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Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights

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BLACKSTONE’S NINTH AMENDMENT: A HISTORICAL COMMON LAW BASELINE FOR THE INTERPRETATION OF UNENUMERATED RIGHTS

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Introduction

The Ninth Amendment explicitly states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹ This seems to clearly indicate that there are

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

rights other than those in the text of the Constitution that should be recognized as constitutional. Further, the United States Supreme Court has recognized a number of unenumerated rights under a variety of rationales.²

Nevertheless, the question of how to identify and give form to these rights still continues to pose problems for judges, lawyers, and legal scholars alike. While the Ninth Amendment points to the existence of these other rights, it gives no clue about what these additional rights are or how they might be found and enforced.³ Recent scholarship based on the history of the Ninth Amendment has sought to fill this void and has identified a number of theories about what the unenumerated rights mentioned in the Ninth Amendment might be.⁴ Of these theories, the one most supported by the historical evidence is

2. See WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 1357-61 (3d ed. 2003) (listing various unenumerated rights recognized by the Court); Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate*, 75 *MISS. L.J.* 495, 524 (2006). The sources that the Court has used include the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses, as well as guarantees implicit in many of the other amendments. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 502-04 (1999) (recognizing a Fourteenth Amendment right to travel within the United States and enjoy the rights and privileges of citizens in the several states); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing a Fourteenth Amendment due process "liberty interest in refusing unwanted medical treatment"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (Burger, C.J., plurality opinion) (recognizing an implicit right under the First Amendment to attend and report on criminal trials); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing a "right of privacy" implicit in the "penumbras" created by the First, Third, Fourth, Fifth, and Ninth Amendments); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that Fourteenth Amendment liberty includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (stating that the Fourteenth Amendment's Privileges or Immunities Clause protects the right of a citizen "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, [and] to engage in administering its functions. He has the right of free access to its seaports . . . subtreasuries, land offices, and courts of justice in the several States" (internal quotation marks omitted) (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867))). The *Slaughter-House* Court further listed the right to demand the "protection of the Federal government . . . when on the high seas or within the jurisdiction of a foreign government[,] . . . [t]he right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, [and] . . . [t]he right to use the navigable waters of the United States . . . [and to enjoy] all rights secured to our citizens by treaties." *Id.*

3. See U.S. CONST. amend. IX.

4. See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *TEX. L. REV.* 1, 11-21 (2006) (identifying and discussing the various historical models) [hereinafter Barnett,

that the “rights retained” mentioned in the Ninth Amendment are personal rights belonging to the people as individuals, rather than collective rights of “the people” as citizens of the states.⁵ As such, the rights retained are of the same character as the others in the Bill of Rights and the fundamental rights recognized by the Supreme Court.⁶

If this theory is correct, however, the question how these unenumerated rights might be identified and given force still remains. The U.S. Supreme Court has attempted to set out doctrinal tests for identifying and enforcing unenumerated rights in its substantive due process jurisprudence; however, no consistent test has emerged. Indeed, there seem to be almost as many tests to adjudicate unenumerated rights as there are Justices to apply them.⁷

In looking at unenumerated rights and considering whether they are fundamental, the Court employs several different tests that are variants on a historical inquiry. Under these tests, the Court looks to various historical sources regarding rights in an attempt to discern a tradition concerning the right at issue. It then tries to evaluate this tradition against some sort of standard to ascertain its importance, asking such questions as whether the right

Ninth Amendment].

5. See *id.* at 79-80. But see Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (both arguing that newly interpreted historical evidence suggests that the Ninth Amendment refers to the collective rights of the states).

6. See U.S. CONST. amends. I-VIII; see also cases cited *supra* note 2.

7. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997) (Souter, J., concurring in judgment) (test is (1) whether the right is “exemplified by ‘the traditions from which [the Nation] developed,’ or revealed by contrast with ‘the traditions from which it broke,’” and (2) whether it outweighs the competing governmental interest (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))); *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23, 127 n.6 (1989) (test, according to Justice Scalia, joined by Justice Rehnquist, is whether the interest in question is one traditionally protected by our society, based on an inquiry at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion) (test is whether the right is “deeply rooted in this Nation’s history and tradition”); *Griswold*, 381 U.S. at 484 (finding justification for the right to privacy through “emanations” of specific guarantees in the Bill of Rights that form “penumbras”); *id.* at 493-94 (Goldberg, J., concurring) (test is (1) whether the right in question is “so rooted” in the “traditions and collective conscience” of the American people “that it cannot be denied without violating fundamental principles of liberty and justice”; (2) whether it emanates from a specific constitutional guarantee; or (3) whether it is necessary to the “requirements of a free society” (original alteration omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 517 (1961), *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and *Powell v. Alabama*, 287 U.S. 45, 67 (1932))); *id.* at 500 (Harlan, J., concurring in judgment) (question is whether the right is “implicit in the concept of ordered liberty” (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

at issue is grounded in the “‘collective conscience of [the American] people’”⁸ or whether the right is “‘traditionally protected by our society.’”⁹

The problem, however, is that these inquiries lack a coherent baseline from which to begin. In the absence of any agreement regarding a baseline, a historical inquiry often becomes an exercise in rummaging through the historical record and “cherry-picking” different statements made by supposedly influential sources of rights at the time of the framing that support the conclusion that a particular Justice wants to reach.¹⁰ As a result, the Court’s version of history tends to come from a hodgepodge of sources, without regard to how much these sources actually influenced the ways in which particular rights were viewed by the framing generation.

In an attempt to provide courts with a consistent baseline or theme to identify rights, various legal commentators have posited theories regarding unenumerated rights. Some of the most popular theories argue that the “rights retained” are natural law rights, derived either from the writings of specific natural law theorists such as John Locke,¹¹ from a combination of different natural law theorists,¹² or from some shared natural law idea of individual freedom.¹³

As elegant as these theories are, they all face significant problems when placed in a historical context. Those theories arguing for rights based on natural law theorists generally overstate the influence of these theorists on the views of the framers, ratifiers, and, most important, the general public regarding their rights.¹⁴ Further, such theories underestimate the degree to which the rights existing at common law and the common law method of rights adjudication formed the basis for the general person’s conception of his or her rights at the time of the ratification of the Constitution and the Bill of

8. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (original alteration omitted) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

9. *Michael H.*, 491 U.S. at 122.

10. See Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 8-11 (2001) (criticizing the Court’s use of the historical record).

11. See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 30-33 (1995); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 108-16 (2000).

12. See, e.g., J. D. Droddy, *Originalist Justification and the Methodology of Unenumerated Rights*, 1999 MICH. ST. L. REV. 809, 828-32.

13. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 253-73 (2004).

14. See *infra* text accompanying notes 92-105.

Rights.¹⁵ Finally, these theories also suffer from a prudential problem. Because they would require a full-scale reworking of the Supreme Court's jurisprudence with regard to rights, they are unlikely to prove attractive to the Court anytime soon.¹⁶

This article explores the common understanding of rights at the time of the framing of the Constitution and the Bill of Rights. It argues that while the "rights retained" by the people as provided in the Ninth Amendment were individual rights, they were not natural law rights in the sense that they corresponded to the idea of rights articulated by any individual natural law theorist, or even a combination of such theorists. Rather, they were those rights that the framing generation believed they inherited from English constitutional and common law, with important modifications stemming from the experiences of American colonists. While the framing generation would have considered these rights "natural" in the sense that they were preexisting, the rights were not the "theoretical or philosophic" rights of natural law theorists,¹⁷ but instead rights based on the framing generation's understanding of English constitutional law, common law, and tradition.¹⁸ Further, for most Americans at the time of the framing, their conception of these rights was informed not by the musings of John Locke and other natural law writers, nor by the careful study of the common law decisions of Lord Coke, but by the readily accessible summary of the common law provided by Sir William Blackstone.¹⁹ Thus, if the goal is to determine what was the general consensus among Americans at the time of the framing and the adoption of the Bill of Rights, the formulation of rights in Blackstone's *Commentaries* should form

15. See *infra* text accompanying notes 106-117.

16. For example, Barnett's framework would cause the Court to abandon the tiered-scrutiny approach that it has used since 1938. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Under Barnett's theory, all liberty interests would be presumptively protected by the Constitution, and laws infringing on those interests would be judged by a "necessary and proper" standard. See BARNETT, *supra* note 13, at 335-53 (discussing his framework in comparison to existing doctrine). Similarly, Niles's framework would abandon tiered scrutiny in favor of assessing the motives behind rights-infringing legislation. See Niles, *supra* note 11, at 135-43.

17. Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 314 (1936).

18. See *id.* at 313-14. In what is generally considered to be the first "modern" Ninth Amendment law review article, see Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 762 n.7 (1994), Kelsey theorized that the rights referenced in the Ninth Amendment are the "natural . . . rights of Englishmen" exemplified by the writings of Blackstone, Kelsey, *supra* note 17, at 314.

19. See *infra* text accompanying notes 223-26.

the baseline.²⁰ From that baseline, however, the common law concepts of custom and practice should be used to identify present-day rights.²¹

I. Historically Construing the Ninth Amendment: Whose Views Are Important?

The first question that must be asked by anyone attempting to outline a historical theory of unenumerated rights is one of methodology: whose views of unenumerated rights should control? Determining whose views are important with respect to unenumerated rights is especially problematic because of the peculiar way in which the Constitution deals with the concept of rights.

A notion often referred to in interpreting the Constitution in a historical manner is the “original intent” of the framers.²² This concept presupposes that we can look at the framers’ intentions in drafting the Constitution in the same way that we might try to divine the intent of the legislature in enacting a statute from the language used and the legislative history.²³ While this method is quite useful in the field of statutory interpretation, it has much less utility for constitutional interpretation.²⁴ Looking to the intent of the legislature works in the statutory-interpretation arena because the legislature originates, debates, and ultimately passes the legislation, subject to executive signing.²⁵ The legislature is thus the decision-making body with respect to what the legislation means. Consequently, the statements of legislative intent and the

20. See Kelsey, *supra* note 17, at 313.

21. See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 593-600 (2006) (advocating a common law-based originalism approach that would take into account the common law and use it as a guide to shape the contemporary meaning of rights). Meyler argues that the common law at the time of the framing was not a unified field and that common law judges often reinterpreted the law to fit their respective time periods. See *id.* at 593. I agree with Meyler that, rather than try to determine “original intent” at the time of the framing, we should look at problems today through the lens of the common law; however, we disagree about the baseline that should be used.

22. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885-86 (1985) (discussing originalist theories).

23. See *id.* at 886.

24. See 1 THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 143 (Walter Carrington ed., 8th ed. 1927) (comparing the controlling force of legislative history on statutory interpretation with the force of Constitutional Convention proceedings on constitutional interpretation).

25. See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 27-29 (1997).

debates surrounding a particular piece of legislation are highly probative in determining what that legislation was designed to do.²⁶

The body of the U. S. Constitution, however, is fundamentally different from ordinary legislation because it is the product of both a constitutional convention and a state ratification process.²⁷ While the framers may have crafted the original language of the Constitution, this language had no force until ratified by the state ratification conventions.²⁸ Because the state ratification conventions were the final decision-making bodies regarding the language of the Constitution, the views of the framers concerning the meaning of a particular passage are only relevant to the extent that they can be said to have informed those bodies' understandings of what that particular passage meant. James Madison recognized as much when he stated, "If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution."²⁹ Thus, when dealing with original provisions in the Constitution, the pertinent question is, What would the ratifiers have thought they were ratifying, informed as they were by the language, stated intent, and debates of the framers, and the debates at the ratification conventions?

Interpreting constitutional amendments from a historical point of view requires a different inquiry. Amendments to the Constitution, such as those contained in the Bill of Rights, are introduced and passed by Congress and then ratified by the states, either through state legislatures or state conventions.³⁰ In the same way that the ratifiers were the final decision makers with respect to the original Constitution, legislators and conventions are the final arbiters of amendments. Therefore, in determining what the particular language of an amendment means, one should look to the understandings of those persons in the state legislatures or state conventions that ratified the amendment.³¹ The intent of those members of Congress who introduced the amendment is relevant to the interpretation of the amendment in the same way that the intent of the framers is relevant to the interpretation of the Constitution; that is, the intent of Congress is relevant only to the extent that it can be said to have informed the members of the legislatures or state conventions that ratified the amendment—it is useful but not dispositive.

26. *See id.* at 29; COOLEY, *supra* note 24, at 143.

27. COOLEY, *supra* note 24, at 143.

28. *See id.*

29. 5 ANNALS OF CONG. 776 (1796).

30. *See* U.S. CONST. art. V.

31. *See* COOLEY, *supra* note 24, at 124 ("The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.").

Instead of focusing on the *drafters* of the amendment, the proper place to look is to the views of the *adopters*.³²

The unwieldiness of trying to discern intent, as well as questions over whether intent should even matter, has led to a new form of originalist interpretation: “public-meaning originalism.”³³ The original public-meaning method “looks to how a reasonable member of the public (including, but not limited to, the framers and ratifiers) would have understood the words of the text (in context) at the time of its enactment.”³⁴ By looking at the text itself rather than the specific intent of those enacting it, public-meaning originalism seeks to avoid the problems associated with “original-intent” originalism.³⁵

Nevertheless, when trying to determine the substance of unenumerated rights in the Constitution, both “original-intent” and “original public-meaning” originalism come up short. Unenumerated rights occupy a unique position in constitutional interpretation. The text of the Ninth Amendment and the history surrounding the ratification of the Constitution and the addition of the Bill of Rights confirm their existence. Yet, they are by nature outside the text of the Constitution and thus cannot be looked at in quite the same way as we might look at the meaning of “Commerce” in Article I,³⁶ or even the meaning of the “right of the people to keep and bear Arms” in the Second Amendment.³⁷ The Commerce Clause confers a power on the federal government, and the central inquiry is what the framers and ratifiers of the Constitution intended the nature and extent of that power to be, or, for public-meaning originalists, how the language used in the Commerce Clause would have been understood by the public at large.³⁸ The Second Amendment recognizes a right, and because the right is expressly stated in the Constitution, the Second Amendment’s language and history can be probed to determine what was the general understanding of the nature and extent of that right.³⁹

32. *Id.*

33. Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 3-11 (2007) (discussing “The Rise of Public-Meaning Originalism”); *see also* Barnett, *Ninth Amendment*, *supra* note 4, at 5-7 (discussing this model of constitutional interpretation).

34. Barnett, *Ninth Amendment*, *supra* note 4, at 5-6. For further discussion of this method, *see* BARNETT, *supra* note 13, at 92.

35. *See* BARNETT, *supra* note 13, at 113-16; Rosenthal, *supra* note 33, at 8-9.

36. *See* U.S. CONST. art. I, § 8.

37. U.S. CONST. amend. II.

38. *Cf.* Barnett, *Ninth Amendment*, *supra* note 4, at 7 (similarly contrasting the language of the Commerce Clause with the language of the Ninth Amendment and concluding that the pertinent inquiry with respect to the latter examines the “publicly known purpose” behind the amendment’s inclusion).

39. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789-812 (2008). Justice

The Ninth Amendment, on the other hand, does not confer a right.⁴⁰ Rather, as will be seen, it simply evidences a whole body of preexisting rights.⁴¹ Because these rights are not stated in the text, the determinative question is not, What did the framers, ratifiers, or members of Congress think they were doing when they used certain language in the Constitution? or, What did the members of the state legislatures who ratified the Ninth Amendment think they were ratifying? None of these individuals were the final arbiters of the Ninth Amendment's substance. Rather, they were simply heirs to a tradition that recognized the existence of the rights mentioned in that amendment. Nor is it useful to inquire into the "original public meaning" of the text itself, for all the text can do is point us in the right direction by confirming the existence of rights; it cannot give us their substance. Instead, in order to determine what rights are retained by the people, one must ask a broader question: what was the general understanding of the rights possessed by individuals at the time of the adoption of the Constitution and the Bill of Rights?⁴² To answer this question, it is necessary to start at the beginning.

II. *The Ninth Amendment in Context: Whose Rights?*

By now, almost everyone with any background in constitutional law knows the thumbnail history of how the Ninth Amendment came to be. Nevertheless, understanding the historical view of unenumerated rights requires a close examination of the framing and ratification of the Constitution as well as the disputes that led to the adoption of the Bill of Rights, including the Ninth Amendment. In order to put this information into its proper context, it is first

Scalia's majority opinion in *Heller* used both text and history to determine that the Second Amendment contains an individual right to possess firearms and that this right is broad enough to encompass the right to possess a handgun in the home for self-defense. *See id.*

40. *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 903 (2008) (noting that "[t]he Ninth Amendment . . . is neither a grant of power nor a source of rights" (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 776 n.14 (2d ed. 1988))).

