> Pennsylvania Ratification Debates (Oct. 28, 1788), in 2 DEBATES, *supra* note 39, at 436.

<sup>45</sup> South Carolina Ratification Debates (Jan. 18, 1788), in 4 DEBATES, *supra* note 39, at 316.

<sup>46</sup> 1 ANNALS OF CONG. 442 (Joseph Gales ed., 1834) (June 8, 1789) (James Jackson is the Representative from Georgia).

<sup>47</sup> See LOCKE, *supra* note 2, at 156–57.

a proportion of natural freedom is necessary to be yielded by individuals, when they submit to government, I shall not now enquire. So much, however, must be given up, as will be sufficient to enable those, to whom the administration of the government is committed, to establish laws for the promoting [sic] the happiness of the community, and to carry those laws into effect. But it is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc. Others are not necessary to be resigned, in order to attain the end for which government is instituted, these therefore ought not to be given up. To surrender them, would counteract the very end of government, to wit, the common good. From these observations it appears, that in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.<sup>48</sup>

Madison made a similar argument on the floor of the House in the First Congress. He explained that the purpose of a bill of rights is fourfold. First is to “assert those rights which are exercised by the people in forming and establishing a plan of Government.”<sup>49</sup> Here he referred to provisions of state bills of rights regarding popular sovereignty and to his own first proposed amendment, which declared that all power is vested in and derived from the people.<sup>50</sup> Second is to “specify those rights which are retained when particular powers are given up to be exercised by the Legislature.”<sup>51</sup> Note the reference to “retained” rights. Third is to “specify positive rights,” like trial by jury, which “cannot be considered as a natural right, but a right resulting from a social compact.”<sup>52</sup> The fourth

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<sup>48</sup> Brutus, *supra* note 29, at 373.

<sup>49</sup> 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>50</sup> *Id.* at 433 (June 8, 1789). This proposal was adopted by the House, *id.* at 719 (Aug. 14, 1789), but ultimately dropped from the Bill of Rights.

<sup>51</sup> *Id.* at 437 (June 8, 1789).

<sup>52</sup> *Id.*

purpose of a bill of rights is to “lay down dogmatic maxims with respect to the construction of the Government.”<sup>53</sup> Madison gave the example, which appears in the Massachusetts Constitution of 1780,<sup>54</sup> of a declaration that the three branches of government “shall be kept separate and distinct.”<sup>55</sup> He expressed skepticism regarding the value of these “dogmatic maxims,” dryly suggesting that the “best way of securing this in practice is, to provide such checks as will prevent the encroachment of the one upon the other.”<sup>56</sup>

Brutus and Madison employed a common language, the language of Lockean rights theory. Certain natural rights are “surrendered” or “relinquished,” while others are “retained” or “reserved.” Still others are not natural rights, but “positive” or “stipulated” rights “resulting from a social compact.” In interpreting the rights language of the Constitution, it is important to understand the meanings then attached to these words and to bear in mind the differences between those meanings and modern usage.

The key words here are: *natural* rights, *positive* rights, *retained* rights (also called *reserved* rights), and *relinquished* rights. As already noted, “natural rights” are rights human beings possess in the state of nature, principally ownership of one’s own body and the product of one’s labors and the right to use violence against others to punish violations of the law of nature.<sup>57</sup> Importantly, these natural rights do not necessarily survive into civil society; some are “retained” and others are “relinquished” in exchange for the greater security of those that are retained. “Positive rights” are rights not enjoyed in the state of nature; they are a product of civil society.<sup>58</sup> As The Federal Farmer explained, many important rights, such as the right to trial by jury, to the writ of habeas corpus, to counsel, and to confront witnesses, are not “reserved” natural rights, but “stipulated

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<sup>53</sup> *Id.*

<sup>54</sup> MASS. CONST. OF 1780, pt. II, ch. I, § 1, art. I.

<sup>55</sup> 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>56</sup> *Id.*

<sup>57</sup> See LOCKE, *supra* note 2, at 101–03.

