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Secundum Civilis: The Constitution as an Enlightenment Code

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SECUNDUM CIVILIS:

THE CONSTITUTION AS AN ENLIGHTENMENT CODE

Derek Warden*

Abstract	586
I. Preliminary Title.....	587
A. Introduction.....	587
B. Answers to Two Objections	591
C. What this Essay is not Intended to Do	593
D. Note on the Title	596
II. Article I: The Roman Law	597
A. The Roman Law and Europe	597
B. The Prussian Code.....	601
C. The Austrian Code	603
D. The <i>Code Civil</i>	605
E. The Roman Law and the United States Constitution	607
1. Article I, Sections 1 & 3	607
2. Article I, Section 9, Clause 2	609
3. Article IV, Section 4	611
4. The Fifth Amendment and Infamy.....	613
5. The Fifth Amendment and Double Jeopardy	615
6. The Ninth Amendment and the Roman Legal Method...	616
III. Article II: The Natural Law	618
A. The Natural Law and the Code of Prussia	619
B. The Austrian Civil Code	622
C. The <i>Code Civil</i>	624
D. The Natural Law and The Constitution	626

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1. The Designation of Rights in the Declaration of Independence.....	627
2. The Structure of our Federal Government is Born out of the Natural Law.....	628
3. The Natural Law and the Bill of Rights.....	629
4. The Argument from Phraseology.....	635
IV. Article III: The Functions of the Codes and its Consequences.....	637
A. Abrogation.....	638
B. Completeness.....	641
C. Consequences.....	647
1. Jurisprudence.....	648
2. Implications for Several Current Doctrines.....	650
V. Conclusion.....	652

ABSTRACT

The American Constitution has been the subject of heated debate since its formation. This article simply introduces a new argument. It suggests that there exists a “form”¹ of an Enlightenment era code, which is met by the Constitution, and that the requirements of this form can be derived from inspection of the three great codes of the time: the Prussian, the Austrian, and the French. It further notes that these requirements are (1) Roman law influence; (2) natural law influence; and (3) that they perform the same functions—they abrogate the prior laws on their respective subjects and they are “complete” in themselves, covering the whole aspect of a legal field. In the process of doing so, the essay shows that the common law was not the only source of inspiration for the framers of the Constitution; it also shows heavy civil law influences. The article opens with a “preliminary title”, which introduces the subject, its sources, and instructs the readers as to

1. This notion of form comes from Aristotle instead of Plato. Instead of the form existing outside and entirely separate from the thing under discussion, I find that the form may exist within and be discoverable in, the things under discussion.

how to read the article itself. The whole closes by laying forth a few broad possible consequences of accepting this view, while leaving a full discussion on the consequences of this understanding to a later article.

I. PRELIMINARY TITLE²

A. Introduction

The Age of Enlightenment (commonly “the Enlightenment”) lasted throughout the seventeenth, eighteenth, and the nineteenth centuries. This era observed some of our world’s most pivotal moments: the Renaissance came to an end; a global economic climate was just starting to appear; slavery was being banned in the western world; the divine right of kings was—at last—being challenged; Napoléon was gaining ground in his conquest of Europe, only to meet defeat at Waterloo; the British Empire rose to prominence; the once-prestigious Holy Roman Empire fell into oblivion; and a new republic was born across the sea, destined to grow into a super power in its own right.

But not all important events of the Enlightenment were geopolitical. Philosophy was having yet another reformation. During this age of man, humanity was given the minds and thoughts of brilliant political theorists and jurists such as Locke, Rousseau, Hobbes, Montesquieu, Martini, Voltaire, Puffendorf, Domat, and Grotius, to name only a few. These people laid the foundation of our modern society. They gave us the separation of

2. The term “preliminary title” was chosen for this section instead of “introduction” as it does far more than merely introduce the subject. Indeed, the first subsection under this heading is “introduction.” This term is in reference to that portion of modern codes which lays out what the sources of law are and how the document is to be interpreted. LA. CIV. CODE arts. 1-14. I have organized this first section of the paper in much the same fashion. I give the sources of my criteria, and describe how this essay is to be understood. Even the introduction names sources, for those events and minds described therein played vital roles in setting the stage for the Codes and the Constitution.

powers, limited self-government, the French *Encyclopédisme*,³ and codification of law in new form.