41. *See infra* text accompanying notes 202-05.

42. This analytical approach is somewhat akin to the modified "original public-meaning" method of historical interpretation employed by Randy Barnett in his Ninth Amendment analysis arguing for an individual-rights interpretation. *See* Barnett, *Ninth Amendment*, *supra* note 4, at 7 (focusing on the "publicly known purpose" of the Ninth Amendment as shaping its text). A strict application of the "original public-meaning" method is not possible with regard to interpreting *unenumerated* rights because, as discussed above, there is no actual text to examine. *See supra* text accompanying notes 36-37. Nevertheless, the general idea is the same in the sense that the public's understanding is what matters. But, instead of looking at the public's understanding of the Ninth Amendment's text, we can look at what the general public would have understood their rights to be at the time of the amendment's adoption.

necessary to understand the preconceived views about rights held by the framers of the Constitution, the members of Congress that crafted the Bill of Rights, and the citizens of the young United States that ratified each of those documents. These views developed from a long line of traditional English thought regarding rights, some of it grounded in fact and some of it mythological.

A. The English Constitution and the Rule of Law

To begin understanding the thoughts of the framing generation on rights, it is important to look at how that generation perceived rights. As historian Jack Rakove notes, the language of rights was the “native tongue” of eighteenth-century Americans.⁴³ One of the main ideas that the American colonists inherited from their English ancestors was that they had a certain body of rights and liberties, even if they could not articulate the exact content of those rights and liberties.⁴⁴ Of one thing they were certain: the rights and liberties were not new. According to a long-held tradition, these rights had as their source an “ancient constitution” made up of laws and customs brought to England by Saxons from Germany some thirteen hundred years earlier.⁴⁵ In this version of history, England, before the coming of the Normans, was an “agrarian paradise” whose inhabitants possessed perfect liberty to do as they chose and where disputes were “settled by established custom and the common law, which all men understood and revered.”⁴⁶ The major declarations of rights in English history, including the Magna Carta, The Petition of Right of 1628,⁴⁷ and the 1689 Bill of Rights,⁴⁸ were not thought to have declared new

43. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290 (1996) (detailing the prevailing views of rights among the American colonists).

44. See *id.* at 290-92.

45. See JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 84 (2005) [hereinafter REID, ANCIENT CONSTITUTION]; see also FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 76 (1985).

46. McDONALD, *supra* note 45, at 76.

47. The Petition of Right of 1628, instigated by Edward Coke, was aimed at curbing the violations of rights by Charles I. See BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 12 (1992) [hereinafter SCHWARTZ, GREAT RIGHTS]. According to Schwartz, the Petition “declared the fundamental rights of Englishmen as positive law.” *Id.* at 11.

48. The 1689 Bill of Rights, which enacted the 1689 Declaration of Rights, was intended to correct the abuses of James II and included the direct ancestor of the Eighth Amendment. See *id.* at 21-23.

rights, but rather to have reinstated the rights of this earlier period that had been lost to Norman conquest or the wickedness of rulers.⁴⁹

This original constitution creation story was, of course, fictional.⁵⁰ Nevertheless, it was subscribed to by many persons who ought to have known better from a historical standpoint, including key members of the founding generation, such as John Adams and Thomas Jefferson.⁵¹ One key reason for this was the story's utility as a political idea: if certain rights were antecedent to kings and government, those rights did not depend on kings or governments for their existence and could thus serve as limits on governmental power.⁵² The actual historical accuracy was beside the point; rather, the purpose of the tale was to illustrate that rights did not owe their creation to any governmental power, for what the government could create, it could deny.⁵³ Only if the constitution preexisted the government could it serve as a standard against which to test the enactments of the government.⁵⁴

A second concept that worked its way through English law and to the colonists was that of "the original contract."⁵⁵ The original contract was also a legal theory that circumscribed the power of the government.⁵⁶ Under this theory, the king had contracted with the people, promising to recognize their rights, not to intrude on those rights, and "to govern according to the laws."⁵⁷ Whether there had ever been an actual original contract was uncertain.⁵⁸ Nevertheless, as with the ancient constitution, the reality was less important than the utility. The ancient constitution established rights, and the original contract bound the government—both the king and Parliament—to respect them.⁵⁹

Americans at the time of the revolution assumed that the guarantee of the original contract extended to them because of the existence of a colonial

49. See McDONALD, *supra* note 45, at 76-77. For a detailed account of ancient constitutionalism, see J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (2d ed. 1987).

50. See REID, *ANCIENT CONSTITUTION*, *supra* note 45, at 13-16 (discussing the difference between actual history and lawyer's history).

51. See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 169-70 & n.66 (1928).

52. See *id.* at 170.

53. See *id.*

54. See REID, *ANCIENT CONSTITUTION*, *supra* note 45, at 6-7.

55. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 132-38 (1986) [hereinafter REID, *AUTHORITY OF RIGHTS*] (describing the original contract).

56. *Id.* at 134.

57. *Id.* at 137-38 (discussing the terms of the original contract).

58. *Id.* at 136.

59. See *id.* at 136-38.

contract, either express or implied.⁶⁰ Under the terms of this contract, the colonists' ancestors had pledged to settle the New World in exchange for the promise that they would continue to be granted the rights of the ancient constitution and the original contract.⁶¹

A concept intertwined with the ancient constitution and original contract was the "rule of law."⁶² If the ancient constitution provided the basis for rights, then the rule of law gave the rights their vitality. Under the rule of law, the individual had the right to be governed by laws that applied to all rather than by arbitrary government action.⁶³ Further, government was to be conducted through rules promulgated prior to their application in a particular case⁶⁴—an idea that would later become part of what American constitutions would call "due process."⁶⁵ The concept of the rule of law, however, was not limited to the procedural, at least not prior to the eighteenth century.⁶⁶ Rather, the rule of law was also substantive in that it was a constraint on the power of the king and Parliament to infringe on customary rights.⁶⁷ Under the rule of law, the rights that persons received by virtue of the ancient constitution and custom were superior to those enacted by Parliament.⁶⁸ This is not to say that Parliament could not enact laws contrary to customary rights. If Parliament did so, however, then the laws were not "laws," but merely arbitrary declarations of power.⁶⁹

By the time of the American Revolution, the concept of the rule of law in Great Britain had shifted from a substantive notion of due process toward a notion of parliamentary sovereignty that gave Parliament the ability to make law and rendered the rule of law procedural.⁷⁰ By contrast, in America, the

60. *See id.* at 139-45 (discussing the original colonial contract).

61. *Id.* at 140. Reid quotes one anonymous writer who, in 1774, envisioned the original colonial contract "as if both King and people had assembled upon the sea shore, and the one had sworn to govern them according to the laws of the land, and the other to obey him in *America* as subjects within the realm." *Id.* at 150 (quoting AN ARGUMENT IN DEFENCE OF THE EXCLUSIVE RIGHT CLAIMED BY THE COLONIES TO TAX THEMSELVES 95 (London, Brotherton & Sewell 1774), available at <http://www.constitution.org/bcp/ader1774/ader1774.htm> (follow the "Pages 051-100" hyperlink)).

62. *See generally* JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (2004) [hereinafter REID, *RULE OF LAW*].

63. *Id.* at 4.

64. *Id.* at 5-6.

65. *See* RODNEY L. MOTT, *DUE PROCESS OF LAW* 1-29 (1926) (detailing the history of the phrasing of due process).

66. *See* REID, *RULE OF LAW*, *supra* note 62, at 78.

67. *Id.* at 78-79.

68. *See* REID, *AUTHORITY OF RIGHTS*, *supra* note 55, at 75-76.

69. *See id.* at 76-77.

70. *See* REID, *RULE OF LAW*, *supra* note 62, at 78. Reid notes that by the late seventeen

concept of the rule of law remained “more historically English than contemporary British,”⁷¹ and Americans still believed in a substantive rule of law that checked Parliament’s power.⁷²

It is also imperative to understand how the framing generation viewed the concept of bills of rights. The purpose of a bill of rights was not to categorically list all the rights that an individual or body of individuals possessed, for such rights existed whether listed or not.⁷³ Rather, the purpose of a bill of rights was to reaffirm rights that had recently come under attack or were likely to come under attack.⁷⁴ The idea was that the listing of particular rights would serve as a reminder and reaffirmation of their existence, though such existence did not depend on this reaffirmation.⁷⁵

B. The Influence of Natural Law

Another major influence on the thinking of the framing generation was the idea of natural law. The framers, and many other learned persons of the framing generation, were familiar with natural law theorists such as John Locke, Samuel Pufendorf, Emerich de Vattel, Hugo Grotius, Jean-Jaques Burlamaqui, and Thomas Rutherforth.⁷⁶ Locke’s ideas regarding natural law were particularly influential on Thomas Jefferson when he drafted the language used in the Declaration of Independence. When Jefferson wrote that “all men” had “certain inalienable rights” such as “life, liberty and the pursuit of happiness,”⁷⁷ he was borrowing from Locke’s formulation of the inalienable rights of man: life, liberty, and property.⁷⁸ Similarly, when Jefferson stated in the Declaration that “whenever any Form of Government becomes destructive

hundreds, “for the English it had become enough that laws be promulgated and be certain for rule-of-law to define what liberty meant for most individuals.” *Id.* In other words, the view that came to predominate in Britain was that, while Parliament had “no right to alter fundamental laws without the acquiescence of the people, . . . the very fact the House of Commons vote[d] a law suppose[d] the acquiescence of the majority of the people.” REID, *AUTHORITY OF RIGHTS*, *supra* note 55, at 76 (internal quotation marks omitted).

71. REID, *RULE OF LAW*, *supra* note 62, at 78.

72. See REID, *AUTHORITY OF RIGHTS*, *supra* note 55, at 76. Reid casts the entire American Revolution as a fight between seventeenth-century constitutionalism, which favored the colonists, and eighteenth-century constitutionalism, which favored the British. See *id.* at 74-78.

73. See *id.* at 69-70 (discussing the purpose of the English Bill of Rights).

74. See *id.*

75. See *id.*

76. See Droddy, *supra* note 12, at 830 (discussing the sources that founding-era citizens relied on for natural law theory); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 860-64 (1978) (describing the influence of natural law theory at the time of the revolution).

77. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

78. See Niles, *supra* note 11, at 109.

of these Ends, it is the Right of the People to alter or to abolish it,”⁷⁹ he was referencing another Lockean ideal: where the government acts against the trust reposed in it, the people have a right to dissolve it and create another.⁸⁰

Locke was similarly influential on the colonists’ conception of the formation of governments. Locke posited a “compact theory” under which persons surrendered their natural rights—that is, rights that they possessed in the state of nature—to the community in return for its protection of their lives and property from others in the community and from outside forces.⁸¹ The people did not surrender all of their rights, however. Rather, they surrendered only those rights necessary for the common good, while retaining all others.⁸²

Locke’s compact theory, with alterations, was echoed by other writers, including Pufendorf, Burlamaqui, and Vattel.⁸³ Each of these writers postulated some sort of theory whereby persons formed a government by agreeing to delegate their own sovereign powers and rights to the government while retaining those rights that they did not delegate.⁸⁴ The writings of these authors, in combination with Locke, provided a framework through which the colonists could justify their claim to rights and their decision to revolt against British rule.⁸⁵

There is no question that Locke and other natural law philosophers were highly influential on the framers as well. Locke was the “prime source” for Madison’s ideas about founding principles.⁸⁶ James Wilson was also heavily

79. THE DECLARATION OF INDEPENDENCE para. 2.

80. See JOHN LOCKE, LOCKE’S SECOND TREATISE OF GOVERNMENT 77-79 (Lester DeKoster ed., Wm. B. Eerdmans Publ’g Co. 1978) (1690). Jefferson was heavily influenced by Locke in general, declaring that “Locke’s little book on government is perfect as far as it goes.” Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), reprinted in 5 THE WRITINGS OF THOMAS JEFFERSON 171, 173 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895) [hereinafter WRITINGS].

81. See LOCKE, *supra* note 80, at 47-49.

82. See *id.* at 58.

83. See Grey, *supra* note 76, at 860-63.

84. See *id.* Pufendorf’s theory of government held that the people could condition their grant of powers on compliance with a constitution, but that even if they did not, the ruler would be bound by natural law. See *id.* at 861. Under Burlamaqui’s theory, persons could delegate all of their rights if they chose to do so. See *id.* at 862. Vattel wrote that power could be delegated to government, but that government could not change the fundamental laws of the state. *Id.* at 862-63.

85. See, e.g., JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (Boston, Edes & Gill 1764) (drawing on Locke’s *Two Treatises* to argue that the government’s power was limited to providing the security of life, liberty, and property), as reprinted in NEIL H. COGAN, CONTEXTS OF THE CONSTITUTION 227, 228, 232 (1999); THOMAS PAINE, COMMON SENSE (Phila., R. Bell 1776) (advancing a Lockean idea regarding the formation of government), as reprinted in COGAN, *supra*, at 235-45.

86. Marvin Meyers, *Introduction* to THE MIND OF THE FOUNDER: SOURCES OF THE

influenced by natural law theory, a subject that he lectured on as a law professor at the College of Pennsylvania.⁸⁷ Other framers similarly espoused natural rights principles.⁸⁸

The prevalence of natural rights rhetoric in the Declaration of Independence and in some of the works of the framers has led many scholars to propose using natural rights as a foundation for unenumerated rights jurisprudence. Some of these scholars focus on Lockean philosophy,⁸⁹ while others look to the full panoply of natural rights philosophers for evidence of rights.⁹⁰ One scholar relies on natural law principles to find “presumption of liberty” in the Constitution.⁹¹ In each case, natural law principles or a general theory derived from those principles forms the constitutional baseline for determining rights.

For a number of reasons, these scholars overstate the influence of natural law philosophers such as Locke on the framing generation, particularly when it comes to the substance of unenumerated rights. First, although natural rights were one of the bases on which the American colonists asserted their claim to rights, this was due in large part to the prevailing practice at the time of asserting numerous bases for rights to give them a firmer foundation.⁹² As historian John Philip Reid notes, the American colonists at the time of the revolution asserted at least ten bases for the rights they claimed, including “their rights as Englishmen,” “the original contract,” “the original American contract,” and “principles from the British Constitution.”⁹³

Second, using Lockean ideals as the sole basis for unenumerated rights overstates Locke’s influence on the framing generation’s understandings of the

POLITICAL THOUGHT OF JAMES MADISON, at xi, xxiii (Marvin Meyers ed., Brandeis Univ. Press 1981) (1973). Madison was also influenced by Grotius and a host of other philosophers. *See id.* at 56 (transcribing Madison’s notes on confederate systems of government).

87. *See GERBER, supra* note 11, at 82-84 (discussing Wilson’s natural law views).

88. *See id.* at 64-65 (discussing statements made by Roger Sherman, Gouverneur Morris, and Robert Yates, which Gerber characterizes as reflecting natural law principles). Alexander Hamilton’s oft-cited remark that the rights of man are “written, as with a sunbeam” also references natural law ideas. *See* 1 THE WORKS OF ALEXANDER HAMILTON 113 (Henry Cabot Lodge ed., G.P. Putnam’s Sons 1904) (1850).

89. *See, e.g., GERBER, supra* note 11, at 25-32 (describing and arguing for an approach based on both Locke and the ideals articulated in the Declaration of Independence); Niles, *supra* note 11, at 108-16 (describing a Lockean natural rights approach).

90. *See, e.g., Drodgy, supra* note 12, at 830-32 (illustrating the reliance of the colonial elite on the writings of Locke, Vattel, Burlamaqui, and others, and pointing to these sources as evidence of original intent and avenues for adjudication).

91. *See BARNETT, supra* note 13, at 255-59.

92. *See REID, AUTHORITY OF RIGHTS, supra* note 55, at 87-95 (explaining the use of natural law rhetoric by the colonists).

