

# THE BILL OF RIGHTS, SOCIAL CONTRACT THEORY, AND THE RIGHTS "RETAINED" BY THE PEOPLE

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## I. INTRODUCTION

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>1</sup> There is no question that this Amendment was designed as a savings clause, to ensure that the specification of particular rights would not raise an inference that the Bill of Rights exhausted the rights which the people held as against the newly-created national government. But there is an ongoing debate as to nature of these additional rights retained by the people and as to the sort of claim they might support against the exercise of government power.

On the one hand, some commentators contend that the other "retained" rights are those guaranteed by a fundamental law that exists outside the written Constitution; they are the natural rights that individuals "retain" when they enter into civil society by agreeing to live by the social contract that forms the system of government.<sup>2</sup> On this view, the Ninth Amendment is the textual evidence that the framers of the Constitution were social contract political theorists

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1. U.S. CONST. amend. IX.

2. Among those who have advocated this view, see Randy E. Barnett, *James Madison's Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 7 (Randy E. Barnett ed., 1989); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145, 162-67 (N. York ed., 1988); John Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *THE BILL OF RIGHTS* 141 (1987); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127, 1161-67 (1987); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional*, 100 *YALE L.J.* 1073, 1074-81 (1991). See also Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *COLUM. L. REV.* 1215, 1266 n.198 (1990) (citing additional works that treat natural rights theory as a key to understanding the Ninth Amendment).

who envisioned the social contract as consisting of both the terms of the written Constitution as well as limitations on government that are inherent and inalienable.

The Ninth Amendment thus acknowledges the constitutional status of the rights retained because they cannot in principle be alienated, and the consequence is that we have both a written and unwritten Constitution. The reason for the Ninth Amendment was to clarify that the specification of rights in the *written* Constitution was not intended to imply that the natural rights not included in the writing were forfeited; they were still "retained" and held constitutional status. Since these additional rights are not to be disparaged, an implication is that they are judicially enforceable to the same extent as the rights enumerated in the text. This I shall call the Natural Law reading of the Amendment.

On the other hand, a number of commentators (of whom I am one) assert that the historical evidence shows that the other rights "retained" by the people are those which the framers of the proposed Constitution sought to secure by the granting of specified and limited powers to the national government.<sup>3</sup> Those who defended the Constitution in the original struggle over ratification (the Federalists) were those who stood against the proposal for a bill of rights during that struggle. They defended the omission of a bill of rights by arguing that the limited powers given the national government provided adequate security for the people's rights because (as Madison said) "it follows that all [powers] 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 necessary as if the residuum was thrown into the hands of the government."<sup>4</sup>

Moreover, this apparent suggestion implicit in a bill of rights, that "the residuum was thrown into the hands of the government,"

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3. Recent works that endorse this reading include McAfee, *supra* note 2; Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315-17 (1989); Wilmarth, *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1287-89, 1297-98, 1301-03 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 269-73 (1988); Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL'Y 63 (1987).

4. 1 ANNALS OF CONG. 438 (Joseph Gales ed., 1789). Madison is herein summarizing an argument offered by Federalist defenders of the Constitution during the ratification debate; in the same speech to Congress, Madison acknowledges that the argument is valid only in part.

meant that a bill of rights actually posed a threat to the rights of the people. To the extent that any of "the great residuum of rights" referred to by Madison were omitted from a bill of particular rights, it might be inferred that such rights "were intended to be assigned into the hands of the general government."<sup>5</sup> The purpose of the Ninth Amendment, on this reading, was to clarify that the strategy of enumerating "certain rights" was not intended to jeopardize those rights already secured as a residuum from the limited powers scheme of the proposed Constitution.

On this alternative reading, while the other rights retained are not "enumerated" in the Constitution, they are just as surely provided for by the language and design of the written Constitution; the point of the Ninth Amendment is to affirm that the bill of rights has not changed this design. The implication is that the rights secured by the Ninth Amendment are those rights which cannot be invaded because the national government simply was not empowered to act to affect these rights; but these are not rights found outside of the written Constitution which restrict government regardless of the grants of power contained in the Constitution.<sup>6</sup> This I shall call the Positivist reading of the amendment because on this understanding the focus of the amendment is to secure the rights which the people had already retained for themselves by virtue of the limited powers scheme of the written Constitution; the purpose was not to avoid an

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5. *Id.* at 439. I have here brought language from Madison's description of the argument that we need no bill of rights and linked it directly to language from his description of the danger that had been perceived in a bill of rights. But this is not selective quoting out of context. I am suggesting that when these statements are read in light of the ratification-debate history, it becomes evident that there is a direct connection between Madison's initial suggestion that a bill of rights could be read to imply that "*the residuum* was thrown into the hands of the government" (emphasis added) with his subsequently expressed concern that rights not enumerated in a bill of rights might be thought "to be assigned into the hands of the General Government." For further analysis of Madison's speech before Congress explaining the proposed Ninth Amendment as it relates to the overall ratification debates, see McAfee, *supra* note 2, at 1285-87.

6. In a previous article, I have referred to this construction as the "residual rights" reading of the Ninth Amendment. See McAfee, *supra* note 2, at 1221. The point is that the rights held harmless by the Ninth Amendment are the rights which are secured by the limited grants of federal power; the rights are not "affirmative rights," or rights that would serve as exceptions to the powers granted by the Constitution. See McAfee, *supra* note 2, at 1222. The residual rights reading corresponds with what I label for our purposes the Positivist reading; the affirmative rights reading corresponds with what I here label the Natural Law reading. While this treatment focuses on an explanation of the Ninth Amendment in terms of natural law jurisprudence, some advocates of the affirmative rights reading have explicated the idea of unenumerated affirmative rights without placing exclusive (or, in some cases, even primary) reliance on the founders' commitment to natural law.

inference against the idea of enforceable unwritten natural rights.

Despite reliance on the Ninth Amendment to help justify an expansive human rights jurisprudence at least since 1936,<sup>7</sup> for many the Amendment has remained a seemingly unsolvable mystery.<sup>8</sup> Even so, it has become popular to rely upon the Ninth Amendment as itself a key piece of evidence that the founders embraced a natural law jurisprudence that included the idea that republican constitutions presuppose (and thus implicitly contain) limitations on government resting on the inherent rights of people.<sup>9</sup> In my own lengthy article on the Ninth Amendment, I attempted to call into question the claim that the Ninth Amendment lent support to the project of defending an unwritten Constitution.<sup>10</sup> But it seems worthwhile to also look at these questions through the other end of telescope: I propose here to address the question as to whether evidence we have as to the founders' views about the relationship between natural law and constitutional law might strengthen or weaken the modern claims for the Natural Law reading of the Ninth Amendment.

While we can hardly exhaust this debate within the compass of this occasion, it is possible to undertake two somewhat more modest tasks. First, by briefly reviewing the social contract/natural law political theory of the founding period, particularly as revealed by the debates over ratification of the Constitution, we can summarize what appear to be the most salient (and in my view fatal) objections to the idea that unwritten constitutionalism is what illuminates the Ninth Amendment. Second, we can use this review to assess arguments defending the Natural Law reading which have been fully formulated (or reaffirmed) subsequent to my own published defense

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7. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936).

8. ROBERT H. JACKSON, *THE SUPREME COURT AND THE AMERICAN SYSTEM OF GOVERNMENT* 74-75 (former Justice Jackson observing that the Ninth Amendment rights "which are not to be disturbed by the Federal Government are still a mystery to me"); Testimony of Robert Bork, as quoted in Barnett, *supra* note 2, at 1 (comparing Ninth Amendment to an inkblot that cannot be used by courts because it lacks meaning; a constitutional provision cannot be applied unless you "know something of what it means").

9. The works cited in note 2 *supra* reflect this tendency. In addition, in 1975 Thomas Grey pointed to the text of the Ninth Amendment as such a piece of evidence in a celebrated article heralding the modern recognition that we have an unwritten Constitution that has a historical claim of legitimacy. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975) ("The Ninth Amendment is the textual expression of the idea [of higher law] in the federal Constitution.").

10. McAfee, *supra* note 2, at 1318-19. The issue of natural and inalienable rights as they related to the debate leading to the Ninth Amendment is therefore treated specifically in the article. *Id.* at 1265-77. As we shall discover, however, the ratification debate sheds light on the debate over the unwritten Constitution in various ways.

of what I have called the Positivist reading of the amendment.

## II. NATURAL RIGHTS, SOCIAL CONTRACT THEORY, AND CONSTITUTIONAL LAW

Proponents of the Natural Law reading of the Ninth Amendment frequently write as though modern positivists have simply forgotten that the framers of the Constitution and Bill of Rights were committed to the idea of natural rights in the context of social contract political theory. But if any have forgotten this historical fact, their position is a straw man that need not detain us. The ratification debates over the Constitution are filled with the rhetoric of natural and inalienable rights, and both sides in the debate stood as pretenders to the role of guardian of such rights. The modern debate is not over whether it was a central end of the Constitution to secure natural rights, but the relationship of such natural rights to the law of the Constitution.

Proponents of the Natural Rights reading begin with the premise that the founding generation believed that these natural and inalienable rights had binding force as legal limitations on government even within a duly-constituted legal order in which a written Constitution made no explicit provision for their protection — i.e., by virtue of their status in natural law standing alone (or at least by virtue of the well-understood and universally accepted social contract theory as briefly summarized above). This premise is a necessary one since the Ninth Amendment operates as a rule of construction as to what does or does not follow from the enumeration of rights in the Constitution and therefore does not purport to be the source of the constitutional status of the unenumerated rights.

If this premise is correct, and the founders believed that even in the absence of a bill of rights these natural and inalienable rights necessarily would still be part of the fundamental law of the land, it seems plausible that they might wish to clarify whether the provision for a bill of rights was intended to affect any such rights that were omitted. If the founders did not agree that at least some natural rights operated as self-executing constitutional limits on the powers granted by the Constitution, even without a bill of rights, the Ninth Amendment rule of construction would make little sense as a way of securing natural rights against any perceived threat presented by a bill of rights.<sup>11</sup> Indeed, considering that the provision appears to

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11. In the abstract it might make sense that the founders simply wanted to affirm that

presume a general understanding of the unenumerated constitutional rights retained by the people that might conceivably be threatened by a bill of rights, we would expect the historical evidence to show that most, if not all, the founders assumed the inherent constitutional status of certain natural rights. This paper will attempt to show that there was no such general understanding.

#### A. The Written Constitution and the Doctrine of Popular Sovereignty

We can begin by appreciating that the idea of unwritten constitutional rights must be based on more than the near-universal commitment to natural rights and social contract political theory. After all, two of the natural rights theorists who most influenced the founding generation, John Locke and William Blackstone, nevertheless assumed a constitutional system dominated by a doctrine of legislative supremacy (wherein the power of legislature could not be challenged within the legal order).<sup>12</sup> The natural rights, after all, were

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there are non-legal (political) claims to rights, rooted in natural law, that the Bill of Rights should not be taken as eliminating. On this view, the Ninth Amendment would have the effect of acknowledging the continuing significance of this sort of political discourse without acknowledging or creating any legal status for such claims of right. Such a view is suggested, though not defended at great length, in Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 185-88 (1988) (observing that a ground for appeal of "political" rights reading is precisely that, while the founders "subscribed to some such strong affirmation of the independent validity of basic rights (natural or otherwise)," *Id.* at 187, it would be "extremely surprising" to find a basis for the view "that they believed that the basic rights so understood were legally self-executing, to the point of not needing any further support as authority in the courts of law." *Id.*).

But in my judgment, Lawrence Sager is correct that the historical materials show that the Ninth Amendment grew from a concern as to the potential legal construction that might be given to the existence of enumerated rights. Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 242-43 (1988). It is therefore not surprising that no commentator has provided a sustained defense of this essentially political reading of the Amendment.

12. For commentary on Locke's decisive commitment 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, see WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 27-28, 187-88 (1987); EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* 45-51, 57 (1948); GARSON, *THE INTELLECTUAL REFERENCE OF THE AMERICAN CONSTITUTION, REFLECTIONS ON THE CONSTITUTION* 1, 7-9, 19 (1989).