This humanist movement saw one of the few instances where high thought would be brought down and put into practical application.⁴ Many saw that the law of nature (natural law) could be a source of the positive law, or instruction on what that should be. The robust spirit of the age described gave hope that law could be eternal and that principles of the same could be written down for all humanity, not just Europe, not just the Western hemisphere, but for all of the world. To achieve this end, civilians developed codes.⁵ But natural law was not the sole source of these documents. It is indisputable that the drafters looked to Roman law⁶ and customary law⁷ to forge these great codes.

I do not mean “code” in the contemporary sense.⁸ For example, I do not mean a publication in which statutes are kept and constantly updated, as one would describe the U.S. Code. Nor do I mean a book into which one collects pre-existing rules of law without, *inter alia*, usurping the prior law, which is more properly

3. This compilation of work was intending to put all of human knowledge in one place. It dealt heavily with philosophy and law. Some have even noted the larger movement around this document, calling it “French *Encyclopédisme*”. See generally Mitchell Franklin, *The Encyclopédiste Origin and Meaning of Fifth Amendment*, 15 LAW. GUILD REV. 41 (1955-1956) [hereinafter *The Encyclopédiste*].

4. Julio C. Cueto-Rua, *The Future of The Civil Law*, 37:3 LA. L. REV. 645, 647 (1976-1977) (Explanation, logic and reason were never divorced, however, from social reality; the civil law absorbed these higher law elements “without detriment to the practical needs of society”).

5. Roscoe Pound, *The Influence of the Civil Law in America*, 1:1 LA. L. REV. 1, 4 (1938) (explaining universal validity of the codes); see also H. Patrick Glenn, *The Grounding of Codification*, 31 U.C. DAVIS L. REV. 765, 766 (1997-1998) (explaining the codes’ capability to extend beyond Europe).

6. PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 111-23 (Cambridge Press, New York 2007) (explaining Roman law influences in the three great codes) [hereinafter *ROMAN LAW*]; see also Pan. J. Zepos, *The Legacy of the Civil Law*, 34:5 LA. L. REV. 895, 902 (1974) (stating “The Roman law, together with customary law . . . formed the chief sources of inspiration for the great codifications.”).

7. *Id.*

8. I must digress briefly and say that I am not the first, nor shall I be the last, to point out features of codification. See JACQUES VANDERLINDEN, *LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIIIe AU XIXe SIECLE* (1967).

called a Digest. A code, in the understanding of this essay is an Enlightenment code; or, as has been described by previous scholarship, a natural law code.⁹ These are documents created from the above-mentioned sources that serve a distinct function and require a distinct form of interpretation.

The function is both of completeness and abrogation. These two concepts will be reviewed more thoroughly below but deserve mention here. Codes in the understanding of the Enlightenment, were to be all-encompassing.¹⁰ This doctrine meant that all possible situations dealing with the type of law covered by the codes were to have their decisions based on the same—the codes covered everything and were meant to extend for centuries.¹¹ To realize this end, two methods were used; discussion on which will wait for the appropriate article. Abrogation, on the other hand, is a more simple function to discuss.¹² Put briefly, these codes, although drawn from prior law, dispensed with the control of the prior law.¹³ Lawyers were not permitted to cite to the former rules, as the codes were the sole source of law.¹⁴

9. See generally Horst Klaus Lucke, *The European Natural Law Codes: The Age of Reason and the Powers of Government*, 31 U. QUEENSLAND L.J. 7 (2012). By this I mean that these codes were heavily influenced by the eighteenth century and medieval understandings of a “higher law” based on human reason.

10. Glenn, *supra* note 5, at 766.

11. *Id.* See also Jean Louis Bergel, *Principal Features and Methods of Codification*, 48:5 LA. L. REV. 1073, 1079 (1988) (stating, “Codes last much longer than ordinary statutes, some lasting centuries; they are subject to (usually) very minor and very rare changes.”).

12. I must make an aside and note that the new drafting of the Louisiana Civil Code lacks an abrogation article.

13. Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe*, 5 J. CIV. L. STUD. 31, 37 (2012) (showing the need for an abrogation clause and the necessity of breaking from the prior law); see also Bergel, *supra* note 11, at 1074 (“[the codes] repeal [] the old legal system (laws, ordinances or customs) that were dealt with specifically in the new civil code.”).