93. *Id.* at 66.

substance of rights.⁹⁴ There is no doubt that Locke's theories provided significant justification for the rights claimed by the colonists leading up to the revolution and that, as Mark Niles and others have noted, Locke was second only to the Bible as a quoted source in American political writings between 1760 and 1775.⁹⁵ This was due in large part to the usefulness of Locke's theories in producing a "clear-cut rationale for independence."⁹⁶ Locke's influence on the American public, however, did not long survive the revolution.⁹⁷ As historian Forrest McDonald notes, while Locke's theories met the goals of the revolution, they "did not accord with the desires of the society of acquisitive individualists that emerged afterward."⁹⁸ While many of the framers continued to espouse Lockean ideals, no new edition of Locke's *Two Treatises* was published in America for more than a century and a half following the colonial-era edition of 1773.⁹⁹

Further, while Locke was a considerable influence on the framers, he was far from the only natural law philosopher that they consulted regarding theories of government. Madison was also influenced by Montesquieu, especially on the subject of separation of powers,¹⁰⁰ and by David Hume on the subject of the evils of factions.¹⁰¹ James Wilson was extremely well versed in all of the natural law philosophers and was heavily influenced by Burlamaqui, Frances Hutcheson, and Rousseau.¹⁰² As a result, the idea that any one natural

94. See Grey, *supra* note 76, at 860.

95. Niles, *supra* note 11, at 108 (citing, inter alia, STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 34-35 (1990)); see also MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 18-25 (1994) (noting colonists' greater familiarity with Locke relative to other popular political works).

96. MCDONALD, *supra* note 45, at 60.

97. See *id.* at 66; see also Grey, *supra* note 76, at 860 (suggesting that "[t]he very elements that made Locke's theory so appropriate as the justification of the extra-legal break with England in 1776 at the same time lessened its usefulness in the disputes that led up to the break" because Locke "did not mean [for] rights to operate as legal checks" to legislation).

98. MCDONALD, *supra* note 45, at 66.

99. *Id.*

100. See *THE FEDERALIST* No. 47, at 235-37 (James Madison) (Terence Ball ed., 2003) (referring to Montesquieu as "[t]he oracle who is always consulted and cited" on the subject of separation of powers); NEAL RIEMER, *JAMES MADISON: CREATING THE AMERICAN CONSTITUTION* 18 (1986) (discussing the influence of Hume).

101. See RIEMER, *supra* note 100, at 18, 31.

102. See MCDONALD, *supra* note 45, at 188 (observing that Wilson was most influenced by Burlamaqui and Hutcheson); PAUL MERRILL SPURLIN, *ROUSSEAU IN AMERICA 1760-1809*, at 61 (1969) (noting, as evidence of Rousseau's influence on Wilson, that Wilson cited the *Social Contract* in some of his law lectures).

law philosopher, even one as influential as Locke, can be made to serve as the guiding influence for unenumerated rights appears untenable.

What then of the idea, suggested by Droddy and others, that we should use the *collective* works of natural law philosophers as evidence of the original understanding of unenumerated rights?¹⁰³ The problem in doing so is that it vastly overstates the degree to which the ordinary person at the time of the formation of the Constitution was familiar with natural law works, especially those of the more obscure writers. To say that James Wilson was intimately familiar with the works of the natural law theorists of the time is one thing.¹⁰⁴ To say that the ordinary person was as familiar with these works as was James Wilson is quite another. It is true that many Americans at the time of the revolution and the framing had some exposure to and familiarity with the outlines of natural law philosophy, whether through Pufendorf and Locke or through textbooks distilling their ideas written by Hutcheson or Rutherford.¹⁰⁵ Nevertheless, the extent to which the general public considered these natural law theories controlling on the content of rights is debatable.

Instead, what most people at the time of the revolution thought of as “natural law rights” were not those found in the treatises of natural law philosophers. Rather, they were the rights “existing ‘under English government’; that is, [rights] established and recognized under the British constitution or English law. What exist[ed] under the British constitution [was] natural, and it [was] natural because it exist[ed].”¹⁰⁶

What is more, although the rhetoric of the colonists at the time of the revolution included many references to natural law, the specific rights they claimed were all English rights.¹⁰⁷ Reid notes that “[t]he fact of the matter is that the American whigs did not in any official petition or resolution claim a natural right that was not already extant in British constitutional theory or

103. See *supra* notes 12, 76 and accompanying text.

104. See, e.g., Knud Haakonssen, *From Natural Law to the Rights of Man: A European Perspective on American Debates*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW* 19, 45 n.59 (Michael J. Lacey & Knud Haakonssen eds., 1991) (discussing the multiple sources of natural law theory with which Wilson was familiar).

105. See *id.* at 43-45 (discussing natural law theory as part of the classic college curriculum in the colonies).

106. JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 29 (1988) (quoting D.S. Rowland, Thanksgiving Sermon 1766, as reprinted in ALICE M. BALDWIN, *THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION* app. at 178 (2d prtg. 1965)); see also REID, *AUTHORITY OF RIGHTS*, *supra* note 55, at 95 (concluding that the so-called natural law “rights that British subjects on both sides of the Atlantic claimed to possess . . . [were] a curious mirror of British constitutional law and English common law”).

107. See REID, *AUTHORITY OF RIGHTS*, *supra* note 55, at 92 (suggesting the irrelevance of natural rights to the American Revolution).

English common law.”¹⁰⁸ The problem with using natural law as a basis for the content of rights was that natural law philosophers spoke in generalities; they could provide a basis for claiming rights, but not the substance of those rights.¹⁰⁹ Thus, when the colonists actually identified their rights, the rights that they identified mirrored English rights.¹¹⁰

This understanding of natural law rights did not change with independence. Under the ideas espoused by Locke and other natural law philosophers, once the colonists had declared that they were free of the British crown, they reverted to a “state of nature” where they could reconstitute their governments as they wished.¹¹¹ Indeed, the writings and speeches of leading revolutionaries were replete with statements that emphasized this point.¹¹² Nonetheless, almost immediately upon receiving this opportunity, the colonists drafted new constitutions and declarations of rights that protected only traditional English rights,¹¹³ although they often included grand statements infused with natural rights rhetoric.¹¹⁴ Further, many constitutions, statutes, and declarations explicitly reaffirmed the controlling status of English common law.¹¹⁵

At the time of the drafting of the Constitution, most Americans continued to adhere to an English notion of rights.¹¹⁶ While those rights were refined by American use of the common law, they still retained their essential English

108. *Id.*

109. *See id.* at 89-90.

110. *Id.* at 94-95.

111. *See* McDONALD, *supra* note 45, at 59; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 286-88 (1969).

112. *See, e.g.*, Patrick Henry, Remarks in Debate of the Continental Congress (Sept. 6, 1774) (declaring, in response to the actions of the Continental Congress, “We are in a State of Nature”), *reprinted in* 2 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 124 (L. H. Butterfield ed., 1961).

113. *Compare* McDONALD, *supra* note 45, at 152-53, *with* REID, *AUTHORITY OF RIGHTS*, *supra* note 55, at 92; *see also* RAKOVE, *supra* note 43, at 306-07.

114. *See, e.g.*, PA. CONST. of 1776, pmb1. (“WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights”); DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF THE DELAWARE STATE § 1 (1776) (“That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”); VIRGINIA DECLARATION OF RIGHTS art. 1 (1776) (“THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity”).

115. *See, e.g.*, N.J. CONST. of 1776, art. XXII (“[T]he common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the legislature.”); *see also* McDONALD, *supra* note 45, at 153.

116. *See* JAMES R. STONER, JR., *COMMON-LAW LIBERTY* 14-16 (2003) [hereinafter STONER, *COMMON-LAW LIBERTY*].

heritage, and lawyers and judges often resorted to English common law to determine what rights meant.¹¹⁷

C. The Framing

It is fair to say that the framers of the Constitution were not chiefly focused on individual rights during the drafting stages.¹¹⁸ Instead, they were focused primarily on the task at hand, which was increasing the power of the federal government.¹¹⁹ The federal government created under the Articles of Confederation was not powerful enough to threaten rights or to effectively run the country.¹²⁰ It is unsurprising that rights would get short shrift in such an environment.

The framers did, however, protect some rights during the drafting.¹²¹ The rights that they protected share two important characteristics. First, they were almost exclusively individual rights.¹²² Second, they were overwhelmingly English rights or responses to perceived violations of the rule of law in England.¹²³

The majority of the rights protected in the body of the Constitution had a long pedigree in English law. For example, the right to trial by jury, which eventually found its way into Article III, Section 2 of the Constitution, was included in the Magna Carta and was traditionally believed to have been a part of English law from its beginning.¹²⁴ The privilege of the writ of habeas corpus found in Article I, Section 9 was one of the traditional rights of Englishmen that Parliament identified in the Petition of Right in 1628,¹²⁵ and

117. See *id.* at 15; see also Lawrence M. Friedman, *Introduction to COMMON LAW, COMMON VALUES, COMMON RIGHTS* 11, 12 (Am. Bar Ass'n ed., 2000) (noting that because there were relatively few printed legal materials available, "[l]awyers and judges had to lean, when they could, on English legal material").

118. See James H. Hutson, *The Bill of Rights and the American Revolutionary Experience*, in *A CULTURE OF RIGHTS*, *supra* note 104, at 62, 85.

119. *Id.*

120. See *id.* at 85-86.

121. See LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 150-52 (1988); RAKOVE, *supra* note 43, at 317. Most of these protections were inserted by the Committee of Detail and were not discussed beforehand. *Id.*

122. See LEVY, *supra* note 121, at 150-152.

123. See STONER, *COMMON-LAW LIBERTY*, *supra* note 116, at 15.

124. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 2-5 (James Appleton Morgan ed., New York, James Cockcroft & Co. 1875). Forsyth quotes William Blackstone as saying that trial by jury had "been used time out of mind in [England], and seems to have been coeval with the first civil government thereof." *Id.* at 3.

125. See *THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS* 3-4 (Gordon Lloyd & Margie Lloyd eds., 1998) [hereinafter *ESSENTIAL BILL OF RIGHTS*] (commenting on the Petition of Right); see also *supra* note 47 and accompanying text.

its use as a tool for inquiring about the cause of a person's imprisonment stretches as far back as the fourteenth century.¹²⁶ The prohibitions on bills of attainder in Article I, Sections 9 and 10 were a response to the political usage of such bills in both England and colonial America.¹²⁷ Bills of attainder were generally thought to violate the due process of English law, even though they were within the power of Parliament to enact.¹²⁸ The prohibitions on ex post facto laws in the same sections were generally thought to be a principle of English law (though this principle was not always followed by Parliament),¹²⁹ and three state constitutions prohibited ex post facto laws at the time of the framing.¹³⁰

There was very little thought about actually setting forth a bill of rights in the Constitution. The only mention of the possibility of a bill of rights in the convention record occurred three days before the end of the convention during the debate regarding whether the right to a jury trial extended to civil cases.¹³¹ George Mason of Virginia noted that he "wished the plan had been prefaced by a Bill of Rights, [and] would second a Motion if made for the purpose."¹³² He stated that such a bill would "give great quiet to the people; and with the

126. See WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 23-27 (1980) (chronicling the development of the writ). Blackstone referred to England's Habeas Corpus Act as the "bulwark of [the British] Constitution." 4 WILLIAM BLACKSTONE, *COMMENTARIES* *438.

127. See SOURCES OF OUR LIBERTIES 342-45 (Richard L. Perry ed., 1959) (discussing bills of attainder in the context of Maryland's Declaration of Rights). Both the Massachusetts Constitution of 1780 and the Vermont Constitution of 1786 prohibited bills of attainder. *Id.* at 345.

128. See EDWARD COKE, *FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 37 (London, W. Rawlins 1681).

129. See MCDONALD, *supra* note 45, at 38.

130. See SCHWARTZ, *GREAT RIGHTS*, *supra* note 47, at 75-77 (examining the contents of state constitutions). This is not to say that all of the rights included in the body of the Constitution had roots in English law. The Article I, Section 10 prohibition on states' impairing private contracts, for example, had its roots in the unfortunate experiences of the framers under the Articles of Confederation. See *THE FEDERALIST* NO. 44, *supra* note 100, at 218-19 (James Madison). In explaining the restriction on the impairment of contracts, Madison stated,

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising [sic] and influential speculators; and snares to the more industrious and less informed part of the community.

Id. at 218.

131. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 587-88 (Max Farrand ed., 1937) [hereinafter *RECORDS*]. By this time the convention had already received copies of the proposed Constitution from the Committee of Style. See LEVY, *supra* note 121, at 147.

132. 2 *RECORDS*, *supra* note 131, at 587.

aid of the State declarations, a bill might be prepared in a few hours.”¹³³ Elbridge Gerry then moved for a committee to prepare a bill of rights; however, the motion was rejected after a vote.¹³⁴ The only debate on the motion occurred when Roger Sherman of Connecticut stated that he was “for securing the rights of the people where requisite” but noted that “[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”¹³⁵ In calling for the vote, however, Mason pointed out that the “Laws of the U.S. are to be paramount to State Bills of Rights.”¹³⁶ Possibly reluctant to jeopardize the legal efficacy of their respective state bills of rights in light of this federal supremacy, each of the twelve state delegates present voted against the motion, and the effort was abandoned.¹³⁷

Apart from any uncertainty suggested by the momentary exchange between Sherman and Mason, exactly why the framers chose not to include a bill of rights at that juncture is unclear. Many of the framers did attempt to explain themselves on this score later; however, it is difficult to determine the extent to which these later statements were sincere as opposed to simply invented post hoc as a way to rationalize the absence of a bill of rights and to argue that one was unnecessary.¹³⁸ The most plausible explanation is that the framers

133. *Id.* at 587-88.

134. *Id.* at 588.

135. *Id.*

136. *Id.*

137. *See id.*

138. *See, e.g.*, Governor Edmund Randolph, Remarks at the Virginia Ratification Convention (June 9, 1788), *reprinted in* 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 191 (facsimile reprint 1941) (Jonathan Elliot ed., 2d ed., Phila., J.B. Lippincott 1836) [hereinafter DEBATES]. Randolph argued that a bill of rights would be “quite useless, if not dangerous to a republic” because bills of rights were designed to limit the prerogative of the king. *Id.* But Leonard Levy contends that this position was “unpardonable” when compared to some of Randolph’s previous statements regarding the function or effect of bills of rights. LEVY, *supra* note 121, at 157. James Wilson seems to have chosen to forget that there had ever been an attempt to include a bill of rights. *See* James Wilson, Remarks at the Pennsylvania Ratification Convention (Oct. 28, 1787), *reprinted in* 2 DEBATES, *supra*, at 435-36 (“[T]here was no direct motion offered for any thing [sic] of the kind.”). Wilson would repeat this assertion a month later, when he stated that “of so little account was the idea [of a bill of rights] that it passed off in a short conversation, without introducing a formal debate or assuming the shape of a motion.” 3 RECORDS, *supra* note 131, at 143.

Of course, revisionist accounts of the failure to include a bill of rights were not exclusive to Federalists. George Mason, who refused to sign the Constitution, made the lack of a bill of rights the first sentence of his pamphlet entitled “Objections to the Proposed Federal Constitution.” *See* GEORGE MASON, OBJECTIONS TO THE PROPOSED FEDERAL CONSTITUTION (1787), *reprinted in* THE ANTIFEDERALISTS 191, 192 (Cecilia M. Kenyon ed., 1966); RAKOVE, *supra* note 43, at 318. Yet, at the convention, when his objection might have done some good, he made no real argument for a bill, instead offering only to second a motion for one if made.

saw a bill of rights as unnecessary at the beginning of the process because they were not creating a new society, but simply rearranging powers within the existing society without affecting the fundamental rights of the people.¹³⁹ Once the Committee of Detail had finished its work and it became apparent that the relationship between the people and the government would be altered in significant ways, the framers were simply too far along in the process to risk having it derailed by arguments over rights.¹⁴⁰

D. The Ratification

The framers' decision not to include a bill of rights would prove to be a huge problem when the Constitution was sent to the states. In fact, the lack of a bill of rights became the main objection to ratification.¹⁴¹ Prominent opponents of the Constitution immediately objected to the omission of a bill of rights, arguing that its absence endangered many important rights.¹⁴² In actuality, some of these opponents were not as interested in seeing a bill of rights added as they were in seeing the Constitution defeated.¹⁴³ For them, the lack of a bill of rights was simply an expedient ground on which to attack a Constitution that they felt gave too much power to the federal government at the expense of the states.¹⁴⁴ Nevertheless, many of the Constitution's opponents were sincere in their desire to protect rights, and their arguments carried great weight in the ratification conventions.¹⁴⁵

See LEVY, *supra* note 121, at 147.