For useful commentary on Blackstone's commitment to common law and natural law as well as Parliamentary sovereignty (and the related idea of legislative supremacy), see SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 13-16, 114-17, 128, 203-04 (1990); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 89, 93, 232

not secure except within a well-governed legal order; and popular legislatures were most likely to strike the necessary balance between liberty and order.<sup>13</sup> In general, it was assumed that the people's representatives would best secure their rights, and Locke and others held out the possibility that serious abuse of the pre-existing rights could ultimately be remedied by the people's right of revolution.

The views of Locke and Blackstone point up that the assumption that natural law-based principles provide a foundation for limiting government power is compatible with more than one conception of legal and institutional arrangements for giving the limiting principles effect. There is no question of the existence of such principles for the founders, but they faced serious issues relating to how best to secure them in the real world of political practice and by what allocation of legal and constitutional power. For example, although the founding generation eventually rejected the doctrine of legislative supremacy which Locke and Blackstone embraced, this was only one aspect of the attention they devoted to the problem of the potential gap between normative political theory — which addresses the elements of a just political order — and the reality of descriptive jurisprudence, which confronts the actual elements of existing legal systems. Because they had learned by sad experience that human

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(1988); DANIEL FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 67 (1990); RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* 28-30 (1969); J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 192 (2d ed., 1961); CORWIN, *supra* note 12, at 55-56.

See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-87*, 292 (1969) (observing that various thinkers who had espoused natural rights and/or British fundamental law, including Locke and Blackstone, believed that fundamental law was "enforceable only by the people's right of revolution," and concluding that "[t]here was therefore no logical or necessary reason why the notion of fundamental law . . . should lead to the American invocation of it in the ordinary courts of law.").

13. Modern Americans, steeped in their own understanding of constitutionalism, find it impossible to understand reconciling commitment to fundamental or higher law principles with a doctrine of legislative sovereignty. But as Sylvia Snowiss observes, legislative sovereignty did not appear as an invitation to arbitrariness to a mind like Blackstone's because the "parliamentary omnipotence defended [by him] related to a Parliament containing an effective system of checks and balances" which made England "the acknowledged leading example of successfully limited government." SNOWISS, *supra* note 12, at 16. As Americans we sometimes fail to consider that over time "English politics generally has sustained Blackstone's expectations." *Id.*

For additional insight as to how eighteenth-century thinkers would believe that the British system embodied the concept of civil liberty (and thus supplied adequate protection to natural rights) by virtue of institutional mechanisms that balanced consent and restraint and prevented both arbitrary power and licentiousness, see JOHN PHILIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 74-83 (1988).

liberty might seem to be protected by well-established political (or even constitutional) principle without receiving meaningful protection in the actual legal and political order,<sup>14</sup> the founders never took for granted any connection between principles of natural right and the notion of constitutional government.

Thus in the years following the American Revolution, which had begun as a fight over constitutional principle, thoughtful Americans had eventually concluded that the British lacked a meaningful Constitution both because it lacked the specificity of written law and because the doctrine of Parliamentary sovereignty permitted Parliament to ignore established principle.<sup>15</sup> One consequence was the emphasis on the importance of written constitutions. As one modern scholar has put it, whereas the British relied on "an unstipulated, imprecise constitution," the Americans "insisted in contrast that the principles and rules essential for organizing power and preserving liberty be separated from government and objectively fixed in positive form."<sup>16</sup>

The debate leading to the Revolution also fixed the founding generation's attention on the critical question of who ultimately exercises political authority to determine the law's content. This is the issue of sovereignty. Despite the struggle with Great Britain over the notion of Parliamentary sovereignty, particularly as applied to the American colonies, there is little question that most thoughtful Americans came to embrace Blackstone's formulation that every political order must have one party that holds illimitable power to

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14. As to the American revolutionary experience with the violation of established principles of right (some of which were conceived to be rooted ultimately in natural law), see JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986).

15. For standard formulations, see T. PAINE, *Rights of Man*, in *THE SELECTED WORKS OF TOM PAINE* 218 (H. Fast ed., 1945) ("[F]rom the want of a Constitution in England to restrain and regulate the wild impulse of power, many of the laws are irrational and tyrannical, and the administration of them vague and problematical."); *THE FEDERALIST* No. 53, at 360-61 (James Madison) (Jacob Cooke ed., 1961) (noting the distinction "between a constitution established by the people, and unalterable by the government" and "a law established by the government," and observing that the distinction is not well understood in England where Parliament is viewed as "uncontrollable" even by the constitution).

For commentary on this development in early American thinking, see BERNS, *supra* note 12, at 77; Herman Belz, *Constitutionalism and the American Founding*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 333, 337 (Leonard W. Levy & Dennis T. Mahoney eds., 1987); Gordon S. Wood, *The Political Ideology of the Founders*, in *TOWARD A MORE PERFECT UNION* 7, 23 (N. York ed., 1988).

16. Belz, *supra* note 15, at 336.

establish the law.<sup>17</sup> This concept of sovereignty is associated for obvious reasons with the rise of modern legal positivism.

For Americans at the time of independence, the way to reconcile the positivist idea of sovereignty with the concept of government limited by precepts of natural law was to place that sovereignty in safe hands: the hands of the people. Thus in 1776, the Massachusetts General Court (a popular body) proclaimed: "It is a maxim that, in every Government, there must exist a Supreme, Sovereign, absolute, and uncontrollable Power; But this Power resides, always in the body of the people, and it never was, or can be delegated, to one Man or a few."<sup>18</sup> For a time, this sovereignty was thought by many to effectively exist in the people's representative assemblies (as in the thinking of Locke and Blackstone), but in the years following independence Americans gradually came to their own unique view that even popularly elected legislatures represented the people as agents but derived their authority from the people acting through constitutional conventions.<sup>19</sup>

The American theory of popular sovereignty became a key ingredient in the defense of the newly-proposed Constitution, and its chief defenders relied repeatedly on the people's sovereign right and power to alter their government as the justification for the decision in Philadelphia to exceed the Convention's original charge to propose amendments to the existing Articles of Confederation, as well as for the proposal to shift the balance of power from the states to the central government. James Wilson insisted:

The truth is, that, in our governments, the supreme, absolute and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures; so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess, over our constitutions, control in *act*, as well as in right.

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17. See, e.g., WOOD, *supra* note 12, at 528-32.

18. Massachusetts General Court, Proclamation of the General Court, Jan. 23, 1776, quoted in WOOD, *supra* note 12, at 362.

19. The key development in the shift from reliance on popular legislatures to an enlarged view of popular sovereignty was the development of the institution of the popular constitutional convention that established a document that bound all branches of government. See, e.g., THOMAS G. WEST, *The Rule of Law in the Federalist*, in *SAVING THE REVOLUTION* 150, 155 (C. Kesler ed., 1987). As Belz observes, the central American idea of constitutionalism as limiting government power could not fully emerge until the power of the legislature was disassociated from the power of the people. Belz, *supra* note 15, at 339.

The consequence is, that the people may change the constitutions whenever and however they please. This is a right, of which no positive institution can ever deprive them.<sup>20</sup>

The debate leading to the Bill of Rights and the Ninth Amendment can be understood fully only against the backdrop of the insistence on the device of a *written* Constitution and the doctrine of popular sovereignty. My thesis is that, as of 1787, thoughtful Americans believed that the people were the ultimate judges of the division between the powers to be granted and the rights retained by the people. They also believed that there were rights which the people ought always to retain when entering civil society — those which even the people may not *legitimately* yield up to government because they are inalienable. Even so, these rights were to be secured by the written Constitution. And even such natural and inalienable rights did not hold an inherent status *within* the legal and constitutional system absent provision for their security within the written Constitution.<sup>21</sup>

#### B. The Antifederalists

If anything is clear from the ratification debates, it is that those most responsible for the Bill of Rights, the Antifederalist opponents of the proposed Constitution, did not believe that their fundamental rights were inherent features of legal and constitutional orders, whether or not found in the written Constitution. In their view, the purpose of the written Constitution was to secure these rights; if it failed to do so, the rights were forfeit as far as the legal system was

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20. VERSION OF WILSON'S SPEECH BY THOMAS LLOYD (NOV. 24, 1787), reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 361-62 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY]; see also *id.* at 348 (while some Americans think that the power "from which there is no appeal" resides "in their constitutions," in fact "it remains and flourishes with the people").

For confirming evidence that the founders were committed to the people's absolute right to alter and reform their constitutions, see Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1049-52, 1058-59 & n.49, 1102 n.209 (1988). Amar concludes, correctly I think, that the theory of popular sovereignty "served as the foundational principle of the Constitution." *Id.* at 1064 n.77; see also *id.* at 1071 (contending that "our true constitutional rule of recognition is . . . the principle of popular sovereignty that undergirds every Article of the original Constitution and every Amendment in the Bill of Rights.').

21. For foundational treatments of the natural rights/social contract theory underlying our constitutional order along these lines, see PHILIP A. HAMBURGER, *NATURAL RIGHTS IN THE BILL OF RIGHTS* (forthcoming); Walter Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 50, 54-59 (Robert A. Goldwin & William A. Schambra eds., 1985).

concerned. These points governed their thinking, both as to inherent rights of nature properly retained as well as to the fundamental law rights Americans had uniformly enjoyed under the English constitution. After summarizing a number of essential rights that a bill of rights must contain, including various due process guarantees and the right to trial by jury, the author of *Letters from a Federal Farmer*, the leading Antifederalist tract, stated: "These rights are not necessarily reserved, they are established or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws."<sup>22</sup> The people had effectively secured these rights "by long custom, by magna charta, bills of rights &c."<sup>23</sup>

The implication was clear enough. The traditional means for preserving these rights — the sources and mechanisms for protection rooted in the English constitution — would have no application in America after adoption of the proposed Constitution. These essential protections could be effectively secured only by "compacts" or "immemorial usage."<sup>24</sup> Reasoning that "it is doubtful, at least, whether [the rights under discussion] can be claimed under immemorial usage in this country,"<sup>25</sup> the *Farmer* goes on to argue that

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22. LETTERS FROM A FEDERAL FARMER (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 328 (Herbert J. Storing ed., 1981). It might be wondered how the Federal Farmer's views as to the constitutional status of due process and jury trial rights that are not incorporated in the written constitution bears on the issue of the inherent legal status of natural or inalienable rights. The basic answer is that commentators who insist that the Ninth Amendment presupposes inherent constitutional status for certain natural rights typically suppose that traditional principles of English constitutionalism were also considered to enjoy inherent constitutional status as unwritten fundamental law. See, e.g., Sherry, *supra* note 2, at 1130-34, 1137, 1139-41, 1173 n.198; Grey, *supra* note 2, at 150-53, 156, 166. Indeed, modern commentators tend to assimilate unwritten principles of the English constitution with natural and inalienable rights on the ground that the Americans embraced the views of English thinkers who saw their rights as existing from "time immemorial" and as rooted in reason and natural law. E.g., Sherry, *supra* note 2, at 1129, 1132. Whether this assimilation makes sense as historical analysis is an issue to be addressed in the larger work of which this is a part.

23. LETTERS FROM A FEDERAL FARMER (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 328.

24. *Id.* The rights of Englishman which the colonists had enjoyed were thought to rest both on an original contract, see REID, *supra* note 14, at 133-34 (describing the eighteenth century conception of the original contract of the English constitution), and confirming compacts. *Id.* at 68-69, 137-38 (discussing the relationship between the original contract and compacts such as Magna Carta in securing basic rights).

25. LETTERS FROM A FEDERAL FARMER (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 328. In light of the *Farmer's* additional statements confirming that the most recent original contract implicitly abolishes former constitutions and rights, *infra* note 27 and accompanying text, it may seem strange that the statement in text seemingly leaves some room for doubt about whether the rights he is discussing are necessarily repealed by the proposed Constitution. See also *id.* at 329 (argument proceeding on basis of arguable propo-

Congress' power to institute and regulate courts would include the right to "exercise those powers, and constitutionally too, as to destroy those [procedural] rights."<sup>26</sup> In another letter, the *Farmer* even more emphatically relies upon the well-understood principle that, since the proposed Constitution would be people's "last and supreme act," it would follow that "wherever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away."<sup>27</sup>

The same analysis applied to the rights that were considered natural and inalienable. Among the natural rights as to which the Antifederalists were most anxious was the freedom of the press.<sup>28</sup> Even so, the author of the *Federal Farmer* letters argued that the powers granted the national government would appropriately be construed to include authority to limit the press and concluded:

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sition that "the case is only doubtful"). Although in context the author seems confident that the proposed Constitution would properly be read as abolishing these traditional rights, it may be that he is hedging his bet and leaving open the possibility that one or more of these rights might be inferred from constitutional structure (perhaps from the concept of separation of powers and from the creation of an independent judiciary).

