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Just Not Who We Are: A Critique of Common Law Constitutionalism

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I. INTRODUCTION

ALL of a sudden Edmund Burke is "in." Leading arbiters of intellectual fashion such as David Brooks and Cass Sunstein have recently defended what they describe as the "Burkean approach" to political and legal affairs.[1] This approach, Brooks argues, entails "not an ideology or creed, but a disposition, a reverence for tradition, a suspicion of radical change."[2] The constitutional law analogue to this emphasis on the centrality of tradition and the need for measured change is the idea of common law constitutionalism. This approach to constitutional interpretation holds that "constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices."[3]

Common law constitutionalism defines itself, in part, by how it differs from its main competitors. On one hand, the dominant tradition among constitutional theorists calls for what Michael McConnell terms the "moral philosophic" approach to interpretation of the Constitution.[4] This approach interprets the document to reach the best results possible in accor-

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1. *See* Cass R. Sunstein, *Burkean Minimalist*, 105 MICH. L. REV. 353, 356 (2006) (describing Burkean minimalism approach); David Brooks, Op-Ed., *The Republican Collapse*, N.Y. TIMES, Oct. 5, 2007, at A25.

2. Brooks, *supra* note 1, at A25.

3. Sunstein, *supra* note 1, at 356.

4. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 668 (1997) [hereinafter McConnell, *Right to Die*]. For a detailed discussion of this approach and the common law constitutionalists' criticisms of it, see *infra* notes 14-20 and accompanying text.

dance with society's ideals of justice—most especially liberty and equality.[5] On the other hand, originalism, the rising and opposing tradition in interpretation, rejects the notion that judges may supply their own meaning to the Constitution.[6] Instead, originalism insists that judges should discover and apply the original public meaning of the text in question.[7]

The moral philosophic approach is problematic because, if one understands the Constitution's binding nature as deriving from the authority of the people to make law, it is illegitimate for judges, without popular warrant, to interpret the Constitution based on their own notion of what justice requires. This approach also places excessive faith in the ability of judges to discern the correct answers to society's most difficult questions. Conversely, the originalist approach promises to restrain the judges' power to change the Constitution. But, originalism's critics argue, this restraint is an illusion. They contend that a principled commitment to originalism would require a court to overrule many of its precedents, making an originalist court far more "activist" and disruptive than even its moral philosophic predecessors.

The advocates of common law constitutionalism reject both the moral philosophic and originalist approaches to constitutional interpretation. Instead, they argue that judges should interpret the Constitution in a "common law" fashion.[8] This method would allow the meaning of the Constitution to change incrementally, case by case, over time.[9] Judges ought to use their traditional tools of presumptive—but not absolute—adherence to precedent, reasoning by analogy, and willingness to consult current social practice, to adjust the meaning of the Constitution as times and circumstances require. Unlike the moral philosophic approach, which empowers judges to define what justice requires, common law constitutionalists *must* defer to precedent, current practices, and social traditions. Change, under the common law constitutionalism approach, takes place incrementally and with due deference to the existing customs and practices of the governed.

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5. *See id.* at 667-69.

6. For a detailed discussion of this approach, and the common law constitutionalists' criticisms of it, see *infra* notes 21-29 and accompanying text.

7. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)). According to Calabresi, "what really matters in constitutional interpretation is not what the Framers intended that provision to mean but rather what the original language actually meant to those who used the terms in question." *Id.*

8. For a detailed discussion of the theory and methods employed by common law constitutionalists, see *infra* notes 30-112 and accompanying text.

9. *See* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482-83 (2007) (explaining method and underlying theory of common law constitutionalism).

Common law constitutionalists argue that their approach is both descriptively and normatively superior to the alternatives. Descriptively, they argue, their approach far more accurately explains the practice of the current United States Supreme Court. Normatively, they argue that their approach is more consistent with democratic norms. In addition, they believe that their approach, by reflecting genuine democratic norms, is more likely to contribute to the law's justice, because rules rooted in opinions and practices adhered to by many people over time are more likely to be objectively correct than rules rooted in the opinions of a few. Finally, the judicial norms and practices inherent in common law constitutionalism—including a strong commitment to precedent, the limited exercise of judicial power, and a close attention to facts—will lead both to better judicial craft and to genuine judicial restraint.

I concede that the Court's current practice is largely consistent with the practice of common law constitutionalism. This practice, however, does not produce law that either accurately reflects democratic norms or is constitutionally legitimate. Certainly, the common law was intended to serve as a critical foundation of our constitutional regime, but it is necessary to correctly understand how the architects of the Constitution understood the relationship between the common law and the principles of liberal political theory that are the foundation of our political system.

Under the principles of the American system, common law jurisprudence serves as the source of background legal principles for judicial interpretation. Even more importantly, the Constitution's understanding of judicial power assumes that judges ought to and will follow common law traditions and practices, including adherence to precedent, reasoning by analogy, and the interpretation of positive law by reference to its drafters' intent. Yet the American Revolution was a true revolution; the Americans broke not simply with the political authority of Great Britain but also with the political and legal theory of pre-liberal common law theory. This theory, often attributed to Edward Coke, holds that rights established by the common law—rights that could be added to or changed over time—cannot be taken away by the other powers of government.

Instead, the Lockean principles of the Revolution—including natural equality, natural rights, and, most important for understanding American constitutionalism, government by consent—fundamentally shaped Americans' understanding of the relationship between common law and more popular forms of lawmaking. The most popular and thus legitimate form of lawmaking is the making of a constitution. Because it is the law made most directly by the people, a constitution cannot be interpreted in a way that undermines the primacy of the consent of the governed. Common law constitutionalism, by empowering judges to change, however slowly, the meaning of the people's work, violates the fundamental principle of consent. A legitimate understanding of constitutional interpretation authorizes a court to invalidate law made by the consent of the governed

only when the Constitution clearly mandates this result. If the Constitution's meaning is ambiguous, judges should not exercise their power of judicial review to interfere with the work of the people's agents; rather, through their power of statutory interpretation, judges may employ the principles and practices of the common law, without jeopardizing their legitimacy, to improve legislation by engaging in dialogue with, not dictation to, lawmakers. A proper understanding of the relationship between common law and liberal principle, therefore, will lead both to sounder and more legitimate law.

In this Article, I show that common law constitutionalism is inconsistent with the principles of liberal political theory that underlie the Constitution and, consequently, that its practice will lead to inferior judicial decisions. In Part II, I explain the general methodology of common law constitutionalism and identify two predominant models of the methodology: rational traditionalism and common law traditionalism.[10] Part III critiques both of these models from the perspective of the history and liberal political theory of the Founding.[11] I demonstrate that both models violate the fundamental principle of consent central to our regime. Finally, in Part IV, I outline how judges may legitimately employ the principles and practices of the common law in their work.[12]

II. EXPLAINING COMMON LAW CONSTITUTIONALISM

A. *The Search for the "Third Way"*

Common law constitutionalism has emerged as a distinct school of constitutional interpretation because of dissatisfaction with the two reigning methods of constitutional interpretation. Thomas Merrill has described this unattractive choice as one between Brennan and Bork.[13] Taking Brennan first, Judge Michael McConnell describes the approach that best characterizes decisions such as *Brown v. Board of Education*[14] and *Roe v. Wade*[15]—indeed the constitutional corpus of the Warren Court—as the moral philosophic approach. Under this approach, judges decide difficult cases "in light of the best moral-philosophical understanding of the problem confronted by the interpreter."[16] Adherents to this approach are

10. For an explanation of the two models of common law constitutionalism, see *infra* notes 63-112 and accompanying text.

11. For a critique of both models of common law constitutionalism, see *infra* notes 113-249 and accompanying text.

12. For a discussion of the proper role of the common law in modern constitutional interpretation, see *infra* notes 250-82 and accompanying text.

13. *See* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509 (1996).

14. 347 U.S. 483 (1954).

15. 410 U.S. 113 (1973).

16. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 173 (1998) [hereinafter McConnell, *Tradition*] (explaining that judges use this method to decide hard cases, the resolutions to which are "not compelled by tolerably clear text, history, or precedent").

particularly concerned with the definition of constitutional rights. These adherents argue that, in order to ensure that government operates consistently with evolving principles of justice, judges must be free to articulate rights and liberties that government may not invade.[17] Judges must, the argument goes, be able to protect these rights even if they are not supported by the specific text, structure, or history of the Constitution.

McConnell argues that there are two fundamental problems with this approach. First, there is no guarantee that decisions made under this approach will be "wiser and more just" than those made under any other method of interpretation.[18] The limits of abstract human reason make it possible, if not likely, that a judge will not answer a question correctly. The presupposition that "judges are wiser, fairer, more reflective decision makers than those who are more immediately accountable to the public" is not supported by any evidence.[19] Second, and more importantly, the moral philosophic approach violates the "postulate of our political system that legitimate government has its origins in the consent of the governed."[20] Because the moral philosophic approach depends on judges dismissing the decisions of the people, it cannot be a legitimate method of interpretation in a constitutional democracy.

Originalism, on the other hand, is founded on the principle that authoritative law must be traced to the will of the people as expressed by the text of the Constitution, originally understood by those who framed and ratified it. This principle gives originalism the appearance of legitimacy, and has led even common law constitutionalists who approve of the work of the Warren Court to concede that originalism and the allied approach of textualism have set the terms of debate in constitutional interpretation.[21]

Common law constitutionalists, however, see originalism as equally unacceptable as the moral philosophic approach. Though originalism promises faithful adherence to the rule of law, common law constitutionalists argue that given how much constitutional doctrine has diverged from the text's original meaning, a faithful originalist will be forced to seriously

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17. *See* McConnell, *Right to Die, supra* note 4, at 667-69.

18. *See id.* at 682. This argument is best expressed in the writings and speeches of Edmund Burke. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 644-50 (1994).

19. McConnell, *Right to Die, supra* note 4, at 684.

20. *Id.* at 682. McConnell avers that in order to be legitimate, "constitutional rulings must trace their authority, in some sense, to decisions of the people." *Id.*

21. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 878 (1996) [hereinafter Strauss, *Common Law*] ("[T]he terms of debate in American constitutional law continue to be set by the view that principles of constitutional law must ultimately be traced to the text of the Constitution, and by the allied view that when the text is unclear the original understandings must control.").

consider overruling many entrenched precedents.[22] Overruling even incorrect precedents, particularly those long relied upon, will undermine the very kind of rule-of-law values that originalists claim to support. Overruling settled precedent, for example, compromises both the principle of equal treatment of equally situated parties and the legal edifice of stable and predictable rules.[23] The instability and inequity originalism potentially creates is exacerbated when even self-confessed originalist judges defer somewhat to precedent. This practice makes it difficult for citizens and lawyers to predict when an originalist judge will either adhere to precedent, even if incorrect from the originalist perspective, or conclude that the precedent is simply too far a departure from the original meaning to tolerate.[24] In addition, it is difficult for originalists to justify their approach as an effective means of judicial restraint. By providing judges a license and a method for striking down disagreeable precedent, originalism, whether it intends to or not, affords judges a weapon to work their own will, as long as they can plausibly attribute their view to the text or the original understanding of the Framers and ratifiers.[25]

Beyond the rule-of-law problems that originalism creates, critics argue that this approach is simply too difficult a project for judges to do well. Originalism requires that judges possess the skills of trained historians, both in unearthing the relevant materials—assuming they even exist—and in ascertaining their significance. Judges are not trained to do, or even to judge, this work.[26] Even if judges could do the work, or were able to rely upon competent history, there remains the difficult problem of translating the original understanding into legal doctrine that addresses contemporary problems, which often involve facts or circumstances that the Framers or ratifiers could not have known or anticipated.[27] Judges attempting to

22. *See* Young, *supra* note 18, at 673-74 ("In the end, the most damning aspect of originalism for Burke would almost certainly be the radical restructuring of our constitutional order that a serious attempt to implement that interpretive philosophy would entail."). Justice Thomas, for example, is far more willing than his less originalist colleagues to reconsider long-standing precedent. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49-53 (2004) (Thomas, J., concurring) (arguing that settled principles of Establishment Clause jurisprudence should be overturned because they contradict constitutional text and Framers' intent); United States v. Lopez, 514 U.S. 549, 584-601 (1995) (Thomas, J., concurring) (explaining how contemporary Commerce Clause jurisprudence "has drifted far from the original understanding of the . . . Clause").

23. *See* Merrill, *supra* note 13, at 516; *see also* Sunstein, *supra* note 1, at 358 ("From the Burkean perspective, originalism is far too radical, because it calls for dramatic movements in the law, and it is unacceptable for exactly that reason.").

24. *See* Merrill, *supra* note 13, at 516-17.

25. *See* David A. Strauss, *Panel on Originalism and Precedent*, *in* ORGINALISM: A QUARTER CENTURY OF DEBATE 199, 220-22 (Steven G. Calabresi ed., 2007) [hereinafter, Strauss, *Panel on Originalism*].

26. *See id.* at 218-20 (describing these concerns as problems of "ascertainability" and "indeterminacy"); *see also* Merrill, *supra* note 13, at 520-21.

27. *See* Strauss, *Panel on Originalism*, *supra* note 25, at 218-19 (identifying this problem as one of "translation").

practice originalism will be often left at sea and, no matter what they believe they are doing, will end up making decisions based on their own preferences while pretending they are following the original understanding. Thus, originalism is really no better than the moral philosophic approach, either in providing judges with a reliable and legitimate source for legal rules, or in constraining judicial power.

Even common law constitutionalists who find originalism attractive, at the end, find it wanting. McConnell, for example, certainly concedes that the text is the first, and most important, source of interpretation. He argues, however, that the text is not the only legitimate source of constitutional interpretation; there are other ways of discerning the will of the people. McConnell argues that:

> Longstanding consensus similarly reflects a supermajority of the people . . . . When judges base their decisions either on constitutional text or on longstanding consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitment of the people.[28]

Thus, a judge who insists only on protecting rights that are specified in the Constitution's text, ignores a legitimate, and potentially illuminating, source of law.

The common law approach, however, attends to this potentially illuminating source of law, and provides a mechanism for constitutional meaning to evolve in conjunction with the long-standing moral consensus of the nation. A constitution that cannot so evolve inherently loses its legitimacy; indeed, it is the need for prudent constitutional change that makes the moral philosophic approach—which is the negation of constitutionalism—so attractive to so many. Compared to a narrow originalist approach, which only looks at history "as a snapshot of a particular moment," the common law approach "views as authoritative the gradually evolving moral principles of the nation."[29] Adoption of this approach makes it possible for judges, if they find sufficient proof of a long-standing consensus, to recognize a right even if it is not protected by specific text and, just as importantly, even if it were not protected in a previous time in our nation's history. Originalism, narrowly understood as fidelity to the text, would, of course, preclude any such conclusions.

Common law constitutionalism, therefore, provides the much desired "third way." McConnell concludes that "an approach to constitutional law based on long-standing custom and national experience would have been natural and familiar to the framers of our Constitution," and thus is a legitimate way to interpret the document.[30] To understand this approach to

28. McConnell, *Right to Die*, *supra* note 4, at 682.
29. McConnell, *Tradition*, *supra* note 16, at 174.
30. *Id.* at 175.

constitutional law, we must first examine the general approach common to common law constitutionalists and then identify and explain two models of common law constitutionalism: rational traditionalism and common law traditionalism.

B. *The General Approach*

The reality of legal and judicial practice is the foundation of common law constitutionalism, and is the most persuasive argument in its favor. Lawyers arguing cases and judges making decisions do not approach legal problems by first turning to John Rawls or doing historical research—they begin with precedent.[31] Common law constitutionalists begin with the premise that, rather than indulge the presumptions that one can solve social problems by philosophizing, or that answers to hard interpretive questions can be found in history, judges instead rely on what Ernest Young calls a "jurisprudence of doctrine."[32] In reality, judges decide cases based largely on the structure of rules established by their prior precedents, using the familiar common law technique of reasoning by analogy.[33] Common law constitutionalists embrace this practice and make it the center of their theory of constitutional interpretation.[34]

Why decide cases based on the way they have been decided in the past? Common law constitutionalism is founded on the Burkean idea that reliance on abstract human reason is less likely to lead to wise decisions than reliance on the decisions made by many judges over time.[35] Common law constitutionalism, therefore, "is based on humility and . . . a distrust of the capacity of people to make abstract judgments not grounded

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31. *See* Strauss, *Common Law*, *supra* note 21, at 883. As Strauss explains, "[m]ostly the courts decide cases by looking to what the precedents say." *Id.* More authoritatively perhaps, Chief Justice Roberts made a similar point during his confirmation hearings when he commented that "I tend to look at the cases from the bottom up rather than the top down . . . . In terms of the application of the law, you begin obviously with the precedents before you." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 159 (2005) (statement of nominee).

32. *See* Young, *supra* note 18, at 691 (emphasis omitted).

33. *See id.* at 691-92.

34. *See id.* at 689 (arguing that "a common-law model fairly describes much of what courts actually do when interpreting the Constitution, and that such interpretation would generally be more successful if the common-law model were more candidly acknowledged and more broadly employed").

35. *See* EDMUND BURKE, REFLECTION ON THE REVOLUTION IN FRANCE 74 (Frank Turner ed., Yale University Press 2003) (1790). As Burke famously stated:

> We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.

Id.

in experience."[36] Reliance on precedent is also justified by what Strauss calls "rough empiricism."[37] Difficult constitutional problems are far too complex to be solved by abstract human reason; one is more likely to reach the correct solution by consulting experience, not theory. Precedent, at bottom, is a record of our society's experience in grappling with the problem at issue. How we have decided to resolve these problems in the past is the best evidence for how to resolve them in the future.[38]

The need to be both appropriately modest about one's power of reason and respectful of human experience counsels deference not only to judicial precedent but also to established practices of other agencies of government and to social traditions.[39] If the Executive Branch, for example, has consistently engaged in a particular practice without serious objection from Congress, courts should uphold the legality of such a practice.[40] Courts should afford similar deference to the practices of individuals if the government has acquiesced to these practices, thus producing "settled expectations or reliance interests."[41] Common law constitutionalism is more than adherence to precedent; it is more accurately described as traditionalism, a presumption in favor of society's long-established practices.

Common law partisans, however, recognize that deciding cases based on deference to established practices raises problems of legitimacy. These problems arise when it is unclear that judges have obeyed authoritative text or intent or when decisions are not objectively just.[42] Common law constitutionalists address this problem by arguing that judges applying the common law method do not and should not ignore sources of legal interpretation other than established precedents, practices, and traditions. Rather, judges, employing what Strauss calls "conventionalism," ought to use all the possible sources of legal interpretation in order to create "an overlapping consensus" in favor of a decision.[43] In other words, if text can

36. Strauss, *Common Law*, *supra* note 21, at 891; *see also* Andrew C. Spiropoulos, *Aristotle and the Dilemmas of Feminism*, 18 OKLA. CITY U. L. REV. 1, 28 (1993) (describing Aristotle's belief that political science is a "practical science").