139. *See* LEVY, *supra* note 121, at 149. The basis for Levy's argument is a statement in the notes of the Committee of Detail, attributed to Randolph, that there was no need for philosophic statements of government in the preamble because the framers were "not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and (supporting) *interwoven with* what we call (states) the rights of states." 2 RECORDS, *supra* note 131, at 137; *see also* RAKOVE, *supra* note 43, at 317 (arguing that the framers may have thought that a bill of rights was not necessary because the federal government was not interfering with the fundamental rights of the citizens, but only "acquiring from the states and the people the resources and authority to exercise its essential tasks").

140. *See* DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 225-26 (2007) (noting that by September 12, it was "well beyond late" to introduce any major changes).

141. *See* RAKOVE, *supra* note 43, at 318.

142. *See* Richard Henry Lee, Proposed Amendments to the U.S. Constitution (Sept. 27, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 238-40 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY].

143. *See* ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 278-79 (setting forth the political motives of the Antifederalists).

144. *See id.* at 278.

145. *See id.* at 278-79.

The Federalist supporters of the Constitution attempted to counter these objections by arguing that a bill of rights was unnecessary.¹⁴⁶ These arguments generally took one of two forms. First, some Federalists argued that, while a bill of rights might have been necessary in England because it wrested power from the king, a bill of rights was not appropriate for a republic founded on the power of the people.¹⁴⁷ This argument was unpersuasive, however, because the “dominant theory” in the United States was that a bill of rights was appropriate and even necessary in a compact creating a government.¹⁴⁸

Second, many Federalists argued that a bill of rights was unnecessary because the Constitution established a government of limited powers. In such a system, any power not delegated to the federal government was reserved to the states and the people.¹⁴⁹ Alexander Hamilton conveyed the logic of this position in *The Federalist* when he asked, “Why . . . should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”¹⁵⁰ Further, according to this argument, the enumeration of certain rights in a bill of rights would actually be dangerous because Americans would presume that only the rights enumerated were retained, with all others ceded to the national government.¹⁵¹

146. *Id.* at 278 (setting out the Federalist arguments).

147. See LEVY, *supra* note 121, at 156. Alexander Hamilton made this argument in *The Federalist* when he stated,

[B]ills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. . . . It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.

THE FEDERALIST NO. 84, *supra* note 100, at 419 (Alexander Hamilton). James Wilson also put forth this contention during the Pennsylvania ratification convention. See James Wilson, Remarks in Pennsylvania Convention Debates (Nov. 28, 1787), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 142, at 383 (Merrill Jensen ed., 1976).

148. See LEVY, *supra* note 121, at 156-57. This theory was reinforced by the fact that eight states had adopted bills of rights. *Id.*

149. *Id.* at 153.

150. THE FEDERALIST NO. 84, *supra* note 100, at 420 (Alexander Hamilton).

151. LEVY, *supra* note 121, at 153-54. James Wilson made this argument in addition to the first argument at the Pennsylvania ratification convention, stating,

A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

Wilson, *supra* note 147, at 436 (Nov. 30, 1787).

This argument similarly failed to impress the Constitution's opponents. They noted that although the Constitution purported to grant only limited powers to the federal government, it actually contained clauses of expansive powers, such as the power to act where "necessary and proper."¹⁵² Further, the convoluted nature of the argument put forth by proponents of the Constitution worked to convince the Constitution's critics that some deception was afoot.¹⁵³ The fact that the Constitution did explicitly protect some rights also served to convince its opponents that the Federalists' contentions were not made in good faith.¹⁵⁴

The resonance that the Antifederalist argument had with the general population was apparent from the start in the state ratification conventions. Although Pennsylvania became one of the first states to ratify the Constitution, a minority of the Pennsylvania convention demanded a comprehensive bill of rights that would have included provisions protecting liberty in matters of religion, freedom of speech and press, trial by jury in property cases, and due process in criminal prosecutions, a prohibition against excessive bail and cruel and unusual punishments, a requirement that warrants be supported by evidence, and the right to bear arms.¹⁵⁵ The demand for a bill of rights was even greater in Massachusetts, which provided the ratification process with its first real test.¹⁵⁶ Because of strong opposition, the Constitution was only ratified with the concession that the ratification include recommended amendments protecting, *inter alia*, the right to trial by jury in civil suits and the right to indictment by a grand jury.¹⁵⁷

Although Maryland ended up ratifying the Constitution as it stood, the convention attempted to recommend a bill of rights and then to recommend

152. See Cecelia M. Kenyon, *Introduction* to THE ANTIFEDERALISTS, *supra* note 138, at xxi, lxx.

153. See MARK N. GOODMAN, THE NINTH AMENDMENT: HISTORY, INTERPRETATION, AND MEANING 26-28 (1981) (noting that the Federalist position required substantial "mental gymnastics").

154. See RAKOVE, *supra* note 43, at 320. For an example of a view opposing the Federalist argument, see Brutus, *No. II: To the Citizens of the State of New York*, N.Y.J., Nov. 1, 1787, as reprinted in ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 295-300.

155. See ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 308-10.

156. See JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES ON ORIGINAL INTENT 39 (1999)

157. See *id.* Levy notes that these were the only two recommended provisions that actually belonged in a bill of rights. LEVY, *supra* note 121, at 162. The other recommended amendments, such as a limit on the power of direct taxation and a provision fixing the number of representatives at one per thirty thousand people in a state, were really changes to the powers of Congress. See Proposed Amendments to the U.S. Constitution, Mass. Ratification Convention (Feb. 6, 1788), reprinted in ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 311-13.

amendments.¹⁵⁸ These proposed amendments were eventually published in pamphlet form and included provisions for trial by jury in all cases, a prohibition on double jeopardy, a prohibition on general and oathless warrants, a prohibition on the quartering of soldiers, a prohibition on the establishment of religion and a guarantee of religious liberty, and a provision protecting freedom of the press.¹⁵⁹

South Carolina and New Hampshire also ratified with recommended amendments.¹⁶⁰ South Carolina recommended four amendments, one of which would have recognized that the states retained every power not expressly vested in the federal government.¹⁶¹ New Hampshire's recommended amendments paralleled those recommended by Massachusetts, but New Hampshire also added bans on troop quartering, laws infringing freedom of religion, and laws infringing the right to bear arms.¹⁶²

In Virginia, a fierce ratification fight erupted over the absence of a bill of rights and the implications of the new powers of the federal government over the states.¹⁶³ The bill of rights issue was particularly strong in Virginia because its state constitution contained a declaration of rights that was enforceable by the courts through judicial review.¹⁶⁴

Virginia eventually ratified the Constitution, but not without compromise. A motion by Patrick Henry to make ratification contingent on the passage of amendments was narrowly defeated.¹⁶⁵ But, in order to secure ratification, the supporters of the Constitution were forced to accede to the public sentiment for a bill of rights by taking steps to make recommendatory amendments after

158. See Bernard Schwartz, *Commentary* in 4 THE ROOTS OF THE BILL OF RIGHTS 729-30 (Bernard Schwartz ed., 1980).

159. *Id.*

160. See LYNCH, *supra* note 156, at 39; see also ROBERT ALLEN RUTLAND, THE ORDEAL OF THE CONSTITUTION 168, 212 (1966) (noting the role of recommended amendments in helping to pass the Constitution); SCHWARTZ, GREAT RIGHTS, *supra* note 47, at 133-34.

161. See S.C. Ratification Convention, Proposed Amendments to the U.S. Constitution (May 23, 1788), *reprinted in* 4 THE ROOTS OF THE BILL OF RIGHTS, *supra* note 158, at 756-57.

162. See N.H. Ratification Convention, Proposed Amendments to the U.S. Constitution (June 21, 1788), *reprinted in* 4 THE ROOTS OF THE BILL OF RIGHTS, *supra* note 158, at 758-61.

163. See LYNCH, *supra* note 156, at 41; Schwartz, *supra* note 158, at 762-63. Several other economic and practical factors also played a part in the reluctance of Virginia to ratify. These factors included fears that the federal government would allow British creditors to pursue claims for prewar debts owed by Virginians, the loss of revenue from taxing interstate commerce, and the loss of legislative influence because of the equality of the Senate. LYNCH, *supra* note 156, at 39-41. Nevertheless, the controversy over the absence of a bill of rights soon eclipsed these factors. See *id.* at 41.

164. See Schwartz, *supra* note 158, at 762-63.

165. *Id.* at 764.

ratification.¹⁶⁶ The day after ratification, a drafting committee including proponents of the Constitution such as Madison and John Marshall, as well as opponents of the Constitution such as Henry and George Mason, went to work on proposed amendments.¹⁶⁷ Two days after ratification, the committee reported a proposed bill of rights containing twenty articles to be added to the Constitution.¹⁶⁸ The bill included the right to know the nature and cause of accusation, the right to confrontation, the right to present evidence, the right to a trial by jury in criminal and civil cases, the privilege against self-incrimination, a prohibition against deprivation of property unless done in accordance with “the law of the land,” a prohibition against excessive bail or fines, a prohibition against cruel and unusual punishment, a prohibition against unreasonable searches and seizures, the right to assemble and petition for redress of grievances, the right to freedom of speech and press, the right to bear arms, a prohibition against the quartering of soldiers, and a right respecting freedom of religion.¹⁶⁹

Once Virginia had ratified, New York followed suit.¹⁷⁰ In order to win ratification, however, the Federalists in New York had to agree to recommend a bill of rights based on a draft by Antifederalist John Lansing.¹⁷¹ This recommended bill was quite similar to that recommended by Virginia, except that it contained, for the first time in a proposed American constitutional provision, the phrase “due process of Law.”¹⁷²

The rights recommended by the state ratification conventions lend further support to the argument that most people at the time of the framing thought of their rights as English in origin. Many of the proposed rights that would later find their way into the Bill of Rights had a long pedigree in English law.¹⁷³ The prohibition on quartering troops in the homes of private citizens without consent, found in the recommended amendments of New Hampshire, Virginia, and New York, as well as in Maryland’s attempted amendment,¹⁷⁴ was a staple of English common law, and the English Bill of Rights of 1689 provided a

166. *Id.* at 764-65; see also LEVY, *supra* note 121, at 163. A motion by Patrick Henry that a declaration of rights and other recommendations be referred to other states for consideration prior to ratification was defeated by only eight votes, 88-80. LYNCH, *supra* note 156, at 46-47.

167. See Schwartz, *supra* note 158, at 764-65.

168. *Id.* at 765.

169. *Id.* at 765-66.

170. See *id.* at 852-55.

171. *Id.* at 854.

172. *Id.* at 855-56.

173. See Kris E. Palmer, *Bill of Rights*, in CONSTITUTIONAL AMENDMENTS 1789 TO THE PRESENT 1, 2 (Kris E. Palmer ed., 2000) [hereinafter CONSTITUTIONAL AMENDMENTS].

174. See SCHWARTZ, *GREAT RIGHTS*, *supra* note 47, at 157.

statutory prohibition against troop quartering.¹⁷⁵ The right to indictment by grand jury, recommended by Massachusetts and New Hampshire,¹⁷⁶ can be traced back to Henry II's enactment of the Assize of Clarendon in 1166.¹⁷⁷ The prohibition against double jeopardy was a concept of English law applied to capital offenses, albeit in a narrower form.¹⁷⁸ Its abuse by English royalty caused the American colonists to expand it to all crimes.¹⁷⁹ The prohibition on excessive bail recommended by Virginia and the Pennsylvania minority also descended from English common law and was expressly included in the 1689 Bill of Rights.¹⁸⁰ Rights such as the right to petition for redress of grievances and the right to bear arms were also protected under the 1689 Bill of Rights.¹⁸¹ The prohibition against unlawful seizures of the person and the rights to due process and trial by jury had their origins in the Magna Carta.¹⁸²

Even those lesser-known rights discussed at the ratification conventions reflect an English origin. The rights championed by the Pennsylvania minority, the "liberty to fowl and hunt in seasonable time . . . [and] to fish in all navigable waters," seem curious to us today.¹⁸³ These rights, however, had their genesis in English "forest-laws," under which the king could designate any land within the kingdom as a "forest" and thereby prevent anyone but himself from hunting on it.¹⁸⁴ Federalist supporters such as Noah Webster ridiculed these suggested

175. See R.B. Bernstein, *Third Amendment*, in CONSTITUTIONAL AMENDMENTS, *supra* note 173, at 59, 60-61. Justice Story referred to this amendment as securing "that great right of common law, that a man's house shall be his own castle." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 709 (Carolina Academic Press 1987) (1833). The English Bill of Rights of 1689, which gave statutory force to the Declaration of Rights of 1689, *see supra* note 48 and accompanying text, asserted the "ancient and indubitable rights and liberties of the people." ENGLISH BILL OF RIGHTS (1689), available at http://avalon.law.yale.edu/17th_century/england.asp. It also justified the "Glorious Revolution," through which King James II was replaced with William of Orange, and restricted the powers of the monarchy. See LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 3-7 (1981) (setting out the "historians' view" of the Declaration of Rights and Bill of Rights of 1689).

176. SCHWARTZ, GREAT RIGHTS, *supra* note 47, at 128, 157.

177. Frederick K. Grittner, *Fifth Amendment*, in CONSTITUTIONAL AMENDMENTS, *supra* note 173, at 91, 93. According to Grittner, Henry II "issued the assize to take control of the courts from the Catholic Church and local nobility." *Id.* at 93.

178. *Id.* at 94.

179. *See id.*

180. See Mary Hertz Scarbrough, *Sixth Amendment*, in CONSTITUTIONAL AMENDMENTS, *supra* note 173, at 123, 129.

181. See SCHWARTZ, GREAT RIGHTS, *supra* note 47, at 197-200.

182. *Id.* at 198-200.

183. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 462 (John Bach McMaster & Frederick D. Stone eds., Phila., Historical Soc'y Pa. 1888).

184. See McDONALD, *supra* note 45, at 32-33 (citing 2 BLACKSTONE, *supra* note 126, at *38-39) (discussing forest laws regarding hunting).

rights as “absolutely trifling” given the state of property laws in the United States.¹⁸⁵ Nonetheless, they reflect the quintessential “Englishness” of the rights that Americans at the time believed themselves to possess.

The proposed bill of rights Madison that submitted to Congress in 1789 continued this theme. Madison and other Federalists faced the thorny question of how to satisfy the public sentiment for a bill of rights and at the same time prevent wholesale changes to the Constitution that would wreck its essential structure.¹⁸⁶ Their solution was to focus on guaranteeing individual rights, rather than on suggested amendments that would have altered the Constitution’s distribution of power between the states and the federal government.¹⁸⁷

Operating in accordance with this plan, Madison drew up a list of proposed amendments, many of which were taken from Virginia’s recommended amendments.¹⁸⁸ Madison’s original conception was that the rights would be

185. See Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 27-28 (1994).

186. See JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 221 (1992) [hereinafter STONER, COMMON LAW AND LIBERAL THEORY]. The controversy over the failure of the Constitution to include a bill of rights had quieted down by the time the first Congress met in April of 1789. See RAKOVE, *supra* note 43, at 330-31. Once ratification had been accomplished and the new government was in operation, the Antifederalist opposition that had seized upon the idea of a bill of rights as a means to defeat the Constitution collapsed, and many Federalists believed that it would be better to let the whole idea simply fade away rather than risk substantive changes to the constitutional structure. *Id.* Although Madison was of the opinion that “parchment barriers” such as bills of rights would be ineffective to stop a government from infringing rights and that the better course would be to restrain powers in the first place, he had become convinced that a bill of rights would at least “counteract the impulses of interest and passion” and provide “good ground for an appeal to the sense of the community.” Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 326-27. He was also concerned that, if a bill of rights were not introduced, opponents of the Constitution would say that the Federalists had not kept their promises and call for a second constitutional convention. See Letter from James Madison to Richard Peters (Aug. 19, 1789), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 491 (Philip B. Kurland & Ralph Lerner eds., 1987). In a letter to Richard Peters, Madison stated his belief that the failure to propose amendments would give “fine texts for popular declaimers who wish to revive the [antifederalist] cause, and at the fall session of the Legislares. [sic] to blow the trumpet for a second Convention.” *Id.*

187. See STONER, COMMON LAW AND LIBERAL THEORY, *supra* note 186, at 221. Madison mentioned this idea in a letter to Jefferson on December 8, 1788, wherein he stated that although the Federalists conceded the necessity of amendments, “they wish[ed] the revisal to be carried no farther than to supply additional guards for liberty, without abridging the sum of power transferred from the States to the general Government, or altering previous to trial the particular structure of the latter.” Letter from James Madison to Thomas Jefferson (Dec. 8, 1788), *reprinted in* ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 329.