26. *Id.* at 328. For the pervasiveness of these Antifederalist claims that basic rights of Englishmen, particularly the right to trial by jury, were forfeited by the unamended Constitution, see Wilmarth, *supra* note 3, at 1282-83. See also *infra* notes 68-70 and accompanying text (reflecting Federalist agreement that omission of jury trial provision left the question of civil juries to discretion of Congress). Cf. Sherry, *supra* note 2, at 1138-40 (treating confederation-era case on right to trial by jury under a colonial charter and viewing it as an inherent right that bills of right merely "declare"); *id.* at 1146 (arguing that "indubitable truths and time-tested customs" retained their status as fundamental law and did not depend on the Constitution as positive enactment).

27. LETTERS FROM A FEDERAL FARMER (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 246; *id.* at 328-29 (acknowledging that power to alter or destroy constitutions includes authority to annihilate rights previously held); ESSAYS OF BRUTUS (Nov. 1, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 376 (proposed Constitution will be "an original compact; and being the last, will, in the nature of things, vacate every former agreement inconsistent with it" and "must receive a construction by itself without any reference to any other").

28. George Mason, *Objections to the Constitution* (Oct. 6, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 20, at 346, 350, offered a couple of weeks after the end of the Philadelphia convention, to Roger Sherman's draft of a bill of rights during the first Congress that considered amendments to the Constitution, ROGER SHERMAN'S PROPOSED COMMITTEE REPORT (July 21-28, 1789), reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 266, 267 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS]. The debate over ratification of the Constitution and bill of rights is filled with references to freedom of the press as among the most fundamental rights of the people which the Constitution might threaten.

While most of these ratification-period writings and statements pertaining to this particular right do not even focus on the underlying basis for its claim, Sherman probably accurately reflects common sentiment in describing it as among the "natural rights which are retained by [the people] when they enter into society." *Id.* at 267.

The people's or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. *The people, who can annihilate or alter those constitutions, can annihilate or limit this right.* This may be done by giving general powers, as well as by using particular words.<sup>29</sup>

The Antifederalists went further in denying that a written Constitution includes even a presumption of any sort in favor of fundamental rights. They repeatedly insisted that it is "universally acknowledged" that the natural rights "can neither be retained to themselves, nor transmitted to their posterity, unless they are expressly reserved."<sup>30</sup> This doctrine extended not merely to the natural rights that people necessarily give up to obtain the advantages of civil government, but also to the rights described as inalienable. Patrick Henry declared: "If you intend to reserve your inalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights."<sup>31</sup>

We might be tempted to think that Patrick Henry is speaking out of both sides of his mouth. How can rights be "inalienable" and yet presumed to be transferred unless expressly reserved? But it is we, not Henry, who are confused; he is speaking at different levels of discourse. His normative moral and political views sound in natural law: we have rights by nature and the purpose of civil society is to secure these rights; since they are moral rights, they can never

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29. LETTERS FROM FEDERAL FARMER (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 329 (Jan. 20, 1788) (emphasis added); cf. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 476 (Max Farrand ed., rev. ed. 1937) (Aug. 31, 1787) (since the people were "the fountain of all power," they "could alter constitutions as they pleased") [hereinafter Farrand]. Such statements underscore that the founding generation fully understood the language of the doctrine of sovereignty that referred to the unqualified nature of the people's sovereign power. The *Federal Farmer* is perhaps the most sophisticated of all the Anti-Federalist opponents of the Constitution, and he indicates in his writings that the sovereign people are obligated to honor the inalienable rights of individuals (see *infra* text accompanying note 33); but he does not confuse this question of obligation with the separate question of whether the people are the ultimate judges who hold illimitable power to establish binding fundamental law. Contrast the careful thinking on these questions by the Antifederalists with the confusion that sometimes infects modern treatments of the relationship between popular sovereignty and natural rights. See *infra* note 40.

30. ESSAYS BY THE IMPARTIAL EXAMINER (Feb. 20, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 176; 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445 (1941) (Patrick Henry, June 14, 1788) ("all nations" have adopted construction that rights not expressly reserved are impliedly relinquished) [hereinafter ELLIOT'S DEBATES]; LETTERS FROM AGRIPPA (Jan. 14, 1788), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 515 (1971) (people "of course" delegate "all rights not expressly reserved").

31. 3 ELLIOT'S DEBATES, *supra* note 30, at 445 (Patrick Henry, June 14, 1788).

justifiably be taken or relinquished. But Henry's constitutional jurisprudence is positivist: in practice (and hence in descriptive theory) it is understood that the people are charged with securing their rights in the actual social compact (the written constitution), or those constitutions are construed in favor of government power.

The ratification materials are replete with similar statements confirming that "inalienable" rights are those which are not *properly* granted away, but which may nevertheless be granted away in law by the people's design or neglect. "[A] free and enlightened people will not resign all their [unalienable and fundamental] rights to those who govern."<sup>32</sup> Even though there are natural rights "of which the people cannot deprive individuals," the only inevitable implication is that "the national laws *ought to* yield to unalienable and fundamental rights"; even so, this "will not be the case with the laws of Congress."<sup>33</sup> Although the "great object [of the people] in forming society is an intention to secure their natural rights," where the people fail to expressly reserve their rights "every right whatsoever will be under the power and controul of the civil jurisdiction."<sup>34</sup>

Consider George Mason's contribution to this discourse. Mason drafted Virginia's 1776 Declaration of Rights, the document that became the pattern for the declarations of rights found in a number of subsequent state constitutions, and which anticipates a good portion of the federal bill of rights which we are commemorating.<sup>35</sup> Mason's famous declaration referred to "certain inherent rights" of which the people "cannot, by any compact, deprive or divest their

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32. LETTERS FROM FEDERAL FARMER (Oct. 9, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 231.

33. *Id.* at 247 (Oct. 12, 1787). There is arguably some ambiguity in the statement as to precisely what "will not be the case" with congressional enactments inasmuch as the author had referred earlier in the paragraph both to limiting principles that ought to be observed as well as the idea that national laws ought to extend to only a few objects. *Id.* In the same paragraph, however, the author also states that while it might be hoped that Congress would abide by well-known "principles" that are essential to free government, it "will not be bound by the constitution to pay respect to those principles." *Id.*

34. ESSAYS BY THE IMPARTIAL EXAMINER (Feb. 20, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 30, at 176, 177. In fact, an outspoken Antifederalist delegate to the North Carolina ratifying convention, David Caldwell, proposed that the convention address whether the Constitution was fitting by considering whether it embodied "those *maxims* which I conceive to be the fundamental principles of every safe and free government." 4 ELLIOT'S DEBATES, *supra* note 30, at 9 (July 24, 1788). One of the maxims he set forth for discussion was this one: "Unalienable rights ought not to be given up, if not necessary." *Id.*

35. See VIRGINIA DECLARATION OF RIGHTS, reprinted in 1 SCHWARTZ, *supra* note 30, at 233-314, 256, 262, 276, 286, 338.

posterity."<sup>36</sup> Some modern commentators have suggested that such natural rights provisions were thought to be declaratory of limitations which, because they are inherent, exist as legal limitations whether declared in writing or not.<sup>37</sup>

But 11 years later, when Mason was opposing the proposed Constitution in part because it omitted a bill of rights, he asserted with great force that the omission of a provision stating the principle that all powers not granted to the national government are retained within the states would imply that "many valuable and important rights" had been "given up."<sup>38</sup> Mason also originated the standard Antifederalist argument that "the Laws of the general Government being paramount to the Laws and Constitutions of the several states, the Declarations of Rights in the separate states are no security."<sup>39</sup> If natural rights were viewed as creating inherent and enforceable legal limits on the scope of granted powers, Mason and others should logically have viewed the supremacy clause as subject to these implied limitations, particularly since the supremacy clause grants the status of supreme law only to laws enacted pursuant to the Constitution. Implicit in Mason's argument is the assumption that natural rights had become binding constitutional norms by virtue of their inclusion within the state constitutions; since those constitutions were inferior to the federal constitution, it followed that the natural rights would be forfeited to the extent that federal powers were construed broadly enough to reach them.<sup>40</sup>

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36. *Id.* at 234.

37. *E.g.*, Sherry, *supra* note 2, at 1132-33; Grey, *supra* note 2, at 156; Patterson, *The Forgotten Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE* 107, 108-09 (Randy E. Barnett ed., 1989).

38. 3 *ELLIOT'S DEBATES*, *supra* note 30, at 444 (George Mason, June 14, 1788).

39. 13 *DOCUMENTARY HISTORY*, *supra* note 20, at 348 (Oct. 7, 1787). For useful analysis of Mason's compelling fears as to the proposed Constitution, see Wilmarth, *supra* note 3, at 1275, 1281.

40. While the Antifederalists are clear that the existence of inalienable rights generates an obligation in the people to secure such rights, they are equally clear that the people possess the political and legal authority to fail or refuse that task. The people are the ultimate judges, and popular sovereignty (understood as the people's limitless power to fix the law of the Constitution) is the first principle of American constitutionalism. See *supra* note 20. This is what accounts for the urgent need to persuade the sovereign people that they are at great risk of ceding their basic rights away to government.

Modern commentators, by contrast, have created enormous confusion by failing to thoughtfully reconcile the founding generation's dual commitment to natural rights and popular sovereignty. *E.g.*, Sherry, *supra* note 2, at 1133-34, 1146, 1160, 1165-65 (suggesting that natural rights were viewed as unalterable limitations on government so that constitutional provisions recognizing such rights were viewed as declaratory and as immune from constitutional amend-

Some appear to be tempted to discount the importance of the Antifederalists' decidedly positivist constitutional jurisprudence, presumably because the Ninth Amendment has generally been traced to the arguments offered by the Federalists against inclusion of a bill of rights.<sup>41</sup> But this move is a mistake for several reasons. First, it

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ment even by the people; fundamental law might evolve, but never in derogation of natural rights); *id.* at 1156 n.132 (confronting doctrine of popular sovereignty in a single footnote with the assertion that the founding generation did not perceive a tension between popular sovereignty and fundamental rights during the 1780's). But the oft-expressed Antifederalist fear that the people were being duped into casting away their precious rights shows a sharp awareness of the tension between popular sovereignty and fundamental rights and, indeed, points out the direction in which any conflict would be resolved.

A striking example of the resulting confusion is the recent law journal note arguing that the proposed flag burning amendments of recent years would be unconstitutional infringements on the natural right of free speech. *Cf.* Rosen, *supra* note 2, at 1085-86 (right to alter and abolish government does not extend to inalienable rights because individuals lack power "to surrender or alienate their retained natural rights"); *id.* at 1090-91 (arguing that recently proposed flag burning amendment would be an unconstitutional invasion of inalienable right to free speech because the term "unalienable" should be understood "literally" rather than "rhetorically;" also contending that even repeal of the Ninth Amendment would not permit an amendment abridging an inalienable right because the Ninth only makes explicit what is already implicit), *with id.* at 1081 & n.53 (acknowledging that "the people are 'indispensably' bound by the law of nature, but as the supreme judicial power, the people themselves are the judges of the natural law boundaries that constrain them"); *id.* at 1082 (appearing to recognize the people's authority to recognize "a new natural right" or to deny "an old one"); *id.* at 1092 (arguing that a particular hypothetical flag burning amendment might be constitutional, but only if the amendment articulated the people's conclusion that free speech should not be considered a natural right).

In the first place, the author fails to explain why the recently proposed amendments, drafted as exceptions to the first amendment, are not properly construed as the people's judgment that the natural right of free speech does not extend to flag burning. If the people are "the judges of the natural law boundaries that constrain them," they surely would be empowered to determine the scope of protection such a natural right would offer as much as whether free speech is a natural right at all. And if (as the author claims) the Constitution necessarily embodies the inalienable rights on the grounds that individuals may not cede such rights when entering civil society, and judges are empowered to invoke these rights as inherently part of the fundamental law with or without a Ninth Amendment, how can it even be proper for the people to be in any sense be the ultimate judge of the natural law boundaries? The author, in short, engages in a futile attempt to avoid the necessity for choosing whether to give priority to popular sovereignty or to the supposed inherent constitutional status of inalienable natural rights. But that is a choice that cannot be avoided.