37. *See* Strauss, *Common Law*, *supra* note 21, at 892.

38. *See id.* (arguing that, rather than trying to solve problems by reasoning from abstractions, we are better off looking to answers that "have been tested over time, in a variety of circumstances, and have been found to be at least good enough").

39. *See* Merrill, *supra* note 13, at 511. In Merrill's conception of common law constitutionalism, for example, the judge should seek "not the original meaning but the conventional meaning—the consensus view about the meaning in the legal community of today." *Id.*

40. *See id.* (explaining common law constitutionalism within context of modern separation of powers jurisprudence).

41. *See id.* at 512.

42. *See* Strauss, *Common Law*, *supra* note 21, at 906 (stating that "[t]raditionalism does fall short in at least one important respect: it cannot account for the deference that is given to the text").

43. *See id.* at 907 (citing JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993)). According to Strauss, "[t]he text of the Constitution is accepted . . . by an 'overlap-

be read in a way that justifies an existing practice, judges ought to rely on text—in addition to the existing practice—in making decisions.[44] If evidence of drafters' intent conflicts with a plausible reading of a text that would justify existing practices, judges may choose not to follow that intent and instead rely on the text and existing practice.[45] If the intent supports upholding the practice, it certainly should be relied upon.

What is most important is that judges rely on every source of legal reasoning that justifies their decisions to vindicate existing practices and traditions. This approach, Strauss argues, "is a way for people to express respect for their fellow citizens. Even among people who disagree about an issue, it is a sign of respect to seek to justify one's position by referring to premises that are shared by the others."[46] Thus, reliance on the other sources of legal reasoning, particularly text, structure, and intent, maximizes the perceived legitimacy of the judicial decision.

The primary consequence of placing the preservation of current practices and traditions at the center of one's theory of constitutional interpretation is that the meaning of the Constitution will evolve over time. It will evolve incrementally, changing only as society and government change. If an agency of government consistently acts contrary to the best reading of the text or the original understanding of the Constitution over a long period of time, and that practice is vindicated by the courts, then under the common law constitutionalist approach, the meaning of the Constitution has altered. It is precisely because the meaning of the Constitution must be allowed to evolve that common law constitutionalists reject originalism.[47] As Sunstein states:

> When Burkeans recoil at the suggestion that the founding document should be understood to mean what it originally meant, they are embracing a conception of the Constitution as evolving in the same way as traditions and the common law—not through

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ping consensus': whatever their disagreements, people can agree that the text of the Constitution is to be respected." *Id.*

44. *See id.* at 920. According to Strauss:

> So long as a judge can show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text—so long as she can plausibly say that she, too, honors the text—she has maintained some common ground with her fellow citizens who might disagree vehemently about the morality or prudence of her decision.

Id.

45. *See id.* at 919-20 (explaining how Supreme Court used this method of interpretation in, for example, its Sixth Amendment jurisprudence).

46. *Id.* at 908.

47. *See* Vermeule, *supra* note 9, at 1502 ("[O]riginalism suffers from a dead hand problem—why should the views of past framers control the living? —while common law constitutionalism is a form of living constitutionalism.").

the idiosyncratic judgments of individual judges, but through a process in which social norms and practice play the key role.[48]

C. *Advantages of the Common Law Approach*

To return to my beginning point, the most compelling argument in favor of common law constitutionalism is its power to explain our current legal and judicial practices. Lawyers and judges understand the Constitution through the lens of the common law; indeed, it is because we view law as the product of a distinctive form of thinking that judges are the primary authors of constitutional law.[49] As Strauss suggests, unless we are willing to consider largely rejecting our current practices, we will be well served by understanding the reasons for our presumption in favor of following precedent and social practices, thereby deepening our reliance on the common law approach to constitutional interpretation.[50]

Common law constitutionalists argue that, although their approach empowers judges to alter the Constitution, it is actually more respectful of democratic values than the alternative methods of interpretation. Deference to traditions and social practices makes the people, not the judges or the Framers, the lawmakers.[51] The underlying premise of the common law method has always been that, when deciding cases, judges will incrementally adjust doctrine at the margins to cohere with well-established views of the current society. Decisions founded on reasoning that is inconsistent with the deeply held beliefs and established practices of society are unlikely be used as robust precedents, whereas decisions that meet with popular approbation will likely be extended in future cases.[52] In addition, the common law approach serves the principle of democratic legitimacy by reserving the task of lawmaking to the legislature. If the people have confidence that law will follow existing precedent and social practices, they will know that to fundamentally change these precedents and prac-

48. Sunstein, *supra* note 1, at 389. In support of this conception, Sunstein quotes, to good effect, Justice Frankfurter: "'It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.'" *Id.* (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

49. *See* Strauss, *Common Law*, *supra* note 21, at 887-88.

50. *See id.* at 888; *see also* Young, *supra* note 18, at 688-89. Young argues that we should work to "refine and strengthen" our reliance on the common law method because it has been tested and widely accepted over a long period of time, particularly by practitioners who would resist a radical new approach. *See id.*

51. *Cf.* Strauss, *Common Law*, *supra* note 21, at 928 ("The originalist notion that the decisions of the eighteenth-century Framers somehow reflect the views of a continuous 'we the people' extending since that time is as mystical and implausible as the most remote reaches of the common law ideology.").

52. *See id.* at 929 (providing examples, such as expansion of federal and presidential power, of how change in constitutional principles can occur through the common law constitutional method).

tices they will have to turn to a legislature. If a legislature does not alter the law, it will remain stable.[53]

Common law constitutionalists also claim that, under their approach, judges are more likely to make objectively good decisions. The argument that there is a higher likelihood of correct decisions when judges rely on precedent, tradition, and social practices is related to the argument for democratic legitimacy. If many people, over time, continue to adhere to a particular principle or legal outcome, that principle or outcome is likely to be correct. This idea is generally credited to Burke—practices and norms rooted in tradition are likely to be best because their very survival vindicates the truth underlying these practices and norms.[54]

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53. *See* Merrill, *supra* note 13, at 522 (explaining "what stodgy and boring places courts would become" under a common law constitutionalism regime). According to Merrill, "[t]hose intent on social engineering through litigation will obtain a very low return on their investment [under a common law constitutionalism system]. Far better to hire a lobbyist and see if you can get a law enacted by Congress." *Id.*

54. *See* Sunstein, *supra* note 1, at 369-72. Today's common law constitutionalists, however, hesitate to invoke the standard form of the Burkean argument. According to these common law constitutionalists, the Burkean argument holds that we should follow what was done in the past because past generations have an inherent claim on the present. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1031-32 (1990) (explaining that in common law systems, "the law has been built up by a long line of judges"). Instead of the standard Burkean argument, they root their case in consequentialist or pragmatic arguments, invoking the authority of modern social science for basing legal decisions on long-standing social practices and traditions. *See* Sunstein, *supra* note 1, at 359. In particular, the common law constitutionalists base their argument on the Condorcet Jury Theorem, popularly known as the "wisdom of crowds," which holds "that if each individual in a group is more than 50% likely to be right, the probability that the majority of the group will be right increases to 100% as the size of the group expands." *Id.* at 370-71. *See generally* JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004). For example, if one asks ten people what they believe is the right answer to a multiple choice question (assuming that each individual is more likely to be right than wrong) and seven of them pick the same answer, one cannot rely on that opinion with nearly the same confidence as one can when seventy thousand out of one hundred thousand asked tell you the same answer; the probability that this answer is correct significantly increases when it is held by a majority of a very large number of people. *See* SUROWIECKI, *supra*, at 3-4. Common law constitutionalists, therefore, believe that well-established precedent, traditions, and practices approximate views of thousands, if not millions, of people, both dead and alive. If all of these people have concluded that a legal question ought to be resolved in a certain way, that outcome is far more likely to be correct than if the decision is the product of the mind of a single judge or court. The private stock of reason of one or a few is small, but collective wisdom, especially if one consults multiple generations, is considerable. *See* Sunstein, *supra* note 1, at 371. As Sunstein notes:

> Burke appeared to see traditions as embodying the judgments of many people operating over time. If countless people have committed themselves to certain practices, then it is indeed possible, on Condorcetian grounds, that "latent wisdom" will "prevail in them," at least if most of the relevant people are more likely to be right than wrong.

Id.

Finally, common law constitutionalists argue that their method of interpretation, compared to those of their competitors, is one that lawyers and judges are trained to employ and one that they can employ well. Able originalist judges, for example, would possess the rare talents, extensive training, and specialized skills of professional historians.[55] Judges adhering to the moral philosophic approach must have aptitudes for and professional training in the high art of philosophy.[56] Conversely, common law constitutionalist judges are only asked to do what they are trained to do and have always done: determine how law and society have traditionally answered particular questions.[57] Common law constitutionalism involves the discovery and interpretation of positive sources of law. This is a far more interpretive, rather than creative, approach that does not allow judges much freedom to impose their visions of justice on society. Moreover, it does not require judges to take on intellectual jobs that they are neither trained nor inclined to perform. The pragmatic benefits and comparative ease of this approach justify the law's central role in practical application of the Constitution, because it is otherwise not obvious why lawyers, as opposed to political theorists or historians, ought to be society's main expositors of constitutional principle.[58]

In addition, by restricting judges to the traditional tasks of the common law judge, common law constitutionalists argue that their method most effectively constrains judicial discretion—the supposed comparative

55. *See* Merrill, *supra* note 13, at 520-21. Merrill explains:

> [O]riginalism by its very nature requires that the interpreter comprehend and adopt the values, aspirations, and linguistic conventions of a society several steps removed in time from our own. This exercise in historical recreation also involves a rather Herculean feat—one that requires both extensive historical knowledge and severe intellectual discipline. One can fairly question whether the average judge or lawyer—a member of a profession notorious for its obsession with the bottom line and with tendentious renditions of history—is capable of carrying off this kind of inquiry.

Id.

56. *See id.* at 520 ("Normativism requires truly heroic assumptions about the powers of judges to reorder society in accordance with precepts like natural law, the interests of traditionally subordinated groups, public choice theory, or what is 'best' for the future.").

57. *See id.* at 521. Merrill characterizes the "more mundane set of intellectual skills" needed to engage in common law constitutionalism as "the stuff of the law office memorandum," requiring only the collection of precedents and the interpretation of actions taken by the other branches of government, related laws, and other evidence of social practices. *See id.*

58. *See* Strauss, *Common Law, supra* note 21, at 932 ("In fact, one great advantage of the common law approach is that it explains why trained lawyers—not historians, literary critics, philosophers, or political scientists—should play such a large role in constitutional interpretation."). Though one perhaps ought to question whether unelected judges, as opposed to publicly accountable officers or the people themselves, should be the most authoritative interpreters of the Constitution, there is little doubt that the paradigm of judicial supremacy currently governs our current practice. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004) (explaining history of judicial review in United States).

advantage of originalism.[59] Judges who approach their vocation from the common law perspective will be constrained by its characteristic institutional structures and norms. For example, common law judges will be careful to render decisions and write opinions designed to resolve specific concrete disputes, and they will not aim to make general social policy.[60] Common law judging also counsels respect for and honesty in dealing with the facts and record of a case. It is founded on collegial and deliberative decision making, which requires reliance on sources of interpretation that can appeal to judges of differing moral and political commitments.[61] Reliance on precedent is the method of interpretation that best fits the norm of fact-sensitive, ideologically neutral dispute resolution. All lawyers can unite in their commitment to the foundation of the rule of law—the elucidation and equal application of predictable, stable rules. In fact, as Strauss comments, originalists of a textualist bent cannot hope to deliver on their promise of a body of stable doctrine based on the original understanding of the document if judges do not commit to following precedent.[62] Only a firm commitment to reliance on precedent can mitigate the risk that judges will abandon the established reading of the Constitution and seek their own "better" reading.

D. *Two Models of Common Law Constitutionalism*

Despite their common principles, common law constitutionalists seriously diverge in their approach to interpretation. The disagreement centers on the question of whether common law constitutionalist judges may legitimately critique past practice and, if necessary, depart from the past and articulate new, more just rules. There are two primary models of common law constitutionalism that stem from their differing answers to this question.

The first, which Strauss calls "rational traditionalism," argues that judges must critically examine precedents, practices, and traditions to ensure that public law is reasonable. The second, which I call "common law traditionalism," holds that the true common law judge does not question the rationality or justice of established social practices. Rather, the common law judge ought to defer to established social consensus supporting a particular legal practice. Unless one can prove the existence of a genuine, long-standing social consensus rejecting a particular legal practice, judges should continue to uphold the practice. If, however, there is a historically rooted consensus establishing a new constitutional right or disapproving of a particular government practice, courts should base their decision on that consensus, even if it entails constitutional change.

59. *See* Strauss, *Common Law*, *supra* note 21, at 926-28.

60. *See* Young, *supra* note 18, at 693.

61. *See id.*

62. *See* Strauss, *Common Law*, *supra* note 21, at 926 ("The notion that the text of the Constitution is an effective limit on judges is plausible only if one assumes a background of highly developed precedent.").

1. *Rational Traditionalism*

The unavoidable question with regard to any legal theory that relies on deference to precedent or tradition is what a judge should do when confronted by a precedent that appears irrational or unjust. Strauss's position is clear: judges must critically examine precedents and tradition. Adherence to tradition cannot be an "iron rule"; instead, it must be placed on a "rational basis."[63] For Strauss, common law constitutionalism generally is "by no means hostile to innovation," even if this innovation is "undertaken frankly for reasons of what we would call justice, or fairness, or good policy."[64] Indeed, he concludes that "[t]here is nothing illegitimate about interpreting precedents in a way that candidly promotes good results; there is nothing even necessarily illegitimate about overruling precedents for that reason."[65]

Rational traditionalists do not find any virtue in deferring to an unjust tradition for the sake of tradition; rather, they treat precedent or tradition as presumptively correct and worthy of great respect, but not infallible.[66] Judges, thus, are not required to follow even well-established tradition or practice. They may innovate so long as such innovation is "undertaken with due regard for what has gone before; that is, with due regard for the limitations of abstract reasoning and for the value of experience."[67]

To the rational traditionalist, although abstract reasoning or moral principles are to be relied upon only with caution and care, they do play a critical role in common law judging.[68] Judges should certainly begin with

63. *See id.* at 895. As Strauss explains, "[t]raditionalism need not mean that all traditions are sacrosanct or that abstract argument is never to be accepted. If one has a great deal of confidence in an abstraction, it can override the presumption normally given to things that have worked well enough for a long time." *Id.*

64. David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 858 (2007) [hereinafter Strauss, *Genius of the Warren Court*].

65. *Id.*

66. *See* Strauss, *Common Law*, *supra* note 21, at 896-97. According to Strauss:

> [The common law approach] does not suppose that there is some independent value in adhering to past judgments that are by hypothesis wrong, which is compared to the value of making the right judgment. The idea of rational traditionalism is simply that we should think twice about our judgments of right and wrong when they are inconsistent with what has gone before. We adhere to past practices not despite their wrongness, but because we might be mistaken to think them wrong. It follows that if, on reflection, we are sufficiently confident that we are right, and if the stakes are high enough, then we can reject even a long-standing tradition.

Id. It is important to note that the definitions of right and wrong against which judges test the tradition must come from the judges themselves. When push comes to shove, therefore, the rational traditionalist approach is not substantively different than the moral philosophic approach. After all, where can our view of right and wrong come from if not from our philosophical or moral views?

67. Strauss, *Genius of the Warren Court*, *supra* note 64, at 858-59.

68. *See* Strauss, *Common Law*, *supra* note 21, at 900 ("Moral judgments—judgments about fairness, good policy, or social utility—have always played a role in the

precedent, tradition, or current practice. They, however, must also continually test these established practices against our society's views of equality, justice, fairness, and other foundational principles.[69] When these precedents or practices are found morally wanting, they must be amended or abandoned in favor of practices and policies more consistent with consensus views of right and wrong. Rational traditionalists claim that this explicit and unapologetic turn to moral and philosophical principle has the virtue of confronting difficult interpretive questions, particularly the question of whether we adhere to what we have done in the past, or do what is just instead of confusing the issue by turning the problem into one of historical reconstruction or a semantic game.[70] As rational traditionalists understand it, "in common law constitutional interpretation, the difficult questions are on the surface and must be confronted forthrightly."[71]

The latest iteration of rational traditionalism, however, attempts to moderate its radical nature by relying less on moral and philosophical speculation. The moral or philosophical principle may justify an innovation in the law, but this kind of change "can be most solidly justified if it is rooted in the past."[72] Thus, innovation is more easily justified when the seeds of change appear in previous cases. If, for example, the most recent cases in a line of precedent state that they are following the traditional rule, but their actual holdings narrow or refuse to expand the application of the rule, then there is evidence to believe that both judges and the larger society they reflect do not really approve of the rule and it should be discarded.[73] By relying on the hints contained in the earlier cases, judges can "use the past against itself" and more effectively justify, when "[a judge is] very confident that what has gone before is badly wrong," even a "sharp, nonincremental change."[74] At bottom, a rational traditionalist believes that the "common law approach cautions against change but does not preclude changes designed to bring about a more fair or more just world."[75]

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common law, and have generally been recognized as a legitimate part of common law judging.").

69. *See id.* at 902. No matter the vintage or strength of the tradition, "[m]oral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do, traditionalism must give way." *Id.* One should also keep in mind that "if the tradition is weak, equivocal, or unsettled, moral judgments play a correspondingly greater role." *Id.*

70. *See id.* at 928.

71. *Id.*

72. Strauss, *Genius of the Warren Court*, *supra* note 64, at 859.

73. *See id.* at 852-60. Strauss argues that the paradigm for the approach he suggests is Cardozo's famous opinion in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). *See id.*

74. *Id.* at 859-60.

75. *Id.* at 859. Strauss illustrates how this approach is applied by challenging the conventional understanding of *Brown*. *See id.* at 860-68. Rather than see the case, as many do, as the paradigmatic example of the moral philosophic approach, Strauss believes that *Brown* is best understood as a triumph of the common law

2. *Common Law Traditionalism*

The second model of common law constitutionalism adheres to the traditional understanding of common law jurisprudence, one that is founded on fidelity to established traditions and practices.[76] This understanding, its proponents argue, is rooted in two propositions regarding the

approach. Indeed, he asserts "*Brown* is *MacPherson*." *See id.* at 862. Although *Brown* condemns the moral wrong of segregation, it does not simply rely on moral arguments. Instead, the Court in *Brown* roots its holding in a series of precedents that had already begun to chip away at the fortress of segregation. *See* Brown v. Bd. of Educ., 347 U.S. 483, 490-95 (1954).