14. From an earlier draft of the Prussian Civil Code, THE FREDERICIAN CODE: OR, A BODY OF LAW FOR THE DOMINIONS OF THE KING OF PRUSSIA: FOUNDED ON REASON, AND THE CONSTITUTIONS OF THE COUNTRY at Pt. I, Bk. I, T. II, § 5 (Jean-Henri-Samuel Formey & Alexandre-Auguste de Campagne trans., Edinburgh 1761): “. . . we discharge the advocates from quoting hereafter the authority of the Roman Law or that of any doctor whomsoever.” [hereinafter

There is now almost no dispute that three codes in particular are considered great among their peers.¹⁵ It is from these three codes that the author has drawn his understanding of the Enlightenment codes. They are, the *Allgemeines Landrecht für die Preußischen Staaten* (ALR), drafted under King Frederick of Prussia (hereinafter called the Prussian Civil Code); the Austrian Civil Code, drafted largely by Martini, under Emperor Joseph of the Holy Roman Empire; and the Code Napoléon (hereinafter *Code civil*), drafted under the guidance of Portalis and passed under the eyes of Napoléon Bonaparte.¹⁶ Moreover, reference from time to time may be made to the Louisiana Civil Code, which has been described as “the most perfect child of the Civil Law.”¹⁷

Even though all these events were taking place in Europe, one should not ignore what was happening “across the pond.” As one may tell by the title of this essay, there was yet another document in the same vein as the three great codes. It, too, as will be shown below, meets all three requirements for being an Enlightenment code. It has Roman law and Natural Law sources, and can be characterized by its “completeness”¹⁸ and has lasted over centuries

THE FREDERICIAN CODE]. See also ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 131 (Harvard Univ. Press 1981) (stating, “the preexisting law ceases to have even subsidiary force.” “The Code itself becomes the historical starting point.”).

15. Lucke, *supra* note 9 (discussing the Prussian, the Austrian and the French Codes); see also Glenn, *supra* note 5, at 767 (noting the poetic majesty of the *Code civil*); Zepos, *supra* note 6, at 902 (drawing particular attention to the French *Code civil* and the Austrian Civil Code); and Cueto-Rua, *supra* note 4, at 650 (stating “The Civil Law gave full recognition to this basic philosophy in the three great codes enacted at the end of the XVIII Century and the beginning of the XIX Century: the Code Napoleon in France, the Civil Code for the Kingdom of Prussia, and the Austrian Civil Code.”).

16. Cueto-Rua, *supra* note 4, at 651 (discussing the *Code Napoléon*, the Prussian Civil Code, and the Austrian Civil Code); see generally Lucke, *supra* note 9 (discussing the Prussian Civil Code, the Austrian Civil Code and the *Code civil*).

17. John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18 (1956).

18. The broad provisions let generally applicable rules stretch forward continuously and to unseen situations. Moreover, since the Federal government is one of the enumerated powers, the specific listing of those powers (and those

with comparatively little revision.¹⁹ Therefore, what Field said more than a century ago shall be proven true on a different basis: the United States Constitution is “a great code in a small compass.”²⁰ Thus, the thesis of my paper is this: The American Constitution may be properly understood as an Enlightenment code, regardless of the specific intent of the framers, because it meets three criteria discovered by reference to the three great codes: it has heavy Roman law influences, natural law influences, and serves the two primary functions of the codes—(1) it abrogates control of the Articles of Confederation and the English common law on the subject of foundational national law, and (2) it is “complete in itself,” as it, by use of broad generalities and specific enumeration, covers the whole arena of fundamental law for the nation and is capable of extending eternally forward with little revision.

B. Answers to Two Objections

Throughout the crafting of the arguments in this essay, I was confronted by several objections raised by classmates. Instead of

necessary and proper to the same) means that the Constitution is literally complete as to all the basic rules of our government. This rule will be dealt with more fully in Article III of this essay.