41. As to the Federalist argument which most commentators have thought leads to the Ninth Amendment, see *infra* notes 50-51 and accompanying text. The inference that commentators tend to discount the importance of the Antifederalist constitutional jurisprudence is largely derived from the fact that most pass over the intense positivism of the Antifederalists while focusing on what they take as a Federalist argument that the preexisting rights of nature would be secured as implied limitations on the powers granted to the national government by the proposed Constitution. *E.g.*, Grey, *supra* note 2, at 162-64 (summarizing Antifederalist demand for bill of rights without making clear its grounding in positivist insistence on strict legal necessity for such provisions; eventually acknowledging that "some of the Antifederalists"

would seem anomalous to assume that any difference between the parties on the issue of the inherent legal status of the inalienable rights should be resolved in favor of the Federalist position; the Federalists, after all, effectively lost the debate over the necessity of a written bill of rights as reflected in their own recognition of the need to appease the many people who accepted the Antifederalist arguments.<sup>42</sup>

Moreover, as observed above, the text of the amendment reads not as a provision securing rights, but as a rule of construction that avoids an inference against rights generally understood as already secured without the enumeration of rights in a bill of rights. Clearly both sides of the dispute generally understood that at least some rights were secured by the enumerated powers scheme (especially, in

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responded to asserted Federalist reliance on implied limitations with arguments favoring presumptive legislative power, with the conclusion that to "omit stating [rights] was to risk surrendering them") (emphasis supplied); Sherry, *supra* note 2, at 1161-65 (explicating debate leading to the Ninth Amendment in terms of supposed Federalist concern that implied limitations might be lost by construction if a bill of rights were inserted; no attention to positivist character of Antifederalist position); Van Loan, *Natural Rights and the Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 2, at 149, 154-58 (summarizing the positions of the parties about necessity and propriety of a bill of rights without alluding to the positivism of the Antifederalists).

This sort of passing over (as presumably irrelevant) the jurisprudential underpinnings of the Antifederalist insistence on a bill of rights is perhaps most strikingly illustrated in a recent Yale Law Journal Note dealing with the Ninth Amendment. Rosen, *supra* note 2, at 1077 n.23. There the author, Jeff Rosen, contends that my own assertion that the Federalists agreed that even inalienable rights could be granted away rested on a fallacious failure to distinguish between "alienable" and "inalienable" rights. (A response to the claim is offered *infra* notes 48-50 and accompanying text.) On the very page where I supposedly fell into this error, however, I had also set forth the Antifederalist position that inalienable rights could be granted away in a written Constitution. Rosen's observation gave no attention to this treatment, which rested on an explicit statement that inalienable rights would be deemed granted if not expressly reserved.

Since Rosen was generally explicating the distinction between alienable and inalienable natural rights for purposes of Ninth Amendment analysis (and was not, for example, purporting to treat the views of the Federalists), his limiting this criticism to my treatment of the *Federalists* seems to reflect (1) an admission that the Antifederalists' position on this question, by contrast, was not limited to the alienable natural rights and (2) an undefended assumption that Federalist views on the inherent legal status of inalienable rights is the more crucial one for purposes of understanding the Ninth Amendment.

42. Thus even if we assumed that the Federalists did not concur that inalienable rights could be granted away, "[i]t is odd indeed," as Randy Barnett observes, "to insist that the best interpretation of the Bill of Rights is based on the theory used by its most vociferous opponents." Barnett, *supra* note 2, at 10. As I have observed elsewhere, however, both the history and original drafts of the Ninth Amendment were in fact drafted to appease both sides of the debate over the necessity for a bill of rights. McAfee, *supra* note 2, at 1226, 1263-64. As we shall see, of course, the Federalists in fact agreed that even so-called inalienable rights might be granted away.

the case of the Antifederalists, when article I of the Constitution was supplemented by the contemplated tenth amendment).<sup>43</sup> On the other hand, it is clear that *at least* the Antifederalists did not believe that the natural rights were reserved by the Constitution, except to the extent that it might be supplemented to clarify the reservation of such rights by reference to the powers expressly granted.<sup>44</sup>

Finally, the explicit Antifederalist rejection of the notion of an inherent legal status for natural rights ought to weigh heavily in evaluating the significance of the fact that they offered arguments about the risks of enumerating some rights that paralleled the arguments of the Federalists against a bill of rights.<sup>45</sup> The Antifederalists simply emphasized that the problem posed by the decision to enumerate some rights was already present — i.e., that broad national powers could in fact be implied from the provision for some fundamental rights in the body of the proposed Constitution. They reasoned: if the constitutional scheme could not be construed broadly enough to threaten fundamental rights, why did the framers include such rights as jury trials in criminal cases while omitting a provision for juries in civil cases?

Since, according to the Antifederalists, the limitations found in the body of the Constitution “are no more nor less, than a partial bill of rights,” it followed that “[t]he establishing of one right implies the necessity of establishing another and similar one.”<sup>46</sup> For

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43. It might be thought that the Antifederalists believed that no rights would be secured absent the enumeration of specific rights in a bill of rights. As I have demonstrated elsewhere, however, the Antifederalists did believe that the Constitution would reserve rights to the states and the people so long as language clearly stating that all powers not granted were reserved was added to the Constitution. McAfee, *supra* note 2, at 1244-45, 1274-75. The parties disagreed, of course, as to whether the concept of limited powers and reserved rights was a completely sufficient safeguard of cherished rights.

44. One of the few commentators to attempt to call this argument into doubt is David Richards. See DAVID RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 220 (1989) (viewing author of LETTERS FROM A FEDERAL FARMER, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, as proponent of implied unenumerated rights who advocated “a provision like the Ninth Amendment” to rebut “any negative inference drawn from enumeration of certain rights”). For a refutation of this reading of the *Federal Farmer*, which includes a summary of the *Farmer's* proposal for a comprehensive scheme of listing rights combined with a general reservation of rights from granted powers, see McAfee, *supra* note 2, at 1272-75. See also *supra* notes 22-23, 25-27, 32-33 and accompanying texts (pointing up positivist views of *Federal Farmer* and other Antifederalists).

45. For a brief summary of the Federalist argument, see *supra* notes 4-6 and accompanying text.

46. LETTERS FROM A FEDERAL FARMER (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 248, 249.

the Antifederalists, at least, this argument cannot be that natural and fundamental rights which otherwise would hold inherent legal status might be forfeited by construction (they, after all, had effectively rejected any notion of natural rights with inherent legal status); it is, instead, an argument that the existing partial enumeration of rights implicitly acknowledged the contemplated breadth of the powers granted by the Constitution. Indeed, when the Federalists expressed concern that a bill of rights might be construed as the sole source of limitation on national power, Antifederalists such as Patrick Henry (who rejected that inalienable rights held inherent legal status) pointed to the enumeration of rights in the proposed Constitution and observed that the argument against specific limitations "reverses the position of the friends of the Constitution, that every thing is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved."<sup>47</sup>

Such arguments by the Antifederalists almost assuredly influenced the decision to add a provision clarifying that the enumerated rights would not exhaust the rights retained by the people. That influence is probably reflected in the drafting of the Ninth Amendment in terms of the inference to be drawn from the enumeration of rights in "the Constitution" — rather than in terms merely of the Federalist concerns about the insertion of a bill of rights as advocated by those who opposed ratification. Considering this Antifederalist contribution to the dialogue leading to the Ninth Amendment, it would seem reasonable to assume that their constitutional jurisprudence would be as likely to bear on the meaning of the amendment as would the jurisprudence of the Federalists. Fortunately, however, the jurisprudence of the contending parties shared more premises than we are sometimes led to believe, as the following section will show.

### C. The Federalists

The Federalist defenders of the proposed Constitution disagreed completely with the Antifederalist interpretation of the Constitution. What is frequently missed is that they shared with the Antifederalists the same basic assumptions about the relationship between the written

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47. 3 ELLIOT'S DEBATES, *supra* note 30, at 461 (Patrick Henry, Va. Ratifying Convention, June 15, 1788). Henry's statement reflects not only that he saw the problem of a partial enumeration of rights as bearing on the debate over the reach of constitutional powers, but also that he construed the Federalist argument in the same terms. See McAfee, *supra* note 2, at 1254-55.

Constitution, natural rights, and social contract theory. If modern commentators were on the mark, the Federalists logically should have reminded the Antifederalists that the most crucial rights about which they were concerned were "inalienable" and thus held inherent constitutional status. Instead, they agreed that the key to everything was in the written constitution.

An example is James Wilson's landmark defense of the omission of a bill of rights, offered just three weeks after the Philadelphia convention adjourned. In his speech in Philadelphia, Wilson clearly conceded that natural rights obtained constitutional status only when they are secured by the written constitution. He acknowledged, for example, that under their state constitutions the people had "invested their representatives with every right and authority which they did not in explicit terms reserve."<sup>48</sup> According to Wilson, *all* rights — traditional or natural, as well as those referred to as either alienable or inalienable — were subject under the state constitutions to this presumption that they were granted if not reserved. None of these rights would have constitutional status merely because they were deemed implicit in the social contract.<sup>49</sup>

Wilson's defense rested instead on the contention that the proposed Constitution was unique because, like the Articles of Confed-

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48. JAMES WILSON'S SPEECH IN THE STATE HOUSE YARD (Oct. 6, 1787), *reprinted in 2 DOCUMENTARY HISTORY*, *supra* note 20, at 167. For useful explication of the Federalist focus on the uniqueness of the proposed Federal Constitution, and the contrast between it and the state constitutions from which the Antifederalists had drawn their constitutional theory, see Wilmarth, *supra* note 3, at 1285.

49. One commentator has suggested that my own "failure to distinguish between alienable and inalienable rights" led me to the misguided conclusion that "Federalists believed 'that even inalienable rights may be granted away.'" Rosen, *supra* note 2, at 1077 (citing McAfee, *supra* note 2, at 1267). The author, however, does not cite a single Federalist statement that purports to make this distinction critical to the Federalist argument stressing that rights not specifically retained under the state constitutions were deemed granted. From my own careful review of the ratification debates, it seems clear that the Antifederalist arguments and the Federalist counter-arguments were not driven by, nor explicated, in terms of a distinction between alienable and inalienable natural rights; any emphasis on inalienable rights came because Antifederalists most feared the loss of their inalienable rights, and the Federalist arguments were primarily directed at reassuring the people that the inalienable rights were secured by the federal system so as to obviate the need for a bill of rights.

It is thus quite clear in context that Wilson's argument was referring to all species of rights — natural and positive, alienable and inalienable. The remarks are offered in response to pervasive Antifederalists claims that all the rights previously secured in the bills of rights of the state constitutions (which included the most-valued inalienable rights as well as rights that might conceivably have been properly granted to government) would be lost because not expressly reserved. Moreover, in the same remarks Wilson refers to the specific example of freedom of the press as one that could be forfeited under a state constitution if not specifically provided for — a right which most would have conceived of as an inalienable right.

eration which it replaced, the government thereby contemplated was designed to accomplish a limited number of specific national objects. Because of the enumerated powers scheme, then, "the reverse of the proposition [found in the state constitutions] prevails, and everything which is not given, is reserved."<sup>50</sup> Before the North Carolina ratifying convention, James Iredell made the point even more emphatically:

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.<sup>51</sup>

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50. JAMES WILSON'S SPEECH IN THE STATE HOUSE YARD (Oct. 6, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 20, at 167-68. Thus Wilson's argument that the freedom of the press had been retained under the Constitution did not refer to that freedom's unique status as an inalienable right. Rather, Wilson's overall argument provides an example of response by confession and avoidance — yes, even such an inalienable right *would be ceded* if not expressly retained as to a government formed like the state constitutions, but this argument has no application to the federal Constitution because it forms a government of specific powers.