For example, in *McCabe v. Atchison, Topeka & Sante Fe Ry. Co.*, 235 U.S. 151 (1914), the Court invalidated an Oklahoma statute that required separate but equal railroad facilities for blacks but permitted sleeping, dining, and chair cars for whites, on the ground that the facilities as a whole were not truly equal. Then, in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the Court invalidated a state policy that denied blacks entrance into the University of Missouri Law School and instead offered to provide tuition funding for blacks to attend law school in neighboring states. The Court held that it did not matter if the legal education provided in other states was equal to that of Missouri, because the policy treated blacks unequally regardless. *See Gaines*, 305 U.S. at 345. The Court's refusal to accept a definition of equality that turns on whether the quality of the service provided by government is equal, and the Court's rationale that the fact of discrimination itself may constitute the legal harm—a stigmatic harm, in other words—is the key principle that makes *Brown* possible. Strauss argues:

> [In *Gaines*,] the Court was, in effect, holding that the provision of tangibly equal educational opportunities was not enough to satisfy "separate but equal." The state had to treat blacks and whites equally in some way that went beyond that. In this way, *Gaines* suggested that symbolism mattered, not just tangible equality. That principle was ultimately incompatible with "separate but equal."

Strauss, *Genius of the Warren Court*, *supra* note 64, at 865.

In 1950, just four years before *Brown*, in both *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950), the Court again held that even though the state could show substantial tangible equality in the education offered to white and black students, this tangible equality did not outweigh the harm caused by the nature of the racial classification. *See* Strauss, *Genius of the Warren Court*, *supra* note 64, at 866. Once this principle became firmly established in the law, it was a very short step to *Brown*'s conclusion that classification was by its nature constitutionally infirm. *See Brown*, 347 U.S. at 493-95. Though it cannot be denied that the *Brown* Court was both influenced by and relied upon moral considerations, Strauss argues that the Court could have shown that "the formal abandonment of the old doctrine was no revolution but just the final step in a common law development." Strauss, *Genius of the Warren Court*, *supra* note 64, at 867. Once the Court became repeatedly skeptical that it could find a case in which it would find segregated facilities equal, it was only a moderate step to find that separate could never be equal. The *Brown* Court, despite the dominant narrative, did not simply and creatively rewrite the Constitution to make it more consistent with a moral and philosophical commitment to equality. Instead, "[i]t was acting as a quintessential common law court." *Id.* at 868. It cannot be denied, however, that the meaning of the Constitution did change and, with it, the well-established traditions and practices of a significant portion of the nation.

76. *See* Sunstein, *supra* note 1, at 385-86. Cass Sunstein draws a similar, and useful, distinction between Burkean and rationalist minimalists: the former would be much more unwilling, for example, to create new rights. *See id.*

nature of the Founding—one widely and traditionally accepted, and another more recently propounded.

The first proposition is that, contrary to the principles of the English Constitution as explicated in action by the British Crown during the Revolution and in print by William Blackstone, the American revolutionaries rejected the idea of parliamentary or legislative supremacy. Instead, they believed that higher law—expressed in the language of natural law or natural rights—bound even a legislature and thus placed actual, concrete limits on what government could legitimately do. The classic statement of this idea comes from the political scientist Edward Corwin:

> There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery or declaration.[77]

The central idea of higher law constitutionalism—or, as Americans believe, "constitutionalism period"—is that there are certain principles that government simply may not transgress. A fundamental purpose of a constitution is to embody these principles in law. As Corwin notes, "the *legality* of the Constitution, its *supremacy*, and its claim to be worshiped, alike find common standing ground on the belief in a law superior to the will of human governors."[78]

The orthodox account of American constitutionalism, however, holds that this idea of higher law was subsumed in the minds of the Framers by the dominant principles of liberal political theory, especially as articulated

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77. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4-5 (Great Seal Books 1955) (1928). Other scholars provide more contemporary explanations of the American resistance to the idea of legislative supremacy. *See, e.g.*, ELLIS SANDOZ, REPUBLICANISM, RELIGION, AND THE SOUL OF AMERICA 59 (2006) ("Americans of the time would readily have embraced Aquinas's teaching that, if positive or human law departs from the law of nature, it is no longer law but perversion of law."); JAMES R. STONER, JR., COMMON-LAW LIBERTY 13 (2003) [hereinafter STONER, LIBERTY] ("Although Blackstone would, within a generation, replace Coke as the favorite authority on common law among Americans, it was understood that his account of parliamentary sovereignty was inapplicable here—it might even be said that the American Revolution was fought against the assertion of that principle in the colonies . . . ."); MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC 112 (1996) [hereinafter ZUCKERT, NATURAL RIGHTS].

78. CORWIN, *supra* note 77, at 5 (emphasis added).

by John Locke.[79] Corwin demonstrates how, through largely the agency of Blackstone, the principles of liberal theory were reduced to the central concept of popular sovereignty and its concrete embodiment, a written constitution made by the people.[80] The people, the story goes, use their sovereign power to write a constitution that transforms the traditional principles of higher law into positive, statute-like law that can be enforced by courts through judicial review—without those courts having to engage in the more amorphous and, under the principles of popular sovereignty, seemingly less legitimate common law adjudication.[81]

This narrative constitutes the core of originalism and textualism. Common law traditionalists do not dispute that popular sovereignty played an important role in the legal and political theory of the Constitution. What they dispute is that the Revolution and the Constitution were the products solely of Lockean liberalism. Other traditions, they argue, played at least as important a role in the thought of the Framers.

This resistance to the notion that the American regime is all about liberalism leads to the second proposition that undergirds common law constitutionalism. In recent decades, there has been a profusion of scholarship dedicated to unearthing and explaining the sources of the political thought of the Framing.[82] The common thread in this new scholarship is the recognition, even among those who believe liberalism is the core of the American regime, that both the Revolution and the Constitution were

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79. *See id.* at 3 ("It is customary nowadays to ascribe the *legality* as well as the *supremacy* of the Constitution—the one is, in truth, but the obverse of the other—exclusively to the fact that, in its own phraseology, it was 'ordained' by 'the people of the United States.'") (emphasis added).

80. *See id.* at 84-89.

81. *See id.* at 89. According to Corwin:

> [I]n the American *written Constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*. . . . Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian.

Id. (emphasis added).

82. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 333-552 (1975) (discussing role of Machiavellian thought in Pre-Revolutionary American history and discourse); JOHN PHILIP REID, IN DEFIANCE OF THE LAW: THE STANDING ARMY CONTROVERSY, THE TWO CONSTITUTIONS AND THE COMING OF THE AMERICAN REVOLUTION (1981); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-87 (1969). Other scholars have both built upon and critiqued these earlier works. *See, e.g.*, THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988); JAMES L. STONER, JR., COMMON LAW AND LIBERAL THEORY 4-5 (1992) [hereinafter STONER, LIBERAL THEORY]; ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 108-17 (critiquing REID, *supra* note 82). *See generally* THE AMERICAN FOUNDING AND THE SOCIAL COMPACT (Ronald J. Pestritto & Thomas G. West eds., 2003).

the products of multiple sources. These sources are known collectively as the "American amalgam."[83]

Scholars differ about what constitute the various strands of the amalgam. Zuckert, for example, identifies four major strands, including Whig constitutionalism, religion, republicanism, and natural rights liberalism.[84] Sandoz identifies five, including the Bible, republicanism, the classics, Lockean liberalism, and common law constitutionalism.[85] Stoner weighs in with a list including, but not limited to, Christianity, capitalism, liberalism, natural law, and the common law.[86]

With regard to the formation and interpretation of the Constitution, in particular, common law traditionalists emphasize, as one would suspect, the important and often neglected influence of the common law on American constitutionalism. As Stoner describes, "the common law has had a formative influence on the American character and a recognition of what it is and has become is an essential part of understanding our constitutionalism, our possibilities, and ourselves."[87] The case for common law traditionalism thus depends on understanding the role common law constitutionalism played in the thought underlying the Revolution, and how that thought was embodied in the Constitution.

A leading proponent of common law traditionalism, McConnell argues that the traditional paradigm of the Revolution portrayed the philosophical dispute underlying the conflict as pitting the British belief in the absolute sovereignty of Parliament versus the American belief in natural rights derived from liberal political philosophy.[88] According to the traditional account, the Americans believed that all men were created equal and were thus endowed with certain natural rights, including life, liberty, and the pursuit of happiness. The Americans established governments based on the consent of the governed to secure these rights. The British government deprived the colonists of their rights to life, liberty, and property. In addition, by abolishing or interfering with colonial legislatures, they took away the colonists' right to govern themselves. All of these deprived rights belonged to the Americans by nature of having been born human and, thus, created equal. These rights were abstract ones, based on liberal political theory. Consequently, scholars argue that the content of these rights evolves when the consensus understanding of the abstract ideas that underlie them evolves. If we have a different understanding of liberty than did the Founders, the contours of the right to liberty must also change.

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83. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 95 ("The amalgamation that occurred in America was unique in the world, and led America to a unique path of political development . . . .").

84. *See id.* at 6.

85. *See* SANDOZ, *supra* note 77, at 56.

86. *See* STONER, LIBERAL THEORY, *supra* note 82, at 4-5.

87. STONER, LIBERTY, *supra* note 77, at 10.

88. *See* McConnell, *Tradition*, *supra* note 16, at 175-77.

McConnell rejects this understanding of the Revolution and believes that the Framers did as well. The Framers, rather than rebelling only to secure abstract natural rights, sought primarily to restore their inheritance of British rights and privileges.[89] The Americans, in McConnell's view, saw themselves as "historical animals," not as theoretical ones.[90] They based their Revolution on the theory of "Whig constitutionalism." The "central tenet" of this theory was "that the power of the Crown was limited by the 'ancient constitution,' which was defined by custom and had existed (in the [W]hig legal imagination) from time immemorial."[91] The "ancient constitution" consisted of an established body of law protecting fundamental rights and limiting government. Rather than the product of the "natural reason" of any philosopher or legislator, this law was founded in the immemorial common law and custom of the people of England. Judges did not create this law themselves; rather, they declared its existence upon discovering sufficient proof of a long-standing custom or practice. Once declared, the sovereign was unable "to annul the 'fundamental'—which is to say the immemorial—rights of the people."[92] Because the sovereign did not grant these rights, he could not take them away. Custom, therefore, was seen as the most secure foundation for rights, and only custom could change custom.[93]

This historical method, called by its great practitioner, Sir Edward Coke, the use of "artificial reason," takes its bearings from the limitations of natural human reason. Because human affairs are so complex and human beings so variable, it is impossible for one mind or even a set of minds to discern the right answer to difficult questions of law. Rather than relying on their own inadequate reason, judges should rely on the experience of the community as a whole. Reliance on the long-standing consensus of the polity produces good law because "[i]f a practice is adopted by many different communities, and maintained for a considerable period of time, this provides strong evidence that the practice contributes to the common good and accords with the spirit and mores of the people."[94] Indeed, any polity that ignores its long-standing traditions and practices puts itself at risk. Without sufficient attention to the maintenance of a common culture and traditions, human beings, in the words of Burke, "become little better than the flies of summer."[95]

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89. *See id.* at 195 ("Whatever the precise formulation of the origin of rights—from custom, nature as perceived by reason, divine law, or a mixture of them all—the reference was always back into time: Americans wanted to preserve their ancestral liberties.").

90. *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1135 (1998).

91. McConnell, *Tradition*, *supra* note 16, at 176-77.

92. *Id.* at 185.

93. *See id.*

94. McConnell, *Right to Die*, *supra* note 4, at 683.

95. BURKE, *supra* note 35, at 174.

Whether one agrees with the Burkean understanding of law does not matter so much as the fact that the Framers believed it. They understood that the long-standing traditions and practices of the English people created legal rights that courts were obliged to protect. James Wilson, who McConnell calls the "most sophisticated lawyer" among the Framers, argued that "'the most significant, and the most effectual' source of law is 'custom,' because custom 'involves in it internal evidence, of the strongest kind, that the law has been introduced by common *consent*; and that this consent rests upon the most solid basis—experience as well as opinion.'"[96] The Americans believed that the ancient constitution, therefore, consisted of a body of legal rights established by custom that neither the Parliament nor the King could legally deny.

In sum, despite using the term "Revolution," the Americans did not rebel against the British Constitution; instead, they saw themselves as the defenders of it. They fought to protect their ancient rights, not to gain themselves new ones based on theoretical innovation.[97] What is crucial for our purposes is that, after establishing their own governments, including the national government, the Framers did not dispense with the ideas of the "ancient constitution" or "artificial reason." They continued to believe that the long-standing traditions and practices of the people created rights that the government was obliged to protect. The concept of fundamental law that could not be breached by the sovereign applied just as much to the democratic governments established by the Americans as it did to the British regime.[98] The Framers, therefore, were committed to the idea—as much in their own constitutions as in their interpretation of the British one—that "the most fundamental law, including their most cherished rights and liberties, is a product not of deliberate legislative action but of custom."[99] Rights, therefore, may arise just as much out of tradition as they can out of text.

The most important doctrinal implication of the traditionalist approach is that it provides a method for the definition and protection of unenumerated rights. Indeed, McConnell finds a textual warrant for the employment of the traditionalist approach in the jurisprudence concern-

96. McConnell, *Tradition*, *supra* note 16, at 186 (emphasis added).

97. *See id.* at 196. According to McConnell:

> The purpose of the Revolution, and later of the Bill of Rights, was not to create new rights, not to expand rights, and still less to authorize an unelected judiciary to effect social change, but to defend and secure the rights we already had. The Founders adhered to a theory of fundamental rights as rooted in the experience and customs of the people rather than the grace of the sovereign.

Id.

98. *See id.* at 197 (concluding that, because common and constitutional law went hand in hand, "the entire structure of government presupposed a preexisting set of rights and responsibilities"). "It was the duty of the government to secure these rights, and the institutions of government were designed to make them more secure." *Id.*

99. *Id.*

ing the Fourteenth Amendment.[100] Though the most textually and historically plausible foundation for the protection of unenumerated rights may be found in the Privileges and Immunities Clause of the Fourteenth Amendment, the Court's decision in *The Slaughter-House Cases*[101] foreclosed the use of the Clause. The Court's error in that case, however, did not alter the commitment of the Framers of the Constitution and of the Fourteenth Amendment to protect the privileges and immunities of American citizens, which are precisely those legal rights established by long-standing tradition and practice. Since *Slaughter-House,* the Court has repeatedly recognized that there are some rights not specifically identified in the text of the Constitution and its Amendments that deserve protection. The Court has avoided the damage done by *Slaughter-House* by relying on the Due Process Clause of the Fourteenth Amendment as the source for the protection of substantive, unenumerated rights.

McConnell concedes that in cases such as *Lochner v. New York*[102] and *Roe v. Wade,*[103] the Court, in ostensibly interpreting the Due Process Clause, illegitimately used the moral philosophic approach to find rights that were not traceable to the consent of the governed. He argues that the Court, however, has recently rejected the moral philosophic approach and has properly adopted the common law traditionalist approach as the proper method for the definition and protection of unenumerated rights under the Due Process Clause of the Fourteenth Amendment. The Court's doctrine, he concludes, now provides that "an individual may challenge the denial of any right that has been recognized by a sufficiently large number of states for a sufficiently long period of time so that it can truly be said to be part of the fabric of American liberty."[104]

McConnell argues that this common law traditionalist approach to substantive due process jurisprudence became firmly established doctrine in the Court's 1997 opinion in *Washington v. Glucksberg.*[105] In *Glucksberg,* the Court rejected a claim for the protection of the right to assisted suicide.[106] More importantly, the Court articulated a methodology, anchored in a traditionalist approach to constitutional interpretation, for determining whether the asserted right is supported by a sufficiently long-standing practice or tradition to warrant its protection under the Due Process Clause. McConnell identifies three core elements of this doctrine. First, "a person challenging a law on substantive due process grounds must satisfy a 'threshold requirement' of demonstrating that the 'challenged

100. *See* McConnell, *Right to Die, supra* note 4, at 692.

101. 83 U.S. (16 Wall.) 36 (1873).

102. 198 U.S. 45 (1905).

103. 410 U.S. 113 (1973).

104. McConnell, *Right to Die, supra* note 4, at 696.

105. 521 U.S. 702 (1997).

106. *See id.* at 728.

state action implicates a fundamental right.'"[107] Second, "this threshold requirement may be satisfied only by showing either that the asserted right is textually based (like the right of freedom of speech), or that it is 'objectively, deeply rooted in this Nation's history and tradition.'"[108] Finally, this inquiry "must be based on 'a careful description of the asserted fundamental liberty interest.'"[109]

Unlike the moral philosophic approach and the common law rational traditionalist approach, this method for evaluating claims for the protection of an unenumerated right does not authorize judges to decide these cases by referring to their own political opinions. Rather, the Court requires judges to decide cases by examining the objective facts of history.[110] Without historical proof, therefore, of a long-standing tradition, the issue reverts to the political branches for a legislative answer to the problem. McConnell concludes that this common law traditionalist approach to deciding unenumerated rights claims is "wise, workable, and firmly grounded in principles of American constitutionalism."[111] The wisdom of this approach is that it provides a check on states or other jurisdictions that violate rights rooted in long-standing tradition or custom, even if the rights are not embodied in constitutional text, while not licensing judges to create and protect rights supported only by their personal view of justice.[112]

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107. McConnell, *Right to Die*, *supra* note 4, at 670 (quoting *Glucksberg*, 521 U.S. at 722 (1997)).

108. *Id.* (quoting *Glucksberg*, 521 U.S. at 703).

109. *Id.* at 671 (quoting *Glucksberg*, 521 U.S. at 721).

110. *See id.* at 672-73.

111. *Id.* at 681.

112. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1116 (1990) [hereinafter McConnell, *Revisionism*]. In addition to providing a method for identifying and protecting unenumerated rights, the traditionalist approach provides the key to understanding how McConnell interprets the proper scope of rights protected in the text. One illustration of this importance of the traditionalist approach can be seen in McConnell's work on the original understanding of the Free Exercise Clause of the First Amendment. McConnell is the foremost scholarly advocate for the argument that the Free Exercise Clause empowers the judiciary to consider and grant claims for religious exemptions from generally applicable laws. In making this argument for a strong free exercise right, he concedes that the text does not conclusively answer the exemption question either way. *See id.* Consistent with the traditionalist approach, McConnell contends that the meaning of free exercise, lacking a definitive answer in the text, can best be determined by carefully examining the historical, legal, and philosophical context in which the framers of the amendment worked. In his major work on this question, McConnell criticizes the "ahistorical" manner in which the question has previously been examined by courts and commentators, and undertakes "a fresh look at the historical record" in order to "correct misconceptions that have arisen from the ahistorical manner in which free exercise exemptions have been created and defended." *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) [hereinafter McConnell, *Origins*].