19. There are several other similarities between the documents, which are not discussed fully in this paper. The documents all arose out of much controversy, political upheaval, and philosophical change. The controversies and turmoil surrounding Civil Codes has been noted before. (Bergel, *supra* note 11, at 1077). They are held in almost the same reverence. Of the Civil Codes it was said, they “are Constitutions for civil society.” (Glenn, *supra* note 5, at 769). They are drafted in much the same way, as Professor Moréteau has noted, “reforming a civil code is like amending a constitution. One may imagine a process comparable to a Constitutional convention.” (Moréteau, *De Revolutionibus*, *supra* note 13, at 64). Moreover, as an explanation of the title below will lay out, they are both oriented toward the citizens and are meant to be understood by the same.

20. MICHAEL KAMMEN, *THE ORIGINS OF THE AMERICAN CONSTITUTION* at vii (Penguin Books 1986) (citing 1 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 379 (A. P. Sprague ed., New York 1884)).

hindering my endeavor, these objections actually helped to sculpt my writing. As such, I will briefly address them here.

It was argued that since the Constitution deals with public law matters and not private law matters it could not be considered a “code” like the civil codes of the Enlightenment. This seemed to be a troublesome argument. However, upon closer inspection, it fails. Codes do not have to deal with one specific area of law. They may cover either private law or public law so long as they conform to the three requirements above. The Prussian Civil Code has sections that deal with what today we would call “public law;”²¹ drafters of both the Austrian and Prussian Codes wanted to put more public law into them, which, as noted by another author reaches into what is commonly considered Constitutional governance.²² Moreover, even some modern codes that have their basis in the three great codes have provisions that would seem to deal with public law matters, such as Louisiana Civil Code article 671, which states, in pertinent part, “[w]hen private property is so destroyed in order to combat a conflagration, the owner shall be indemnified by the political subdivision for the actual loss.”²³

It was also argued that the Constitution was drafted prior to the completion of the three great codes. Therefore, they argued, how could the framers have taken the ideas of drafting that the Europeans used? I answer that timing is of no import here. I do not argue that the framers stole their ideas for drafting broad articles from the French, or that specific enumeration was stolen from the Austrians or Prussians. These ideas for drafting pre-date all of these documents. I argue merely that the *same thing occurred*. Thus, the Constitution is the result of a sort of convergence.²⁴

21. For Prussian, see Lucke, *supra* note 9, at 21 (citing to Pt. II, tit. 11, § 1).

22. *Id.* at 21-28.

23. This is especially true since, like the Enlightenment codes, the Louisiana Code is “natural law based.” Moréteau, *De Revolutionibus*, *supra* note 13, at 41.

24. Convergent evolution: A process in evolutionary biology where two unrelated species develop similar traits in response to similar circumstances.

Certain characteristics were obtained in response to certain conditions (here, the Enlightenment, Natural Law, and Roman law, consequent with political and philosophical changes) to achieve a certain end (a code serving a particular function). This is not to say, however, that the two had no influences on each other.

C. What this Essay is not Intended to Do

I do not mean, nor should the contents of this essay in any way be taken, to disrespect either of the two systems of law discussed herein. I place this disclaimer here due to several experiences I have had while at law school. Attending a bijural institution has led to several remarks that gave me pause. Some professors advocated that Louisiana simply rid itself of the civil law, others remarked, “the next time a civilian is kind to the common law will be the first time.” This same animosity has reached to students. Some of who have uttered phrases such as, “there’s no difference between the two systems anymore;” or “Louisiana is a common law state with different words.” One may attribute this not infrequent hostility to civilian professors “feeling like a minority and [developing] an inferiority complex”²⁵ or to common law advancement in Louisiana. After all, LSU is the only law school in the state that requires civilian training.²⁶ In the end, both the civil law system and the common law system have positives and negatives. There are strong similarities between the systems; but this may be due to the near homogeneity of European civilization for centuries. Moreover, although it was the civilian thinkers who sought to protect “natural rights” for all humankind (they abolished, *inter alia*, slavery and torture),²⁷ it was the common law nations that were initially successful in putting this higher law into a practical

25. Moréteau, *De Revolutionibus*, *supra* note 13, at 33.

26. *Id.* at 51.