<sup>58</sup> This definition of the term “positive rights” is closely related, but perhaps not identical, to the definition famously employed by Isaiah Berlin in contradistinction to “negative liberty.” See ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969). The term, as used by Madison and Brutus in the Lockean tradition, refers to the derivation of the right, whereas the Berlin definition refers to its nature.

rights” that “individuals acquire by compact.”<sup>59</sup> Modern welfare rights might fall in this category. “Retained rights” are a subset of natural rights. Some natural rights—such as freedom from taxation or military conscription—are relinquished. Those that are not relinquished are retained. The category of “retained rights,” by definition, does not include “positive” rights, which are the product of the civil society.

At the time of the social compact, the people decide which of their natural rights to surrender for “the good, prosperity, and safety of the society.”<sup>60</sup> The boundary between retained rights and relinquished rights may be established in either of two ways: by defining the powers of government or by defining the rights of the people. Individual rights and governmental powers were understood to be reciprocal—two sides of the same coin. As Madison wrote in a letter to Washington: “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.”<sup>61</sup> Thus, there are two ways in which the people may protect their natural liberty: by careful enumeration and limitation of the powers of government, or by reservation of the rights of the people through a bill of rights. These techniques come down to the same thing. That is why Hamilton (and many others) argued that the unamended Constitution, with its limited grants of power to the new federal government, was “itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”<sup>62</sup> The framers in Philadelphia

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<sup>59</sup> The Federal Farmer, *supra* note 29.

<sup>60</sup> See LOCKE, *supra* note 2, at 156.

<sup>61</sup> Letter from James Madison to George Washington (Dec. 5, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 222 (U.S. Dept. of State ed., 1905). Professor Lash points out that Madison’s letter is not expressly confined to individual natural rights, but refers more broadly to all rights retained by the people, which could include collective political rights exercised through state government. See LASH, *supra* note 1, at 55–59. For present purposes, the significant point is that Madison regarded enumeration of power and reservation of rights as equivalent strategies.

<sup>62</sup> THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 31, at 515. We should not forget that Hamilton was partly, even if not entirely, correct: the enumeration of congressional powers, which implies that many powers are beyond the scope of national authority, protects a broad swath of rights both natural and political. Professor Thomas B. McAfee stresses that the Ninth Amendment ensured that the enumeration of rights would not be interpreted as abrogating these “residual rights.”

focused on the first technique; the framers of the Bill of Rights in the First Congress focused on the second.

By the same token, there were two means by which the people might imprudently relinquish their natural rights: by overbroad delegations of power to the government or by incomplete enumerations of rights, which, as interpreted under the *expressio unius* canon, is the same thing as a grant of additional power.

The question of overbroad delegation occupied a great deal of attention during the ratification debates, and later was the subject of the Tenth Amendment. The ratification debates focused only secondarily on the substance of the enumeration of powers in Article I, Section 8 (and then principally on the most ominous of the powers: taxation and the military). More prominent were questions about how the line between governmental power and individual rights would be interpreted. Specifically, would there be *implied* powers, or would the new federal government be confined to those enumerated? And what would be the scope of powers used to *execute* the enumerated powers? Advocates of limited government largely prevailed as to the first of these issues: both the first phrase of Article I, Section 8 (limiting Congress to the powers “herein delegated”)<sup>63</sup> and the Tenth Amendment limited the federal government to its enumerated powers. All powers not delegated to the federal government would be “reserved” to the states or to the people.<sup>64</sup>

As to the scope of the powers that could be used to execute the enumerated powers, however, advocates of limited government did not prevail. The Necessary and Proper Clause<sup>65</sup> gave Congress some degree of latitude to determine the means by which to carry out the enumerated powers. For example, although Congress was not given any general power to enact criminal laws, no one doubts that it could enact and enforce criminal laws in service of the enumerated powers, such as punishment for evading taxes or interfering with the mails. The Anti-Federalists repeatedly attempted to confine national powers to those “expressly” delegated, using the

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Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1221–22 (1990).

<sup>63</sup> U.S. CONST. art. I, § 8.

<sup>64</sup> See U.S. CONST. amend. X.

<sup>65</sup> U.S. CONST. art I, § 8, cl. 18.

language of the Articles of Confederation; but they did not command a majority.<sup>66</sup> The Tenth Amendment conspicuously does not read that powers not “expressly” delegated to the federal government are reserved to the states or the people, as had the corresponding provision in the Articles. The Tenth Amendment thus fell short of what advocates of a more limited government desired. Its omission of the word “expressly” could even give countenance to a broad interpretation of the scope of the Necessary and Proper Clause.<sup>67</sup> The difficulty in limiting powers thus made the definition of retained rights all the more important.