McConnell exhaustively analyzes the historical record, including the place of religion in the different colonies before the Revolution, the treatment of the right

III. CRITIQUING COMMON LAW CONSTITUTIONALISM

Advocates for both models of common law constitutionalism claim the allegiance of the current Court, and both can make a case that the Court's interpretive product reflects their approach. The most revealing example of the Court's use of both approaches is its substantive due process doctrine. As we have just seen, McConnell persuasively demonstrates that *Glucksberg* employs the common law traditionalist approach in finding that the nation's traditions and practices do not justify establishing a fundamental right to assisted suicide—no matter what reason may counsel on the subject. Strauss can just as persuasively argue that the Court adopts the rational traditionalist approach in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[113]

The heart of the joint opinion in *Casey* is, on the one hand, its adherence to the doctrine of stare decisis, and, on the other hand, its argument that substantive due process claims cannot be resolved by any simple formula.[114] The *Casey* Court rejected both sole reliance on the text of the Fourteenth Amendment and the Bill of Rights, as well as reliance on a narrow understanding of history and tradition.[115] The joint opinion instead contends that, in judging claims of unenumerated rights, the Court must exercise "reasoned judgment."[116] The Court's exercise of that reasoned judgment—and what makes it reasoned rather than judicial fiat—is,

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to free exercise of religion in the early state constitutions, judicial treatment of such questions before the Constitution, and the history of the First Amendment. This analysis leads McConnell to conclude that:

> (1) [The] exemptions were seen as a constitutionally permissible means for protecting religious freedom, (2) . . . constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause, and (3) . . . exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God.

Id. This historical record supports the doctrinal conclusion that "the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." *Id.* at 1512. Though he admits that this historical evidence is not unequivocal, he concludes that it does support an interpretation of the Free Exercise Clause that authorizes judges to grant religious exemptions from generally applicable laws. Thus, McConnell advocates interpreting text-based rights in accordance with the traditions and practices of the American people. In the case of the right to free exercise, this traditionalist approach may result in a right with broader scope than the Framers originally intended. *See id.*

113. 505 U.S. 833 (1992).

114. *See id.* at 849 (discussing need for "reasoned judgment); *see also id.* at 854-69 (discussing doctrine of stare decisis). The joint opinion could not be clearer that adherence to precedent is the foundation of our system of law, stating "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.* at 854.

115. *Id.* at 847 (citing Michael H. v. Gerald D., 491 U.S. 110, 127-28 & n.6 (1989)).

116. *See id.* at 849.

first, its reliance on evolving precedent. The right to choose an abortion can be justified because "in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection."[117] The establishment of the abortion right can also be justified because reason tells us that the abortion decision involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[118] The right to make this decision, therefore, must be recognized under the Fourteenth Amendment because that Amendment protects "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[119] In short, in defining the rights provided special protection by the Fourteenth Amendment, judges must reason from analogy to rights already deemed protected, and ask whether the claimed right fits within the conceptual understanding of liberty articulated in the precedential cases. Judges must engage in this reasoning with the understanding that if the right fits within that concept, it should be protected even if there are extant traditions or practices that oppose the exercise of the right.

The Court's somewhat awkward embrace of both common law approaches can be discerned in its latest substantive due process decision, *Lawrence v. Texas*.[120] In *Lawrence*, Justice Kennedy combines elements of both methods of common law reasoning. For example, he relies upon *Casey* and the contraception line of cases that led to *Roe* in order to analogize the right to engage in a homosexual relationship to the rights protected in the earlier cases.[121] Justice Kennedy then concludes that the choice of whether to enter into such a relationship is also an intimate and personal one that is central to one's autonomy and dignity.[122] This case by case expansion of the abstract principle of personal autonomy is the core of the rational traditionalist approach and could, by itself, justify the decision in *Lawrence*.

The Court, however, also supports its decision with a different kind of common law reasoning—one closer to the reasoning employed in *Glucksberg* and advocated by common law traditionalists like McConnell. Justice Kennedy first quarrels with the account of our tradition regarding the criminalization of homosexual sodomy offered by the Court in *Bowers v. Hardwick*.[123] He then makes a positive case that our current practices and more recent tradition demonstrate an evolving consensus in our society that the state has no legitimate interest in using the criminal law to inter-

117. *Id.* at 852.
118. *Id.* at 851.
119. *Id.*
120. 539 U.S. 558 (2003).
121. *See id.* at 566.
122. *See id.* at 573-74.
123. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578.

fere with such private relationships.[124] When one examines the pattern of legislation and enforcement in the states, the work of leaders in the legal profession such as the American Law Institute, and the treatment of the issue in other Western nations, Kennedy concludes that our society has experienced an "emerging awareness" that liberty includes the right of adults, gay or straight, to engage in private, consensual sexual conduct.[125] This reliance on evidence of how society has treated the claimed right is consistent with the common law traditionalist approach, no matter how traditionalists may disagree about what the practices and traditions discussed in *Lawrence* truly demonstrate about predominant social norms.

Even if one is skeptical about the propriety of common law constitutionalism, it is sensible to concede that the Court's current practice draws significantly from both models of the common law approach. Critics of common law constitutionalism thus bear the burden of demonstrating that not merely an abstract theory of interpretation but also that the Court's actual practice is wrongheaded and should be significantly reformed.

I contend that this burden can be met because both models of common law constitutionalism fail on their own terms. Rational traditionalists claim that their approach permits judges to modify the meaning of the Constitution in accordance with changing social norms, while also ensuring that they stay within their legitimate role as judges rather than becoming the illegitimate philosopher-kings all too often produced by the moral philosophic approach. I demonstrate, however, that the rational traditionalist understanding of the common law approach strips it of all that constrains judges from implementing their personal views of law in violation of the core principle of consent. At the end of the day, this deracinated understanding of the common law is no different than the moral philosophic approach.

Common law traditionalists, on the other hand, argue that their approach is rooted in the genuine thought and practice of the Framers—it is, in essence, an originalist critique of originalism—and that our constitutional regime provides that custom and tradition may serve as a source of law in addition to the text. While there is both a great deal of truth to the revisionist account of the Framing relied upon by the common law traditionalists, and an important place for the traditional common law in constitutional interpretation, I will show that the foundational principles of our constitutional regime require that decisions of the people's elected representatives prevail unless there is clear textual authority for trumping that popular will. A deferential form of originalism and textualism far

124. *See Lawrence*, 539 U.S. at 572-78.

125. *See id.* at 572 (finding that recent historical record demonstrates "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

more closely reflects the Framers' understanding of constitutionalism than common law traditionalism.

A. *The Problem with Rational Traditionalism*

Rational traditionalists like Strauss believe that their common law method enables judges to engineer prudent change in constitutional meaning while avoiding the legitimacy pitfalls of the moral philosophic approach. Rather than answer interpretive questions from their subjective perspective, common law judges look outside themselves to precedent, authoritative practices, and customs. Deference to these external sources of law produces law that is both stable and allows for measured change as social norms shift and are reflected in custom and practice. This reliance on custom and practice also endows judicial decisions, even those resulting in constitutional change, with democratic legitimacy because custom is a form of popular lawmaking. Common law constitutionalism, therefore, explains how judges can both change the meaning of the Constitution and still claim to act as judges.

This argument is persuasive as far it goes. The problem with rational traditionalism is that it extends beyond this traditional common law rationale, and empowers judges, on their own authority, to critique and alter even firmly established traditions and practices. Once judges begin to "critically examine" precedent, custom, traditions, and practices, particularly from the perspective of philosophical concepts such as liberty or equality, judges are no longer employing the common law method but are instead using a more prudent, disguised version of the moral philosophic approach. Though it is true that the rational traditionalists counsel judges to work hard to "discover" the rational principle they are vindicating in prior precedent, the rational traditionalists do not deny that judges need not anchor their revision of benighted doctrine and tradition in precedent—they only should try to do so, if at all possible.

What matters most is that rational traditionalists start with the premise that judges ought to constantly be testing the propriety of precedent against some external standard.[126] They prefer that this standard arise from an interpretation of precedent and tradition, rather than from purely abstract ideas of justice.[127] It is clear, however, that what the rational traditionalist judges actually do is abstract a particular principle from history and then systematically vindicate that principle in future cases, even if it means current practices and live traditions must fall by the wayside. Rational traditionalists argue that reading history at this level of generality provides judges with the necessary freedom to criticize tradi-

126. *See* Young, *supra* note 18, at 702.

127. *See id.* at 704 ("[T]he traditionalist judge derives the standard of justification from a more general understanding of history. From a Burkean standpoint, directing the judge to focus upon the lessons of history is likely to be more reliable than abstract theorizing, even if those lessons still require some degree of discretionary interpretation.").

tion, modify constitutional doctrine, and, if necessary, to vindicate the principles important to our tradition.[128]

Whatever may be said in favor of this method of constitutional interpretation, it is not the traditional common law approach. Rational traditionalists, in their zeal to make the law consistent with notions of justice, wherever derived, jettison the very characteristics of the common law that guarantee judicial legitimacy in a legal regime that distinguishes between law and politics. The traditional common law drew from two principal sources of legitimacy, one more concerned with the method of legal reasoning and the other with the substance of the law applied. The rational traditionalist approach discards both of these sources of legitimacy, making it no different than the moral philosophic approach.

The first pillar of the traditional common law was its embrace of what Coke called "artificial reason," from which, as discussed earlier, he distinguished reliance on abstract human or natural reason.[129] Artificial reason is the province of lawyers, not philosophers, as lawyers are experienced and skilled professionals who are expert in their knowledge and understanding of existing law. Judges do not answer questions by looking to principles outside the law; rather they look to the reason *within* the law. To Coke and the common law traditionalists, there is really no such thing as a case of first impression or a gap in the law to be filled by judges' best understanding of what justice requires. Instead, the law, rightly and skillfully understood, provides the answer to every legal question, including the ostensibly difficult ones.[130] This law is not the product of judicial ap-

128. *See id.* at 709. Cass Sunstein points out that common law constitutionalists, in seeking a source of constraint and objectivity in reliance upon tradition, face the following problem:

> Traditions are hardly self-defining, and this point severely complicates the Burkean enterprise. When a court attempts to follow a tradition, what, exactly, is it supposed to follow? Should a tradition be characterized at a high level of generality (involving, say, respect for intimate personal choices) or a low level (allowing, say, government interference with such choice when traditional morality is being violated)? . . . Might not any such characterization have an evaluative element, and might the task not be a simple matter of discovery?

Sunstein, *supra* note 1, at 381. Rational traditionalists like Strauss do not deny that their approach permits, and even encourages, such an evaluative element.

129. *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1689 (1994) ("A principal key to Coke's historical jurisprudence is his conception of artificial reason, that is, crafted reason, reason that is brought into being not by nature but by human effort and human art."). As Coke wrote,"'[t]he common law itself' . . . 'is nothing else but reason which is to be understood [as] an artificial perfection of reason gotten by long study, observation, and experience' . . . . [N]o man, out of his own private reason, ought to be wiser than the law, which is the perfection of reason.'" *Id.* at 1690 (quoting SIR EDWARD COKE, SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND § 97b (1836)).

130. *Cf.* McConnell, *Tradition*, *supra* note 16, at 180 ("Coke was unwilling to invoke abstract reason or principles of natural justice even for the decision of new cases where custom and precedent provided no clear answer.").

plication of natural reason or subjective notions of justice to legal questions. It arises out of the existing customs, traditions, and practices of the people—it is a form of government by consent.[131]

Judges, therefore, do not criticize the established precedent, custom, traditions, or practices that make up the law; rather, they discover and apply the law that already exists.[132] Discovering what the law requires in a particular case is no easy or mechanical task.[133] At no point, however, may judges, seeking the law in the tapestry of precedent, custom, and tradition, conclude, through some sort of "rational" or "critical" analysis of the law, that the law is unjust and should be changed. Judges who criticize and foster innovation in the law—as the rational traditionalists expect and encourage—employ natural, not artificial, reason in deciding cases. Judges who decide based on natural reason or philosophy, rather than through discovery and application of the law, undermine the very basis of their own authority. Judges are not given power because they are smarter or more expert in philosophy than their fellow citizens; instead, we give them power because they know, respect, and promise to implement the law.[134] Rational traditionalists, like advocates of the moral philosophic approach, are therefore not genuinely applying the common law method or even, in the common law's view, acting as judges at all.

The rational traditionalist approach is inconsistent with the substance of the traditional common law as well as its method. The common law cannot be reduced to the mere technique of reasoning by analogy. Instead, the common law was understood as the positive law embodiment of the traditional, unchanging natural law.[135] This natural law is the classical rationalism of Aristotle, Cicero, and Aquinas. Its fundamental assumption is that there exists a permanent and distinctive human nature, and that law can and should be derived from the fact of that nature.[136] But this natural law is not applied directly; it only can be applied by judges if it is part of the positive law. Coke made clear, for example, that "'the law of nature is part of the law of England.'"[137] He did not believe that English

131. *See* MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY 206 (1996); *see also* SANDOZ, *supra* note 77, at 74.

132. *See* STONER, LIBERTY, *supra* note 77, at 11 ("It was settled in the rhetoric of common law, and held to be fixed in the character of a common-law judge, that in deciding cases, it was the judge's duty to discover, not invent, what law governed the case at hand.").

133. *See* McConnell, *Tradition*, *supra* note 16, at 181 ("[Artificial reason] is based on a deep, intuitive, almost aesthetic, sense of the way in which the new case 'fits' into the rich body of the law.").

134. *See id.* ("If cases are to be decided by natural and not artificial reason, then judges, whose position is based entirely on their superior understanding of the law, have no more authority than anyone else.").

135. *See* ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW 189 (1997).

136. *See id.* at 172-73; *see also* SANDOZ, *supra* note 77, at 58-59 (describing natural law's relationship to common law).

137. Berman, *supra* note 129, at 1692 (quoting Calvin's Case, 77 Eng. Rep. 377 (K.B. 2007)).

law *was required* to conform to an external source of law. Rather, he believed that the natural law was law *because* it was incorporated into the law of England; natural law was binding not because it was right, but because it was English law.[138] This relationship between the positive and the natural law led to the conclusion that English law was consistent with what is right and just—making it all the easier for judges to carry out their duty to follow that law and keep it stable.[139] Thus, the natural law serves a subsidiary role; rather than undermining positive sources of law, it supports them.[140]

The conservative function of the natural law should not surprise contemporary American jurists and lawyers. Given the assumption that the common law of England was consistent with the natural law, one should expect judges to most often decide that a present rule is legitimate and should be upheld. Contrary to the rational traditionalists' defense of the application of liberty and equality to undermine traditional social legislation, the natural law was a powerful tool, for example, in defending laws that embodied the traditional social order, including protection of the traditional family and extensive property rights.[141]

In sum, the natural law is more than a source of external legal and political principles that judges may employ to revise the law. It is also a positive barrier to judicial innovation. Indeed, one of the core tenets of the natural law is, because law is based on a permanent and knowable human nature, the law itself, being objectively correct, is also permanent and—until changed by a popular form of lawmaking not involving the judiciary—should be applied by the judges.[142] The natural law, in other words, requires judicial modesty and rejects judicial supremacy.[143] The rational traditionalists, therefore, seek the authority of the common law while ignoring its constraints.[144] By reducing the common law to a mere

138. *See id.* ("Coke did not deny the validity of natural law, he considered that its legal effect in England is determined by its having been incorporated into the English common law."); *see also* CLINTON, *supra* note 135, at 99.

139. *See* Clinton, *supra* note 135, at 99-101.

140. *See* R.H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 416-17 (2007) ("One expects the normal case to be one in which a statute or other local law was tested against the natural law. But on looking, one finds the reverse: the normal case was one in which a statute was supported by the law of nature.").

141. *See* STONER, LIBERTY, *supra* note 77, at 4.

142. *See* CLINTON, *supra* note 135, at 149 ("Naturalism, properly understood, because of its reliance upon universalizable, intersubjectively verifiable constitutional and legal norms, which are the product of 'experience, not logic,' always counsels a healthy judicial *restraint*.") (emphasis added).

143. *See id.* at 173.

144. *See* STONER, LIBERTY, *supra* note 77, at 3-4. As Stoner states:

> [T]hey admire the techniques available in common law for judge-initiated legal improvement and have invented whole theories explaining how common-law judging ought to proceed. What they like about common law is its process of rational change, not any particular maxims, rules, or principles; . . . [they] seek to use the rational techniques of common-law argumentation to reverse the old common law itself, whose sub-

technique, and then not even following that technique faithfully, the rational traditionalists are merely trying to dress up their moderate variant of the moral philosophic approach in a more tasteful common law outfit.

Just as they are committed to a common law approach that has little resemblance to the authentic common law, the rational traditionalists' pseudo-Burkeanism ignores the substance of Burke's real thought. Burke, in reality, was a committed adherent of the traditional common law and its method of judging.[145] Let us let Burke speak for himself:

> But a Judge, a person exercising a Judicial Capacity—is neither to apply to original Justice alone; nor to a discretionary application of it. He goes to Justice and discretion only second hand, and through the medium of some superiours. He is to work neither upon his opinion of the one nor of the other. But upon a fixed Rule, of which he has not the making, but singly and solely the application to the Case. The very Idea of Law is to exclude discretion in the Judge.[146]

Burke, as the common law did, certainly provided for and advocated reform of the law whenever it became unjust or could be improved. That reform, however, must originate from those who make law, not from those who interpret it—the people and their representatives.

B. *The Problem with Common Law Traditionalism*

1. *Introduction*

The arguments for common law traditionalism are far more difficult to refute than those for rational traditionalism. To begin, as adherents of the common law approach, common law traditionalists truly have the courage of their convictions. Once they discover a tradition or practice has been sufficiently established to be considered law, they will treat it as such without subjecting that tradition or practice to "rationalist" critique. The traditionalists, in other words, understand and apply Coke's method

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stance they see as a repository of traditional economic and moral teachings if not downright prejudice.

Id.

145. *See* FRANCIS CANAVAN, THE PLURALIST GAME 52 (1995) (quoting Burke).

146. *Id.* Cass Sunstein suggests that Burke did not develop an account of judicial review. *See* Sunstein, *supra* note 1, at 372. That may be true in the narrow sense, as the British Constitution does not provide for the kind of judicial review associated with a written constitution, but Burke's commitment to the traditional natural law understanding makes it apparent he would never have countenanced a judiciary that exercises the kind of power claimed by the rational traditionalists. *See* CANAVAN, *supra* note 145, at 52. To Sunstein's credit, he does recognize that Burke's skepticism regarding speculative human reason naturally leads to skepticism about the institution of judicial review. *See* Sunstein, *supra* note 1, at 372. In addition, he notes that some self-described Burkeans are what he calls "Democratic Burkeans" because they are "unwilling to allow any kind of rationalistic revolution through the courts." *Id.* at 376. My point is that Burke himself made clear that he, at least, was a "Democratic Burkean." *See* CANAVAN, *supra* note 145, at 52.

of artificial reason and defer to the established traditions and practices of the people.