Contrast the interpretation of David Richards, who claims that the "standard answer" to objections to the omission of bill of rights was that, "in contrast to the British constitution," the Constitution "*was republican*; any powers not expressly granted to the federal government . . . were reserved for the people, including the wide range of inalienable human rights that could not, in principle, be surrendered to the state." RICHARDS, *supra* note 44, at 220 (emphasis added). Richards is wrong on three counts: (1) the argument that the any powers not granted were reserved did not center on the claim that the Constitution created a "republican" form of government, by contrast to the British constitution, but rather in terms of it being a government of delegated powers for limited purposes; (2) although some Federalists also argued against the necessity for a bill of rights based on the protections to liberty inherent in republican government, those arguments would have also applied to state governments (indeed, no one suggested that the state governments were *not* republican governments); (3) the Federalist arguments were not to the effect that the concept of republican government under a constitution included inalienable rights as implied constitutional rights; indeed, Wilson's statement in text referring to the republican state constitutions is directly to the contrary.

51. 4 ELLIOT'S DEBATES, *supra* note 30, at 149 (James Iredell, July 28, 1788). As with Wilson and others, Iredell's argument that a bill of rights would be "necessary" under a state constitution unquestionably referred to so-called inalienable rights as well as to others. *Cf.* Rosen, *supra* note 2, 1077 & n.23 (denying that Federalists believed that inalienable rights could be granted away). His speech came as part of a colloquy with Samuel Spencer, who had argued for a bill of rights specifically to secure "those unalienable rights which ought not to be given up." 4 ELLIOT'S DEBATES, *supra* note 30, at 137 (Samuel Spencer, No. Carolina Ratifying Convention, July 28, 1788). In response to Spencer's contention that the Constitution required a bill of rights to provide an "express negative" as a "fence against [the inalienable

The fundamentally positivist nature of this debate as to the necessity of a bill of rights under the proposed Constitution is underscored by the Federalist argument referred to by Iredell — that a bill of rights would be dangerous, as well as unnecessary. Just as Wilson had observed that the state constitutions had granted all not specifically retained, which would create the need for a bill of rights, he argued that “annex[ing]” a bill of rights to the federal plan would be improper “for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution.”<sup>52</sup> Samuel Parsons reasoned that inserting a new bill of rights in the place of the limited powers scheme would bring about the implication “that nothing more was left with the people than the rights defined and secured in such bill of rights.”<sup>53</sup>

In other words, resort to a bill of rights might raise the inference that the Antifederalists were right, the new Constitution created a government of general powers like the extant state constitutions — and many of the rights reserved by the limited grants of power would be forfeited because they would not all be specified in the bill of

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rights] being trampled upon.” *id.* at 168, Iredell insisted that such a “fence” was supplied by the enumerated powers scheme of the proposed Constitution. 4 ELLIOT’S DEBATES, *supra* note 30, at 171-72 (James Iredell, July 29, 1788). Had Iredell’s acknowledgment of the necessity of a bill of rights under the state constitutions included an exception for inalienable rights, he surely would have said so. Indeed, it seems likely that such a proviso would also have been employed directly to defend the federal Constitution as well.

Moreover, if the proposed distinction between alienable and inalienable rights were truly the key to understanding Federalist discourse on a bill of rights, it would be precisely the alienable rights that Iredell and Wilson acknowledge are granted to a government of general powers if not expressly reserved. Even so, the advocate of this distinction as the key to explaining the Federalist statements acknowledging that it was possible for the sovereign people to unwisely cede up their rights nevertheless relies on additional elements of social contract political theory to suggest that courts should invalidate even a popularly-based constitutional amendment granting to government an *alienable* right if it concludes that no adequate equivalent had been obtained in exchange for giving up the right. Rosen, *supra* note 2, at 1091-92 (pointing to social contract theory principle that government should limit even alienable rights only to the extent essential and in exchange for enhancing the security of other rights).

But if courts can inquire into the legitimacy of an attempt to delegate even an alienable natural right, it is no longer true that what is not expressly reserved is deemed to be granted, and Federalist spokesmen have fallen into incoherence. The lesson is a simple one: sooner or later, it is critical to discover that every limiting principle of social contract political theory is not *ipso facto* an implied enforceable limitation in the Constitution. By the same token, if the limiting principles concerning alienable rights are not inherent legal limitations, why should we assume differently of the theory of inalienable rights?

52. STATEMENT OF JAMES WILSON AT PENNSYLVANIA CONVENTION (Nov. 28, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 20, at 391.

53. Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), *in* 3 DOCUMENTARY HISTORY *supra* note 20, at 569.

rights. It was this Federalist argument of "danger," as one Antifederalist called it, that led to the Ninth Amendment; and it is an argument that rests on the distinction between governments of general and specific powers and the assumption that even the inalienable rights must be provided for within the Constitution, either by reservation from limited powers or as specific limitations on the general powers of legislation. The purpose of the Ninth Amendment, then, was to preserve the rights retained by virtue of the enumerated powers scheme that was central to the design of the federal Constitution.<sup>54</sup>

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54. In the multitude of speeches and writings that make up the debate over ratification, there are some statements that can be read as assuming the fundamental law status of principles of natural rights and social contract theory. See, e.g., 4 ELLIOT'S DEBATES, *supra* note 30, at 161 (Richard Maclaine, July 29, 1788) (asserting if there are rights "which never can, nor ought to, be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up"). The argument implicit in this statement is less clear than it might appear at first glance. Maclaine could have been contending that inalienable rights cannot properly be said to have been "given away" even if they are not secured within the legal order by the written Constitution. If so, the argument sounds in the discourse of political legitimacy rather than constitutional or fundamental law: the mere omission of rights from the Constitution does not necessarily embody a judgment that it is fitting that government infringe them at will.

A similar tactic was employed by Federalists in defending the omission of a guarantee of trial by jury in civil cases: even while acknowledging that such an omission gave discretion to Congress in regulating the right, a number objected to the claim that civil juries had been abolished, arguing that Congress would of course make provision for jury trials. Compare A CITIZEN OF NEW HAVEN (Jan. 7, 1788), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 20, at 524, 527 (the "citizen" was Roger Sherman) ("[N]or is there anything in the Constitution to deprive [parties to law suits] of trial by jury in cases where that mode of trial has been heretofore used.") and 3 ELLIOT'S DEBATES, *supra* note 30, at 546 (Edmund Pendleton, Va. Ratifying Convention, June 20, 1788) (observing that "there was no exclusion of [jury trials] in civil cases, and that it was expressly provided for in criminal cases;" not even "any tendency towards it") with *id.* at 544 (Patrick Henry, June 20, 1788) (summarizing argument that Congress would honor right to trial by jury because of strong feelings as to its basic nature: "[T]he enormity of the offence is urged as security against its commission.").

Even if Maclaine's argument is that inalienable rights hold a status as fundamental law apart from the written Constitution, his statement does not clarify whether he views unwritten fundamental law as holding a status *within* the legal order established by the Constitution. The general course of debate over ratification of the Constitution confirms that most of its participants agreed that principles of government gained this status by their inclusion in the written Constitution. Maclaine, of course, could be merely scoring a debater's point in suggesting the paradox presented by the notion of alienable "inalienable" rights, or, less ironically, suggesting that government is bound (morally and otherwise) to honor such inalienable rights whether or not they are converted to legal rights. Moreover, even if Maclaine's assumption is that the inalienable rights are part of the fundamental law — perhaps based in part on the widespread recognition of such rights in extant state declarations of rights — Maclaine's statement does not clarify whether he views unwritten fundamental law principles as having force within the ordinary legal order. A more complete treatment, analyzing the

#### D. Beyond the Legalistic Debate Over the Necessity for a Bill of Rights

Beyond the formidable body of evidence demonstrating the lineage from the highly positivist ratification-period arguments to the final language of the Ninth Amendment — a great deal of which we shall pass over — there is a great deal of indirect evidence that the participants in the debate would have placed no stock in a theory of inherent constitutional rights. For example, underlying the formal theory of the Antifederalists was genuine fear of the new national government, reflecting both experience harking back to the American revolution and a general eighteenth century distrust of human nature and government officials. The Antifederalists began with the premise that “[a]ll checks founded on anything but self-love, will not avail,”<sup>55</sup> and that “it is the nature of mankind to be tyrannical.”<sup>56</sup> As Cecelia Kenyon observed, this skepticism led the Antifederalists to a quest for clarity, explicitness, and specificity in stating the nature and limits of government power.<sup>57</sup> It was an attitude conducive to an authentically positivist orientation toward the nature of law and constitutionalism.

The Federalists’ own form of skepticism went to the efficacy of theoretical legal restraints to effectively limit the exercise of arbitrary political power. Many Federalists echoed the theme of one advocate that “[p]aper chains are too feeble to bind the hands of tyranny or ambition.”<sup>58</sup> Federalists, too, relied upon the national experience,

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various statements from the Philadelphia convention and ratification debates which have been relied upon will be a part of the larger project of which this is a part.

Apart from the meaning and significance of such statements, the evidence is overwhelming that any competing views of the nature of fundamental law would have run against the grain of the entire course of the dialogue as to the relationship between fundamental rights and written constitutions and are not related to the arguments that lead to the Ninth Amendment. Given that the Ninth Amendment text, and the debate that leads to it, assumes a universal understanding of the other rights already retained, such statements cannot properly be given significant weight.

55. 3 ELLIOT’S DEBATES, *supra* note 30, at 327 (Patrick Henry, Va. Ratifying Convention, June 12, 1788).

56. JACKSON T. MAIN, THE ANTFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-88, at 161 (1974 ed.) (1961) (quoting William Lenoir).

57. See Cecelia M. Kenyon, *Introduction to THE ANTFEDERALISTS* lxxv-lxxvi (Cecelia M. Kenyon ed., 1966).

58. ESSAY BY ALEXANDER WHITE (Winchester Virginia Gazette, Feb. 29, 1788), *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 438 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter DOCUMENTARY HISTORY]. See also LETTER OF UNCUS (Maryland Journal, Nov. 9, 1787), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 76, 78 (bill of rights “would be no security to the people”); 3 ELLIOT’S DEBATES, *supra* note

this time the experience with the ineffectiveness of the "parchment barriers" in the state bills of rights to stem the tide of unjust laws enacted by "overbearing majorities in every State."<sup>59</sup> According to the Federalists, the enumeration of rights in a bill of rights would be less effective in preserving liberty than the limited powers scheme, the system of checks and balances, and the political safeguards provided by the extended republic created by the Constitution.<sup>60</sup>

Implicit in the Federalist brand of skepticism was the idea that the political checks on government power would be where the real action was. A negative implication is that the idea of inherent rights provides no meaningful check on government — any more than meaningless parchment barriers — because the key to preserving liberty is to create a republican form of government that is well-designed to avoid the creation of despotic power. The Federalists are among the least likely candidates for advocating the idea that the inalienable rights of social contract political theory would constitute enforceable barriers to the exercise of power. And against this backdrop, their argument that the national government had not been empowered to invade the fundamental rights of the people does not plausibly read as an indirect way of describing the notion of inherently binding constitutional norms rooted in natural law.

Finally, the parties to the dispute over the omission of a bill of rights from the proposed Constitution largely shared a general perspective that government's interests and the people's interests in liberty must be carefully balanced; this perspective lent itself to seeing

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30, at 190-91 (Edmund Randolph, Va. Ratifying Convention, June 9, 1788) (maxims within bills of rights "cannot secure the liberties of this country"); *id.* at 450 (George Nicholas, Va. Ratifying Convention, June 14, 1788) (bill of rights is "no security" because it is "but a paper check"; Virginia's had been violated in many instances.).

59. LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (Oct. 17, 1788), reprinted in 1 SCHWARTZ, *supra* note 30, at 614, 616.