Yet as we have seen, the articulation of rights retained by the people was no less formidable a drafting chore. If some rights are expressly reserved, but others are not—and remember, listing them all is impossible—then under the interpretive canons of the day, the unlisted rights are “relinquished,” or “assigned into the hands of the General Government.”<sup>68</sup> Again, the problem was not just that unlisted rights would be left to the vagaries of future interpretation, but that the (necessarily incomplete) enumeration of *some* rights would *surrender* or *relinquish* those unlisted rights, and the attendant powers, into the hands of the federal government. That is why Hamilton (among others) said that a bill of rights would be dangerous. And again, it must be remembered that the problem was not solved by finding that the imperiled rights were “natural” rights; under Lockean social compact theory, not all natural rights survive into civil society. That a right might be “natural” does not determine whether it is retained or relinquished.

A particularly clear illustration of this may be found in the famed Virginia Bill for Establishing Religious Freedom, authored by Thomas Jefferson and championed by Madison, which concludes with the following observation:

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<sup>66</sup> See *supra* note 24 and accompanying text.

<sup>67</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819). Professor Lash casts doubt on whether this was a proper inference from the omission of the word “expressly.” See Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008).

<sup>68</sup> See *supra* notes 41–46 and accompanying text.



And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.<sup>69</sup>

This makes clear that the founding generation, despite their high regard for “the natural rights of mankind,” believed that in the absence of express constitutional protections, legislatures had the power (even if not the right) to infringe those rights. If the rights affirmed by the Virginia Bill, which Madison regarded as not only “natural” but “unalienable,”<sup>70</sup> could be revoked, repealed, or narrowed by future legislatures, this demonstrates that (at least prior to express constitutionalization) the status of “natural” and “unalienable” rights was inferior to that of legislation. The pressing problem, at the time of the framing of the Bill of Rights, was that even silence—a partial enumeration—would be interpreted as relinquishing the rights that were not enumerated.

Madison proposed a solution to this problem—an amendment that, unlike all the others, had no precedent in common law, or state constitutions:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>71</sup>

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<sup>69</sup> A Bill for Establishing Religious Freedom § III (1786), reprinted in 5 THE FOUNDERS’ CONSTITUTION 84, 85 (Philip B. Kurland & Ralph Lerner eds., 1987) (codified in VA. CODE ANN. § 57-1 (2010)).

<sup>70</sup> James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 69, at 82–84.

<sup>71</sup> 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1834) (June 8, 1789).

It is interesting to note that although rights and powers are two sides of the same coin, Madison separated and distinguished them, proposing that the enumeration of rights would not be so construed as to (1) “diminish the just importance of other rights retained by the people” or (2) “as to enlarge the powers delegated by the Constitution.”

This proposed amendment also made clear that at least some of the rights in the Bill of Rights were “actual limitations” of the powers of Congress. We may regard these clauses as clawing back certain rights that otherwise would have been delegated to Congress through the Necessary and Proper Clause. For example, Congress had the power to support armies, but it could not do so in times of peace by quartering soldiers in private homes.<sup>72</sup> This was an “actual limitation” in the sense that it reduced what would otherwise be the full reach of national authority under Article I, Section 8. This confirms the point just made: that Madison did not believe that retained natural rights would operate on their own force if not carved out of the reach of the Necessary and Proper Clause. Natural but unenumerated rights would not trump contrary legislation if it were within the scope of delegated powers.

The Select Committee streamlined Madison’s draft, giving it the form of the current Ninth Amendment: “The enumeration in this Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>73</sup> The question becomes: What does this mean? What protection is accorded the “rights retained by the people”? The Supreme Court has never said. But the language of Lockean social compact theory helps us to understand it.

The text of the Ninth Amendment differentiates between two different sets of rights. First are “certain rights” that are the subject of “enumeration in the Constitution.” These are the rights (some positive, some natural) that are spelled out in the Bill of Rights, as well as in the few rights-reserving provisions of the original Constitution, such as Article I, Sections 9 and 10 (the prohibitions on bills of attainder, ex post facto laws, and laws (by the states) impairing

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<sup>72</sup> U.S. CONST. amend. III.