188. See Hutson, *supra* note 118, at 90.

inserted at what he considered proper places within the Constitution.¹⁸⁹ At the beginning of the Constitution, he would have inserted language explicitly stating that government exists “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.”¹⁹⁰ The precursors to what became eight of the first ten amendments to the Constitution were to be inserted between Clauses 3 and 4 in Article I, Section 9, the former prohibiting bills of attainder and ex post facto laws and the latter prohibiting nonproportional direct taxes.¹⁹¹

Madison’s proposed amendments also included a provision prohibiting the states from violating “the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases,” which would have been inserted in Article I, Section 10.¹⁹² Additionally, Madison proposed amendments to Article III: one would have guaranteed, *inter alia*, that all criminal trials (except those involving impeachment or the military) be heard by an “impartial jury of freeholders of the vicinage,” and another would have stated that “the trial by jury [in civil cases] . . . ought to remain inviolate.”¹⁹³ Finally, Madison proposed the insertion of an entirely new article in the Constitution that would have made clear the separation of powers established by the Constitution and underscored the fact that “[t]he powers not delegated to the federal government by this constitution, nor prohibited by it to the states, are reserved to the States respectively.”¹⁹⁴

Although Madison’s proposed amendments are themselves instructive, his notes for the speech proposing the amendments provide further insight. In those notes, Madison set out what he considered the proper subjects to be included in a bill of rights: “1. assertion of primitive equality [etc.] 2. do. of rights exerted in formg. of Govts. 3. natural rights. [sic] retained as speach [sic]. 4. positive rights resultg. as trial by jury. 5. Doctrinl. artics vs. Depts.

189. See James Madison, Speech in the House of Representatives (June 8, 1789) [hereinafter Madison, Amendments Speech], as reprinted in 1 THE FOUNDER’S CONSTITUTION, *supra* note 186, at 479, 481. For the full text of Madison’s speech, see 1 ANNALS OF CONG. 440-62 (Joseph Gales ed., 1834).

190. Madison, Amendments Speech, *supra* note 189, at 481. As Randy Barnett notes, this language is identical to that used in one of the amendments proposed by the Virginia convention. Barnett, *Ninth Amendment*, *supra* note 4, at 39 n.160.

191. See Madison, Amendments Speech, *supra* note 189, at 481; Hutson, *supra* note 118, at 88.

192. Madison, Amendments Speech, *supra* note 189, at 482.

193. *Id.*

194. *Id.*

Distinct electn. [and] 6. moral precepts for the administrn. & natl. character - as justice - economy - [etc.].”¹⁹⁵

Both these notes and the proposed amendments provide an interesting window on Madison’s thinking and reflect a mixture of common law and natural law. For example, the natural rights language of Madison’s proposed preamble, which was taken almost entirely from one of Virginia’s proposed amendments,¹⁹⁶ clearly reflects John Locke’s formulation of inalienable rights and Locke’s determination that where a government does not properly protect those rights, the people may reform or change it.¹⁹⁷ Similarly, Madison’s proposal regarding separation of powers reflects the thought of a natural law theorist—Montesquieu.¹⁹⁸ But the proposal listing the rights that eventually came to comprise eight of the first ten amendments reflects more pragmatic concerns.¹⁹⁹ Madison’s notes classify the rights in this proposal as either “natural rights retained” or “positive rights result[ing]” from and necessary for the protection of the retained rights.²⁰⁰ Yet, while Madison called the retained rights “natural,” they were actually all personal rights either borrowed directly from traditional English law or modified in response to perceived abuses of the law by the Crown and Parliament.²⁰¹

Madison also attempted to address the fear that the enumeration of specific rights might cause other fundamental rights to be disregarded. The very last

195. James Madison, Notes for Amendments Speech in the First Congress (June 8, 1789) [hereinafter Madison, Notes], reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1042 (1971).

196. See Barnett, *Ninth Amendment*, supra note 4, at 39 n.160.

197. See LOCKE, supra note 80, at 56, 83. Virginia’s proposed amendment made the connection with natural law even more explicit, referring to the “certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity.” See Barnett, *Ninth Amendment*, supra note 4, at 39 n.160 (quoting Va. Ratification Convention, Proposed Amendments to the U.S. Constitution (June 27, 1788), reprinted in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 636, 636 (Neil H. Cogan ed., 1997)).

198. See MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). Montesquieu theorized that “when legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.” *Id.*

199. See Madison, Amendments Speech, supra note 189, at 481.

200. See Madison, Notes, supra note 195, at 1042; Madison, Amendments Speech, supra note 189, at 482 (recognizing a distinction between natural rights and positive rights).

201. See SCHWARTZ, GREAT RIGHTS, supra note 47, at 197-200 (noting the English origins of the right to petition for redress of grievances and the right to bear arms). Although Schwartz argues that the other rights contained in what became eight of the first ten amendments were American in origin, his argument understates the extent to which they were influenced by English precursors. See supra text accompanying notes 173-85.

provision in Madison's proposed bill of rights was a precursor to the Ninth Amendment. The provision read,

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.²⁰²

Madison explained the genesis of this language and the reason for including it in his proposal when responding to one of the most prominent challenges to a bill of rights:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.²⁰³

Thus, Madison made clear that the listing of certain rights in a new bill of rights would not preclude the existence of others not specifically enumerated.

The debates in Congress also reinforce the connection of the Bill of Rights to English common law and constitutional practice. Although much of the debate centered on the form and placement of the various amendments,²⁰⁴ some of the debate provides insight into what the members of Congress thought at the time about the nature of rights, and, as important, how much disagreement existed over them.

That the Bill of Rights was simply a declaration of preexisting rights and did not itself confer rights appears to have been beyond dispute. Roger Sherman, in a House of Representatives debate in August 1789, argued for the placement of the Bill of Rights at the end of the Constitution, maintaining that this would not hinder the understanding of the document because "[t]he amendments

202. Madison, Amendments Speech, *supra* note 189, at 482.

203. *Id.* at 483.

204. See SCHWARTZ, GREAT RIGHTS, *supra* note 47, at 173-74. These issues were resolved by attaching the amendments to the Constitution as addenda rather than incorporating them with existing provisions. See *id.* at 174.

reported are a declaration of rights; the people are secure in them, whether we declare them or not.”²⁰⁵

The exact scope of these preexisting rights and their potential for abridgment, however, engendered many disagreements. In a House debate over what would later become the First Amendment, Representative Theodore Sedgwick of Massachusetts took issue with the language guaranteeing the freedom to assemble, not because he disagreed with the right, but because he thought that enumerating the right was unnecessary. “If people freely converse together,” he reasoned, “they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.”²⁰⁶ When Representative Benson reminded him that the committee had assumed that the rights were inherent and had simply sought to protect against their infringement, Sedgwick retorted that, under that principle, the committee “might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper.”²⁰⁷ In Sedgwick’s view, such a lengthy enumeration of rights was unnecessary “in a Government where none of them were intended to be infringed.”²⁰⁸ Other representatives disagreed, however. Most notably, in response to Sedgwick’s suggestion that the right to assemble was no more important than the right to wear a hat, John Page of Virginia stated,

[L]et me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.²⁰⁹

Other discussions about the amendments highlight the effect of customary English practice and abuses on the representatives’ understanding of rights.

205. 1 ANNALS OF CONG. 742 (Joseph Gales ed., 1834).

206. *Id.* at 759.

207. *Id.* at 759-60.

208. *Id.* at 760.

209. *Id.* Page’s statement that “a man has been obliged to pull off his hat when he appeared before the face of authority” was a reference to the trial of William Penn in 1670, during which Penn had been held in contempt and fined for failing to remove his hat in court. SCHWARTZ, GREAT RIGHTS, *supra* note 47, at 175.

Representative Elbridge Gerry cited Great Britain's attempt to prevent the formation of a militia in Massachusetts prior to the revolution to explain his skepticism toward allowing conscientious objector language in a provision that would become the Second Amendment.²¹⁰ Similarly, other representatives invoked British custom in the debate over the quartering of soldiers in private homes.²¹¹

Another interesting development in the House concerned the fate of Madison's grand natural law language. In the course of debate, all of this language was stripped away.²¹² The Senate was similarly inhospitable to Madison's use of natural law concepts. Among other changes, the Senate deleted Madison's Montesquieu-inspired language relating to separation of powers.²¹³

The history of the drafting and ratification of the Constitution and the Bill of Rights confirms the particular "Englishness" of the rights that most Americans thought they possessed. The rights that were adopted in both the Constitution and the Bill of Rights were personal rights that had their genesis in either English tradition or in American refinement of English practice. The Bill of Rights emerged from the state legislatures stripped of its natural law flourishes, instead enshrining the most important rights handed down from the English Constitution.

210. 1 ANNALS OF CONG. 778.

211. *See id.* at 781.

212. *Compare* H. SELECT COMM., 1ST CONG., REPORT ON AMENDMENTS (July 28, 1789), *reprinted in* ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 345, *with* Madison, Amendments Speech, *supra* note 189, at 481-82. This dramatic revision completely excised Madison's preamble reflecting the language of the Declaration of Independence, including the right to dissolve the government. *See* ESSENTIAL BILL OF RIGHTS, *supra* note 125, at 344 (noting that Madison "was ultimately unsuccessful" in altering "the Preamble of the Constitution to incorporate, expressly, the principles of the Declaration of Independence").

213. *Compare* MONTESQUIEU, *supra* note 198, at 157, *with* Madison, Amendments Speech, *supra* note 189, at 482; *see also* SCHWARTZ, GREAT RIGHTS, *supra* note 47, at 183. In the course of reducing the House's seventeen amendments to twelve, the Senate combined some amendments and deleted the provisions preventing states from infringing on freedom of conscience, speech, press, and the right to a jury trial. *Id.* at 182. Unfortunately, because the Senate held debate behind closed doors (and continued to do so until 1794), there is no record of the reasons for these changes. *Id.* at 181. Of the twelve amendments recommended, ten were eventually ratified by the states. *Id.* at 186. With regard to the first two amendments, dealing with apportionment of representatives and compensation for senators and representatives, five states either rejected these outright or delayed ratification long enough to assure their demise, though the reasons for such direct or indirect rejection are unclear. *Id.* at 184, 187. As Schwartz notes, there is surprisingly little on record about the debates over the Bill of Rights in the states. *See id.* at 187.

The role that traditional English rights played in the formation of the Constitution and the Bill of Rights should inform our understanding of the rights that were not included but that were in fact “retained” by the people. Rather than being based on abstract natural law concepts, they were traditional rights located within the English constitutional heritage and the common law.

III. Whose Common Law?

If most Americans during the framing period viewed their rights as based on traditional English law, then the question becomes, where did they get their conception of what the common law was? For most Americans, their idea of the common law came from two sources: Sir Edward Coke’s *Institutes of the Laws of England*, the first volume of which was published in 1628, and Sir William Blackstone’s *Commentaries on the Laws of England*, the first edition of which was published in four volumes between 1765 and 1769.

Most lawyers in the United States at the time of the revolution had studied Coke, and the principles laid down in his *Institutes* informed their view of rights.²¹⁴ In the *First Institute*, which was alternatively titled, *A Commentary on Littleton*, Coke wrote to summarize and update Sir Thomas de Littleton’s fifteenth-century treatise entitled *Tenures*, which had long been a staple of the English legal curriculum, serving as the first textbook that law students were expected to study.²¹⁵ Although Littleton had dealt mostly with property law, Coke took Littleton’s work as a point of departure for discussion of the common law generally.²¹⁶ Thomas Jefferson noted, with regard to Coke on Littleton, that “a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what was called British liberties.”²¹⁷ Coke followed his work on Littleton with his *Second Institute*, a commentary and gloss on the Magna Carta and other famous statutes; his *Third*

214. See HASTINGS LYON & HERMAN BLOCK, EDWARD COKE: ORACLE OF THE LAW 346 (1929) (noting that Coke’s *First Institute* served as the “lawyer’s primer” for nearly one hundred and fifty years, until the publication of Blackstone’s *Commentaries*); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 366 (1929) [hereinafter Corwin (pt. 2)] (quoting Thomas Jefferson’s characterization of the *First Institute* as “the universal lawbook of students” in the pre-revolutionary period). The Puritans of Massachusetts had ordered copies of Coke’s *Institutes* as early as 1647. DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 370 (2d ed. 2004).

215. See LYON & BLOCK, *supra* note 214, at 345-46.

216. *Id.* at 343, 345.

217. Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *reprinted in* 10 WRITINGS, *supra* note 80, at 376 (1899); see also Corwin (pt. 2), *supra* note 214, at 365, 366.

Institute, which dealt with criminal law; and his *Fourth Institute*, which dealt with court jurisdiction.²¹⁸

Collectively, Coke's *Institutes* served as one of the chief sources for the American lawyer's view of the common law and rights during the revolutionary period.²¹⁹ They were not readily accessible to the general population, however. The text of the *First Institute*, for example, appeared as marginal commentary alongside the text of Littleton's *Tenures*, which in turn appeared on the page in both Latin and English.²²⁰ And if the formatting presented a challenge to Coke's readers, the writing was at least as difficult to understand.²²¹ Thomas Jefferson, who would later speak of Coke in glowing terms, said as a law student, "I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrel in my life."²²²

By the time of the revolution, the popular view of the law in the United States had shifted, and Blackstone had largely replaced Coke as the source for information regarding the common law of England.²²³ Rather than providing a gloss on previous sources of law or statutes like Coke's *Institutes*, Blackstone's *Commentaries* marked "the first comprehensive attempt to state the whole of English law in the form of substantive rules."²²⁴ It imposed a structure that classified and compiled the common law into a more usable form than that of earlier works, which reflected the "ad hoc" growth of English common law.²²⁵ This systematic approach gave rise to "[t]he most important

218. See COQUILLETTE, *supra* note 214, at 317.

219. See Harold Gill Reuschlein, *The Ante-"Taught Law" Period in the United States*, 32 VA. L. REV. 955, 956 (1946). Reuschlein adhered to Roscoe Pound's characterization of the common law of the colonies as "Coke's common law." *Id.* at 956 n.7 (quoting Roscoe Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 679 (1914)). "English case law and English legislation prior to Coke," Pound explained, "were summed up for us and handed down to us by that indefatigable scholar in what we have chosen to consider an authoritative form; and we have looked at them through his spectacles ever since." See Pound, *supra*, at 679-80.

220. See COQUILLETTE, *supra* note 214, at 317 n.18. To view a revolutionary-era printing of the *First Institute*, see EDWARD COKE, *FIRST INSTITUTE, OR HIS COMMENTARY UPON LITTLETON* (Francis Hargrave ed., 13th ed., London, G. Kearsly & G. Robinson 1774), available at www.constitution.org/18th/coke1st1778/coke1st1778_001-050.pdf.

221. See Corwin (pt. 2), *supra* note 214, at 365, 366. Corwin characterizes Coke's method as "irritatingly fragmentary, with the result that his larger ideas have often to be dug out and pieced together from a heterogeneous mass." *Id.*

222. Letter from Thomas Jefferson to John Page (Dec. 25, 1762), reprinted in 1 GEORGE TUCKER, *THE LIFE OF THOMAS JEFFERSON* 26 (London, Charles Knight & Co. 1837).

223. See Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 744 (1976).

224. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 362 (4th ed., Butterworth & Co., Ltd. 1948) (1929).

225. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 8 n.35

feature of Blackstone's *Commentaries*[, namely,] that it could be read and understood by intelligent laymen."²²⁶

The reaction to Blackstone's *Commentaries* in America was immediate. The first four-volume English edition was published between 1765 and 1771, and more than one thousand copies of this first edition were sold in the American colonies.²²⁷ Robert Bell published a pirated edition in America between 1771 and 1772, adding another fourteen hundred copies to the mix.²²⁸ Among the first to obtain copies of Blackstone during this period (pirated or otherwise) were revolutionaries and founders such as James Otis, John Adams, James Madison, Thomas Jefferson, and Alexander Hamilton, as well as Thomas Marshall, who subscribed to the American edition for his eldest son (and future Chief Justice), John Marshall.²²⁹ In 1775, member of the House of Commons Edmund Burke, in urging conciliation with the American colonies, stated that "[i]n no country perhaps in the world is the law so general a study [as in the colonies]. . . . I hear that they have sold nearly as many of Blackstone's *Commentaries* in America as in England."²³⁰ By that time, Blackstone's *Commentaries* had become "the chief if not the only law books in every [colonial] lawyer's office, and the most important if not the only textbooks for [colonial] law students."²³¹ Further, because the language of Blackstone was written for the layman, it was "approachable for the colonists with limited legal skills but a great thirst to learn of their legal rights."²³²

The *Commentaries* became even more entrenched in America in the time between independence and the framing of the Constitution.²³³ As Blackstone's

(1996).