60. See, e.g., Aristides, MARYLAND JOURNAL, at 4 (arguing against necessity of bill of rights partly based upon "[t]he manner, in which Congress is appointed; the terms upon which it's members are elected; the mutual checks between the branches; the check arising from the president's privilege; the sure pledge we enjoy in the proper interests of the members . . ."); THE FEDERALIST No. 9, at 50, 51-52 (Alexander Hamilton) (Jacob Cooke ed., 1961) (focusing on checks and balances, an independent judiciary, republican government, and the "ENLARGEMENT of the ORBIT within which such systems are to revolve," i.e., the extended republic); THE FEDERALIST No. 49, at 333, 338 (James Madison) (Jacob Cooke ed., 1961) (framers avoided tendency of legislature to absorb all power by connecting and blending powers to achieve the actual separation of power "essential to a free government"). For useful commentary, see LEVY, *supra* note 12, at 150; WOOD, *supra* note 12, at 547-62; BERNS, *supra* note 12, at 130-31; Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CRI.-KENT L. REV. 89, 106 (1988).

the written Constitution as the place to hammer out the balances to be struck.<sup>61</sup> Two prominent members of the Philadelphia convention, Roger Sherman and Oliver Ellsworth, wrote that the Convention sought "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."<sup>62</sup>

Indeed, a government of ample powers was deemed by many as an essential prerequisite to true liberty.<sup>63</sup> One supporter of the Constitution offered the thought of many Federalists: "there is no way more likely to lose ones liberty in the end than being too niggardly of it in the beginning."<sup>64</sup> Moreover, since "all governments are founded on the relinquishment of rights to a certain degree," there was a "clear impropriety" about attempting to be "very particular about them;" the creation of exceptions to delegated power might prevent government "from doing what the private, as well as the public and general, good of the citizens and states might require."<sup>65</sup> Implicit in this line of reasoning was the assumption that a decision to exclude a proposed right (or set of rights) from a written constitution was to acknowledge government's discretion to act within the powers delegated out of a preference for erring on the side of

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61. Indeed, John Philip Reid has shown us that the very conception of liberty in the eighteenth century contrasted the civil liberty that just laws secured from abuses of liberty and licentiousness that government should not protect. REID, *supra* note 13, at 32-37, 115-19; see also PHILIP A. HAMBURGER, *NATURAL RIGHTS IN THE BILL OF RIGHTS*, (forthcoming). While liberty was a constant refrain of the revolutionary and founding eras, the founders were in general not "libertarians" in the modern sense of the term.

62. LETTERS FROM ROGER SHERMAN AND OLIVER ELLSWORTH TO GOVERNOR HUNTINGTON (Sept. 26, 1787), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 20, at 351 (Sherman and Ellsworth to Governor Huntington, Sept. 26, 1787). For a general perspective on the tension between governmental authority and liberty that to a great extent underlies the debate over the omission of a bill of rights from the proposed Constitution, see John K. Kaminski, *Liberty Versus Authority: The Eternal Conflict in Government*, 16 S. Ill. U.L.J. \_\_\_\_ (1991).

63. As Storing observes, one factor underlying Federalist opposition to a bill of rights was the fear that adding a list of rights "might weaken government, which is the first protection of rights and which was in 1787 in particular need of strengthening." Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 69.

64. VIRGINIA INDEPENDENT CHRONICLE, Jan. 16, 1788 (State Soldier), quoted in Storing, *supra* note 63, at 29.

65. 2 ELLIOT'S DEBATES, *supra* note 30, at 87 (James Bowdoin, Mass. Ratifying Convention, Jan. 23, 1788). In referring to the "private good," Bowdoin is clearly referring to private rights; he goes on to argue that "the private good could suffer no injury from a deficient enumeration, because Congress could not injure the rights of private citizens without injuring their own, as they must, in their public as well as private character, participate equally with others in the consequences of their own acts." *Id.* at 87-88.

government effective enough to secure the rights and interests of the people.

The founders also saw that the Constitution was to govern an expanding nation over time and was not lightly to be amended. At the Convention, the Committee of Detail wrote that it had been its purpose "[t]o insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."<sup>66</sup> Finally, there were, in addition to the problem of balancing the ends of empowering as well as limiting government power in general, the various difficulties associated with securing individual and group liberty while not undermining what were perceived as the liberty-enhancing advantages of retaining considerable power within the states.<sup>67</sup>

In defending the omission of a provision for a right to a jury in a civil case, Hamilton employed these very sorts of concerns. Hamilton began by describing the difficulties in establishing a uniform rule, given the varieties of jury trial practices in the several states.<sup>68</sup> This argued in favor of leaving provision of such rules for the discretion of Congress. More fundamentally, Hamilton expressed doubts about the appropriateness of jury trials in all cases and then questioned whether a jury provision could be drafted "in such a form, as not to express too little to answer the purpose, or too much to be advisable."<sup>69</sup> Implicit in Hamilton's argument is the assumption that a constitutional provision is designed to limit government (whether it does so meaningfully or not), and that omission of such a limitation leaves discretion in government (at least to the extent that such discretion is effectively granted by the powers delegated by the people to a particular government).<sup>70</sup>

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66. 2 Farrand, *supra* note 29, at 137. See generally Hamburger, *supra* note 3, at 271-300; Storing, *supra* note 63, at 29-30.

67. For a powerful treatment of these themes, see Wilmarth, *supra* note 3 (confronting the search for "a workable balance between federal and state power"). See also Akhil R. Amar, *The Bill of Rights as Constitution*, 100 YALE L.J. 1131 (1991) (treating federalism-related themes in the original bill of rights).

68. THE FEDERALIST No. 83, at 568 (Alexander Hamilton) (Jacob Cooke ed., 1961).

69. *Id.*

70. The civil jury debate provides a striking illustration of the real terms of the bill of rights debate. By contrast to the Federalist responses to fears expressed about freedom of the press and freedom of conscience, which relied on the lack of any delegated power to regulate those fundamental rights, Hamilton is fully acknowledging that the discretion to decide the question of jury trials would logically fall within Congress' power to establish lower federal courts. If the Federalist argument that the most fundamental rights had been retained were

Now it is true that proponents of a bill of rights feared that the sponsors of the Constitution held too much regard for governmental efficiency and too little for liberty.<sup>71</sup> Particularly as to the federal government, they favored defining and limiting power as carefully and precisely as possible. Even so, the Constitution's opponents also acknowledged this need for balancing collective need and individual liberty. For example, George Mason and Patrick Henry both objected to the proposed Constitution's *ex post facto* clause, which they construed as prohibiting retroactive legislation, both civil and criminal. Mason contended that "there never was, or can be a Legislature but must and will make such Laws, when necessity and the public Safety require them."<sup>72</sup>

Once again, an underlying assumption of such arguments over the merits of specific provisions on the balancing scales of liberty and efficiency is that a victory in favor of those opposing inclusion of a provision would imply a decision to leave discretion to the legislature. It is well known, for example, that when the Virginia declaration of rights was drafted, Patrick Henry successfully opposed inclusion of a ban on bills of attainder. According to one account, Henry presented "a terrifying picture of some towering public offender, against whom ordinary laws would be impotent."<sup>73</sup> And subsequently the Virginia legislature actually enacted a bill of attainder against an unpopular Tory at the instigation of Governor Patrick Henry.<sup>74</sup>

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really an argument about implied limitations on federal power, rather than an assertion about the scope of powers delegated, the argument logically should have been extended to the basic right of trial by jury — a right that Americans considered fundamental and which had generally been secured in the state declarations of rights. Compare Sherry, *supra* note 2, at 1163 (explicating Federalist argument about rights "which are not intended to be given up" as reference to inherent limits on government power) with *supra* notes 22 and 26 (documenting Sherry's view that "time-tested customs," such as right to trial by jury, were among rights that did not depend on the positive law of the Constitution).

71. See, e.g., LETTERS FROM A FEDERAL FARMER (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 22, at 329 ("many of us are quite disposed to barter [our freedom] away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty"); LETTER FROM THOMAS JEFFERSON TO JAMES MADISON (Dec. 20, 1787), reprinted in 2 SCHWARTZ, *supra* note 30, at 605, 608 (Jefferson owning that "I am not a friend to a very energetic government" because they are "always oppressive").

72. Speech of Patrick Henry at the Virginia Ratifying Convention (June 15, 1788), in 2 SCHWARTZ, *supra* note 30, at 803 (objecting to inclusion of *ex post facto* clause).

73. EDMUND RANDOLPH, ESSAY ON THE REVOLUTIONARY HISTORY OF VIRGINIA, reprinted in 1 SCHWARTZ, *supra* note 30, at 249.

74. LEVY, *supra* note 12, at 154-55. When the incident was paraded during the debate over ratification, Henry defended the bill as justified by the circumstances. 3 ELLIOT'S DEBATES, *supra* note 30, at 140 (June 16, 1788).

Henry's argument in 1776 tracks the equivalent arguments of statesmen during the debates of 1787-1788. Federalists and Antifederalists disagreed over the appropriate content of a bill of rights, and as to which provisions were essential to secure liberty and which would unduly hamper government, then or in the conceivable future. In both settings, the parties well understood on the one hand that the failure to include a proposed prohibition, such as the one on bills of attainder, did not necessarily embody an endorsement of such measures as an ordinary method of policy or as a just way of dealing with individuals. On the other hand, omission of a such a provision was understood to embody a decision to leave the evaluation of such questions entirely to the legislatures in their representative capacities (to the extent that granted powers encompassed such a grant of discretion).<sup>75</sup>

#### E. Summary

These are in general, then, the reasons I find the Natural Law reading of the Ninth Amendment to be implausible historically. The whole approach misconceives the relationship between natural law and natural rights and the written constitution; the purpose of the positive legal order is to secure the natural rights, and they remain insecure until they are protected by the established constitutional order. It also ignores the essentially positivist jurisprudential assumptions that underlie the debate leading to the enactment of both the Bill of Rights and the Ninth Amendment. These positivist assumptions pervade both the formal debate over the necessity and propriety of a bill of rights under the federal constitution, but also the larger debate over trust for government, the efficacy of reliance on parchment barriers, and the pervasive disagreements over how to

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75. The evidence reviewed above sharply undermines the efforts of modern libertarians, such as Randy Barnett, to read a constitutional presumption in favor of liberty and against government power into the Ninth Amendment as an embodiment of the foundational thinking of the framers. See Randy Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 629-40 (1991). Nor does the inclination during the early national period to rely on the Ninth and Tenth Amendments in strictly construing federal power in favor of the prerogatives of states and individuals reflect such a general libertarian constitutional philosophy. See *id.* at 635-40 (pointing to Madison's arguments against the first national bank relying in part on the Ninth Amendment). I will develop a more complete analysis of the significance of the argument over the first national bank to understanding the constitutional philosophy of the founders, and the original meaning of the Ninth Amendment, in a subsequent treatment.

strike the balance between the needs of government and the liberty of the people.

### III. NEW VARIATIONS ON THE NATURAL RIGHTS READING

Against this body of evidence, and much more that could be cited, proponents of the Natural Law reading of the amendment have recently offered some new supporting arguments that call for attention; the arguments focus on the arguable significance of Madison's reference to the rights "retained" by the people. Thus one commentator suggested that my own previous efforts at reviewing the historical materials bearing on the meaning of the Ninth Amendment had failed to take into account that the phrase referring to the rights "retained by the people" draws on a term of art from social contract theory.<sup>76</sup> According to social contract theory, the people "retained" certain natural and inalienable rights when they entered into civil society. Madison would have known that a reference to the "retained" rights would be understood as drawing upon this foundation of the natural and inalienable rights that are retained.

For one who is intimate with the debate over ratification of the Constitution, however, it is impossible to credit the claim that the allusion to rights "retained" by the people uniquely refers to natural rights retained under social contract theory. The ratification debates are filled with references to the rights and powers which the people "reserve" or "retain;" throughout the debates these terms are used interchangeably and they generally are used to refer to the people's grants and reservations of their own sovereign power.<sup>77</sup> James Wilson referred to a bill of rights as "an enumeration of the powers reserved,"<sup>78</sup> a fact which gave rise to the feared inference that

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76. Rosen, *supra* note 2, at 1075. The author, Jeff Rosen, argues that the history suggests a "specific understanding of the phrase 'retained by the people.'" *Id.* It refers to "natural rights 'retained' during the transition from the state of nature to civil society." *Id.* Cf. Amar, *supra* note 67, at 1200 n.307 (suggesting that Rosen's point that there was a precise meaning of "retained" rights in the founders' lexicon was one that previously been passed over without analysis).

77. As I have noted elsewhere, the ratification debates were filled with property law references to "grants" and "reservations" in which the people are compared to property owners or testators. McAfee, *supra* note 2, at 1231 n.61.