<sup>73</sup> 1 ANNALS OF CONG. 754–55 (Joseph Gales ed., 1834) (Aug. 17, 1789).

the obligation of contract),<sup>74</sup> plus Article III's guarantee of jury trials in criminal cases.<sup>75</sup> Because these are express constitutional rights, they have the status in our law of judicially-enforceable "trumps": even if violation of these rights would otherwise be an appropriate means of effectuating an enumerated power, the government may not infringe or abridge them.<sup>76</sup> As Madison explained to the First Congress, if protections for these rights "are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."<sup>77</sup>

The second set of rights to which the Ninth Amendment refers comprises the "other" rights that are "retained by the people."<sup>78</sup> This phrase employs the vocabulary of "retained rights": those natural rights that are not relinquished, but retained by the people under the social compact. Examples might include the right to control the upbringing of one's children, the right not to kill other persons, the right to travel, the right to engage in nonprocreative sex, the right to read, the right to control one's own medical care, the right to choose one's own friends and associates, the right to pursue a job or profession, or the right of self-defense.<sup>79</sup> During the Bill of Rights debates, reference was made to the right to wear a hat and to go to bed when one pleases.<sup>80</sup> As explained above, this set does not include positive rights, which are not "retained," but rather created by the social compact. Nor does it include those natural rights that the people chose to relinquish in order to promote the good, prosperity, and safety of society. Nor does it include those rights "expressly stipulated for in the Constitution

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<sup>74</sup> U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

<sup>75</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>76</sup> I borrow the terminology of "trumps" from RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

<sup>77</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>78</sup> U.S. CONST. amend. IX.

<sup>79</sup> I make no argument regarding how claims of these rights might fare in litigation, but mention them only to give a sense of the range of rights that might fall within the category of unenumerated retained natural rights.

<sup>80</sup> See 1 ANNALS OF CONG. 732 (Joseph Gales ed., 1834) (Aug. 15, 1789).

by the declaration of rights.” These “other” rights “retained” by the people have three features: they are natural rather than positive, they are retained rather than relinquished, and they are unenumerated.

What is the legal status of these unenumerated retained natural rights? The Ninth Amendment seems to say that they have precisely the same status they had before adoption of the Bill of Rights or of the rights-protecting provisions of the original Constitution. Even scholars who take an expansive view of the protections accorded these rights share this interpretation. As Professor Randy Barnett has written: “The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before.”<sup>81</sup> These “other” rights are not “denied or disparaged” on account of the principle of *expressio unius*. On the other hand—and this is the controversial point—I maintain that these rights were not elevated to the status of constitutional rights; they are not among those rights “expressly stipulated for in the Constitution,” which will be enforced by the “independent tribunals of justice,” even in the face of “assumption[s] of power in the Legislative or Executive.” Rather, these rights merely continue to enjoy the limited protection accorded to retained natural rights prior to the adoption of a constitutional bill of rights.

In order to understand what force these unenumerated retained rights have under the law, we must therefore examine how natural rights were invoked prior to the Constitution. Some scholars, among them Professor Barnett, argue that unenumerated natural rights are now constitutional rights, with the same status as rights spelled out by the First through Eighth Amendments. Other scholars regard the Ninth Amendment as a protection for federalism, for certain collective rights of a republican nature, or as largely unenforceable—as a truism or an inkblot.<sup>82</sup> My reading of the historical materials suggests a middle ground: that unenumerated natural rights are protected through some combination of self-control on the part of political actors (reinforced by the separation of powers) and equitable interpretation by the courts, which entails the narrow

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<sup>81</sup> Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEXAS L. REV. 1, 2 (2006).