27. Lucke, *supra* note 9, at 17.

form.²⁸ Indeed, the monarchy was still quite strong in both Austria and Prussia at the time of the drafting of the codes, but the common law was invoked to limit the monarchy in England.²⁹

Moreover, I do not intend to prove specific civilian/continental influence on the Constitution or the American legal system as a whole. Such a job has already been done. Much has already been written on the subject of civilian theory and the framing generation.³⁰ Some have noted that, at times, the framers appealed to civilian theory more often than to common law thinkers—even Blackstone!³¹ Others have shown, through extensive research, that the civil law was appealed to on private law matters that the common law already covered,³² and in American law generally.³³ Indeed, some of the most famous cases in common law property were actually civil law based decisions.³⁴ The use of civilian theory was even stronger in the area of Constitutional adjudication.³⁵ Further still, others have inadvertently noted statements by the framers which show vivid knowledge of the civil

28. *Id.* at 37, (explaining that the American Declaration of Independence was recording these ideas while the Europeans were trying to put them into their codes); common law courts also acted early in protecting certain rights against one's neighbors; Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 170 (1928-1929).

29. Corwin, *supra* note 28, at 183-85.

30. Some have set forth that the method of adjudication that was used in the founding documents appears more civilian than common law-based—i.e. looking for fundamental principles first, then applying them to the facts, rather than deriving fundamental principles from the facts. See Jacques Vanderlinden, *Is the Pre-20th Century American Legal System a Common Law System? An Exercise in Legal Taxonomy*, 4 J. CIV. L. STUD. 1 (2011).

31. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POLIT. SCI. REV. 195 (1984).

32. R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence in Symposium: Relationships Among Roman Law, Common Law, and Modern Civil Law*, 66 TUL. L. REV. 1649, 1679 (1992).

33. *Id.* at 1653.

34. *Id.* at 1664 (citing *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)).

35. *Id.* at 1671, 1676 (stating "The Constitution of the United States and those of the several states were understood in the light of these civilian statements of principle.").

law, even going so far as to state that writing the Constitution down would give it “a usufruct” over the next generation.³⁶

Finally, I do not mean to deny any and all common law influence on the Constitution. However, it is highly important to note that the common law was not as sacrosanct to the framing generation as the modern Supreme Court opinions would have us believe. At times, many were openly hostile to the adoption of the common law, and made sure that individuals knew they did not adopt it simply by being under English control—and this was two years before the colonies declared independence.³⁷ Moreover, others were concerned about the political structure that having common law courts would bring, to wit it was noted, “To bring the common law wholesale would bring ‘a thousand anti-republican theories.’”³⁸ Perhaps these hostilities were more directed at the source of the common law rather than at the common law itself. After all, we declared independence from, and fought a war against, the English Monarchy. Is it any surprise that the people would be somewhat put off by adopting a legal regime created by Crown-appointed judges? In the generation following the framing, it was succinctly put. “[W]e are not so strict as [England] in our attachment to everything in the Common Law.”³⁹ Finally, one should take note that the drafters of the Constitution were not the ones who actually gave it power. The people of the United States gave it power. As a result, it was not Englishmen alone who

36. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (Harvard Univ. Press 1980) (citing, 5 *THE WRITINGS OF THOMAS JEFFERSON* 116, 121 (P. Ford ed., 1895) (emphasis omitted from original).

37. Pound, *supra* note 5, at 6 (stating, “already in Novaglus (1774) John Adams argued against the proposition that the colonists, of legal necessity, had brought over English law with them and were bound by it . . .”).

38. KAMMEN, *supra* note 20, at 54 (citing letter from George Washington to Alexander Hamilton, July 10, 1787).

39. Thomas H. Lee, *The Civil Law Tradition in American Constitutionalism* (citing letter to Sir William Scott (Lord Stowell), Sep. 22, 1828, in 1 *LIFE AND LETTERS OF JOSEPH STORY* 559 (William Story ed., 1851)), available at http://www.law.nyu.edu/sites/default/files/upload_documents/Lee%20Civil%20Law%20Tradition%20NYU%20Final%20Draft.pdf.

ratified it,⁴⁰ but a people consisting of mainly Continental Europeans.⁴¹ This idea is reflected through Thomas Paine, who once stated, “Europe, and not England, is the parent country of America. Not one third of the inhabitants, even of this province [Pennsylvania], are of English descent. Wherefore, I reprobate the phrase of parent or mother country applied to England only as being false, selfish, narrow and ungenerous.”⁴²