78. STATEMENT OF JAMES WILSON AT THE PENNSYLVANIA CONVENTION (Nov. 28, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 20, at 387, 388. Consider, in this light, Roger Sherman's draft of a prototype Tenth Amendment:

And the powers not delegated to the government of the united States by the

everything "not enumerated is presumed to be given."<sup>79</sup> President Washington explained that we did not need a bill of rights because the people "retained every thing which they did not in express terms give up."<sup>80</sup> Archibald Maclaine observed: "We retain all those rights which we have not given away to the general government."<sup>81</sup>

These were not arguments about limitations on the powers granted to the government based on natural or inalienable rights that were implicit in the decision to enter the social contract; they were arguments referring to the scheme of limited powers by which the people retained all rights and powers not granted.<sup>82</sup> In the summer

Constitution, nor prohibited by it to the particular States, are retained by the States respectively.

ROGER SHERMAN'S PROPOSED COMMITTEE REPORT (July 21-28, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 28, at 268 (emphasis added).

79. STATEMENT OF JAMES WILSON AT THE PENNSYLVANIA CONVENTION (Nov. 28, 1787), reprinted in 2 *DOCUMENTARY HISTORY*, *supra* note 20, at 388. Wilson's reference to a bill of rights as an enumeration of "powers reserved" points us toward the portion of the text of the Ninth Amendment that belies that the unenumerated rights "retained by the people" consist only of the natural rights which the people keep upon entering civil society. The amendment refers to the unenumerated rights as the *others* retained by the people; one clear implication is that the enumerated rights are also rights "retained by the people." Clearly, however, the rights retained by the federal Bill of Rights included what Madison and others called "positive" rights that would not have been considered among the natural or inalienable rights which the people bring to civil society under social contract political theory. See Statement of James Madison (June 8, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 28, at 81 (observing that bills of rights "specify positive rights" such as trial by jury which, although not natural rights, are "as essential to secure the liberty of the people as any one of pre-existent rights of nature").

The division between natural and positive rights secured in a bill of rights also points up that the attempt to define the unenumerated rights exclusively in terms of natural rights retained during the transition to civil society would actually serve to narrow the scope of the Ninth Amendment as conceived by most modern advocates of the view that it is a central provision recognizing implied individual rights limitations. Most advocates of the unwritten Constitution find support for their view of implied constitutional rights in the natural and inalienable rights texts of the founding period, but they also trace the idea to the unwritten fundamental law of the English constitution. See *supra* note 22 (describing this sort of view).

80. Letter from George Washington to Lafayette, in 29 *THE WRITINGS OF GEORGE WASHINGTON* 478 (J. Fitzpatrick ed., 1939).

81. 4 *ELLIOT'S DEBATES*, *supra* note 30, at 139, 141 (Archibald Maclaine, No. Carolina Ratifying Convention, July 28, 1788) (emphasis added).

82. For further documentation and defense of this view, see McAfee, *supra* note 2, at 1246-47, 1256-57, 1271 n.218. The Federalist argument about the rights retained by enumerated powers went far beyond natural rights, alienable or inalienable. In waxing eloquent in defending the Constitution, Wilson stressed that the people could respond to the call for a bill of rights: "We reserve the right to do what we please." STATEMENT OF JAMES WILSON AT THE PENNSYLVANIA CONVENTION (Nov. 28, 1787), reprinted in 2 *DOCUMENTARY HISTORY*, *supra* 20, at 389. STATEMENT OF JAMES WILSON AT THE PENNSYLVANIA CONVENTION (Dec. 4, 1787), reprinted in 2 *DOCUMENTARY HISTORY*, *supra* note 20 at 470 (no need for a bill of rights because under proposed Constitution the sovereign people "never part with their power"). By contrast, when

of 1789, during the process of considering Madison's proposed amendments, Richard Parker wrote to Richard Henry Lee that he did not object to Madison's proposed Bill of Rights because "we declare that we do not abridge our Rights by the reservation but that we *retain* all we have not specifically given."<sup>83</sup> The proposals for the Ninth Amendment drafted at the state ratifying conventions were framed as prohibitions on an inference of new or enlarged powers from the provision for "exceptions" to those powers.<sup>84</sup> During the drafting process, it was recast as a prohibition on an inference against other rights "retained by the people" from the reservation of particular rights in the Constitution.<sup>85</sup> This shift in focus was

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you impose a bill of rights on this scheme, "*everything* that is not enumerated is presumed to be given" — a phrase that in the context of our federal system includes, but is not limited to, natural rights. STATEMENT OF JAMES WILSON AT THE PENNSYLVANIA CONVENTION (Nov. 28, 1787), reprinted in 2 DOCUMENTARY HISTORY *supra* note 20, at 388.

It is true that the argument was sometimes couched in terms of the principle that people had "retained" all the natural rights which they did not "transfer to the government." STATEMENT OF THOMAS HARTLEY AT THE PENNSYLVANIA CONVENTION (Nov. 30, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 20, at 430. But contrary to the suggestion of one commentator, Rosen, *supra* note 2, at 1075, this sort of focus (prompted by the debate over whether natural rights might have been forfeited by the proposed Constitution) did not exhaust the implications of the people's reserved sovereignty. In the debate over a bill of rights in Congress, Hartley himself said that "it had been asserted in the convention of Pennsylvania, by the friends of the Constitution, that all the rights and powers that were not given to the Government were retained by the States and the people thereof." HOUSE OF REPRESENTATIVES JOURNAL (Aug. 15, 1789), reprinted in 2 SCHWARTZ, *supra* note 30, at 1091. Hartley accurately summarizes the arguments of Wilson and others, and this statement accentuates that the rights of the people are "retained" in the precise manner that the rights of the States are retained. There is also no doubt that the inclusive residuary sovereignty to which he alludes included various positive law and customary rights (as well as state's rights) not thought to be within the reach of the enumerated powers; this is not centrally about natural or inalienable rights.

As Philip Hamburger observes, Wilson's own inclusive statements about the rights "retained" can be taken as referring (at least in part) to the entire body of natural rights, which includes basically every species of natural liberty, including those aspects that are properly given up upon entering civil society. Philip A. Hamburger, *Natural Rights and Positive Law: A Comment on Professor McAfee's Paper*, 716 S. ILL. U. L.J. 307 (1992). But Hamburger's observation simply points up the popular sovereignty/federalism roots of the conception of "retained" rights at stake. This understanding is reflected in the amendment proposed by New York which states that every "right" not "clearly delegated" to the federal government "remains to the People of the several States, or to their State Governments to whom they may have granted the same . . ." NEW YORK PROPOSED AMENDMENTS, 1788, reprinted in 2 SCHWARTZ, *supra* note 30, at 911-12.

83. LETTER FROM RICHARD PARKER TO RICHARD HENRY LEE (July 6, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 28, at 260. Parker's formulation is particularly telling because it so explicitly links the Ninth Amendment proposal with preserving the substance of the Federalist refrain that a bill of rights was not really necessary because the people retained all that they had not specifically granted.

84. See McAfee, *supra* note 2, at 1236, 1278-79.

85. *Id.* at 1236-37, 1282-87.

objected to in Virginia, where the first of these proposed amendments had been drafted.<sup>86</sup> In a letter to President Washington, Madison (the amendment's draftsman) objected that any proposed distinction between the two forms of the amendment was "altogether fanciful."<sup>87</sup> The key to the provision in either of its forms would be the success of the Constitution's limited powers scheme: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the [rights] be secured . . . by declaring that they shall [not be abridged], or that the [powers] shall not be extended."<sup>88</sup> On the other hand, if the enumerated powers are so ill-defined that "no [such] line can be drawn, a declaration in either form would amount to nothing."<sup>89</sup>

Madison's defense of the rights-based version of the amendment draws upon the pervasive themes of the ratification debates and makes it very clear that the other "retained" rights were those reserved by the limited powers scheme; his acknowledgment of the hypothetical possibility that the scheme could fail in adequately securing rights if governmental powers had not been adequately defined (an acknowledgment anticipating our historical development) reflects that he referred to the positive law of the Constitution (as created by the sovereign people) rather than to pre-existing inherent rights.

A closely-related argument is Randy Barnett's reliance on a July 1789 draft of the Bill of Rights which Roger Sherman presented to the House Select Committee on which Madison and Sherman served. Sherman's draft includes a provision referring to the "natural rights" which are "retained by [the people] when they enter into society."<sup>90</sup> Barnett concludes that this provision "reflects the sentiment that came to be expressed in the Ninth [Amendment]."<sup>91</sup> Though he offers us virtually no help on this, Barnett apparently presumes this connection because Sherman's draft refers to rights that are "retained" by the people, the very language employed by the Ninth Amendment.

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86. LETTER FROM JAMES MADISON TO GEORGE WASHINGTON (Dec. 5, 1789), reprinted in 2 SCHWARTZ, *supra* note 26, at 1190. For further discussion of the incident, see McAfee, *supra* note 2, at 1287-93; Wilmarth, *supra* note 3, at 1302-03.

87. LETTER FROM JAMES MADISON TO GEORGE WASHINGTON (Dec. 5, 1789), reprinted in 2 SCHWARTZ, *supra* note 26, at 1190.

88. *Id.*

89. *Id.*

90. See Barnett, *supra* note 2, at 7 n.16, 351 (App. A).

91. *Id.* at 7 n.16. See also Barnett, *supra* note 75, at 629-30 & n.48, 639 n.91; Rosen, *supra* note 2, at 1073 n.5.

Before we take this inference too seriously, of course, we might expect its proponents to explain the statements developed above in which the rights referred to by the Ninth Amendment are described as those retained by virtue of the limited grants of federal power.<sup>92</sup>

We ought also to be confident that there is a real connection between Sherman's proposed amendment and the Ninth Amendment. But the historical context calls this assumption into serious question. To begin with, Madison's proposed draft of the Ninth Amendment, referring to the other rights retained by the people, had been presented to Congress during the previous month; so it is not likely that Madison's draft or the committee's work owed anything to Sherman's particular choice of language. Moreover, it is by no means clear that Sherman's effort here was intended as an important contribution to the substance of the proposals. Sherman was the main proponent of placing the Bill of Rights at the end of the document, rather than inserting the amendments into the body of the text as proposed by Madison. The editors of the documentary record of the first Congress' consideration of the Bill of Rights suggest that Sherman's proposed amendments were largely directed to "showing how Madison's amendments could be revised and placed at the end of the Constitution."<sup>93</sup>

When this historical context is taken into account, it appears ~~that the provision in question was based on Madison's draft of a proposal for language to be inserted into the preamble of the Constitution that would affirm the basic principles of popular sovereignty~~

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92. Indeed, careful attention ought to be paid to the entirety of Sherman's draft bill of rights. It includes, for example, a provision anticipating the Ninth and Tenth Amendments that (1) reserves all powers not delegated, and (2) forbids an inference against powers "retained" from limitations inserted by way of caution. Barnett, *supra* note 2, at 352. See *infra* note 94. (Sherman's draft is also found in ROGER SHERMAN'S PROPOSED COMMITTEE REPORT (July 21-28, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 28, at 266.)

Sherman's use of the term "retained" in his prototype of the Ninth and Tenth Amendments cuts against the view that the concept of retained rights necessarily consists of those identified in social contract theory as natural rights retained as people enter into civil society. Moreover, despite Barnett's claim (as quoted in the text accompanying note 87) that the concept of retained natural rights was "the sentiment that came to be expressed in the Ninth [Amendment]," he nevertheless indicates in a subsequent treatment that he believes that state law rights might also serve as a source of rights secured by the Ninth Amendment. Barnett, *supra* note 75, at 630 n.48 (citing Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229). But if the phrase "rights retained by the people" can (and in the Ninth Amendment does) apply beyond the notion of natural rights, as Barnett thus acknowledges, why would we think that a provision exclusively focused on retained natural rights states the sentiment that became the Ninth Amendment?