<sup>82</sup> For a summary of five leading views on the meaning of the Ninth Amendment, see *id.* at 10–21.

construction of statutes so as to avoid violations of natural rights. In other words, natural rights would control in the absence of sufficiently explicit positive law to the contrary. The point here is not that unenumerated retained natural rights are “constitutional rights” under the Ninth Amendment, but that the Ninth Amendment makes clear that they continue to enjoy some degree of legal protection in their pre-constitutional status as retained natural rights.<sup>83</sup>

The historical evidence indicates that natural rights in the pre-constitutional world did *not* have the status we now ascribe to constitutional rights—meaning supreme over positive law. Excluding the single, highly-contested—indeed mistakenly-interpreted—example of *Bonham’s Case*,<sup>84</sup> there appear to be no examples of courts in England upholding natural rights claims in the teeth of statutes passed by sovereign authorities.<sup>85</sup> Locke himself presupposed that the only available judge of “whether the prince or legislative act contrary to their trust” is “the body of the people” and that if the government should “decline that way of determination,” the people’s only recourse is to rebellion: the “appeal . . . to heaven.”<sup>86</sup> As Blackstone explained in his *Commentaries on the Laws of England*, Parliament had “no superior upon earth,” and if Parliament made its intent clear, “there is no court that has power to defeat the intent of the legislature.”<sup>87</sup> With minor departures, this was established doctrine in American colonial and state courts as well.<sup>88</sup>

That natural law did not trump positive law as a legal matter in court, however, did not mean it was merely hortatory. To begin with, legal theorists regarded natural law as binding on Parliament itself. It may have been true that courts were not free to hold Acts of Parliament “unconstitutional” or “void,” but Parliament remained subject

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<sup>83</sup> William Baude points out in correspondence that judges who have taken an oath to uphold the Constitution therefore might not have a duty to enforce retained natural rights, even if they have authority to do so.

<sup>84</sup> (1610) 77 Eng. Rep. 638 (C.P.). See generally Theodore F. T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

<sup>85</sup> See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 237–54 (2008).

<sup>86</sup> See LOCKE, *supra* note 2, at 208.

<sup>87</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*90–91.

<sup>88</sup> For this proposition, I rely on the definitive research of Professor Philip Hamburger. See HAMBURGER, *supra* note 85, at 278–80.

to the unwritten constitution of the realm and was under an obligation, albeit not judicially enforceable, to control itself.<sup>89</sup> Even after ratification of a written Constitution, Americans expected that Congress and the President, and ultimately an alert and engaged citizenry, would be the principal bulwarks against violations. Madison, for example, told the First Congress that a written bill of rights would help to “establish the public opinion in their favor” and “rouse the attention of the whole community.”<sup>90</sup> This was, indeed, the principal reason the Federal Farmer gave for supporting enactment of a bill of rights. “If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book.”<sup>91</sup> Rights should be declared so “that the people might not forget these rights, and gradually become prepared for arbitrary government.”<sup>92</sup> Recall the stern warning the enactors of the Virginia Bill for Establishing Religious Freedom gave to future legislators who might contemplate repeal.

But natural rights were not merely political principles. They also had purchase in court, albeit not as constitutional rights, that is, not as superior to positive law. It was understood that courts had the power to engage in equitable interpretation, under which statutes were interpreted narrowly so as to avoid violations of the law of nature.<sup>93</sup> As Blackstone explained:

[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it. . . . But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and

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<sup>89</sup> See *id.* at 252–54.

<sup>90</sup> 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>91</sup> The Federal Farmer, *supra* note 29, at 324.

<sup>92</sup> *Id.* at 325.

<sup>93</sup> This is the best reading of *Bonham's Case*. See generally J.H. BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY 28 n.96 (2001); HAMBURGER, *supra* note 85, at 344–57, 622–30; S.E. THORNE, *Dr. Bonham's Case*, ESSAYS IN ENGLISH LEGAL HISTORY 269, 275 (1985).

only *quoad hoc* disregard it. . . . [T]here is no court that has power to defeat the intent of the legislature, when couched in such evidence and express words, as leave no doubt whether it was the intent of the legislature or no.”<sup>94</sup>

In part, this equitable interpretation was predicated on the charitable assumption that the legislature likely did not intend, by the use of broad language not explicitly addressed to the point at issue, to violate the law of nature. As one American judge stated in a 1784 decision that closely followed and quoted from the above passage from Blackstone: “When the judicial make these distinctions, they do not control the Legislature; they endeavour to give their intention its proper effect.”<sup>95</sup> Equitable interpretation was interpretation according to the animating purpose or spirit of a law, rather than its letter.<sup>96</sup>