226. COUILLETTE, *supra* note 214, at 438.

227. Alschuler, *supra* note 225, at 5; *see also* COUILLETTE, *supra* note 214, at 371.

228. COUILLETTE, *supra* note 214, at 371, 438; Alschuler, *supra* note 225, at 5. Bell noted that the reason for the pirated edition was to "produce mental improvement, and commercial expansion, with the additional recommendation of positively [sic] saving thousands of pounds to and among the inhabitants of the British empire in America." Robert Bell, Subscription Notice (1771), *reprinted in* COUILLETTE, *supra* note 214, at 421.

229. *See* COUILLETTE, *supra* note 214, at 371; DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 171 (1938). In 1771, James Iredell, who later became one of the first Justices of the Supreme Court, wrote his father in London asking him to procure a copy. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 7 (1994).

230. EDMUND BURKE, SPEECH ON CONCILIATION WITH AMERICA (Hammond Lamont ed., Boston, Ginn & Co. 1897) (1775).

231. LOCKMILLER, *supra* note 229, at 170; *see also* Bader, *supra* note 229, at 6-11 (describing the influence of Blackstone on early American law in the colonies).

232. Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 479 (2005).

233. *See* Nolan, *supra* note 223, at 744 (noting that, while claims that Blackstone's *Commentaries* provided the principal inspiration for the Constitution are overblown, the

Commentaries became the chief source of legal education, it simultaneously supplied the language of the common law.²³⁴

This is not to say, of course, that the *Commentaries* went without criticism, or that all of the framers were unhesitatingly enthusiastic about Blackstone himself. As a member of Parliament, Blackstone was unsympathetic to American colonists' claims.²³⁵ He was an apologist for the Crown and Parliament, and he maintained that the colonists were not entitled to the "common law rights of British subjects."²³⁶ Further, Blackstone was a proponent of parliamentary supremacy,²³⁷ a doctrine that, although triumphant in Great Britain, was repugnant to Americans.²³⁸ Thomas Jefferson accused Blackstone of being a disciple of Lord Mansfield—one of the principal engineers of British colonial policy—and later in life decried the extent to which "the honied Mansfieldism of Blackstone" had replaced Coke on Littleton as the primary teaching tool for law students, causing the legal profession to "slide into toryism."²³⁹ James Wilson criticized Blackstone's assertion of parliamentary supremacy and argued that Blackstone had failed to properly recognize that rights were natural in origin rather than created by government.²⁴⁰ St. George Tucker attempted to limit Blackstone's influence on American law students by identifying ways in which Blackstone's *Commentaries* was not

"*Commentaries*' position as an authority on the common law was more firmly established in 1787 than in 1776").

234. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3-4 (1941) (explaining that, in the first century after independence, Blackstone's *Commentaries* "constituted all there was of the law" for most lawyers).

235. Alschuler, *supra* note 225, at 9, 15. For example, Blackstone voted in favor of renewing the Stamp Act and generally positioned himself against recognition of robust rights for colonists. See *id.* at 15.

236. *Id.* at 9. In his original version of the *Commentaries*, Blackstone stated that the common law did not run to "conquered or ceded countries" and described the American colonies as such. 1 BLACKSTONE, *supra* note 126, at *108.

237. See Alschuler, *supra* note 225, at 9.

238. See REID, *RULE OF LAW*, *supra* note 62, at 77-79 (describing the American Revolution as a battle between the recently ascendant British ideal of parliamentary sovereignty and the American view of the supremacy of the rule of law, which arguably hearkened back more deeply into English constitutionalism).

239. See Jefferson, *supra* note 217, at 376; Alschuler, *supra* note 225, at 10 n.49. For more criticisms of Blackstone by Jefferson, see Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 634-46 (1933). Jefferson also criticized the *Commentaries* itself, stating that it was only a digest of what students might acquire from "the real fountains of the law." Letter from Thomas Jefferson to John Tyler (May 26, 1810), reprinted in 9 WRITINGS, *supra* note 80, at 276-77 n.1 (1898).

240. See Waterman, *supra* note 239, at 650-51.

sued to American law, an endeavor which led him to publish a “republicanized” version of the *Commentaries* in 1803.²⁴¹

Furthermore, the *Commentaries* was not an entirely accurate representation of the state of British common law at the time it was published.²⁴² Blackstone’s *Commentaries* was published at a time when the British legal system was in flux, with the common law itself giving way to parliamentary authority.²⁴³ The *Commentaries* straddled both sides of this conflict, with Blackstone stating at once that “no human laws are of any validity, if contrary to [the law of nature]” and that “[parliament] can, in short, do every thing [sic] that is not naturally impossible.”²⁴⁴ Blackstone concluded, “So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.”²⁴⁵ As a result of Blackstone’s attempt to gloss over the changing nature of the common law, the legal theory in the *Commentaries* is often “contradictory, muddled, and disorderly.”²⁴⁶

Despite these criticisms, however, the *Commentaries* formed “the principal means of . . . information as to the state of English law in general” for the average American citizen at the time of the framing.²⁴⁷ The *Commentaries* stood in for the body of the common law and became the principal source of law for many courts that did not have access to other materials.²⁴⁸ For law students and courts alike, “[t]he easiest course to pursue was to follow [Blackstone] in all cases where constitutions or legislatures had not spoken.”²⁴⁹ This reliance on Blackstone as an authority for English law extended even to those who had many other sources available. Specifically, the *Commentaries*

241. Craig Evan Klafter, *The Americanization of Blackstone’s Commentaries*, in *ESSAYS ON ENGLISH LAW AND THE AMERICAN EXPERIENCE* 42, 52-60 (Elisabeth A. Cawthon & David E. Narrett eds., 1994).

242. See Meyler, *supra* note 21, at 562.

243. See *id.*

244. 1 BLACKSTONE, *supra* note 126, at *41, *161.

245. *Id.* at *162.

246. See Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW.L.J. 399, 402 (1959) (discussing problems with Blackstone’s theory of the law.)

247. PLUCKNETT, *supra* note 224, at 271, *quoted in* Waterman, *supra* note 239, at 631.

248. See McKnight, *supra* note 246, at 401 (attributing Blackstone’s influence to the fact that the *Commentaries* “was the only general treatise available in a land where well-trained lawyers were almost non-existent”); Waterman, *supra* note 239, at 631 & nn.14-16 (collecting and quoting sources). St. George Tucker was concerned with Blackstone’s influence on the Virginia bar even though Virginia, because of the efforts of Thomas Jefferson, had succeeded in passing many law reforms contrary to Blackstone’s version of the common law. Klafter, *supra* note 241, at 52. He feared that most lawyers and judges might continue to rely on the *Commentaries* because they did not have access to the revised laws. *Id.*

249. ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 111 (1921), *quoted in* Waterman, *supra* note 239, at 631.

became the reference source for English common law among some of the framers, who resorted to it to determine the state of the law in England regarding, among other things, whether the term “ex post facto” applied to civil as well as criminal cases.²⁵⁰ The use of Blackstone as a sourcebook on the common law continued during the ratification debates.²⁵¹

Because Blackstone’s *Commentaries* shaped the common perception of the law in America at the time of the framing, it should inform our understanding of the original common meaning of unenumerated rights. If, as I have suggested, what really matters regarding the Bill of Rights is what the people who enacted it thought their “other” rights to be, then it is imperative to look at what source gave the public its ideas of rights. At the time of the framing, those “other” rights were the rights that the people thought they possessed at common law, and their ideas about the common law came from Blackstone. If what we are searching for is the original common meaning of unenumerated rights, then Blackstone is the place to start.

In order to understand the view of rights in Blackstone’s *Commentaries*, it is necessary to understand Blackstone’s ideas of the nature of the law in general. According to Blackstone, there are four types of law.²⁵² The first is the law of nature, by which Blackstone meant not so much natural law as envisioned by philosophers, but rather the “eternal, immutable laws of good and evil,” which are binding on all persons.²⁵³ The second type of law is revealed law, found in the holy scriptures.²⁵⁴ Blackstone considered these two types of law to be superior to human law and not dependent on it for their force.²⁵⁵ Included in these types of laws are laws proscribing what Blackstone considered “moral wrongs,” such as murder.²⁵⁶ A third type of law is that of

250. See, e.g., 2 RECORDS, *supra* note 131, at 448-49 (attributing an invocation of the *Commentaries* during drafting discussions to John Dickinson, a delegate to the Constitutional Convention of 1787); see also C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 48 (New York, MacMillan 1894) (noting the influence of Blackstone’s *Commentaries*, “the highest authority on the laws of England,” on the Constitutional Convention’s plan for a three-part system of government).

251. See Nolan, *supra* note 223, at 744-46 (discussing some of the references to Blackstone in the state ratifying conventions). Nolan is careful to note that the references were directed toward the state of the common law as it actually stood rather than as it should be. *Id.* at 744-45.

252. See 1 BLACKSTONE, *supra* note 126, at *38-44.

253. See *id.* at *39-40.

254. *Id.* at *42.

255. *Id.*

256. See *id.* at *42-43. Of murder, Blackstone stated that this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it, do not at all increase it’s [sic] moral guilt, or

nations, which is governed only by the law of nature and certain compacts and agreements.²⁵⁷

Blackstone's fourth type of law is the municipal law, which covers those matters "in which the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits."²⁵⁸ Liberty may be restrained in certain instances by municipal law, but municipal laws must have certain qualities. First, they must consist of "rules"; that is, they must be "permanent, uniform, and universal" rather than aimed at a particular person.²⁵⁹ They also must prescribe rules of civil conduct as opposed to simply moral conduct.²⁶⁰ This does not necessarily mean that the legislature cannot legislate on moral conduct, but the conduct must have a civil component or benefit.²⁶¹ Additionally, municipal laws must be prescribed, that is, published in some manner, and cannot be *ex post facto*.²⁶² Finally, the laws must be made by "the supreme power in a state," by which Blackstone meant Parliament.²⁶³

According to Blackstone, personal rights are either absolute or relative.²⁶⁴ Absolute rights are not "absolute" in the sense that they cannot be taken away; rather, they are those rights that belong to every man, either in or out of society.²⁶⁵ By contrast, relative rights are those that result from the formation of society;²⁶⁶ that is, they arise from relationships in society and include the rights of Parliament, the king, the magistrates, the people, the clergy, the civil

superadd any fresh obligation in *foro conscientiae* to abstain from it's [sic] perpetration.

Id.

257. *Id.* at *43.

258. *Id.* at *42; *see also id.* at *44-46 (positing a cumulative definition of "municipal law").

259. *Id.* at *44. Blackstone explained that a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule*.

Id.

260. *Id.* at *45.

261. *See id.*

262. *Id.* at *45-46.

263. *See id.* at *46 (emphasis omitted); *see also id.* at *162 ("So long . . . as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.").

264. *Id.* at *123.

265. *Id.*

266. *Id.* at *124.

state, the military, master and servant, husband and wife, parent and child, guardian and ward, and corporations.²⁶⁷ Blackstone stated that the principal aim of society is to protect individuals in the enjoyment of absolute rights, while the secondary aim is to protect people in the enjoyment of those rights that are relative.²⁶⁸

Blackstone divided the absolute rights of individuals into three categories: (1) the right of personal security, (2) the right of personal liberty, and (3) the right of private property.²⁶⁹ The right of personal security includes the rights to enjoy life, limbs, body, health, and reputation.²⁷⁰ Of these rights, the rights to enjoy life and limbs are the most important.²⁷¹ These rights belong to each person at the quickening in the womb and include the right to self-defense and the right to void contracts completed under duress.²⁷² Blackstone also seems to have suggested that there is a right—which he thought adequately protected by the “poor statutes” in England—to demand from society the minimal necessities of life.²⁷³

Blackstone defined the right to personal liberty as the “power of . . . changing situation or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.”²⁷⁴ Blackstone thought this right to be free from arbitrary imprisonment or other confinement well protected by the right to trial, the right to legal indictment, and the right of habeas corpus.²⁷⁵ The right to personal liberty also

267. *See id.* at *125. Blackstone devoted at least one chapter of the first volume of the *Commentaries* to each of the categories listed above. *See generally* 1 BLACKSTONE, *supra* note 126.

268. *Id.* at *124-25.

269. *Id.* at *129. This iteration of common law rights left such an impression on the American legal mind that James Kent and Joseph Story used it verbatim in their treatises on American constitutional law. *See* 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1 (New York, O. Halsted 1827) (“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.”); STORY, *supra* note 175, at 709 (noting that the Fourth Amendment “seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property”).

270. 1 BLACKSTONE, *supra* note 126, at *129.

271. *See id.* at *134 (stating that the rights of security of body, health, and reputation are “of much less importance than those which have gone before”). This is not to diminish the value of the other aspects of personal security. With respect to security of personal reputation in particular, Blackstone remarked that without it, “it is impossible to have the perfect enjoyment of any other advantage or right.” *Id.*

272. *Id.* at *129-30.

273. *See id.* at *131.

274. *Id.* at *134.

275. *See id.* at *134-35.

includes the right to void any contract made under duress of confinement and the right not to be exiled from one's own country.²⁷⁶

The third absolute right is the right of property, which encompasses “the free use, enjoyment, and disposal of all . . . acquisitions, without any control or diminution, save only by the laws of the land.”²⁷⁷ This right protects the person from having property taken arbitrarily, from having property taken for public use without just compensation, and from taxation without consent or representation.²⁷⁸

In addition to these absolute rights, there are other “subordinate” rights whose purpose is “to protect and maintain inviolate the three great and primary rights.”²⁷⁹ The first of these is the “constitution, powers, and privileges of parliament,” which literally means that the manner in which Parliament is elected and the power given to Parliament serve to help protect rights.²⁸⁰ The second, as a corollary to the first, is the limitation of the power of the king.²⁸¹ The third is the right of each English subject to apply to the courts for speedy redress of injuries.²⁸² Fourth, each person has the right, in certain circumstances, to appeal to the king and Parliament for redress.²⁸³ Finally, all persons have the right to “hav[e] arms for their defence [sic], suitable to their condition and degree, and such as are allowed by law.”²⁸⁴

Unlike the rights discussed previously, these rights are not absolute in all applications. Rather, they are bound by “the laws of the land,” that is, by the valid laws enacted to protect and regulate society.²⁸⁵ Not *all* laws are *valid* laws. Instead, only those laws that comport with “the law of the land,”—meaning due process, both procedural and substantive—are valid.²⁸⁶ Thus, in order to be valid, laws must be reasonable rather than arbitrary.²⁸⁷ According to Blackstone, a law is reasonable if it advances the public good, for then it increases rather than restrains liberty by benefitting the civil society that protects liberty.²⁸⁸ Reasonableness is not the only test of a law's validity,

276. *Id.* at *136-37.

277. *Id.* at *138.

278. *See id.* at *139-40.

279. *Id.* at *141.

280. *See id.*

281. *See id.*

282. *Id.*

283. *Id.* at *143.

284. *Id.* at *143-44.

285. *See id.* at *124, *138.

286. *See id.* at *124; *see also* MOTT, *supra* note 65, at 4-5 (establishing the connection between due process and the “law of land” clause from the Magna Carta).

287. *See* 1 BLACKSTONE, *supra* note 126, at *124-26.

288. *See id.* at *126. By contrast, a law that restrains conduct for any purpose not directed

however. The absolute rights of an individual may be restrained only “so far . . . (and no farther) as is necessary” for the needs of civil society.²⁸⁹ The idea is to find the correct balance between the liberty of the individual and the needs of society, and the key to this determination is custom and tradition.²⁹⁰ Thus, there are traditional and customary limitations on what government can do. These limitations are the rights retained by the people.