However, one should also note that the framers adored the common law when it protected individual rights, hence they often invoked the “rights of Englishmen.”⁴³ Moreover, to deny common law influence entirely would be an absurd thing to do, as the Seventh Amendment clearly cites the “common law.”⁴⁴

D. Note on the Title

In searching for a title to this essay, I knew it must be (1) in Latin to reflect the classical legal aspect of this paper, and (2) it must reference both systems of law: common and civil. Eventually, I came to realize that the selected title, *Secundum Civilis*, achieved this end and also reiterated themes present throughout this writing. Taken together the words may mean “through the civilians,” “second city,” or “second civilian.” An astute observer would realize that it also references two works of law that are fundamentally important. The first part denotes what has become known as the *Corpus Juris Secundum*, which is the total body of

40. As the Preamble of the United States Constitution states, “We the people . . .”.

41. This achieved what Benjamin Franklin wanted, i.e., having a Constitution which would be attractive to Continental Europeans. See Mitchell Franklin, *Concerning the Influence of Roman Law on the Formulation of the Constitution of the United States*, 38 TUL. L. REV. 621, 631 [hereinafter *Concerning the Influence*].

42. *Id.* (citing Paine, *Common Sense* (1776) in 2 LIFE & WORKS OF THOMAS PAINE 93, 127 (William Van der Weyde ed., 1925)).

43. Calvin Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 56 (Giving examples of the early American invoking the “rights of Englishmen”).

44. “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....”

law for the United States—a massive compilation of rules of law and court decisions.⁴⁵ The second part denotes the *Corpus Juris Civilis*—the work of, *inter alia*, Tribonian at the order of Emperor Justinian. The CJC, which will be discussed in detail below, served as a source of Roman law for centuries.⁴⁶ One would do well to study it.

Lastly, the interpretation understood as “through the civilian” represents a universal theory: law is meant to be understood by the citizens.⁴⁷ This need for citizen understanding of the law, I believe, inevitably leads to the position that the citizenry ought to be at the center of the law.⁴⁸ Even those principles of law arising from universal reason were understood as needing to be morphed in such a way as to be usable by the average person.⁴⁹ All four Enlightenment era codes share such a belief. Thus, the title drives home the very heart of this essay—the Constitution is, in all essential respects, an Enlightenment code and ought to be understood as one.

II. ARTICLE I: THE ROMAN LAW

A. *The Roman Law and Europe*

What is meant by the term “Roman law” is not a single set of statutes or juristic writers, but rather a broad spectrum of law ranging from the sixth century B.C. through Cicero, Theodosius,

45. It is in the context of the CJS, the term “*Secundum*” denotes the second edition. Kendall F. Svengalis, *Legal Encyclopedias* in LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL 89-90 (Rhode Island Law Press 2010).

46. Zepos, *supra* note 6, at 897 (stating, “the root of that common European Spirit lies in the Roman world-empire, the final phase of which is represented by the Justinian legislation in the form it took in the sixth century.”).

47. The Constitution is meant to be understood by the voters, *District of Columbia v. Heller*, 554 U.S. 570, 576; 128 S. Ct. 2783, 2788 (2008); Others have noted that the Civil Codes are meant to be understood by the citizens. WATSON, *supra* note 14, at 142.

48. Professor Moréteau also believes that citizens should be the center of the “legal universe,” Moréteau, *De Revolutionibus*, *supra* note 13, at 34.

49. Cueto-Rua, *supra* note 4, at 655 (discussing how the drafters morphed the theoretical into the practical).

and the classical Roman age, then deposited, for the most part, within the confines of the *Corpus Juris Civilis* and protected by the Holy Church for a millennium. It is this body of law that has been picked apart throughout multiple eras of human kind and transplanted into the existing social order. Due to its significance in our discussion, a brief history of the Roman law follows, along with an explanation of how it entered the great codes and ultimately the United States Constitution.

Out of historical necessity, we begin with the Law of the Twelve Tables; indeed, no discussion of legal antiquity could be complete without it.⁵⁰ After the monarchy was eliminated and Rome became a fledgling republic, two classes of people existed—patricians (noble-born) and plebeians (essentially, commoners). When a dispute arose between citizens, and the law was not clearly on one side or the other, resort was made to the pontiffs, who were all patricians. Needless to say, the plebeians did not always receive a fair hearing. To resolve the deep mistrust of the plebeians, a group of ten citizens, *decemviri*, were assigned to draft the Twelve Tables, which were to extend over all areas of possible contention among citizens. Ostensibly, this allowed the plebeians to know their rights before they entered court.⁵¹ One can see in this concept the shaping of the theory that law is meant for the citizens.