93. ROGER SHERMAN'S PROPOSED COMMITTEE REPORT (July 21-28, 1789) (editor's note), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 28, at 268.

and government's purpose to act "for the benefit of the people" by securing their time-honored natural rights.<sup>94</sup> Several state ratifying conventions had proffered similar proposed amendments, which were based on similar statements found originally in the Virginia Declaration of Rights.<sup>95</sup>

There is no evidence, of course, that Madison or Sherman, let alone the ratifying conventions that initially proposed such provisions, perceived them as related to the Federalist objections to adding a bill of rights. Not surprisingly, both the Virginia and New York conventions proposed such a statement of first principles along with the provisions that would become the Ninth Amendment.<sup>96</sup> There is no evidence that either convention thought these proposals were redundant. Madison's proposals, as we have noted, tracked the decisions of the state conventions, including both the provision setting forth the language of first principles as well as the "hold harmless" provision we call the Ninth Amendment.<sup>97</sup> Madison's proposed Ninth

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94. MADISON RESOLUTION (June 8, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 28, at 11. Madison's proposal read as follows:

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.

*Id.* It is striking, and perhaps not insignificant, that Madison summarized the gist of what had been referred to as natural and inalienable rights without referring to these interests in those terms. Cf. *NEW YORK PROPOSED AMENDMENTS, 1788*, reprinted in 2 *SCHWARTZ*, *supra* note 30, at 911 (New York proposed amendment omitting allusion to natural rights while referring to same specified rights as the "essential rights which every Government ought to respect and preserve"). In following New York's lead, Madison may have been avoiding the disagreement that had sometimes existed as to whether property should be conceived as among the inalienable natural rights and, in addition, may have thought it wiser to refer to the particular ends to which most agreed government was instituted without intimating any general constitutional incorporation of the doctrine of natural rights. See Herbert J. Storing, *The Constitution and the Bill of Rights*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS* 15, 33 n.50 (Robert A. Goldwin & William A. Schambra eds., 1985) (observing that Madison's proposal shifted from the Virginia Declaration of Rights "in the direction of supporting government"; whereas the Virginia Declaration secured natural rights and referred to the "inherent rights of which man cannot be divested," Madison's proposal begins with society as a starting point and converts the inherent rights to the idea that government should be for the "benefit of the people").

95. See McAfee, *supra* note 2, at 1303 n.333 (citing related provisions and proposals).

96. See *STATE RATIFYING CONVENTIONS*, reprinted in 2 *SCHWARTZ*, *supra* note 30, at 840 (Virginia's first amendment within its "declaration or bill of rights" setting forth "certain natural rights"), 842 (Virginia's first amendment to the Constitution stating the general principle of reserved rights and powers), 844 (Virginia's seventeenth proposed amendment stating that the clauses limiting Congress' powers should not be construed to enlarge its powers, but should be interpreted as "making exceptions to the specified powers" or as "inserted merely for the greater caution"); 911 (New York's provision as to "essential rights"), 911-12 (New York's proposal anticipating the Ninth and Tenth Amendments).

97. MADISON RESOLUTION (June 8, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra*

Amendment, moreover, included the retained rights language, which suggests that he did not see it as embodying the substance of the "first principles" provision. In fact, as I have elsewhere observed, Sherman's own proposed amendments included both provisions as

It is true, of course, that the natural rights language proposed by Madison and Sherman was never adopted as part of the Bill of Rights. The committee that Madison and Sherman served on did not recommend such a provision for the consideration of the whole House.<sup>99</sup> While it might be thought that this language was omitted

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note 28, at 11, 13, 14. Although Madison's draft of the Ninth Amendment contributed new language, not included in the state proposals, that prohibited an inference against unenumerated rights "retained by the people," the new language was closely associated with the language prohibiting an inference enlarging delegated powers; and both the prohibited inferences were contrasted with language indicating that the Constitution's rights provisions were, instead, to be construed "either as actual limitations of such powers, or as inserted merely for the greater caution." *Id.* at 13.

98. McAfee, *supra* note 2, at 1303 n.333. With words added to fill gaps in Sherman's handwritten draft, Sherman's proposal of what would become the Ninth and Tenth Amendments reads as follows:

And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively. nor Shall any [limitations on] the exercise of power by the government of the united States [in] the particular instances here in enumerated by way of caution be construed to imply the contrary.

ROGER SHERMAN'S PROPOSED COMMITTEE REPORT (July 21-28, 1789), reprinted in *CREATING THE BILL OF RIGHTS*, *supra* note 28, at 267. The two sentences of Sherman's draft proposal clearly track the New York pattern of confronting the closely related concerns of the Ninth and Tenth Amendments in a single provision. The second sentence, which embodies the substance of the Ninth Amendment, prohibits the feared inversion of the principle that all powers not delegated are retained as an inference from the enumeration of limitations on national powers (a way of describing rights provisions). This relationship between the Ninth and Tenth Amendments is dramatically underscored when Sherman's Ninth Amendment prototype states that the limitations on powers (set forth in individual rights provisions) shall not "imply the contrary" of the principle of retained powers already set forth in the language stating the substance of the Tenth Amendment.

Sherman's choice of language conveys his understanding that the amendment was not to prevent an inference in favor of national power to invade implied natural rights limitations on delegated power; it was to prevent an overthrow of the scheme of limited powers that preserved the rights and powers of the people and the states. This is significant not only because the language strongly suggests that his natural rights provision is not directly related to the Ninth Amendment, but also because its timing suggests that an important member of the committee apparently saw no difference of substance between Madison's proposed Ninth Amendment, with its reference to retained rights, and the language of the state proposals that had framed the idea in terms of avoiding a construction of enlarged powers. Compare McAfee, *supra* note 2, at 1282-93 (presenting the case for continuity between the Virginia proposals and Madison's Ninth Amendment) with Rosen, *supra* note 2, at 1075 & n.11 (suggesting McAfee misconceives "retained by the people" in claiming that "Madison's reference to 'rights retained by the people' added nothing to a precursor of the Ninth Amendment proposed by Virginia.").

99. See *HOUSE OF REPRESENTATIVES JOURNAL* (Aug., 1789), reprinted in 2 SCHWARTZ, *supra*

because it was conceived of as redundant with the proposed Ninth Amendment, the evidence reviewed above points away from this reading of the Ninth Amendment. Moreover, there are more satisfying explanations for the omission of the language of first principles that bears on our overall discussion.

Such generally worded statements of underlying political principle had been common in the state declarations of rights, but they are widely acknowledged to have been just that — statements of principle that were not originally conceived as creating rights enforceable in ordinary law.<sup>100</sup> They shared this quality with a number of similar provisions that were drafted in the language of obligation and statement of principle rather than as legal command.<sup>101</sup>

A number of modern commentators have noted that one of Madison's great contributions to the federal Bill of Rights was to draft its provisions in the hard language of legal command,<sup>102</sup> reflecting Madison's growing awareness of the Bill of Rights as providing a source for judicial decisions giving legal effect to the stated limits on government power.<sup>103</sup> It is thus in all likelihood no coincidence

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note 30, at 1122-23 (amendments reported by Select Committee to entire House); Storing, *supra* note 94, at 33.

100. See, e.g., DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 61 (1980) (early state declarations of rights "invariably contained general admonitions with no specific legal content" and their provisions thus "lacked positive, binding force"); *id.* at 62 (such declarations "did not so much prohibit use of legislative power as impede legislative will").

101. *Id.* at 65-66 (use of language of obligation rather than command — "ought", "should," etc. — reflects "the prescriptive nature of the [state bills of rights] as opposed to the legally binding nature of the [frames of government].") See also Donald S. Lutz, *The U.S. Bill of Rights in Historical Perspective*, in *CONTEXTS OF THE BILL OF RIGHTS* 9 (S. Schechter & R. Bernstein eds., 1990) (use of admonitory language shows that these provisions were not "capable of being legally enforced"; such provisions are "statements of shared values and fundamental principles rather than a simple listing of prohibitions on governmental action"); Robert C. Palmer, *Liberties as Constitutional Provisions 1776-91*, in *CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55 (1987) (the state bills of rights "were not 'constitutional guarantees'" but "governmental principles"); *id.* at 65 (use of words such as "ought" were purposeful and reflected "that the rights were principles; 'ought' denotes obligation, not a command"); PA. CONST., Declaration of Rights, art. V ("[G]overnment is, or ought to be, instituted for the common benefit, protection and security of the people." (emphasis supplied)); VA. CONST. BILL OF RIGHTS § 12 (the press "can never be restrained but by despotic governments"). As Palmer observes, such statements articulated "governmental principles by which the Virginia government, assumed to be freedom-enhancing and united with the people, should have, ought to have, held itself bound." Palmer, *supra* note 101, at 68.

102. E.g., Lutz, *supra* note 101, at 14; Palmer, *supra* note 101, at 116; Bernard Schwartz, *Madison Introduces His Amendments, May-June, 1789*, in 2 SCHWARTZ, *supra* note 30, at 1008-09.

103. See Bernard Schwartz, *Madison Introduces His Amendments, May-June, 1789*, in 2

that Madison included this language of principle in a proposed prefix to the Constitution, given his probable awareness that preambles are not considered part of the binding law of the Constitution.<sup>104</sup> These were the background principles of America's constitutionalism, not enforceable constitutional commands.<sup>105</sup>

Some objected that these statements of principle would simply clutter the preamble, which was a model of brevity and clarity.<sup>106</sup> And it was even suggested that they would better fit within the proposed Bill of Rights.<sup>107</sup> Ultimately, however, while the first of these judgments was accepted, the second was not adopted. Certainly no one was rejecting the importance of these statements as first principles. No doubt many simply believed that these were the first principles that went without being specifically articulated in the written Constitution; they were in that sense superfluous.<sup>108</sup> But the

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SCHWARTZ, *supra* note 30, at 1009 (referring to Madison's recognition that courts might enforce the provisions of a bill of rights). Schwartz and others have attributed Madison's attention to this aspect of a bill of rights to the correspondence he engaged in with Jefferson during and after the debate over ratification of the Constitution. See LETTER FROM THOMAS JEFFERSON TO JAMES MADISON (March 15, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 28, at 218 (stressing to Madison the significance of "the legal check which it [a bill of rights] puts into the hands of the judiciary"); 1 SCHWARTZ, *supra* note 30, at 593 (attributing Madison's emphasis on the judicial check created by a bill of rights to his correspondence with Jefferson).

104. The idea that preambles were not binding was understood at this time, as is reflected in the Congressional debates over the proposed amendments. DEBATES IN THE HOUSE OF REPRESENTATIVES (Aug. 14, 1789) (Representative Page), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 28, at 138 (the Preamble is "no part of the constitution"). For the standard judicial formulation of this understanding, see *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

105. It is almost certainly no coincidence that the amendments which Madison proposed to insert in the text of the Constitution were stated in the hard legal language of command. By contrast, Madison's proposed prefix that referred to the general headings associated with natural rights states "[t]hat government is instituted, and ought to be exercised for the benefit of the people." MADISON RESOLUTION (June 8, 1789), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 28, at 11. For related comment, see Storing, *supra* note 94, at 32-33 (Madison's first proposal one of few "ought" provisions which he sought to carry over from state declarations).

106. See DEBATES IN THE HOUSE REPRESENTATIVES (Aug. 14, 1789) (Representative Tucker), reprinted in CREATING THE BILL OF RIGHTS, *supra* note 28, at 129; *id.* (Rep. Sherman) (Madison's proposed language "would injure the beauty of the preamble"); *id.* at 132 (Rep. Page, Aug. 19, 1789).

107. *Id.* at 137 (Rep. Tucker, Aug. 14, 1789).

108. Indeed, Madison responded with little fervor to the suggestion that his proposed amendment of the preamble not be adopted. Emphasizing mainly that several states had proposed similar language, Madison acknowledged that the principle stated was "self evident, and can derive no force from this expression"; he concluded nonetheless that "for the reason before suggested it may be prudent to insert it." *Id.* at 132 (Rep. Madison, Aug. 19, 1789).

related point is that a majority of the adopters of the Bill of Rights did not see such provisions as essential to securing the people's fundamental rights; the people's rights would be secured by the specific limitations of the Bill of Rights and the Constitution itself and the reservation of all the rights and powers not delegated to the national government. Neither Sherman's draft, nor the Virginia Declaration of Rights from which it is drawn, provides the key to understanding the Ninth Amendment

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A clue as to why the suggestion to insert the language alongside the other amendments was never acted on might be provided by Madison's suggestion that those not wanting the proposed language in the preamble "will be puzzled to find a better place." *Id.* at 138 (Rep. Madison, Aug. 14, 1789). See also Storing, *supra* note 94, at 33 (observing that "[i]t is hard to imagine that Madison was sorry to see these proposals rejected").