Blackstone’s formulation of rights implies a hierarchy, with absolute rights occupying a higher plane than relative rights and subordinate rights guaranteeing the absolute rights. Yet, as the foregoing discussion suggests, even absolute rights may be infringed, provided that the infringement accords with due process.²⁹¹ On the definition of such “due process,” however, the flesh-and-blood Blackstone of England and the Blackstone understood by Americans diverged, although not as much as might be thought. As noted above, Blackstone’s *Commentaries* straddles the line between the old English notion of due process and the rule of law and the new British notion of parliamentary sovereignty, between what was and what would be.²⁹² Blackstone’s *Commentaries* is firmly on the side of parliamentary sovereignty, but there are echoes of the old common law notion of due process as well. Blackstone would never have admitted that Parliament could not pass any law it wanted, for he viewed Parliament as sovereign.²⁹³ Nevertheless, he was

toward a public good is destructive of liberty. *Id.* Blackstone cited as an example of such a law the statute of Edward IV prohibiting persons below the rank of lord from wearing pikes of more than two inches in length because this prohibition served no public purpose. *Id.* In contrast, he cited the prescription of Charles II that all persons were to be buried in woolen garments as an example of a reasonable law because it advanced the governmental objective of benefitting the wool trade. *Id.* Although this may seem to be a low threshold for public benefit, the wool trade was of vital economic importance to Great Britain, and the degree to which its protection was a matter of public interest should not be understated. *See* W. J. ASHLEY, *THE EARLY HISTORY OF THE ENGLISH WOOLLEN INDUSTRY* 13 (Baltimore, Guggenheimer, Weil & Co. 1887), available at <http://www.archive.org/details/earlyhistoryofen00ashlrich>. Ashley noted that the wool trade was referred to as the source of England’s wealth and constituted two-thirds of its exports by the end of the seventeenth century. *Id.*

289. *See* 1 BLACKSTONE, *supra* note 126, at *125.

290. *See, e.g.,* Michael W. McConnell, *Tradition & Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 193-97 (explaining the close conceptual relationship between “rights” and “custom and tradition” for revolutionary-era colonists). McConnell advocates an approach to constitutional interpretation that “presupposes an established set of fundamental rights not *created* by the Constitution but *protected* or *preserved* by it.” *Id.* at 197.

291. *See, e.g.,* 1 BLACKSTONE, *supra* note 126, at *133-34 (describing the right to personal liberty as subject to infringement only by “due course of law” and the right to life as subject to infringement under English law only by “the law of the land” or “due process of law”).

292. *See supra* text accompanying notes 243-46.

293. *See* 1 BLACKSTONE, *supra* note 126, at *91 (“[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the

forced to admit that some things, if done by Parliament, would be arbitrary or tyrannical.²⁹⁴

By contrast, the idea of parliamentary sovereignty was rejected in America; instead, due process retained substantive meaning rather than signaling simply procedural concerns.²⁹⁵ In America, the term “due process of law” embodied the common law and its general rights and privileges, and due process could be asserted against the legislature and executive alike.²⁹⁶ While Americans of the framing era accepted Blackstone’s exposition of the substance of the common law and rights, they did not rely on his theories regarding the power of Parliament.²⁹⁷

Using English constitutional and common law, especially as expressed in Blackstone’s *Commentaries*, as the chief source of the common understanding of rights at the time of the framing leads to several important conclusions regarding unenumerated rights. First, recognizing this basis for rights should put to rest the idea that enforceable constitutional rights can somehow be limited to those listed in the Bill of Rights or to discrete lists set forth at various times by certain revolutionaries or framers.²⁹⁸ If the existence of the Ninth Amendment were not alone enough to contradict this idea, a historical analysis of the English common law method and the English Constitution should.²⁹⁹ Bills of rights were simply not thought of as ways to enumerate all of the rights that persons possessed.³⁰⁰ Rather, their purpose was to reaffirm those rights that had most recently been under attack or that were considered most likely to be infringed by the government.³⁰¹ This is not to say that the enumeration of rights was of no consequence; it could serve as a way to highlight the special

constitution, that is vested with authority to control it.”).

294. *See id.* at *133 (positing that laws directing the death penalty “for light and trivial causes” are tyrannical, although to a lesser degree than the taking of life by a government without laws at all).

295. *See* REID, RULE OF LAW, *supra* note 62, at 77-79.

296. *See* MOTT, *supra* note 65, at 142.

297. *See, e.g.,* Nolan, *supra* note 223, at 742 (noting how Alexander Hamilton used Blackstone’s ideas regarding the “absolute rights of individuals to buttress his legal arguments against Parliament”).

298. *Cf., e.g.,* ROBERT H. BORK, THE TEMPTING OF AMERICA 251-59 (1990) (criticizing constitutional interpretation of rights not based on original understanding); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 16-18 (Amy Gutmann ed., 1997) (setting out a historical textualist view of the Constitution that would freeze rights at the time of the framing).

299. *See* POCOCK, *supra* note 49, at 30-31, 36; REID, ANCIENT CONSTITUTION, *supra* note 45, at 69; Meyler, *supra* note 21, at 593-600; *see also* discussion *supra* Part II.A.

300. *See* REID, AUTHORITY OF RIGHTS, *supra* note 55, at 69-70.

301. *See id.* (discussing the purpose of bills of rights at the time of the revolution).

importance of certain rights.³⁰² Enumeration, however, was not the determinant of a right's existence.³⁰³

For the same reason, various lists of rights put forth by revolutionaries such as James Otis or framers such as James Wilson cannot be regarded as conclusive lists of rights. They were not attempts to enumerate all of the rights that Americans possessed, but were instead aimed at claiming certain rights that were in danger.³⁰⁴ As a result, though the presence of such rights on these lists is persuasive evidence that they were regarded as existing rights, the absence of certain rights is not proof of the reverse.

Recognizing English common law and constitutional law as the basis for unenumerated rights will invariably frustrate those looking for a neat and tidy "bundle" of rights that can be easily listed and referenced. The rights listed by Blackstone, and in English common and constitutional law in general, were maddeningly vague and imprecise. This is mainly because Great Britain had no supreme court armed with the power of judicial review to settle controversies over the meaning of specific rights.³⁰⁵ As a result, most rights remained relatively abstract and only became definite when they were analyzed in specific situations.³⁰⁶ Even then, no precise boundaries were established.³⁰⁷ English common law and constitutional rights were also vague because there was a fear that being too specific about rights would impose unduly narrow interpretations on them.³⁰⁸ Thus, rights were only clarified when threatened.³⁰⁹

Because rights were vague categories, and because courts were in the business of "discovering" them rather than creating them, it was simply not

302. See Madison, Amendments Speech, *supra* note 189, at 483. In his speech to the House of Representatives, Madison noted his hope that the enumeration of certain important rights would prompt "independent tribunals of justice . . . [to] consider themselves in a peculiar manner the guardians of those rights." *Id.* at 484.

303. See *supra* text accompanying notes 202-05.

304. See *supra* text accompanying notes 209-11.

305. REID, AUTHORITY OF RIGHTS, *supra* note 55, at 10.

306. See *id.* at 10-11.

307. See *id.*

308. See *id.* Reid quotes one reviewer for *The Scots Magazine* as saying,

It perhaps would be dangerous . . . to inquire too curiously into the strict and punctual legality of all the powers exercised by government, and all the privileges claimed by the subject. . . . There are mysteries in politics, as well as in religion, which a good politician, and a good Christian, should endeavour to believe, without attempting even to understand.

Id. at 11 (internal quotation marks omitted).

309. See *id.* at 25. Reid identifies the British "discovery" of the right against general search warrants in the early 1760s as an example, noting that "[t]hey did not, of course, discover the right. What they discovered was that it could be abused in ways previously not suspected or not understood." *Id.*

possible to know ahead of time all of the rights that people possessed. Further, new rights, or at least new interpretations of them, could emerge over time.³¹⁰ This is not to say that Americans at the time of the framing believed in a “living Constitution” with a meaning that would change, but rather that they were heirs to an English common law tradition that treated all rights, even those recently “discovered,” as timeless.³¹¹ Even if the exact expression of the rights might change, the rights themselves had always existed.³¹²

IV. What Does It Mean?

These conclusions, taken together, mean that trying to compile a full list of the rights of Americans, to “enumerate the unenumerated rights,” would be as futile now as it was in 1787. Any listing would necessarily be incomplete. It would also be against the common law tradition, which depends on an orderly development of the law on a case-by-case basis.³¹³ Instead, what can be developed is a mechanism for historically identifying rights as they are challenged.³¹⁴ In many respects, the system is similar to the historical analysis that some members of the U.S. Supreme Court have often performed.³¹⁵ The distinction is in the baseline. Rather than cherry-picking from a variety of sources, anyone engaging in a historical analysis of a proposed right should begin with a determination of the right’s status in practice and tradition at the time of the framing. The baseline for this determination should be the collective common law at that time. As I have suggested above, this should be discerned by looking to Blackstone’s *Commentaries* and the categories of rights contained therein, and also by looking at how those rights had been modified by American practice at the time of the framing.

310. *See id.*

311. *See id.* at 25-26.

312. *See* REID, ANCIENT CONSTITUTION, *supra* note 45, at 3-7, 72 (analyzing the historical approach of “lawyer’s history”). An example of this line of thinking is the statement by John Cartwright that

our object is, to ascertain how [the ancient constitution] was, or must have been, according to the Constitution at its *origin*. It is only by ascending to that point, we can know what it *now is*; because, whatever it originally was it continues to be; no change ever having been made, notwithstanding the numerous changes which have occurred in the *practice* of governing.

Id. at 72.

313. *See* Meyler, *supra* note 21, at 593.

314. *Id.* at 593-94.

315. *See, e.g.,* District of Columbia v. Heller, 128 S. Ct. 2783 (2008). In *Heller*, both Justices Scalia and Stevens attempted to interpret the Second Amendment by looking at the law at the time of the framing. *See id.* at 2790-801, 2835-41.

To be certain, the baseline formed by Blackstone and American practice at the time of the framing is just that—a place to start. A proper historical analysis must take into account the ways in which the rights established at the framing have changed throughout this country's history in response to threats from government.³¹⁶ It was taken for granted in the common law tradition that rights, or at least their interpretations, could change and that new rights could be discovered.³¹⁷ Thus, the question is whether the right asserted is one that can truly be said to have become part of American custom, that is, one that has come to be thought of as part of the “*residuum* of natural liberty . . . not required by the laws of society to be sacrificed to public convenience.”³¹⁸ In this regard, the test should be similar to that enunciated by Justice Harlan in his dissenting opinion in *Poe v. Ullman*, wherein he stated that due process “represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”³¹⁹

It is important to distinguish this standard from the other standards that the Court has used in talking about substantive due process. On the one hand, the common law standard is not one that seeks to protect only those rights “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”³²⁰ Nor is it a standard that protects only those rights that are “so deeply rooted . . . as to be . . . fundamental principle[s].”³²¹ On the other hand, the common law standard is not one that goes so far as to provide a presumption of individual freedom for all rightful conduct³²² or one that protects generalized rights such as “the right to personal freedom and autonomy.”³²³ Rather, the common law standard attempts to find the balance between the interests of the individual and the interests of society.

316. See Meyler, *supra* note 21, at 593 (arguing for a “common law originalism” informed by the evolving nature of the common law).

317. See POCOCK, *supra* note 49, at 35-37 (discussing the way the common law changes in response to new situations).

318. See 1 BLACKSTONE, *supra* note 126, at *129.

319. 367 U.S. 497, 542 (1961).

320. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). It is questionable whether the Court in *Glucksberg* meant this to be a true requirement as it did not actually mention this standard again in the opinion. See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 670 n.38 [hereinafter McConnell, *Right to Die*].

321. See *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996).

322. *But see* BARNETT, *supra* note 13, at 259-62.

323. *But see* Niles, *supra* note 11, at 122.

The exact location of this balance must be determined on a case-by-case basis.³²⁴

A. Some Conclusions . . .

Although my suggested approach requires a case-by-case analysis, there are some conclusions that can be drawn regarding unenumerated rights using the common law, and specifically Blackstone, as a baseline. First, there are a number of rights currently recognized as fundamental that would easily be recognized as fundamental to some extent under this baseline, either explicitly or implicitly. These “easy cases” include the right to educate one’s children in private schools, a right announced in *Pierce v. Society of Sisters*.³²⁵ This right can be inferred from the general control granted to parents over education for their children.³²⁶ The right “to engage in any of the common occupations of life,” as articulated in *Meyer v. Nebraska*,³²⁷ also falls within the ambit of Blackstone’s common law.³²⁸ The same is true for *Powell v. Pennsylvania*’s right to acquire, hold, and sell property³²⁹ and *Edwards v. California*’s right to travel.³³⁰

Second, there are rights that, although not “easy cases,” can nevertheless be inferred from the common law baseline or from the development of custom. One example is the right to refuse unwanted medical treatment established in *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*.³³¹ While Blackstone reported that suicide, whether assisted or not, was ranked “among the highest crimes” and resulted in criminal liability for the person committing suicide and anyone aiding him, no such prohibition was extended to the refusal

324. See Meyler, *supra* note 21, at 593.

325. 268 U.S. 510, 534-35 (1925).

326. See 1 BLACKSTONE, *supra* note 126, at *450-52 (explaining the parent’s obligation and power to educate the child). Blackstone noted that those parents who could afford it were free to decide how to provide the education. *Id.* at *451. This right was not entirely without consequence, however. As Blackstone noted, a parent who sent his child overseas for the purpose of attending a “popish college” or being instructed in the “popish religion” was liable for a fine of one hundred pounds. *Id.*

327. 262 U.S. 390, 399 (1923).

328. See 1 BLACKSTONE, *supra* note 126, at *427 (“At common law every man might use what trade he pleased.”). Blackstone noted that some statutes limited certain professions to those who had apprenticed in them, but stated that these statutes were strictly construed. *Id.* at *427-28.

329. 127 U.S. 678, 684 (1888); see 1 BLACKSTONE, *supra* note 126, at *138 (detailing the right to property).

330. 314 U.S. 160, 178 (1941); see 1 BLACKSTONE, *supra* note 126, at *134 (defining “personal liberty” in part as the right to “remov[e] one’s person to whatsoever place one’s own inclination may direct”).

331. 497 U.S. 261, 270 (1990).

of treatment.³³² Under such circumstances, a right to refuse medical treatment can fairly be said to fall under Blackstone's more general right to personal security, which includes "security from . . . corporal insults" and the "preservation of a man's health from such practices as may prejudice or annoy it."³³³ Although it may seem odd to speak of refusal of treatment in terms of "preservation of health," the point to remember is that the right is a personal one and should be judged from the perspective of the one asserting it.

Another example is the right of married couples to use contraception, a right declared in *Griswold v. Connecticut*.³³⁴ There was not a generalized "privacy right" at common law.³³⁵ Nor, on a more specific level, did the common law deal with contraception. The common law did, however, contain a strong tradition of marriage based on contract.³³⁶ Under the common law, husband and wife were considered one person.³³⁷ They were not allowed to testify against each other, except where the offense was "directly against the person of the wife."³³⁸ The common law also contained a strong bias in favor of protecting private conduct in the home.³³⁹

A definitive answer to the question whether married couples have a right to use contraception requires an examination of the nation's customs and traditions regarding state regulation of the marital relationship. Such an examination provides more evidence in support of the right. As Justice Harlan observed in his dissent in the earlier case of *Poe v. Ullman* concerning a similar statute, enforcement of the prohibition against the use of contraceptives would require states to invade the privacy of the marital relationship, which Harlan recognized as "an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."³⁴⁰ Harlan noted that Connecticut's

332. See 4 BLACKSTONE, *supra* note 126, at *189 (explaining the crime of "self-murder").

333. See 1 *id.* at *134.

334. 381 U.S. 479, 485 (1965).

335. See SAMUEL H. HOFSTADTER & GEORGE HOROWITZ, *THE RIGHT OF PRIVACY* 11 (1964) (observing that neither Blackstone nor any of the prominent political philosophers frequently cited at the time recognized an enforceable right to privacy at common law).

336. See 1 BLACKSTONE, *supra* note 126, at *433-45 (restating the common law with respect to the spousal relationship).

337. *Id.* at *442.

338. *Id.* at *443.