As Rome expanded, the need for new legal devices also grew. To alleviate this growing need, pontiffs were able to creatively interpret the Twelve Tables via analogy to other provisions therein to cover situations not historically provided for. One such event concerned emancipation.⁵² The Twelve Tables had the father as head of the household, who held control over his family until death. Another provision allowed a father to sell his son into

50. *Id.* at 645, n. 1&2 (noting that the history of Roman law is said to have started with the law of the Twelve Tables) (citing Reginald Parker, *The Criteria of the Civil Law*, 7 JURIST 140 (1947) and FRITZ SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE 5 (1946)).

51. STEIN, ROMAN LAW, *supra* note 6, at 3-4.

52. *Id.* 7-9.

servitude, but if he sold him three times, then the son became liberated and was no longer under his father's control. This gave us emancipation, for a father could "sell" his son into servitude three times, each time having a friend "return" his son. Thus, the son would be freed from his father's house. Eventually, this concept of emancipation was expanded to female children as well. One can see in this that the origins of text are only interpretation.

When the republic expanded well beyond Italy, it began having more contact with non-Roman citizens than it ever had before. As such, a new, separate law was created for them—*ius gentium*, meaning the law common to all civilizations.⁵³ That which covered Roman citizens was called the *ius civil*. This need to have separate laws—and separate praetors for each—would come to an end during the classical Roman period, when essentially all residents of the empire were made citizens.⁵⁴

Finally, we reach the Christian era. During the first two centuries of Christianity, the Roman republic saw its most prominent legal age yet. Four members of this class deserve special attention, as their work and ideas will constantly arise in our discussion, and constantly arise in any discussion on Roman law. The first is the great teacher of Roman law, Gaius. He was the one who divided the civil law in his textbook, *The Institutes*, into three concepts: persons, things, and actions.⁵⁵ Then there is Ulpian and Paul, both of whom are still highly regarded today for their ability to synthesize jurisprudence. And finally, there is Papinian, who is beloved for his case analysis.

53. *Id.* 12-13; see also Anton-Hermann Chroust, *Ius Gentium in the Philosophy of Law of St. Thomas Aquinas*, 12 NOTRE DAME L. REV. 22, 26 (1941) (stating that *ius gentium* is "that law which natural reason alone has set up among men" or "that law which all peoples make use of.").

54. STEIN, *ROMAN LAW*, *supra* note 6, at 20 (noting that the *Constitutio Antoniana* stretched Roman citizenship far beyond its former bounds).

55. For a more thorough discussion of Roman legal history, and on Gaius in particular, see ANDREW STEPHENSON, *A HISTORY OF THE ROMAN LAW WITH A COMMENTARY ON THE INSTITUTES OF GAIUS & JUSTINIAN* (1912).

The next phase of Roman legal history came with the *Codex Theodosius*, which was said to be a compilation of all laws created by the Christian Emperors since Constantine's religious conversion of the empire. However grand this work may be on its own, it pales in comparison to that of a later emperor, Justinian.

Justinian, Emperor of the Eastern Empire in Constantinople, looked at the desolation of the West after the German invaders conquered the once great civilization. While at the same time attempting to wrestle authority away from the Roman Papacy, he wanted to restore the magnificence of a unified Empire.⁵⁶ His conquests eventually let him hold Italy for a brief period. But his conquests on land would not be his lasting legacy. Like Napoléon after him, Justinian's memory would be preserved more by his legal writing than by his military conduct. In the sixth century, Justinian appointed a council to combine all the laws of the Empire into one massive volume. Headed by Tribonian, the council made quick work of their task. In the end, the work was divided into three parts: the first is the Institutes, modeled after that of Gaius; the second is the Digest, a compilation of writings by great jurists such as Paul, Ulpian, and Papinian; the third is the Code, modeled after that of Theodosius. Justinian eventually had to add a fourth part, called the *Novels*, a compilation of his own enactments. Massive in size and importance, the document is one and a half times the size of the Bible, and lasted as the basis of law for Romans in Byzantium until the Muslim conquest in 1453.⁵⁷