Further, common law traditionalists are correct on two very important questions. First, they are correct that historians, political theorists, and legal scholars, have, until relatively recently, incorrectly understood the American Revolution and Constitution as exclusively the product of liberal political philosophy or natural rights theory. Also, they are correct that these same scholars have ignored other vital sources of thought in the American Founding. Even the most ardent proponents of the centrality of the natural rights philosophy agree that American revolutionary thought consisted of far more than Enlightenment political theory.[147]

147. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 92. One of the Founders' sources that has not been given its due is "Protestant Christianity in the form of a political theology that mingled religious revival, keeping the faith and fighting the good fight, providential purpose, and a palpable sense of special favor or choseness." SANDOZ, *supra* note 77, at 55-56. It is no coincidence that much of Michael McConnell's work concerns the modern denigration of the importance of religion to the Founding generation. In interpreting the Religion Clauses, there has been a pronounced tendency both in academia and on the Court to see Thomas Jefferson's liberal understanding of the role of religion in government as characteristic of the consensus of the Framers. Jefferson, following the teachings of Locke, evinced a profound unease with not only official establishment of religion by government but also with the desire to reduce the influence of religious belief, particularly passionate belief, in politics. After all, in one of his most important letters, written near the end of his life, Jefferson described the achievement of the Declaration of Independence and the American Revolution as freeing the Americans "from monkish ignorance and superstition." *Id.* Jefferson's intellectual mentor, Locke, believed that "religious strife stems from the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others' province" and therefore was "concerned not only with limiting the powers of government, but also with limiting the purview of religion." McConnell, *Origins*, *supra* note 112, at 1432-33. Locke's "solution was to keep the peace by making religion irrelevant to the things of this world." *Id.* at 1445. Over time, both Locke and Jefferson hoped the reduction in the importance of religion to civil life would encourage the universal acceptance of "a mild, tolerant, and rationalistic brand of religion;" indeed, "Jefferson advocated religious freedom, in large part, as a means of combating religious enthusiasm and advancing the day when all would become adherents of Unitarianism." *Id.* at 1449-50. Given that a large part of their political project was to reduce the influence of religion over public life, it comes as no surprise that both Locke and Jefferson were hostile to the idea of granting religious exemptions to generally applicable laws. They believed that in a clash between the individual's religious exemption from generally applicable law and the government policy embodied in the law, the government policy should prevail. *See id.* at 1435.

McConnell's work, however, authoritatively demonstrates that this Jeffersonian understanding of the relationship between religion and the state was by no means the only, or even the dominant thinking at the time of the Founding. The popular understanding of the right to free exercise, for example, especially among the evangelical Protestant sects, was quite different from that of Jefferson. Religious Americans did not see the church-state problem as one caused by religion; instead, they saw it as a problem of government interference with religion. *See id.* at 1445-46. Thus, rather than approach the question of religion and government from the perspective of the government, most of the faithful approached the question from the point of view of the religious believer. Because a person of true faith

An understanding of the Framers' political theory that only emphasizes the protection of individual rights neglects a fundamental aspect of the Framers' thinking. While they sought to prevent government deprivations of individuals' life, liberty, and property, the Framers were not solely concerned with the rights of individuals. Their political theory also emphasized the importance of self-governing communities, an idea described as "classical republicanism."[148]

When examined from this perspective, a well-governed political community does not merely exist to secure private goods; it must also be dedicated to the common good.[149] To achieve the common good, members of the community must act as citizens. They are not mere rights holders; they must also recognize and carry out their duties to the community. In other words, they must possess civic virtue. The Framers clearly recognized that their regime required this kind of commitment to the civic order.[150] A republican regime that is only dedicated to facilitating private interests cannot long survive.

Most importantly for my purposes, the common law traditionalists are also correct that a particularly vital source—in their view, the most vital—of American constitutionalism has not been given its proper place in the liberal accounts of the Founding. This source is the traditional common law or Whig constitutionalism. The liberal account maintains that the

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could not comply with a state law to perform an action contrary to his faith, the failure to grant exemptions from such laws would require the systematic prosecution of the members of that faith. If society truly desires that the rights of conscience and free exercise of religion be respected, then it must recognize exemptions from laws that burden that exercise. *See id.* at 1446.

This generous understanding of religious freedom and the need for its protection was not only held by members of evangelical faiths. James Madison, the father of the Constitution, drafter of the Bill of Rights, and Jefferson's political partner, also believed that an understanding of religious freedom began with the recognition that a person of faith could never subordinate that faith to the dictates of the state. Any real protection of the natural right to conscience must recognize that the dictates of religious faith come before those of the state. Thus, this theory of religious liberty, unlike that of Jefferson, would support the grant of religious exemptions from generally applicable laws. *See id.* at 1453.

For my purposes, it is unnecessary to examine which theory of religious liberty was more important to those who drafted the First Amendment. What matters to us is that McConnell and the other critics of those scholars who exclude all viewpoints other than the Jeffersonian are correct: an account of the Founding that does not acknowledge the vital role played by fervent religious belief and believers in the Revolution is fatally flawed. The truth is closer to that pointed out long ago by Tocqueville: in America, the spirit of liberty does, and must, coexist with the spirit of religion.

148. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 94.

149. *See id.*

150. *See* THE FEDERALIST No. 55, at 383 (James Madison) (Edward G. Bourne ed., 1937) ("As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.").

Revolution was fought to secure a new set of rights, defined by political theory. The Framers, however, did not understand themselves as fighting merely for an abstract theory of rights; they fought for—and when they prevailed, sought to secure—the traditional rights of Englishmen. The Framers were not complete innovators; they drew on the legacy of the Englishmen who fought for rights from Magna Carta to the Glorious Revolution.[151]

The common law traditionalists, however, take this argument far beyond establishing that the Framers rooted their arguments in positive, historical terms, as well as in philosophical, natural ones. Common law traditionalists hold two propositions. They argue: (1) that the Whig or common law arguments for rights were the actual arguments that animated and justified the American Revolution; and (2) that Whig constitutionalism, or the common law method that established the rights of Englishmen, survives to this day as a vital source of lawmaking in the modern American constitutional order, including, if not especially, the judicial articulation and enforcement of unenumerated rights under the Fourteenth Amendment.

Any considered examination of the historical record reveals that the Framers drew upon diverse sources of thought in reforming their societies and governments. Indeed, Americans synthesized arguments from the common law, natural rights theory, and religion. Common law traditionalists' constitutional arguments from the beginning of the Revolution drew not only from Locke, but also from sources of "customary law, natural law, and divine law."[152] In their zeal, however, to redress the historical imbalance in favor of liberal political theory, common law traditionalists have gone too far in their effort to denigrate the importance of the natural rights philosophy. They have also gone too far in their parallel attempt to establish their version of common law or Whig constitutionalism as both the preeminent source of American constitutionalism and a legitimate, functioning source of American constitutional law.

In my critique of their arguments, I will first demonstrate that the story of Whig constitutionalism that forms the core of their common traditionalist approach is historically inaccurate and theoretically flawed. Their version of common law constitutionalism—if it ever existed—was rejected even in Great Britain in the years before the American Revolution. The effective causes of that rejection were the need to explain and legitimize the Glorious Revolution and its establishment of a constitutional monarchy governed largely by Parliament, and, theoretically, the rise of liberal political theory in the age of Enlightenment. Common law theorists like

151. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 98.

152. *See* McConnell, *Tradition*, *supra* note 16, at 193. McConnell concludes that the Framers' synthesis emphasized their belief in the Whig constitution: "Whatever the precise formulation of the origin of rights—from custom, nature as perceived by reason, divine law, or a mixture of them all—the reference was always back into time: Americans wanted to preserve their ancestral liberties." *Id.* at 195.

William Blackstone, the most influential legal theorist in America before the Revolution and for many decades after, attempted to integrate the principles of liberal political theory, as authoritatively articulated by John Locke, into the English common law constitution. True Whig constitutionalism was not opposed to liberal constitutionalism; it largely *was* liberal constitutionalism. The common law traditionalists, by arguing that the Americans rejected the Blackstonian merging of common law and liberalism, are in effect asking us to accept the implausible notion that the American revolutionaries were less committed to Lockean principles than their British adversaries.

The reality is that the American Revolution was a true revolution, not a disappointed British Restoration. While it was not the only element of American revolutionary thought, liberal theory—not Whig constitutional thought—was the foundation for American political theory.[153] It is Lockean liberalism, not Whig constitutionalism, Protestant theology, or classical republicanism, which "has been remarkably able to assimilate and reshape [the other] elements into a more or less coherent whole."[154] Once it is understood that a belief in Lockean political principles was the common ground for all the different schools of thought that contributed to the American Founding, the flaws in the common law traditionalist approach to constitutional interpretation become readily apparent.

2. *The True Whig Constitution*

To the common law traditionalists, the core principle of Whig and common law constitutionalism is that the sovereign, whether it is a monarch or a legislature, is bound by law. This binding law includes the ancient liberties of the common law and the Whig constitution, defined not only in positive sources like the Magna Carta but also by custom and tradition.[155] It has been common to trace the rise of both judicial review and judicial supremacy to Coke's seeming elevation of common law rights over the authority of the legislature.[156] No matter their position on judicial supremacy, the common law traditionalists rely a great deal on an understanding of Coke that common law rights—in addition to those embodied in constitutional text—may trump the work of a sovereign legislature.

In evaluating the continuing authority of this theory of common law supremacy, one must first begin with the understanding that, seen even in

153. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 240-41 (concluding that natural rights philosophy was—and continues to be—"the senior partner" in American synthesis).

154. *Id.*

155. *See* McConnell, *Tradition*, *supra* note 16, at 176-77. The paradigmatic formulation of this idea comes in Coke's opinion in *Doctor Bonham's Case*, 8 Co. Rep. 107a (1610), where he states that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void." *See* SANDOZ, *supra* note 77, at 58 (quoting *Doctor Bonham's Case*).

156. *See id.*

the context of common law jurisprudence, the theory is a radical notion that was considered a bold innovation with potentially far-reaching implications.[157] In fact, it is unclear whether Coke himself took his common law jurisprudence as far as his acolytes have.[158] Even if Coke did claim a powerful review power for the judiciary, however, it is unlikely that such power survived the fusion of common law and liberal political theory.

The origins of liberal political science, at least in its English version, lie in the work of Thomas Hobbes.[159] Despite his advocacy of vesting near-absolute power in a monarch, Hobbes devised the foundational concepts—including the state of nature, natural rights, the importance of property and commerce, and a government focused on the protection of rights rather than the saving of souls—of the liberal political order to come.[160] Hobbes devised his new political science precisely to replace the traditional common law order, which he despised for what he considered its irrationalism.[161] Hobbes believed that reliance on precedent as the primary source of law leads to unclear law and, consequently, social conflict and misery.[162] The solution is to place the legal system on scientific foundation, one that relies on statutes—commands—emanating from an authoritative sovereign.[163]

Fortunately, the English did not ultimately resolve the conflict between lodging power in the Leviathan and the preservation of common law liberties as Hobbes advised. Instead, the English fought to establish a government limited by the rule of law, culminating in the constitutional order established in the Glorious Revolution. In the aftermath of the Revolution, however, the English faced both an intellectual and a political problem: The forced removal of James II from the throne and the estab-

157. *See* Berman, *supra* note 129, at 1687-88.

158. *See id.* at 1693. For example, although Coke always read legislation in the context of the common law, seeking to integrate legislation into the complex edifice of English law, historically understood, he "never doubted the binding force of legislation." *See id.* James Stoner, in a meticulous reading of *Doctor Bonham's Case*, has shown that the common reading of the opinion is incorrect. *See* STONER, LIBERAL THEORY *supra* note 82, at 49-68; *see also* Berman, *supra* note 129, at 1686 n.92 (agreeing with Stoner's reading of *Doctor Bonham's Case*). Coke did not, Stoner argues, void the law in the case in anything like the sense of modern judicial review; rather he argued that the statute at issue in the case should be read in accordance with the principles of the common law. *See* STONER, LIBERAL THEORY, *supra* note 82, at 53. In modern legal terms, then, Coke's actions in *Doctor Bonham's Case* should be understood more as statutory interpretation than as an application of constitutional law. *See id.* at 60. No doubt Coke intended to vindicate what he believed were the fundamental principles of the English constitutional order, but the fact remains that he did not find it necessary to invalidate the statute in question and, at very least, was not clear whether judges possessed the authority to invalidate statutes. *See id.* at 61-62.

159. *See* STONER, LIBERTY, *supra* note 77, at 13.

160. *See* STONER, LIBERAL THEORY, *supra* note 82, at 71, 72.

161. *See id.* at 84.

162. *See id.* at 84-85.

163. *See id.* at 85.

lishment of a new political order headed by Parliament had changed the English constitutional system. It became intellectually difficult to argue that the new constitutional forms and liberties secured were a product of the ancient order. Under that order, for example, there is no right to resist the monarch even if he has violated your rights, as rights came not from nature but rather from the sovereign, the source of all law.[164] In the official justification of the Revolution, the English Declaration of Rights, the English rebels based their case on the fiction that James II had "abdicated" the throne. The rebels, therefore, were able to pretend that they were merely settling the proper succession to the Crown and acting in accordance with the old order.[165] It was suspected that the Revolution was far more of an innovation than was admitted, but the principles of the English constitutional order had no theory by which such a reform could be justified.[166] This lack of a justifying theory also complicated the political problems of how to persuade one's fellow citizens of the legitimacy of the political order, as well as how to instruct them on the proper functioning of that order.

As the order produced by the Revolution settled in, John Locke took it upon himself to solve these problems by justifying the English constitutional order by means of a reformulated liberal political science, a synthesis of the natural rights philosophy and English law.[167] Locke's goal was to provide a rational foundation for English "practices that would necessarily remain contested and insufficiently grounded so long as their foundation remained obscure, so long as they seemed to rest on history, precedent, or custom," which he viewed as the source of instability in the regime.[168] Conversely, like his fellow cautious liberal, Montesquieu, Locke also wanted to avoid the mistakes made by the imprudent Hobbes and make liberalism—the rule of reason—safe for existing regimes by making it part of the existing legal and political order, rather than upending them.[169] In his *Second Treatise of Civil Government*, Locke laid out the foundational principles of the origin and purpose of government, and sketched out a framework of a government based on these principles.[170] Locke posited that government, unsurprisingly, bore a significant resemblance to the post-Glorious Revolution English constitutional order.

According to Locke, the first principle of legitimate political power is that human beings are born in a state both free and equal, in that all human beings are "creatures of the same species and rank" who are "born

164. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 99, 105.

165. *See id.* at 98-99; *see also* MICHAEL P. ZUCKERT, LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY 289 (2002) [hereinafter ZUCKERT, LIBERALISM].

166. *See* ZUCKERT, LIBERALISM, *supra* note 165, at 289.

167. *See* STONER, LIBERTY, *supra* note 77, at 13.

168. ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 111.

169. *See* STONER, LIBERAL THEORY, *supra* note 82, at 135.

170. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1690).

to all the same advantages of nature and the use of the same faculties."[171] Furthermore, no human being is granted by God "by an evident and clear appointment an undoubted right to dominion and sovereignty."[172] The burden of natural equality, on the other hand, is that with no one appointed by God to rule, all humans exist in a "state of nature," a state without government.[173] The lack of a fair and known rule of law, impartial judges to interpret it, and strong, disinterested executives to enforce it, makes rights in the state of nature "very uncertain and constantly exposed to the invasion of others."[174] Locke, far from being anti-government, maintains that "civil government is the proper remedy for the inconveniences of the state of nature."[175]

This government must be formed by the consent of the governed because "being by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent."[176] This consent will be valid only if it is offered for the purpose of preserving one's rights, particularly to life, liberty, and property.[177] A government that is formed for this purpose will govern by "established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges who are to decide controversies by those laws; and to employ the force of the community" to execute these laws.[178] Locke concludes that "all this [is] to be directed to no other end but the peace, safety, and public good of the people."[179]

Although Locke's argument affords the people a wide discretion in deciding which form of government will best preserve their rights, he provides some particular guidance on which forms of government will best serve the purpose of protecting rights. As we have seen, Locke suggests

171. *Id.* Because all human beings were born equal, they also have an equal right to preserve themselves. This right to self-preservation necessitates that a person preserve their own and, if they consult their reason, others' natural rights, including those to life, liberty, and property. *See id.* at 123-24. Because, however, "self-love will make men partial to themselves and their friends," human beings in the state of nature are incapable either of maintaining "an established, settled, known law, received and allowed by common consent to be the standard of right and wrong and the common measure to decide all controversies between them" or, wanting "a known and indifferent judge," to resolve disputes or execute judgments fairly, dispassionately, or effectively. *Id.* at 127, 184.

172. *Id.* at 122.

173. *See id.*

174. *Id.* at 184.

175. *Id.* at 127.

176. *Id.* at 168.

177. *See id.* at 168-69 ("The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another . . . .").

178. *Id.* at 186.

179. *Id.*

some form of the separation of the legislative, judicial, and executive power. With regard to the all-important legislative power, Locke, for example, argues that it must govern by "promulgated established laws" that apply equally to all and are "designed for no other end [than] the good of the people"; that it cannot delegate its power to another body; and, most important for our concerns, that it may not tax without the consent of the people or their representatives.[180] It is this final principle of governance, which suggests that the legislature must always be, at least in part, popular. With regard to liberty, property, or other rights, Locke suggests that these rights may "be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require."[181]

Also central to our examination of American revolutionary thought is Locke's solution to the problem of a government that does not protect its citizens' rights. Locke argues that when the government breaches its trust, the power the people had entrusted to the government "devolves to the people who have a right to resume their original liberty, and by the establishment of a new legislative, such as they should think fit, provide for their own safety and security."[182] If there is a dispute between the governors and the governed over whether the former have betrayed their trust, Locke could not be any clearer about how that dispute should be resolved. He writes, "The people shall be judge."[183] Locke thus provided a theoretical framework for both the rebellion that produced the Glorious Revolution, and the form of government that the leaders of that revolution established: A legislature (the principal part of which was popular), an executive authority, and independent judges, with each branch dedicated to the preservation of a body of individual rights.

I wish to emphasize two often neglected parts of the Lockean framework. First, once a people enter into civil society, individuals consent to regulation of their natural rights for the common good of society. Because these rights are no longer absolute, it is up to the legislature to decide what the common good requires, unless the Legislature refuses to protect the right entirely.[184] Second, the right to revolution plays a critical role in the Lockean framework. One vainly searches Locke for any other effective limit on the power of the Legislature other than the right of the people to dissolve the government and install a new one.[185] As

180. *See id.* at 194.

181. *Id.* at 185-86.

182. *Id.* at 233.

183. *Id.* at 245 (noting Locke's belief that, because people put trust in their elected officials, they also have power to discard them when that trust is broken).