A striking example of pre-constitutional natural law jurisprudence was Lord Mansfield’s decision in *Somerset’s Case*, involving the legality of slavery within the Kingdom of England. A Virginia slaveowner had brought his slave Somerset to London on a sojourn; Somerset escaped but was recaptured and confined in a ship on the Thames; antislavery advocates brought a habeas corpus action on his behalf, claiming that there was no lawful basis for holding slaves in bondage in England. Mansfield operated on the premise that, “[T]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . . It is so odious, that nothing can be suffered to support it, but positive law.”<sup>97</sup> Finding no positive law to support slavery within England, Mansfield required Somerset’s captors to set him free—thus illustrating the way in which natural law could be enforced in court. Had Somerset been captured in one of the colonies, which had enacted a slave code, the case would have come

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<sup>94</sup> BLACKSTONE, *supra* note 87, at \*90.

<sup>95</sup> *Rutgers v. Waddington* (Mayor’s Ct. of the City of New York, 1784), *quoted in* HAMBURGER, *supra* note 85, at 351.

<sup>96</sup> See HAMBURGER, *supra* note 85, at 344–57; Brutus, *Essay of Brutus* XV (March 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, *supra* note 29, at 440.

<sup>97</sup> *Somerset’s Case* (1772) 98 Eng. Rep. 499 (K.B.), *reprinted in* THE EIGHTEENTH-CENTURY CONSTITUTION 1688–1815, at 388 (E. Neville Williams ed., 1960).

out the other way.<sup>98</sup> Thus, while the case demonstrates the way in which natural law could be enforced, it also makes it plain that natural law cannot trump positive law, however odious.

This approach to the enforcement of rights changed with adoption of a written Constitution. By declaring the Constitution part of the “supreme Law of the Land,”<sup>99</sup> the sovereign people made it positive law, superior to any act of the legislature. By authorizing the federal courts to hear cases “arising under” the Constitution,<sup>100</sup> the people made clear that the positive law of the Constitution would be judicially cognizable. And by enumerating certain rights in the Bill of Rights, the people made those rights every bit as much a part of the positive law of the land as any power of Congress.

To be sure, the full ramifications of judicial enforceability were novel and only slowly dawned on many Americans. Madison, for example, for all his precocity, largely overlooked the courts in his discussion, in *The Federalist No. 49*, of how the boundaries of constitutional power would be enforced. By the time the First Congress was drafting the Bill of Rights, however, Madison had become fully aware that the “independent tribunals of justice” would “consider themselves in a peculiar manner the guardians of those rights.”<sup>101</sup> It was the Anti-Federalist Brutus who most clearly anticipated the sea-change in democratic practice that would come from creation of an independent judiciary with final authority to decide for itself all questions “arising under” the Constitution of the United States and to give the Constitution an equitable interpretation.<sup>102</sup>

Even at the Constitutional Convention, most delegates who spoke to the issue appreciated that adoption of a written Constitution would entail judicial review of its terms. Luther Martin, for example, who, despite his extreme Anti-Federalism moved for the addition of the Supremacy Clause, stated: “[A]s to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the

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<sup>98</sup> See PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 16–17 (1981).

<sup>99</sup> U.S. CONST. art. VI, cl. 2.

<sup>100</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>101</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>102</sup> See Brutus, *supra* note 29, at 419; Brutus, *supra* note 96, at 438.



laws.”<sup>103</sup> Gouverneur Morris insisted that the judiciary would not be “bound to say that a direct violation of the Constitution was law.”<sup>104</sup> In defending the prohibitions on bills of attainder and ex post facto laws, Hugh Williamson of North Carolina commented that although these principles might be violated, the prohibitions “may do good here, because the judges can take hold of it.”<sup>105</sup> Most delegates also understood that this power of judicial review would apply only to the positive law of the Constitution; it would not extend to protect the people against injustice. As Colonel Mason explained: “[Judges] could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.”<sup>106</sup> James Wilson spoke to similar effect.<sup>107</sup>

It appears, then, that the founders recognized a distinction between constitutional law, which is a species of judicially enforceable positive law, and natural law or natural justice. This distinction supports a reading of the Ninth Amendment under which rights arising from natural law or natural justice are not abrogated on account of the *expressio unius* effect of incomplete enumeration, but neither are they elevated to the status of constitutional positive law, superior to ordinary legislation.