339. See 4 BLACKSTONE, *supra* note 126, at *223 (noting, in the context of a discussion of the crime of burglary, that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity"). The protection of the sanctity of the home also extended to privacy and enjoyment, as evidenced by the strictures against eavesdropping and nuisance. See *id.*

340. 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

statute was an “utter novelty” in that no other state had ever chosen to forbid the use of contraceptives by married persons through a criminal statute.³⁴¹ Indeed, Connecticut itself had apparently enforced its statute only one time in eighty-two years, a consideration that contributed to the Court’s dismissal of the declaratory judgment action filed in *Poe* for lack of justiciability.³⁴² Further, practice in America had extended the traditional common law bias in favor of private conduct in the home.³⁴³ As Justice Harlan pointed out, the Court’s decisions under the Fourth and Fourteenth Amendments had broadened the scope of the protection of the home beyond its original application.³⁴⁴

The fact that states did not traditionally regulate the use of contraceptives by married persons and the fact that Connecticut itself did not choose to enforce its own prohibition provide ample evidence that Americans did not consider the subject one that governments were entitled to regulate. This, combined with the sanctity of the marriage relationship at common law and an American tradition in favor of marital privacy in general, suggests that *Griswold* was decided correctly.³⁴⁵

Harder questions arise in cases where the common law baseline is in fact not favorable to the existence of a right. An example of such a case is *Lawrence v. Texas*, wherein the Court found that same-sex couples have a liberty interest in private sexual conduct.³⁴⁶ On the one hand, there is no question that, at common law, homosexual conduct was considered a crime that the government was free to prohibit.³⁴⁷ Further, throughout America’s history, states have passed laws prohibiting this type of conduct.³⁴⁸ On the other hand, there is a

341. *Id.* at 554.

342. *See id.* at 501, 507-09 (majority opinion). In making the determination that the case was not ripe for adjudication because fear of enforcement of the statute was unfounded, the Court noted that “[t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis.” *Id.* at 502.

343. *See id.* at 549-53 (Harlan, J., dissenting) (detailing protections for the home provided by the Constitution).

344. *See id.* at 550-51 (citing a long line of cases expanding the Fourth Amendment search warrant requirements against both the federal government and, through the Fourteenth Amendment, the states).

345. Whether the right to possess contraception extends outside the marital relationship is a different question that requires a different analysis. In *Eisenstadt v. Baird*, the Court struck down a law prohibiting the distribution of contraceptives to an unmarried person; however, that case was decided under the Equal Protection Clause using a rational basis standard. *See* 405 U.S. 438, 454-55 (1972).

346. 539 U.S. 558, 578 (2003).

347. *See* 4 BLACKSTONE, *supra* note 126, at *215-16. Blackstone referred to homosexual conduct as a “crime against nature.” *Id.* at *215.

348. *See* Brief Amicus Curiae of the Center for the Original Intent of the Constitution in

good deal of evidence suggesting that such prohibitions have rarely been enforced against individuals engaged in private conduct.³⁴⁹ In fact, the statute at issue in *Lawrence* had never been enforced, and a previous case in equity challenging the statute had been dismissed by the Texas Supreme Court on the basis that the appellant had not demonstrated a threat of imminent enforcement.³⁵⁰

Lawrence represents a constitutionally close case, one that pits a tradition of regulation, although not necessarily enforcement, against a tradition of noninterference in private relationships. Although *Lawrence* shares some similarities with *Griswold* in that the statute at issue regulated private conduct in the home and was sparsely, if ever, enforced, there are significant differences. The common law had very little to say on the matter of possession of contraception.³⁵¹ The same cannot be said regarding homosexual relations, which were extensively prohibited.³⁵² Thus, the baseline is different. Further, unlike the situation in *Griswold*, the strong traditional common law bias in favor of marital relations does not apply to same-sex relations. Therefore, under the common law methodology I propose, in order to establish an unenumerated right to private relations broad enough to encompass same-sex relations, the petitioners in *Lawrence* would have needed to establish that the tradition of respect for private relations within the home had evolved to the point where the long-standing tradition of regulation of homosexual conduct at common law was no longer truly the tradition and custom of American society.³⁵³ Given the evidence relating to the nonenforcement of antisodomy statutes against private parties, such a showing would have been possible, but it would certainly have been a near-run thing.

A more extreme example of a right not supported by the common law baseline is the right to abortion recognized in *Roe v. Wade*³⁵⁴ and reaffirmed in

Support of Respondent at 11-12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 674354, at *11-12.

349. See Brief of Professors of History George Chauncey et al. as Amici Curiae in Support of Petitioners at 7-9, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350, at *7-9; Brief of Amici Curiae Constitutional Law Professors Bruce A. Ackerman et al. in Support of Petitioners at 24-25, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139, at *24-25; Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Texas in Support of Petitioner at 15-23, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164132, at *15-23.

350. See *State v. Morales*, 869 S.W.2d 941, 942, 946-47 (Tex. 1994).

351. See *supra* note 335 and accompanying text.

352. See *supra* notes 347-48 and accompanying text.

353. See McConnell, *Right to Die*, *supra* note 320, at 681-82 (endorsing such an approach as legitimate).

354. 410 U.S. 113, 154 (1973).

Planned Parenthood of Southeastern Pennsylvania v. Casey.³⁵⁵ The baseline for the right to abortion is clear: Blackstone's version of the common law held that abortion after the infant was able to stir within the womb, usually thought to be at sixteen to eighteen weeks of pregnancy, but possibly as early as eight to ten weeks,³⁵⁶ was a violation of the child's right to life.³⁵⁷ Although Justice Blackmun's majority opinion in *Roe* attempted to infuse some doubt into the status of the common law crime of abortion, stating at one point that research "makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus,"³⁵⁸ his opinion was based on faulty history and was quickly debunked by scholars.³⁵⁹

Moreover, in the years following the framing, the majority of the states that had previously followed the common law enacted statutory prohibitions on abortion.³⁶⁰ Many of these statutes criminalized even abortions occurring before quickening.³⁶¹ A large number of antiabortion statutes continued in effect until

355. 505 U.S. 833, 846 (1992).

356. Compare *Roe*, 410 U.S. at 132, with Robert M. Byrn, *Abortion on Demand: Whose Morality*, 46 NOTRE DAME LAW. 5, 9-10 (1970), and Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 823 (1973) [hereinafter Byrn, *American Tragedy*]. The confusion stems from the different terminology employed by Coke and Blackstone. Coke used the phrase "quick with child," which has been interpreted to mean "quickening," which occurs when the mother can feel the child move. See Byrn, *American Tragedy*, *supra*, at 822-23. Blackstone used both the phrase "quick with child" and the phrase "the point at which the child is able to stir in the mother's womb," which occurs sometime earlier. See *id.* at 823 (internal quotation marks omitted).

357. See 1 BLACKSTONE, *supra* note 126, at *129. Blackstone stated that the right to life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb . . . this, though not murder, was by the antient [sic] law homicide or manslaughter." *Id.* at *129. But, he noted that "the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor." *Id.* at *129-30.

358. 410 U.S. at 136; see also *id.* at 132-36 (discussing abortion at common law).

359. See, e.g., John R. Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in ABORTION AND THE CONSTITUTION 123 (Dennis Horan et al. eds., 1987); Joseph W. Dellapenna, *Abortion and the Law: Blackmun's Distortion of the Historical Record*, in ABORTION AND THE CONSTITUTION, *supra*, at 137; Byrn, *American Tragedy*, *supra* note 356, at 815-27.

360. See *Roe*, 410 U.S. at 174-76 & n.1 (Rehnquist, J., dissenting) (citing the laws of thirty-six states or territories that had enacted abortion-limiting statutes by the time the Fourteenth Amendment was adopted in 1868); see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281-82 (1992). Siegel argues that the statutory prohibitions were part of a campaign by physicians based in part on the idea that "abortion at any stage of pregnancy was an unwarranted destruction of human life." *Id.* at 282.

361. See Siegel, *supra* note 360, at 282.

the Court's decision in *Roe*.³⁶² Further, post-*Roe*, states have continued to pass legislation regulating abortion to the extent allowed by the Supreme Court's decisions.³⁶³ Thus, the common law baseline, combined with the American tradition allowing regulation of abortion, both pre- and post-*Roe*, strongly suggests that there is no customary right to an abortion, at least after quickening.

The status of the right to an abortion prequickening, however, is a different matter. The time when an infant could stir in the mother's womb marked the time at common law when a fetus, at least according to Blackstone, was deemed to have a right to life.³⁶⁴ Prior to that time, it seems that the fetus might be considered part of the mother, in which case Blackstone's right to personal security might give the mother the right to abort.³⁶⁵ This is by no means clear, however. Certainly, abortion was not regulated before quickening under the common law. But, whether this is because of problems related to proving pregnancy prequickening or because of the distinction concerning when the right to life actually begins is a subject of some controversy.³⁶⁶ Adding to the controversy is the tradition in pre-*Roe* American law of attempting to regulate abortion prequickening.³⁶⁷ From a historical standpoint, all of these things need to be taken into account in order to determine whether and under what circumstances an abortion right exists. It is difficult to see how a court could make such a determination without addressing the thorny issue of when the right to life, from a legal standpoint, attaches.

362. See *Roe*, 410 U.S. at 118 n.2 (chronicling statutes in effect in 1972); see also *id.* at 175-77 & n.2 (Rehnquist, J., dissenting) (chronicling the statutes enacted before the adoption of the Fourteenth Amendment that "remained substantially unchanged" at the time the Court decided *Roe*).

363. See Janessa L. Bernstein, *The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash*, 73 BROOK. L. REV. 1463, 1463-65 (2008). Bernstein notes that "[s]ince almost immediately after the United States Supreme Court's landmark 1973 decision in *Roe v. Wade*, state legislatures have continued to impose, and the Court has consistently upheld, restrictions on a woman's ability to obtain an abortion." *Id.* at 1463.

364. 1 BLACKSTONE, *supra* note 126, at *129.

365. See *id.* at *129-31. Blackstone's right of personal security "consists in a person's . . . uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." *Id.* at *129.

366. Compare, e.g., Martin J. Buss, *The Beginning of Human Life as an Ethical Problem*, 47 J. RELIGION 244, 245 (1967) (arguing that "English common law located the beginning of the human soul at 'quickening'"), with Byrn, *American Tragedy*, *supra* note 356, at 824 (arguing that the quickening standard was established for evidentiary reasons).

367. See *supra* notes 360-62 and accompanying text (discussing the history of abortion regulation in the United States pre-*Roe*).

These are just a few examples of ways in which substantive due process cases would have been decided under the theory that I espouse. The case list is not meant to be complete; however, I hope that it is sufficient to give the reader a sense of how the method itself would work.

B. . . . And Some Criticisms

There are a number of criticisms that can be leveled against the method that I have set out. For one, it can be argued that my method does not sufficiently constrain judicial discretion. One of the supposed attractive qualities of the historical analysis of rights is that it meaningfully constrains judges rather than allowing them the discretion to enact their own moral or political judgments.³⁶⁸ If there is room in a historical theory for judges to insert such judgments, then this attractiveness is diminished.

It is admittedly true that there is room in a common law-based historical theory for judicial discretion. This, however, is historically accurate because the common law expected judges to exercise discretion in discovering the law.³⁶⁹ Decisions that were incorrect could be worked out of the law in the fullness of time.³⁷⁰ Whether this is appealing as a construct is beside the point. It is simply not historical to try to use history to constrain judges in a way in which they were not historically constrained. If we accept the historical basis for rights, we must accept the method as well.

Further, there is less discretion in the common law-based theory than might be supposed. Because it requires judges to start with a common law baseline and then to address any evolution of tradition regarding the purported right, judges are not free to decide cases based on their own moral or philosophical leanings.³⁷¹ Rather, a large part of the judicial discretion comes in determining the “level of abstraction” at which the right should be viewed. The level of abstraction issue has continually vexed courts and is a major problem for almost all historical theories of rights that rely on tradition.³⁷² To a certain extent,

368. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 10-14, 34-36 (2002) (summarizing the originalist viewpoints of Robert Bork, Frank Easterbrook, Steven Calabresi, Gary Lawson, and Justice Scalia).

369. See Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 774 (2004) (describing the common law method of adjudication).

370. *Id.* at 774 & n.50. As Lord Mansfield stated in 1744, over time, the common law would “work itself pure.” *Id.* (citing *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 22-23 (K.B.)).

371. See McConnell, *Right to Die*, *supra* note 320, at 697-98 (describing Justice Harlan’s *Poe* dissent as based on historical rather than moral or philosophical judgments).

372. Compare, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (characterizing the right at issue as the right of “homosexuals to engage in sodomy”), with *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (characterizing the right at issue as the liberty of “adult persons [to decide] how

however, reliance on Blackstone as a common law baseline helps to ameliorate this problem. Where the activity is expressly regulated by Blackstone's interpretation of the common law, as is, for example, assisted suicide, there is no level of abstraction problem; rather, the baseline itself provides the appropriate level. The level of abstraction problem only comes in where, as in the case of the right to refuse medication or nourishment, Blackstone is silent. At that point, a judge must make a decision regarding the scope of the right of personal security. This, however, is the type of decision that judges are qualified to make, and the way is not without guideposts.

There is also some leeway for judicial discretion in identifying exactly when a "tradition" can be said to exist. Again, however, this is the kind of judgment that a judge is qualified to make by looking at history. It is also the kind of determination that common law judges were expected to make.³⁷³

On the other end of the spectrum, the method that I propose is vulnerable to the charge that it does not properly protect individual rights to the extent contemplated by the framers' rhetoric or by natural law. Certainly, the method is more restrictive of rights than some other historically based methods suggested by advocates of baselines drawn from natural law philosophy or baselines of personal autonomy.³⁷⁴ Nevertheless, this reflects the actual practice and understanding at the time of the framing. While it is true that Americans at the time of the framing talked of rights in expansive terms, their actual conception of rights was narrower and included a number of governmental restrictions on personal autonomy.³⁷⁵

The method is also vulnerable to charges that it is not a "desirable" interpretation of the Constitution.³⁷⁶ Desirability, however, is beside the point. I make no claim that a method based on tradition is one that will result in decisions that are the "best" public policy or even that align with my personal views regarding what a constitution should protect.³⁷⁷ Rather, my claim is simply that starting from a common law baseline, using Blackstone, and then

to conduct their private lives in matters pertaining to sex"); *see also* Chemerinsky, *supra* note 10, at 12 (discussing the level of abstraction problem in looking at tradition).

373. *See* Schauer, *supra* note 369, at 774.

374. *See, e.g.,* BARNETT, *supra* note 13; GERBER, *supra* note 11; Niles, *supra* note 11.

375. *See* discussion *supra* Part II.B-C. Although more restrictive than some approaches, the method that I describe is much more expansive with regard to rights than those historical methods suggested by originalists such as Justice Scalia, who would apply a restrictive test to the evolution of traditions. *See* FARBER & SHERRY, *supra* note 368, at 52 (discussing Justice Scalia's narrow interpretation of tradition).

376. *See* Chemerinsky, *supra* note 10, at 12 (arguing that "the focus on tradition confuses descriptive and normative inquiries").

377. For instance, I tend to favor individual privacy rights to a greater degree than does my proposed method.

surveying American tradition and custom gets close to the general understanding and philosophy of rights adhered to by the public at the time of the framing of the Constitution and the adoption of the Bill of Rights. And from a historical standpoint, that is what matters.

Conclusion

The Ninth Amendment makes clear that the rights enumerated in the Bill of Rights are not the only rights that the people possess. In developing a historically based theory of unenumerated rights, the important question is, what did the people at the time of the framing understand their rights to be? An examination of the common law heritage of colonial Americans, as well as the circumstances surrounding the framing of the Constitution and the adoption of the Bill of Rights, suggests that the “rights retained by the people” were not mere philosophical musings from natural law philosophers, but instead were common law rights that the people felt they were entitled to by reason of their heritage and that formed the barrier between what government could and could not do. By the time of the framing and the adoption of the Bill of Rights, the prevalent source consulted for an explanation of these rights was Blackstone’s *Commentaries*. The *Commentaries* provided a coherent and rational organization of the common law that could be readily understood.

Nevertheless, accepting Blackstone as the common law baseline for rights only goes part of the way. Just as Americans at the time of the framing were heirs to the common law understanding regarding what rights existed, they were also heirs to the common law understanding that the full extent of their rights had not been discovered. Although they did not and could not know the full extent of their rights, they believed that courts would adjudicate the boundary between the power of the government and the rights of the individual, and that tradition would form the basis of such an adjudication.

Using Blackstone’s *Commentaries* as the common law baseline for unenumerated rights and then using tradition derived from custom and practice to draw the line between legitimate government action and the rights of individuals provides a coherent framework for the identification of unenumerated rights. From this framework, courts can transform the “common law rights of Englishmen” into the “rights of Americans.” Although this methodology cannot provide a definitive list of rights, it can be used to determine the nature and extent of rights on a case-by-case basis and to properly allow the “rights retained by the people” to be given effect.