184. *See* FRANCK, *supra* note 131, at 192, 197 (discussing lack of any limitation on Legislature other than right of revolution); *see also* STONER, LIBERAL THEORY, *supra* note 82, at 149 (discussing Locke's permissive stance on legislative regulation of property).

185. *But see* ZUCKERT, LIBERALISM, *supra* note 165, at 297-99 (noting that critics argue that Locke did not believe in unlimited sovereignty as did Hobbes, thus equating idea of legislative supremacy with Leviathan); Strauss, *Common Law, supra*

Franck comments, "the judicial power is nearly invisible in the *Second Treatise*" and the "only recourse Locke provides in the case of a government gone consistently astray from the law of nature is the threat of the dissolution of the government."[186] Locke's view on judicial review goes hand in hand with his view of legislative supremacy. Because he articulates no limits on the Legislature short of revolution, he cannot have any theory of judicial review, and certainly advocates nothing like the one suggested by the common law traditionalists.[187]

Locke's lack of detailed discussion about the judicial power or about how his principles cohere with the specific doctrines of English law made it important that subsequent scholars undertook a more comprehensive effort to integrate Lockean theory and British common law. William Blackstone, in his *Commentaries on the Laws of England*, written from 1760 to 1765, took on that precise project. His "difficult task" is defined well by Stoner: "to reconcile not just in theory but in detail the principles of liberal political theory and the practices of English common law."[188]

We know that Blackstone built his account of English law on a Lockean foundation because his discussion, particularly of public law, is suffused with Lockean ideas and terminology. For example, he holds that human beings equally possess "natural liberty," defined as "a power of acting as one thinks fit, without any restraint or control, unless by the law of nature."[189] That law of nature, as it does for Locke, commands a human being to use his natural liberty to "pursue his own true and substantial happiness" as the Creator "has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire

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note 21, at 885-87 (attributing originalist arguments based on liberal notions of popular sovereignty to what Strauss calls "authoritative" or "command" theory of law). As Judge McConnell replied to my presentation of an earlier version of this paper, the usual response to an invocation of Locke's commitment to legislative supremacy is to deny that he had any such commitment and to argue that we who interpret Locke as a legislative supremacist are confusing him with Hobbes. Locke did not believe in unlimited sovereignty—no one who believes in the right of revolution could. He, however, argues that limited government did not foreclose a conclusion that, from the legal perspective, Parliament, as opposed to the courts, had the final word in lawmaking. *See* ZUCKERT, LIBERALISM, *supra* note 165, at 306. This power, in other words, may not be unlimited, but it must be located somewhere; on this point Hobbes and Locke did in fact agree. *See id.* ("Locke's supreme legislature is in many ways closer to Hobbes's sovereign than to current 'Lockean' theory."). Where they disagreed was on where this sovereignty was vested. *See id.* Hobbes believed it should be vested in Leviathan, while Locke believed ultimate sovereignty was vested in the people, but was exercised only through their right to revolution.

186. FRANCK, *supra* note 131, at 196.

187. *See* CLINTON, *supra* note 135, at 160.

188. STONER, LIBERAL THEORY, *supra* note 82, at 163; *see also* Michael P. Zuckert, *Social Compact, Common Law, and the American Amalgam*, *in* THE AMERICAN FOUNDING AND THE SOCIAL COMPACT, *supra* note 82, at 41 [hereinafter Zuckert, *Social Compact*].

189. 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

and pursue the rule of right, but only our own self-love, that universal principle of action."[190]

In order to effectively pursue that happiness, however, one must enter into political society. According to Blackstone, "every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish."[191] The valuable goods purchased by one's agreement to be subject to law are secured civil liberties, which are the "*residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals."[192]

The English are especially if not uniquely fortunate that their positive civil liberties, "the rights of the people of England," correspond to what ought to be and, in the past, largely were, the proper rights of mankind. While these rights "in most other countries of the world" are "being now more or less debased and destroyed, they . . . may be said to remain, in a peculiar and emphatical manner, the rights of the people of England."[193] Here then is the link between the common law and natural rights theory: the people of England, under their ancient constitution, may be entitled to their rights as positive law, granted to them in centuries past by the sovereign. They, are, however, fortunate that these positive rights are the proper civil embodiments of the rights they are entitled to by nature.[194]

The English are so richly endowed in their rights because of the genius of their system of common law. Indeed, Blackstone shares Coke's preference for common law over statutory law.[195] But for Blackstone, the true genius of the common law lies not in its ancient heritage but in its origin in the consent of the governed, a core Lockean concept.[196] Abiding by the notion that "customs owe their original to common consent," law derived from custom is often more firmly based on the reality of the lives of the people and is therefore more legitimate and effective.[197]

Nonetheless, the same liberal theory that can justify the superiority of the common law also holds that it must give way if the Legislature repeals or revises the law.[198] The common law may be based on a form of con-

190. *Id.* at *40-41.

191. *Id.* at *125.

192. *Id.* at *129 (emphasis added).

193. *Id.*

194. *See* Zuckert, *Social Compact*, *supra* note 188, at 41-42.

195. *See id.* at 60-61.

196. *See id.* (noting Blackstone's agreement with natural rights philosophers in belief in establishment of customs by consent).

197. *See* BLACKSTONE, *supra* note 189, at *77; *see also* Zuckert, *Social Compact*, *supra* note 188, at 60.

198. *See* Zuckert, *Social Compact*, *supra* note 188, at 60.

sent, but it is a passive one. Statutes produced by a legislature, with at least some popular element, are the product of active or express consent.[199] They are a more authoritative expression of the people's will and therefore must be treated as superior, even if they revise or repeal common law rights.[200] Blackstone leaves no doubt regarding his belief that, in the English regime, "the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth."[201] Consequently, "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no."[202] One therefore should not be allowed to turn to the courts for help against a legislature determined to repeal or modify common law rights.

Blackstone, unlike Locke, has no clear answer about how one legitimately deals with a legislature determined to invade rights. Here his attempt to synthesize Locke and the English constitution reaches an impasse: the English constitution forbids a right to revolution but Locke's political theory is incomplete without it. Reluctantly, Blackstone concedes that extralegal resistance by the people may be the only practical method to limit abuses by government.[203] He does not pretend that revolution is legitimate or legal, but at bottom and with ambivalence aside, his position is closer to Locke than not.[204]

In short, by the time of the Revolution, and in reality well before, it was clear that the true Whig constitution was not based on the Cokean caricature relied upon by the common law traditionalists. Since the Glorious Revolution, the English constitution was understood as a synthesis between the traditional common law and the new liberal political science. Four elements of this synthesis are important to understanding the American version of the synthesis of common law and liberalism. First, when entering political society, one consents to regulation of one's natural rights. In return, one receives secured civil rights. Second, common law rights are these civil rights, the core of one's natural rights that are not given up. Third, a legislature may regulate these rights as it believes neces-

199. *See* FRANCK, *supra* note 131, at 206 ("[T]he proof that the common law rests on tacit consent and not on some inherent judicial authority is that express consent (i.e., a statute) always takes precedence when in conflict with the common law.").

200. *See id.*

201. BLACKSTONE, *supra* note 189, at *90.

202. *Id.* at *91.

203. *See* FRANCK, *supra* note 131, at 204-05 (noting similarities between Locke and Blackstone regarding right of revolution as check on governmental abuse of power).

204. *See id.* at 204 ("In short, tempered in its presentation by his conservatism and moderation, Blackstone's teaching on revolution is in principle indistinguishable from Locke's."). I would not necessarily put the point as Franck does; I would say that Blackstone's position is practically the same as Locke's. As for principle, Blackstone adheres to English law's proscription of rebellion.

sary for the common good, but it cannot take away the natural right entirely. Finally, the remedy for such an abuse of power is the right to revolution. There was no place in the Whig constitution for judicial review of the constitutionality of legislation.

3. *The American Amalgam and Constitutional Interpretation*

I now turn to the question of how Americans integrated the disparate elements that made up their political thought and culture. One way to approach the issue is to ask whether liberal political theory played a larger role in the thought of the Americans than it did for the post-Glorious Revolution English. To accept the common law traditionalist position, one must believe that the American revolutionaries were, in fact, less committed to liberal principles than were the English. The traditionalists argue that the Americans believed that the common law rights included in the "ancient" constitution could not legally be regulated by Parliament, and consequently there was a legal remedy for American grievances. To accept this proposition, one must reject the constitutional principle of legislative supremacy. This principle, however, is fundamental to the thought of Locke and Blackstone; rejecting it means rejecting not an authoritarian version of the English constitution, but liberalism itself.

In fact, the Americans were, as the traditional view teaches, more committed to liberalism than the English and could not justify, or perhaps even conceive of, their rebellion against English taxation and other alleged violations of rights without understanding their rights under English law through the lens of liberal political theory. The nub of the conflict involved the issue of whether Parliament possessed the authority to tax the Colonies. The British government made a plausible argument that the English constitution, in the Declaration of Rights, makes clear that it may tax all British subjects if Crown and Parliament agree.[205] The Americans insisted that, no matter the text of the Declaration of Rights, Parliament could not tax the Americans because they were not directly represented in that body.[206] This position only makes sense if one reads and understands the English constitution through the prism of natural rights theory.[207] The Declaration of Rights must be read to require actual representation before taxation, as no other interpretation will satisfy the liberal principle of consent. If Parliament could tax the colonists without their actual consent, they would not be equal and free citizens.[208] The American attach-

205. *See* ZUCKERT, LIBERALISM, *supra* note 165, at 286 ("The Declaratory Act says no less: The colonies are presumed bound and subject to all relevant acts of king and Parliament.").

206. *See id.* at 286-87 (noting colonists' view that lack of representation in Parliament meant they were not subject to taxation by Parliament).

207. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 115 ("The Americans consistently interpret the constitution in light of the natural rights position, in contrast to the English themselves who interpret it in terms of the very different conception of the ancient constitution and the mixed regime.").

208. *See* ZUCKERT, LIBERALISM, *supra* note 165, at 287.

ment to liberalism continued to manifest itself during and after the Revolution not only in passionate concern for rights, which could be a product of common law thinking, but also in a consistent commitment to popular sovereignty, which is best explained by a belief in liberal principles.[209]

Understanding the centrality of liberal political principles of the Founding only brings us to the beginning of wisdom regarding American political thought. What must be explained, given the truth of the common law traditionalist insistence on the diversity of sources underlying the Founding, is how these different ways of thinking managed to come together into a workable whole. To understand "the American amalgam," one must first separate two aspects of the natural rights philosophy or Lockean liberalism.

The first ideas that form the basis of the natural rights philosophy are what I call the principles of political obligation. Locke himself called these principles "'the original of societies and the rise and extent of political power.'"[210] The second set concerns "'the art of governing men in society.'"[211] These are the principles of political practice. It is important to separate out these two categories of ideas—the principles of political obligation and the principles of political practice—because each school of thought that comprised the American mind accepted the Lockean principles of political obligation. The ground of their difference with liberal theory concerned principles of political practice. It is this distinction between the two sets of principles that explains why it is possible to say that liberal theory was not the sole theoretical foundation of the regime, although it was the most important element. The assimilative character of the natural rights framework should come as no surprise; Locke devised it to synthesize the different elements in his political culture into a stable constitutional regime.[212]

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209. *See id.* at 290 (noting foundations of continued belief in liberal rights of American citizens in scheme of republican government). Zuckert states:

> The political innovativeness of the Americans found expression above all in a principled commitment to republicanism, that is, to government drawn from the great body of the people and operating according to the principle of majority rule. This commitment to republicanism meant that the political order underwritten in and supported by the English Declaration of Rights was definitively rejected as illegitimate: no king, no nobles, no politically empowered clergy.

Id.

210. STONER, LIBERAL THEORY, *supra* note 82, at 144 (quoting John Locke's 1720 essay, *Some Thoughts Concerning Reading and Study for a Gentleman*).

211. *Id.*

212. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 98-99 ("The new natural rights philosophy had an amazing power to sweep up and assimilate these older things; indeed, John Locke, the chief architect of the new philosophy, seems to have gone out of his way to formulate a political philosophy that would do just that.").

The liberal principles of political obligation are the principles articulated in the Declaration of Independence, the founding document of the American regime.[213] These principles are presented as a straightforward logical proof and are familiar to any student of Locke. All men are created equal in the sense that no man is by nature born to rule another. Because they are so created, they are endowed by their Creator with certain inalienable rights, including life, liberty, and the pursuit of happiness. To secure these rights, human beings, as they must given their natural equality, form governments by the consent of the governed. If the governments formed fail to secure these rights, it is the right of the people to alter or abolish these governments and establish new ones that will secure these rights.[214]

These principles were the common creed for each of the schools of thought that formed the American synthesis. In other words, the Framers believed in Whig constitutionalism or integrated Protestant theology into their political thought only to the extent these belief systems were consistent with the liberal principles of political obligation. If some part of Whig constitutionalism was inconsistent with liberal principles of political obligation, Whig thought was altered to follow the natural rights understanding, not the other way around.[215] In short, all schools of thought accepted the fundamental premises of the Revolution; natural rights thinking provided the common ground where all could stand together.[216]

The very real differences between the various paradigms animated the debate over proper principles of political practice, not obligation. In other words, while all agreed that government existed to protect natural rights, advocates of the different modes of thinking differed both on how government should translate these rights into civil rights and on how ultimately to protect these rights. For example, liberals such as Jefferson believed that sound political practice, and thus the effective protection of rights, required that religion be removed as much as possible from politics. Those Americans who, unlike Jefferson, believed that strong religious faith was a prerequisite for ordered liberty, argued that government

213. *See* Andrew C. Spiropoulos, *Natural Right and the Constitution: Principle as Purpose and Limit*, 13 ST. LOUIS U. PUB. L. REV. 285, 288-90 (1993) [hereinafter Spiropoulos, *Natural Right*]. "The Founders linked rights with consent because, following John Locke, they believed that the first axiom of politics was that all men are created equal." *Id.* at 289.

214. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

215. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 117 ("What of the ancient constitution and historic rights that was consistent with the natural rights philosophy, the Americans retained. What was not, they jettisoned or modified.").

216. *Cf.* Young, *supra* note 18, at 624 (arguing that Robert Bork, Antonin Scalia, and other prominent jurisprudential conservatives are not truly conservatives at all, but rather believers in "ideas about human rationality, democracy, and the social contract that are more consistent with classical liberalism"). The obvious problem with Young's argument is that America's tradition is largely a product of the ideas of classical liberalism; if one wishes to conserve the foundations of America's regime, it is difficult not to be a classical liberal.

should encourage and, in some places, establish religion. Disagreement about this question did not shake belief among either group in the principles of the Declaration. Similarly, Jefferson and other liberals advocated abolishing institutions long embedded in the traditions and practices of England, such as entail and primogeniture, because they viewed such practices as hostile to a liberal regime. Not unexpectedly, partisans of Whig constitutionalism objected to this liberal reform, arguing that these devices were part of their English birthright. Again, both parties did not disagree that the ultimate goal was the securing of natural rights; rather, they disagreed about how best to secure these rights in practice.

The centrality of liberal principles of political obligation becomes evident when one examines the statements of those revolutionary actors who, because of their professed theoretical commitments, should have been opposed to liberal principles, but instead supported them. For example, one would not expect Protestant ministers to support liberal principles because of their likely discomfort with the liberal notion that if government does not perform to the satisfaction of the governed, the people may remove it and replace it with another. This right to revolution is utterly at odds with the traditional Christian teaching that the established temporal authorities receive their mandate from God and should not be resisted.[217] When one examines the sermons of the Revolutionary period, however, one finds sermon after sermon supporting Lockean principles of political obligation, including the right to revolution.[218] The best explanation for such an apparent anomaly is that, even among those with the strongest possible commitment to Protestant theology, in articulating the core ideas of the Revolution, liberal principles came first.

We find the same situation regarding the advocates of Whig constitutionalism. For example, in 1763, before the idea of separation from Great Britain was even a glimmer in anyone's eye, one would have expected the colonists to rely on pure Whig arguments in justifying their claims that they were being denied the rights of Englishmen. At that point, there was no rhetorical need to include in any petitions addressed to the Crown any arguments referring to Lockean political theory.[219] When, however, we turn to James Otis's *The Rights of the British Colonies Asserted and Proved*, the first important salvo in the rhetorical war with Great Britain, we find not a pure Whig discussion, but instead the following:

> The *end* of government being the *good* of mankind, points out its great duties: it is above all things to provide for the security, the

217. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 162.

218. *See id.* at 150 ("[T]he preachers spoke out regularly and vociferously on politics, and . . . spoke the language of Locke and the natural rights philosophy."); *see also* STEVEN DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 135 (1990) (finding that "most Americans before and after 1763, and especially in New England, 'absorbed' Lockean political ideas *with* the Gospel").

219. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 108.

> quiet, and happy enjoyment of life, liberty, and property. There is no one act which a government can have a *right* to make, that does not end to the advancement of the security, tranquility, and prosperity of the people. . . .
>
> . . . .
>
> The form of government is by *nature* and by *right* so far left to the *individuals* of each society, that they may alter it from a simple democracy or government of all over all, to any other form they please. Such alteration may and ought to be made by express compact . . . .[220]

The influence of Locke on Otis's work is obvious. Thus, in a work whose very purpose was to claim British rights, the argument was largely based on the liberal principles of political obligation.

How did the Americans understand the relationship between the traditional rights of British citizens and the natural rights of Locke? Much as Blackstone did.[221] The Americans saw the traditional rights of Englishmen, such as trial by jury and the right to due process, as the practical embodiments of natural rights.[222] If these traditional civil rights were taken away, the natural rights of the Americans—which are protected through the provision and enforcement of these civil rights—will be put at risk. The success of the American Revolution, especially as compared to the that of the French, in achieving fundamental political reform without causing a destructive upheaval in the larger society is due in no small part to the fact that "the Americans preserved the inherited legal order, and with it most of the fabric of inherited society, precisely because they had come to see their natural rights/social compact political philosophy to be deeply congruent with their rights under the common law."[223]

Again, where there was a potential conflict between one school of thought and the core liberal principles, the other set of ideas was altered to preserve the primacy of the natural rights philosophy. This alteration is particularly evident in the case of Whig constitutionalism, which, regardless of whether people were deprived of their traditional rights, did not authorize them to alter or abolish their government.[224] The leaders of the Glorious Revolution, in drafting the Declaration of Rights, were careful not to assert such a right, claiming not that they removed James II from

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220. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1765), *reprinted in* THE ESSENTIAL BILL OF RIGHTS, *supra* note 147, at 142-43 (emphasis added).

221. *See* Zuckert, *Social Compact*, *supra* note 188, at 42. In fact, much of Blackstone's prodigious popularity in America can be attributed to the sophistication and utility of his synthesis of liberal theory and common law. *See id.*

222. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 110.

223. *See* Zuckert, *Social Compact*, *supra* note 188, at 42.