I therefore respectfully disagree with the interpretation put forward by my friend Professor Randy Barnett. He asserts that natural rights enjoyed *constitutional* protection prior to adoption of the Bill of Rights and therefore that unenumerated natural rights enjoy constitutional protection as a result of the Ninth Amendment. As he puts it: “in the two year interregnum before the enumeration in the Constitution of certain rights, Congress would have acted improperly and unconstitutionally had it infringed upon the natural rights to the freedom of speech, to the free exercise of religion, and to keep and bear

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<sup>103</sup> 2 RECORDS, *supra* note 6, at 76.

<sup>104</sup> *Id.* at 299. Only two delegates, Mercer and Dickinson, disputed the authority of judges to declare unconstitutional laws void. *Id.* at 298, 299.

<sup>105</sup> *Id.* at 376.

<sup>106</sup> *Id.* at 78. This was not an argument on Mason’s part for judicial restraint, but rather an argument to augment judicial authority with regard to unjust or pernicious laws, by creation of a Council of Revision.

<sup>107</sup> *Id.* at 73.

arms.”<sup>108</sup> He asserts that Congress also “would have acted unconstitutionally had it taken private property for public use without just compensation.”<sup>109</sup> On the basis of this claim regarding the status of unenumerated rights prior to the Bill of Rights, Barnett translates the Ninth Amendment as follows: “the unenumerated (natural) rights that people possessed prior to the formation of government, and which they retain afterwards, should be treated in the same manner as those (natural) rights that were enumerated in the Bill of Rights.”<sup>110</sup> In other words: all retained natural rights are now constitutional rights, whether they are enumerated or not; there is no legal difference between what Madison called “rights expressly stipulated for in the Constitution”<sup>111</sup> and the “other rights” to which the Ninth Amendment refers.

We may call this the “fully enforceable rights” interpretation. Under it, the judiciary is empowered to determine what those natural rights are, how far they extend, and to what extent they may be regulated or curtailed. Exactly how this works is a bit sketchy, but Professor Barnett tells us that judges would “scrutinize a regulation of liberty to ensure that it is reasonable and necessary, rather than an improper attempt by government to restrict the exercise of the retained rights.”<sup>112</sup>

Putting aside the details of administration, I believe that Barnett’s premise is incorrect. First, his interpretation is predicated on the historical assertion that during the “interregnum” between adoption of the Constitution and addition of the Bill of Rights, violations of natural law by Congress would have been regarded as “unconstitutional.” Professor Barnett does not cite any precedent or

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<sup>108</sup> Barnett, *supra* note 81, at 13.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1.

<sup>111</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>112</sup> Barnett, *supra* note 81, at 14. Other scholars have also offered a “fully enforceable rights” interpretation of the Ninth Amendment. See, e.g., DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT LAW REV. 239 (1988); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988); Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95 (1987).

other direct support for this claim, at least if by “unconstitutional” we mean that the claimed right would be enforced in court in the teeth of contrary positive law.<sup>113</sup>

Indeed, the assumption that it was “unconstitutional” for Congress to violate natural rights during the “interregnum” between adoption of the Constitution and addition of a bill of rights contradicts the very purpose of adding the Bill of Rights. Those who advocated a bill of rights did so precisely because they feared that without it, the federal government would be able to violate those rights. Recall George Mason’s worry that that Congress would punish persons who objected to abusive tax collection practices for sedition and Madison’s worry that tax collectors might employ general warrants.<sup>114</sup> To be sure, Hamilton (among others) argued that a bill of rights was unnecessary—but not because violations of natural rights were already unconstitutional. The reason he said a bill of rights was unnecessary was that the powers vested in the new federal government were so carefully crafted that they could not reasonably be read to violate natural rights, such as freedom of the press. As already explained, Hamilton *lost* that debate, and rightly so. As Madison explained, at least some rights listed in the Bill of Rights were “actual limitations on the powers of Congress.”<sup>115</sup>

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<sup>113</sup> Although he does not cite it, Barnett might find some support for his position in the ratifying instrument of the New York ratification convention, which (alone among the states) offered a set of declarations of rights presumed to be “consistent with” the proposed Constitution, in addition to a list of proposed amendments. Among the declared rights were versions of most of the Bill of Rights. 2 DOCUMENTARY HISTORY, *supra* note 18, at 196–203. This strongly suggests that the Anti-Federalists who dominated the New York ratifying convention believed that the new federal government was bound by the listed natural and common law rights, which “cannot be abridged or violated.” *Id.* The fact that other state conventions recommended that these rights be protected by means of constitutional amendment and that the First Congress followed their lead suggests that the New Yorkers’ view was decidedly in the minority.

<sup>114</sup> See *supra* notes 35–36 and accompanying text.

<sup>115</sup> 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1834) (June 8, 1789). In questioning following an oral presentation of this lecture, Professor Barnett suggested that the positive rights in the Bill of Rights were the “actual limitations” and the retained natural rights listed in the Bill were the ones “inserted merely for greater caution.” There is no indication that Madison was drawing any such line. Indeed, he used the same verb, to “specify,” with respect to both natural and positive rights. Moreover, because Madison’s one specific example of the need for amendments—the possibility that tax collectors would break into homes without particularized warrants—

From my reading of the debates over whether a bill of rights was necessary, no one at the Founding articulated the theory on which Professor Barnett bases his interpretation: that violations of natural rights were already unconstitutional in the modern sense. To be sure, natural rights had a certain authority in court, much like common law rights, but they could not prevail over express and specific positive law enactments.

Second, the fully enforceable rights interpretation leaps from the language of the Amendment—that the rights retained by the people not be “denied or disparaged”—to the conclusion that these rights have been elevated to the status of constitutional rights, superior to legislation. That is not what it says.

Third, if all retained natural rights are to be treated “in the same manner,”<sup>116</sup> without regard to the terms of the Constitution, then the careful drafting of the Bill of Rights was pointless. The framers could have left most of the rights off the list, or maybe not enacted a bill of rights at all, and it would have made no difference. Yet Madison explained to the First Congress that as a result of the Bill of Rights, the “independent tribunals of justice” will “be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.”<sup>117</sup> If the tribunals of justice are just as committed to resisting encroachments on rights that were not stipulated for, Madison’s remark would make no sense.

Finally, although Professor Barnett recognizes that, in the Lockean tradition as understood by our founders, certain natural rights are “surrendered” in return for the benefits of civil society,<sup>118</sup> he is unwilling to accept the implications of that surrender. He suggests that it would be “better to adopt the terminology” that only “powers” are delegated to the government, while the “rights that are retained provide the measure of how these powers should be

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pertains to a natural right, it is implausible to read him as saying that natural rights were already legally protected. More likely, his reference to “greater caution” was a gesture to the common Federalist argument that it was unlikely that any of the rights would be infringed.

<sup>116</sup> See Barnett, *supra* note 81, at 1.

<sup>117</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (June 8, 1789).

<sup>118</sup> RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 68 (2004).

exercised.”<sup>119</sup> Under this reformulation, the people never actually surrender or relinquish natural rights; instead, natural rights are treated as “the measure of how these [delegated] powers should be exercised.”<sup>120</sup> In effect, Professor Barnett abandons any distinction between retained and relinquished natural rights and argues that, with respect to all of its actions, “the burden is on the government to establish the necessity and propriety of *any* infringement on individual freedom.”<sup>121</sup>

It is a plain departure from Lockean social compact theory and the language of the Ninth Amendment to treat all natural rights as retained rights. Madison, Wilson, Pinckney, Iredell, Jackson, Brutus, the Federal Farmer, and the other founders would not have worried that overbroad delegations of power and incomplete enumerations of rights would have the effect of surrendering, relinquishing, resigning, or abandoning natural rights if Professor Barnett were correct that all natural rights are nonetheless “retained” and may be invoked in court to limit the scope of delegated powers.

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We are left with the following construction of the Ninth Amendment: Courts should give presumptive protection to natural rights (but should not make up new positive rights), subject to congressional override through explicit and specific legislation. In other words: the rights retained by the people are indeed individual natural rights, but they enjoy precisely the same status, and are protected in the same way, that they were before the Bill of Rights was added to the Constitution. They were not relinquished, denied, or disparaged. Nor did they become “constitutional rights.” They are simply what all retained rights were before the enactment of the Bill of Rights: a guide to equitable interpretation and a rationale for narrow construction, but not superior to explicit positive law.

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<sup>119</sup> *Id.* at 74–75.

<sup>120</sup> *Id.* at 75.

<sup>121</sup> *Id.* at 259–60.