224. *See* ZUCKERT, NATURAL RIGHTS, *supra* note 77, at 99-100.

the throne, but that James had "abdicated the government."[225] Thus, there must be something distinctive about American political thought that provides for the possibility of a revolution, something that is not present in traditional Whig constitutionalism. The heart of American political thought is the commitment to the natural rights philosophy. It is this philosophy that supplies the standards to judge the legitimacy of one's political institutions.

There is, then, an American synthesis. The nature of that synthesis must be understood accurately if we are to base a theory of constitutional interpretation on it. Any theory of constitutional interpretation must recognize the primacy of the liberal principles of political obligation. Any approach that violates these core principles cannot be considered legitimate. Common law traditionalism fails this test. The illegitimacy of the traditionalist approach is particularly revealed in its apology for the judicial protection of unenumerated rights.

To understand why a doctrine that empowers judges to identify and protect unenumerated rights is inconsistent with the political theory of the Framers, we must understand how this theory explains the role of both individuals and government in the protection of rights. The shared premises of Lockean political theory and the Declaration of Independence, as we have seen, hold that once the task of securing these rights is turned over to the government, they are no longer protected directly as *natural* rights; they are transformed into *civil* rights and may be modified by the government for the benefit of the common good. This modification of rights, however, may only take place with the consent of the governed, expressed either directly or through their representatives.

Under our system, therefore, life, liberty, and property are not absolutely protected. The government may regulate them, but only with due process—meaning with consent of the governed. Thus, the effective protection of one's natural rights depends upon the members of the political society taking full advantage of their right to consent to or to oppose the government's proposed regulation of civil rights. Without active involvement by the citizens of a republic, one's rights become insecure. It is this need for what republican theorists call "civic virtue" for the protection of natural rights that creates the common ground between liberalism and classical republicanism. If the government, lacking the discipline imposed by an active citizenry, fails to protect one's rights, the only solution left under liberal theory is the right of the people to alter or abolish the government.[226]

Our regime, therefore, subjects the question of how natural rights will be defined and protected to political debate. The requirement that rights may only be limited with the consent of the governed forces individuals

225. *See id.* at 99.

226. *See* FRANCK, *supra* note 131, at 199 (discussing importance of political power of impeachment in correcting abuse of power).

with political goals to persuade their fellow citizens to adopt their policies. In the words of Harvey Mansfield: "The right of consent presupposes that each adult is worthy of being taken seriously as a rational creature. . . . His dignity requires that his consent be sought through persuasion, and neither ignored nor presumed."[227] This need for consent makes it likely that there will always be a gap between our aspirations of justice and the imperfect reality of our laws. It is this gap, this distance between who we aspire to be and who we are, that spurs us to participate in civic life. As Mansfield states: "A free society is necessarily imperfect; if it became perfect, citizens would no longer have to exert themselves to be free."[228]

Entrusting the protection of our natural rights to the consent of the governed does not mean that the Framers had a blind faith in majoritarian government. Instead, the Framers believed that their primary security against unjust government came from the structural design of their government, not in the judicial enforcement of constitutional rights. They put their faith in the separation of powers, checks and balances, federalism, representation, and the extended republic.[229] Only in the years after the Founding did the judicial protection of rights become a significant feature of the regime.[230]

This reluctance to expand the scope of rights protected by judicial review is well founded in liberal political theory. Creation of a constitutional right removes a whole category of important political questions out of the realm of self-government. As McConnell has rightly stated, granting judges excessive power to create and protect rights takes "the quest for justice" out of politics, and thus "would debase and impoverish republican government."[231] Because citizen participation and consent is vital both to the protection of individual rights and to the health of the community, it is imperative that, in a liberal regime, as few questions as possible are removed from political debate and decided by popularly unaccountable actors. Thus, when deciding whether rights ought to established, one should err on the side of providing the maximum scope for republican government. A right that is not even mentioned by the formal document cannot be one that the Framers, with their liberal principles, meant to protect.[232]

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227. HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 95 (1991).

228. *Id.* at 97.

229. *See* Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 106 (1988) [hereinafter McConnell, *Moral Realist*]. The common law traditionalists do not necessarily disagree with this argument. *See id.*

230. *See* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1435-36 (1999).

231. McConnell, *Moral Realist*, *supra* note 229, at 108.

232. *See* FRANCK, *supra* note 131, at 213 ("[I]n establishing the solid ground for government by consent, the modern doctrine of natural law itself forbids judicial recourse to the laws of nature, in constitutional cases, where the positive law of the Constitution is silent.").

In explaining why constitutional judicial review should not be the means for resolving the question of assisted suicide, McConnell identifies three institutional problems created when courts attempt to solve a complex social problem by identifying and enforcing a constitutional right.[233] First, he argues, judicial recognition of a constitutional right "would nationalize the issue and eliminate the possibility of state variation and experimentation."[234] Second, by their nature, constitutional decisions may not be made by compromising strongly opposing opinions. They instead must be governed "by crisp and principled rules," often precluding a theoretically messy, but practical, compromise that gains a political consensus and lessens social discord.[235] Third, "courts are seriously constrained in their ability to change their policy in response to experience and criticism."[236]

While McConnell restricts his discussion to the question of assisted suicide, the institutional problems he identifies are present every time the Court exercises the power to identify and enforce constitutional rights. In fact, the problems McConnell identifies are really the loss of the advantages of a popular resolution of the issue. Instead of establishing a constitutional right, if one leaves the issue to the process of republican government, the people will be able to experiment, compromise, and implement a new policy if the one originally adopted does not work. These advantages of government by consent are a large part of why the Framers chose to base their regime on liberal political principles; judicial enforcement of unenumerated rights would undermine that regime.

Critics of my view that the Constitution cannot provide for judicial enforcement of unenumerated rights make two strong arguments that need to be answered. First, they argue that the Americans, for all their liberal rhetoric, squarely rejected the Locke-Blackstone principle of legislative supremacy in favor of judicial protection of established common law rights, even against a contrary statute.[237] Second, critics, including Mc-

233. *See* McConnell, *Right to Die*, *supra* note 4, at 686-89.

234. *Id.*

235. *See id.* at 687.

236. *Id.* at 688.

237. *See* STONER, LIBERTY, *supra* note 77, at 13. As Stoner explains:

> To assume that the Americans of the Revolutionary era simply accepted the dominant understanding of common law in contemporary Britain would be a serious error. . . . [I]t was understood that [Blackstone's] account of parliamentary sovereignty was inapplicable here—it might even be said that the American Revolution was fought against the assertion of that principle in the colonies . . . .

Id. This argument is lent further credence by the hostility of some of the leading Framers, including Jefferson, to Blackstone and his work. *See* SANDOZ, *supra* note 77, at 56 (quoting Jefferson's criticism of Blackstone). Reliance on the skepticism or opposition of a few should be tempered, however, by the fact that Blackstone was the second most cited secular author in America during the Founding Era, during which time he replaced Coke as the chief expositor of the common law. *See* Zuckert, *Social Compact*, *supra* note 188, at 40.

Connell, argue that the emphasis I place on Lockean political principles ignores one of the Framers' distinctive contributions to the science of government: the adoption of a written constitution enforced by an independent judiciary.[238]

As to the first argument, the Americans certainly did not believe that Parliament could legitimately do anything it wished—but neither did Locke nor Blackstone. The confusion lies in the modern assumption that possession of a right necessarily means that right can or must be vindicated in a court of law. Both the English and American liberals did not accept this view. They instead believed that rights could and should be secured through political means. Thus, Locke and the Americans believed citizens were entitled to their natural and civil rights, and that a law depriving them of these rights was unjust. If there is no specific constitutional text empowering the Court to act, however, the remedy for such injustice is not to ask a court to strike down the law. If the legislature deprives its citizens of rights often enough, the remedy is to dissolve the government and install a new one that will protect rights.

The Framers' commitment to the primarily political, not legal, protection of rights is confirmed by evidence that we have of the judicial practice of the Founding Era. Rather than a judiciary that employed the power of judicial review to protect natural or other unwritten rights against the legislature, the record demonstrates that "[j]udges did not invalidate statutes simply because they did not accord with the dictates of natural law," as "[d]oing so would have been inconsistent with prevalent understanding of what the law of nature authorized."[239] The constitutional thinking of the era provided for the possibility that there could be rights, endorsed by the law of nature and beyond those enumerated in the Constitution, that were not treated in the same manner as the legal rights protected by the exercise of judicial review.[240] It fell on the people, acting in their political capacity, to act to protect these rights.

As to the second argument, it is of course true that judicial review plays an important role in our scheme of government. I, however, dispute that this institution, when understood and employed as intended, is incompatible with or even a departure from liberal principles.[241] In fact, a written constitution, enforced as law, is the liberal solution to the problems posed by the doctrine of legislative supremacy. The case for judicial review made by Hamilton in *The Federalist*, for example, is consistent

238. *See* McConnell, *Origins*, *supra* note 112, at 1444-45.

239. Helmholz, *supra* note 140, at 418-19.

240. *See id.* at 421.

241. *See* McConnell, *Origins*, *supra* note 112, at 1444. I disagree, for example, with McConnell's statement that "Locke's key assumption of legislative supremacy no longer holds under a written constitution with judicial review." *Id.* There is no reason to believe that Locke would have objected to the enforcement of written law adopted by the consent of the governed that could only be changed by a special process of consent.

with Lockean political principles.[242] Judges are not empowered to enforce constitutional guarantees because there are supratextual principles that trump the consent of the majority. Rather, the power of judicial review is meant to vindicate a more definitive statement of the consent of the governed. As Hamilton states, judges will exercise their power to declare a statute void where "the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution."[243]

In other words, the legitimacy of judicial review is grounded in the formal process of the adoption of the Constitution by the people. The Constitution is simply a law enacted by a more authoritative expression of the consent of the governed than that either expressed by the adoption of a statute or establishment of a common law rule. Thus, under the liberal principles adhered to by the Framers, the legitimacy of judicial review depends upon judges basing their decisions on text consented to by the people. If that text does not clearly resolve the question at hand, however, then the Court should defer to the political judgment of the people and their representatives.

Adoption of the common law traditionalist approach to constitutional interpretation would entail serious consequences beyond the question of the existence and scope of unenumerated rights. Use of this approach would also affect the interpretation of rights protected by the text, and would lead to questionable interpretations. Instead, if problems of constitutional interpretation were addressed from the perspective of the liberal principles of political obligation, the answers reached would be more consistent with the scheme of the Framers.

McConnell's interpretation of the Free Exercise Clause is one example of how the traditionalist approach can lead an interpreter to a questionable resolution of a difficult constitutional problem. The issue of whether the Free Exercise Clause requires judges to provide religious exemptions to generally applicable laws is difficult and McConnell concedes that neither the text nor the history of the Free Exercise Clause definitively answers the question.[244] Nevertheless, McConnell concludes that the best interpretation is that the Free Exercise Clause requires religious exemptions.[245] He bases this conclusion on historical evidence that the established practice and tradition of the states—as revealed in sources such as several state constitutions, laws exempting believers from military conscription and oath requirements, and theoretical arguments from principal proponents of religious liberty like Madison—supported the

242. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 150, at 98-106.

243. *Id.* at 102.

244. *See* McConnell, *Origins*, *supra* note 112, at 1512; McConnell, *Revisionism*, *supra* note 112, at 1116.

245. *See* McConnell, *Revisionism*, *supra* note 112, at 1117.

grant of exemptions, except in cases of danger to public peace or safety.[246]

Let us presume, as I think is true, that McConnell is correct that political opinion and practice at the time of the ratification of the First Amendment favored the practice of granting religious exemptions. To put it another way, in the political arguments over religion's place in society, the number and influence of Protestant theology proponents exceeded that of natural rights liberals like Jefferson. What I question, however, is whether the Free Exercise Clause wrote these political victories into the Constitution. McConnell concedes that exemptions were not sufficiently common to conclude that the drafters of the First Amendment specifically contemplated a judicially enforceable right to an exemption.[247] He argues, however, that the Constitution should be understood to protect those rights that had been protected by law before 1789. Thus, because established political practice at the time of the First Amendment favored the granting of such exemptions, a sound approach to constitutional interpretation would find that "only the institutional mode of protection—but not the substantive content—was changed when these rights gained constitutional status."[248] At the very least, he argues, this established practice should "shift the burden of persuasion to those who contend that the free exercise clause precludes exemptions."[249]

I see the matter quite differently. The Framers' liberal principles require that the burden of proof for justifying an expansive interpretation of a constitutional right, and the consequent removal of an important set of questions from republican resolution, be placed on the proponents of the expansive right. They must show clear and convincing evidence that the framers of the constitutional provision specifically intended that judges, and not legislatures, decide a particular category of questions. Evidence concerning the prevailing political practice regarding exemptions does not demonstrate that the Framers intended that courts, and not popular governments, decide these questions. Indeed, the fact that states seriously deliberated whether such exemptions were proper supports the conclusion that there should be no constitutional right to an exemption.

Furthermore, the state exemption provisions that McConnell cites, which grant the exemption except in cases of danger to peace or safety, involve the kind of weighing and balancing of important interests traditionally done by legislatures. Deciding when the interests of the public outweigh protection of perhaps the most important individual right is exactly the kind of central, ethos-shaping question that a self-governing community must answer for itself. The institutional advantages of a legislative solution are as apparent here as they are with the question of assisted sui-

246. *See* McConnell, *Origins*, *supra* note 112, at 1512-13.

247. *See id.* at 1512.

248. McConnell, *Revisionism*, *supra* note 112, at 1119.

249. McConnell, *Origins*, *supra* note 112, at 1512-13.

cide. Striking the difficult balance between individuals' free exercise of religion and the interests of the whole requires freedom to experiment with different solutions, the ability to make seemingly unprincipled compromises that gather consensus support, and the flexibility to discard failed solutions. In sum, unless the proponents of an expansive constitutional right present authoritative evidence that a legislative solution is prohibited by the Constitution, the liberal principles of the Framers, with their emphasis on the consent of the governed, preclude the removal of important questions from the political process.

Finally, the traditionalist argument for the protection of unenumerated rights ought to be rejected because the grant of excessive authority to the judiciary to displace republican decision making will interfere with the very mechanism the Framers designed to integrate each of the diverse sources of thought into the regime. The Framers recognized that each element of the American synthesis—religion, Whig constitutionalism, republicanism, and natural rights liberalism—played an important part in the polity and existed in tension with the others. In order to gain the benefit from each school of thought, it was necessary to design a constitution that would not definitively choose one mode of thought over another. Instead of entrenching the values of one faction in the Constitution, the Framers chose instead to formally protect relatively few constitutional rights, leaving most of the contested issues of political practice to the political process. Adherents of the different modes of thought could work out their differences in the political arena, rather than in the winner-take-all venue of the courtroom.

Indeed, much of the polarization we currently experience over the role of the Supreme Court has arisen because the Court, in recent decades, has interpreted the Constitution in a manner that favors one school of thought over the other. For example, in cases interpreting the Establishment Clause of the First Amendment, the Court has interpreted the Constitution as if the Framers and everyone since were the most radical Lockean liberals. This interpretation of the Constitution ignores the real differences among both the Framing generation and Americans today. The Constitution works best when the inevitable clash between alternative ways of explaining the world takes place in the political arena and not before the Court.

For a nation of diverse views, the most effective way for the Court to foster the best kind of constitutionalism is to adopt the approach to constitutional interpretation that is best suited to a polity based on the consent of the governed. This approach is one that seeks to determine the original understanding of the text and, if that meaning is unclear, defers to the judgment of the political institutions and ultimately the people. Judges should not interpret the Constitution as evolving with the changing views of society, no matter how long-standing or deeply rooted these views appear to be. In a government founded on popular sovereignty, the people

should be trusted to translate their opinions into law without empowering judges to impose these opinions upon their legislatures.

IV. TOWARD THE PROPER USE OF COMMON LAW

In arguing for the importance of the liberal principles of obligation, one must be careful not to exaggerate the importance of liberal theory on political practice. The important place of liberal principles in the regime does not mean that the Constitution "undertook to remake man on liberal principles."[250] The other sources of thought in the Founding, particularly the common law, were vital foundations of the actual political practice of the Founding era and afterwards. The American Revolution was successful in no small part because of what the revolutionaries did not change. They established new principles and forms of government, while preserving the concrete rights of individuals and the basic institutions of civil society, including the courts of law.[251] This achievement is particularly impressive not only because it took place amidst political turmoil but also because the Founders maintained their institutions in the face of their own profession of liberal, rationalist principles that inherently lead to the scrutiny and possible disruption of these institutions.[252]

The heart of what the Founders preserved was the traditional common law, "the rights and obligations that ordinary, informed individuals would expect to apply to their relations and transactions in the absence of specific legislation."[253] This body of common law rights, rooted in long-standing practice and experience, constituted "the most legitimate and reliable source of law."[254] Americans confirmed their continued allegiance to the common law by, upon forming their new states, adopting the common law as the foundation of their law and judicial system.[255] Given the centrality of the common law to American jurisprudence, the common law traditionalists must be correct that, at the time of the Founding, "common law and constitutional law were understood as closely bound together."[256] The trick is to understand how.

To understand the role common law plays in the Constitution, it is best to begin with the relationship between common law and the liberal

250. James R. Stoner, Jr., *The Idiom of Common Law in the Formation of Judicial Power*, *in* THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 47, 57 (Bradford P. Wilson & Ken Masugi eds., 1998).

251. *See* STONER, LIBERTY, *supra* note 77, at 15-16.

252. *See* Sunstein, *supra* note 1, at 373.

253. McConnell, *Tradition*, *supra* note 16, at 197.

254. *Id.* at 198.

255. *See* STONER, LIBERTY, *supra* note 77, at 14. But as Stoner notes, one must account for the oft-stated condition for reception of the common law: that it is adopted subject to any alteration or repeal by legislation. *See id.* I contend that this proviso confirms the primary commitment of the Americans to liberal principles. The common law is the source of the presumptive rule, but it can and must be trumped by a popular decision to the contrary.

256. McConnell, *Tradition*, *supra* note 16, at 197.

principles that animate the Constitution. By supplying the concrete substance of the norms and legal rights that define American society, common law moderates the abstract nature of liberal political theory, which speaks of liberty and equality but has difficulty offering any tangible understanding of what these ideas mean in practice. In addition, by supplying a theory and a method for preserving traditional norms, rights, and institutions, common law provides the stability that any constitutional order needs to survive.[257] Respect for liberal principles, on the other hand, may moderate the occasional irrationality and lack of popular legitimacy of a legal order that relies upon faithful adherence to traditional norms and practices.

It is difficult to construct a constitutional regime based on adherence both to tradition and to a view of reason that finds its ultimate expression in rule by the people. It is particularly difficult to instruct judges what their proper role is in such a regime. On one hand, we tell them that they are the guardians of the common law and charge them with the duty to maintain these principles against the occasional fevers of public irrationality. On the other hand, we tell them that the people rule and that their job is to vindicate the claims of the majority. The key to resolving this dilemma is for judges to understand that the common law foundation of the regime serves as the background or presumptive source of rules, but that when a democratic majority, after due deliberation, decides to dispense with or modify these rules, the judges must affirm the decision of the people, unless a specific constitutional provision clearly states otherwise. Once one understands the common law as a set of background norms and presumptive alterable rules, the proper use of the common law in constitutional interpretation becomes readily comprehensible.

The most obvious proper use of common law in constitutional interpretation is as an aid in understanding those particular constitutional provisions that make specific reference to common law concepts. Clinton identifies, for example, in the twenty-one sections that make up the first four articles of the Constitution, at least sixteen that can be traced to English common law sources.[258] The interpretation of such concepts as habeas corpus, ex post facto law, privileges and immunities, and impeachment undoubtedly requires judges to consult the common law to ascertain their intended meaning.[259] No one denies the legitimacy of this use of common law.[260]

257. *See* STONER, LIBERTY, *supra* note 77, at 165.

258. *See* CLINTON, *supra* note 135, at 96-97.

259. *See* STONER, LIBERTY, *supra* note 77, at 17.

260. *See id.* Stoner makes a related but broader point that the Constitution not only includes specific common law concepts or provisions, but is also structured and drafted from a common law perspective. For example, rather than defining the power of Congress, as Madison's original Virginia Plan suggested, by use of a general provision empowering Congress to act in all cases where the states are incompetent or where necessary to preserve interstate harmony, the Constitution instead, in legal common law fashion, articulates specific concrete powers that be-

Judges may, and should, also properly consult common law when they are seeking to interpret and understand their role in the constitutional scheme. The spare language of Article III supplies little guidance regarding the nature of the judicial power and the proper elements of the judicial craft. It does not, for example, provide specific rules of interpretation or explain how judges are to fit the Constitution into the existing law.[261] What the language does do, however, by employing such terms as "all Cases, in Law and Equity," is demonstrate that judges must consult the common law conception of the judicial power to discover the proper way of judging.[262]

Most obviously, the common law requires judges to follow precedent, except in extraordinary circumstances. Hamilton, in *The Federalist*, assumed that judges would operate under the Constitution as they had under the common law. Thus, they would be "bound down by strict rules and precedents" that they would discover by "long and laborious study."[263] In addition, the common law provided extensive guidance to judges about how to interpret statutes. Judges were instructed, for example, to discover the intent of the lawmaker, but that intent was to be determined, first, from the meaning of the text itself, and then from how the statute fit into the context of the common law, rather than from the subjective intentions of the lawmakers.[264] If a statute appeared to modify the common law, the judge was instructed to discover the specific problem or mischief that the statute intended to correct, and interpret the statute to resolve that particular problem while leaving the rest of the body of the common law intact.[265]

The incorporation of common law jurisprudence into the federal judicial power thus provides judges with considerable direction on how to carry out the judicial function. Judges are directed to rely first on the text, to practice a moderate form of originalism, and to defer to the common law and traditional practices. The jurisprudence of John Marshall reflects

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long to Congress. *See id.* A similar case can be made from the Supremacy Clause's reliance on judges to protect the law of the land against conflicting federal or state laws. *See id.* at 19. The spirit of the Constitution may be liberal, but much of its body was hewn from common law.

261. *See* CLINTON, *supra* note 135, at xi. According to Clinton:

> Though the written Constitution has its own principles, which bind the courts when they are applicable and clear, it does not mandate rules of interpretation and does not provide case-specific guidance for judges regarding the ways in which they are to settle the meaning of disputed provisions. Since the Constitution is not complete within itself, it must be supplemented by the common law tradition . . . .

Id.

262. *See* STONER, LIBERTY, *supra* note 77, at 18-19.

263. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 150, at 105-06; *see also* STONER, LIBERTY, *supra* note 77, at 18-19.

264. *See* STONER, LIBERAL THEORY, *supra* note 82, at 215.

265. *See id.*

precisely this approach to judging and interpreting the Constitution.[266] Although the common law may not be able to provide an answer to every question concerning interpretation of a written constitution founded on liberal principles, it does instruct judges on how they should go about answering these questions.

Finally, as previously discussed, the common law has and should continue to serve as the presumptive baseline or background source of law for both the rights of individuals and the legitimate prerogative of communities to protect traditional norms and practices.[267] It is also important to recall that the common law was the primary vehicle for the transmission of the norms of natural law to the positive legal order. Natural law, in and of itself, is never directly the source of ordinary law, but it was, and still should be, the "background against all which all constitutions must, in the last analysis, be measured."[268] If the Constitution is separated from the underlying Western legal tradition from which it arose and which gives its provisions meaning, as Clinton has said, it will fail as surely as a plant will die when the ground underneath it is untended.[269]

It follows, then, that McConnell is correct that the common law, and the natural law principles it embodies, was the primary source of law that Americans relied upon to discern their rights and responsibilities. He is also correct that the legal and constitutional order the Framers created was designed to protect these rights from thoughtless invasion by legislatures.[270] Indeed, consistent with the idea that these common law rights were the civil embodiment of one's natural rights, the Framers believed that the central task of government is to protect this "preexisting body of rights and obligations."[271] Modifications of these rights "should be permitted only by the clearly expressed will of the people, in a process that promotes careful deliberation."[272] In other words, our legal system should be structured so that the common law rule will be preferred against any contrary principle.

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266. *See* CLINTON, *supra* note 135, at 59.

267. *See* STONER, LIBERTY, *supra* note 77, at 25 ("The common law provides the background out of which the Constitution emerged and establishes the general principles of jurisprudence it invokes . . . .").

268. CLINTON, *supra* note 135, at 221.

269. *See id.* at 56.

270. *See* McConnell, *Tradition*, *supra* note 16, at 197-98 ("The constitutional text singles out some of these rights and protects them against . . . legislative . . . abridgment . . . .").

271. *See id.* at 198. Recognition of the role and importance of common law rights may help solve the mystery of the meaning of the Ninth Amendment. The Amendment, the argument goes, is meant to protect the unwritten rights entailed in state common law privileges and immunities, rights that the federal government's enumerated powers do not reach. *See* STONER, LIBERTY, *supra* note 77, at 21. The Amendment, therefore, does not refer to an unspecified mass of natural rights that the Court has an unbounded discretion to protect. *See* CANAVAN, *supra* note 145, at 58.

272. McConnell, *Tradition*, *supra* note 16, at 198.

McConnell articulates a useful framework for understanding the basic elements of the American constitutional order. He contends that our system contains three legitimate sources of law: custom, command, and reason. Custom characterizes the common law, command the legislature, and reason arises from the features of our constitutional system that promote deliberation.[273] Our system presumes that law should be based on the customs of the people; our underlying rights and traditional practices should be changed only if the other two elements converge in a deliberative (reason) decision by a democratic majority (command).

McConnell argues that this framework justifies the common law traditionalist approach to the Constitution. For example, by protecting an evolving set of unenumerated rights rooted in custom from legislative invasion, the courts are using the Constitution to promote a reasonable order. The problem, however, with the common law traditionalist approach is that it does not promote deliberation. By potentially displacing legislative choice through overly aggressive judicial review, it could very well terminate it.[274] McConnell is correct that judges must ensure that legislatures deliberate before the common law is changed, but constitutional law is not the only or even the primary tool for fostering thoughtful lawmaking and securing traditional rights and privileges.

Government can secure these common law rights without constitutionalizing them through a doctrine of unenumerated rights, or by distorting written guarantees to include customary rights that were not given explicit protection. In other words, we can protect common law rights

273. *See id.* McConnell's main argument, at that point of his discussion, is that the Constitution promotes deliberation and, therefore, reason in government through its complex structures of bicameralism, presentment, and the separation of powers. *See id.* at 197-98. I wholeheartedly agree with McConnell on this point; what I argue is that the Constitution was not designed to foster this deliberation by providing for the protection of unenumerated rights in particular, or for a common-law-type evolution of its provisions in general. Common law traditionalism, in fact, undermines deliberation.

274. *See* STONER, LIBERTY, *supra* note 77, at 80. It would be unwise, as well as imprudent, not to acknowledge that there is much to be said for the common law traditionalist approach to constitutional interpretation. Common law traditionalists understand that the common law did not simply protect rights; it also provided legal authority for society to protect its traditional moral order and institutions, including the traditional family. *See id.* In fact, as was the case in *Glucksberg*, traditional common (as natural) law principles often provide justification for upholding laws against constitutional attack, particularly if it is a law reflective of the traditional moral order. *See id.* at 86.

Thus, even if one believes, as I do, that the Constitution does not provide for the judicial protection of unenumerated rights, the traditionalist approach is an attractive second-best option to the moral philosophic approach. Use of the common law traditionalist approach may satiate the desire for the protection of constitutional rights beyond those contained in the text, while limiting the protection of such rights to those already protected for many years in many communities. Such protection, then, would be founded in objective custom and practice, rather than the subjective opinion of judges. The approach taken in *Glucksberg* is certainly preferable to that of *Roe* or *Lochner*.

without adopting the common law traditionalist approach to interpretation. What courts can do, consistent with the liberal principles of the Framing, is presume that unless a legislature speaks clearly, the common law right will prevail. This statutory interpretation approach protects customary rights against ill-considered legislative actions; if a legislature simply neglected to consider the common law right when it made the offending law, the statute will be interpreted as if it meant to protect the right.[275] The statutory interpretation approach, unlike the traditionalist approach, is also consistent with the liberal principles of the Constitution. If a legislature, after its initial attempts to regulate certain rights, has been rebuffed by the courts, it may reenact the statute to state its will more clearly. If the legislature, after sufficient deliberation, makes its intent clear, the court must allow the modification of the right. The importance of the common law right is recognized by the presumption in its favor, but the Constitution's liberal principles are vindicated by allowing a legislature, and hence the people, to make the ultimate decision.

This approach is precisely the one—despite the mythology surrounding the case—that Coke actually employed in *Bonham's Case.* Moreover, there is strong evidence that the Framers intended judges to employ such an interpretive approach in order to protect common law rights. In *The Federalist,* for example, Hamilton advocates precisely such jurisprudence. He argues that judges "may be an essential safeguard against the effects of occasional ill humors in society."[276] Some of the effects of these "ill humors" include "the injury of the private rights of particular classes of citizens, by unjust and partial laws."[277] In these circumstances, the decisions of judges are of "vast importance in mitigating the severity and confining the operation of such laws."[278] By interpreting the laws in this fashion, judges not only prevent the short-term deprivation of rights, but they also force a legislature to seriously deliberate about the propriety of the laws in question.[279] At no point in this discussion, however, does Hamilton argue that judges may declare these laws void; they may confine their operation, not eliminate them.

We can appreciate the utility of such this approach in resolving concrete interpretive problems by applying it to the problem of whether the law should require exemptions from neutral laws that burden the free exercise of religion.[280] Let us presume that the established practices and

275. For a more detailed discussion of this approach from the statutory interpretation perspective, see Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction,* 2001 UTAH L. REV. 915 (2001) [hereinafter Spiropolous, *Making Laws*].

276. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 150, at 104.

277. *Id.*

278. *Id.*

279. *See id.*; *see also* Spiropoulos, *Making Laws, supra* note 275, at 956.

280. *See, e.g.,* Employment Div. v. Smith, 494 U.S. 872, 872 (1990) (finding that sacramental peyote can be banned by Oregon's controlled substance law).

traditions of our people prove that there is a customary right to an exemption, except in cases of danger to peace or safety. Rather than establishing this custom as a constitutional right, judges can effectively protect this custom by presuming that, unless a legislature clearly states otherwise, a statute that regulates religiously motivated conduct includes an exemption for religious believers. If a legislature does not wish to exempt believers from the operation of this statute, it must deliberate on this question and state its intent clearly.

This approach will prevent the unintended regulation of religious conduct and also, if there is a concealed desire to regulate religious conduct, require that it be stated publicly. Legislators who may be willing to regulate the exercise of religion if it can be done quietly may not be so willing to do so in the face of public attention. If the legislators, after deliberation, are openly willing to regulate such conduct and face the electoral consequences of their actions, then judges, lacking an explicit constitutional guarantee, have achieved all they can under a liberal regime. If the resulting law is unjust, it is the responsibility of the people to redress the wrong. If the people lack the virtue to do justice, judges will not be able to save us.

We therefore have sketched out an approach to constitutional interpretation that respects the primacy of liberal principles in our regime, while also accounting for the necessary role played by other sources of thought in our constitutional law, especially the common law. Judges, following liberal principle, should read the Constitution as a product of the consent of the governed. Following the principles of common law jurisprudence, judges should seek the meaning of the document in the intentions of the people who drafted and ratified the document, but that intention is best found in the text of the instrument, read in the context of the particular legal problem the text intended to solve. If the text and intent are not clear, then the judge should defer to the decision of the representatives of the people. In reviewing legislation, judges should respect the common law's role as the primary repository of the people's rights and privileges, and thus ought to presume that the Legislature or Executive intended to preserve common law rights, unless it clearly said otherwise. This approach ensures that the Legislature or administrative agency must deliberate before repealing or modifying the rights and privileges protected in common law, both of individuals and society.

This approach to interpretation will secure many of the advantages of common law constitutionalism, while maintaining legitimacy under the liberal principles of our regime. If judges defer to the established practices of the political branches and states, instead of arrogantly displacing their judgments based on their private stock of reason, society will benefit from the reason and experience of these other actors. In addition, by staying their hand, courts will be deferring to society's customs, traditions, and practices, allowing law to emerge from public opinion and thus main-

taining democratic legitimacy. Also, if the courts follow the common law example and firmly adhere to precedent, unless the precedent at issue is both clearly wrong under the original meaning and displaces political resolution of an important issue, the advantages of originalism can be secured without its potentially destabilizing effects.

The adoption of a restrained originalist approach to interpretation, with its deference to the people and their representatives, will also allow the law and political practice to evolve as society evolves—which both facilitates beneficial change and increases society's faith in law. Allowing decisions to be made by legislatures and the people, rather than by a small group of judges, makes it more likely that society will benefit from the "wisdom of crowds;" legislatures, with their large numbers, wide access to information, and majority rule voting practices, have an overwhelming advantage over courts from the Condorcet perspective.[281] In short, deference to the decisions of actors who are likely to be more informed and more in sympathy to the people's needs and desires is likely to lead to better law.

At the same time, judges can help improve the product of lawmakers and other political actors by making sure that lawmakers' work is informed by the wisdom and experience embedded in the common law and the natural law that underlies it. By presuming that the common law prevails but allowing legislatures to repeal or modify these rights if it makes its intent clear, judges can dialogue with the Legislature, rather than dictate to it, and custom and tradition can be given their due as equal or even superior sources of law, while remaining faithful to the liberal principles of our polity.[282]

V. CONCLUSION

The serious conflict in our legal community and the larger society over the proper method of interpreting the Constitution is, to a large extent, a debate over what one thinks about the Court's current practice.[283] If one believes that the Court's common law treatment of the Constitution, which allows for the evolution of the meaning of the document, is legitimate and works well, then one is pleased with our current course, sees no need for fundamental change, and is puzzled or even angered by the heated criticism of the Court. On the other hand, if one sees, as I do, much of the Court's work as destructive of the constitutional order and as

281. *See* Vermeule, *supra* note 9, at 1507.

282. *See id.* at 1515. Vermeule suggests that Condorcetian advantages could best be achieved by judges deferring to legislatures and by legislatures deferring to the judgments of past legislatures and social traditions. *See id.* A judicial presumption in favor of the common law would accomplish much of what Vermeule suggests by his "common law constitutionalism" for legislatures.

283. *See* Spiropoulos, *Natural Right, supra* note 213, at 285-86.

a fundamental source of the bitter politics of our society, then one is looking for a better way.[284]

Much of the harm to our law and society arises because the majority of the Court and its defenders fundamentally misconceive the nature of the Constitution.[285] Rather than understanding the Constitution as almost entirely a framework for the deliberative political resolution of disputes over social policy, modern jurisprudence too often wrongly understands the Constitution, through the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as a compendium of answers to these problems and a source of authority for the Court to impose their solutions on the recalcitrant.[286] The problem with construing the Constitution as empowering the judiciary to resolve our most controversial social disputes is that it politicizes the judicial process and makes it likely that the Court, by taking one side in these bitter disputes, will render decisions that will be seen as both illegitimate and partisan. I agree with Canavan that "the more that people come to understand that constitutional law is politics carried on by other means, the less faith they have in the judiciary's impartiality and concern for the Constitution."[287]

Public faith and confidence in the Constitution and the Court will be restored only if we rediscover the Constitution's original design for republican government and the Court's limited role in that structure. I agree with the younger McConnell that "[o]pen-ended judicial review—the doctrine of unenumerated rights—threatens to cut short the very process of 'open-minded and public-spirited' deliberation" upon which just government depends.[288] He was also right that the central question judges must ask in interpreting the Constitution is "whether a decision made by democratically elected representatives of the people was forbidden, in advance, by the people through the instrument of the Constitution."[289] Any constitutional restraint on legislative authority "must be fairly traceable to a decision that was made, at some level of intelligible principle, by the people in

284. *See* STONER, LIBERTY, *supra* note 77, at 16 ("That our lives are so thoroughly politicized today, and thus our politics so bitter, might be a testimony to the consequences of dismantling the buffer of common law that stood between the individual and the legislative will.").

285. For a discussion of the Court's often inconsistent common law constitutionalist tendencies, see *infra* notes 100-25, 244-49, and accompanying text.

286. *See* CLINTON, *supra* note 135, at 22.

287. CANAVAN, *supra* note 145, at 57.

288. McConnell, *Moral Realist*, *supra* note 229, at 109.

289. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 359 (1988). To be fair to McConnell, however, even at this early point of his scholarly evolution, McConnell demonstrated his willingness to question some forms of originalism. He argued that the "classical conception" of constitutional interpretation he defended did not permit an approach that interprets the Constitution "as if it froze into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations." *Id.* at 361-62.

the course of constitution-making or amending."[290] Only this kind of approach to constitutional interpretation is faithful to the liberal foundation of the Constitution. Common law constitutionalism, in either form, is not faithful to these principles. The Constitution is not meant to evolve at the command of judges, no matter how prudent or deferential they may be to what they perceive as society's traditions. The approach to interpretation that is most faithful to all of our principles is a deferential originalism, leavened by a presumption in favor of the common law.[291] Judges should try to lead us to wisdom, but they may not force it upon us.

290. *Id.* at 360.

291. For a summary of the theories, methods, and criticism of originalism, see *supra* notes 21-29 and accompanying text. For a discussion of why originalism is, in fact, the best method of constitutional interpretation in the American system, see *supra* notes 113-249 and accompanying text.