But in the west, the CJC was lost in the sixth century. It would not be rediscovered until more than four hundred years later. This does not mean that Roman law was entirely lost for that lengthy period. The conquerors adopted some provisions of Roman law and traces of it can be seen in the Visigoth Code. Moreover, the

56. Stein, *ROMAN LAW*, *supra* note 6, at 32-35 (noting his desire to restore the glory of the old Roman Empire).

57. *Id.* (noting the massive size and complexity); *see also* Zepos, *supra* note 6, at 899 (noting that the Muslim conquerors allowed Roman law to continue as a basis for enslaved Christians).

Catholic Church, being the only Roman institution left in the West after the fall, helped to preserve many Roman legal customs, most notably by the use of its ecclesiastical courts.

After its rediscovery in Italy, the CJC gave rebirth to the study of Roman law. Students from throughout the continent came to study it. During this frenzy a number of different groups developed *inter alia*, the commentators and glossators—who sought to explain the text. Eventually the glosses were given their own books. In time, some sought to defend Roman law on the basis of a higher law; others used it as a supplement to their own laws; and it became a corner stone in the ecclesiastical courts, which gave it almost universal application in Europe. It was studied to some degree in England, until those who tried to teach it were exiled. Roman law was to have its greatest impact when it filled the void left by the Catholic Church following the Reformation. After those unfortunately volatile years, a universal system of law seemed impossible. But the respect many had for the Roman custom allowed it to continue crossing international borders, including those of France, Prussia, Austria, and, eventually, to the United States.⁵⁸

B. The Prussian Code

Most people are familiar with the saying, “all roads lead to Rome.” This section of the essay may be construed as implying, “all codes lead to Rome.” Indeed, that body of law, as has been noted above, played a pivotal role in the formation of the civil law, and it is the adoption of the same that gives the civil law, and the codes of the Enlightenment, a unique spirit.⁵⁹ Given the extreme

58. For a more thorough discussion on Roman legal history, see CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* (1917) and PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* (1988) [hereinafter *CHARACTER AND INFLUENCE*].

59. WATSON, *supra* note 14, at 1-22 (noting that one of the main characteristics of the civil law and of the Codes is the basis of Roman law;

importance of each code in laying the criteria for what is an “Enlightenment code,” it is necessary to show how these codes came to be, for it is by the similar political and social processes that created them that one may compare them to the United States Constitution; this is especially true with Roman law.⁶⁰

Therefore, we begin with the Prussian Civil Code. In German, its name is *Allgemeines Landrecht für die Preußischen Staaten* (ALR), and it was initially begun under the leadership of Frederick the Great.⁶¹ But did not come into force until his son, Frederick II, came to power in 1794. It is said to have dealt with what we call today constitutional law,⁶² civil law, and criminal law.

When Frederick William I first sought to adopt a code for his scattered kingdom in 1714, he looked to the faculty of law at the University of Halle, led by Christian Thomasius. His goals were not reached. But a little more than two decades later, he arranged for Samuel von Cocceji to draft a new law. It is said that unlike Thomasius, Cocceji was “a keen Romanist [who] tried to maintain the primacy of Roman law.”⁶³ The kingdom was against him, though, on this point.

Part of the reason why the code took so long to be drafted was due to Roman law. Initially, the King wanted to remove the “Roman law which [was] written in Latin and compiled without any order or system.”⁶⁴ This dream, however, was not realized, as the bulk of the draft simply rearranged what had become the *ius*

Roman law is essentially the intellectual basis of the civil law and of the Civil Codes).

60. Others have given blanket statements as to the effect of Roman law on the great codes. See Zepos, *supra* note 6, at 903 (noting particular characteristics of the great codes showing Roman law influences).

61. STEIN, ROMAN LAW, *supra* note 6, at 112; Lucke, *supra* note 9, at 13-24.

62. Pt. II, tit. 13, giving legislative authority, power to lay taxes, and power to levy war; Pt. II, tit. 17, § 18 dispenses judicial power; § 44 gives sovereign immunity, abrogated only by consent.

63. STEIN, ROMAN LAW, *supra* note 6, at 112.

64. Lucke, *supra* note 9, at 18.

commune—Roman law changed to fit into each nation. Indeed, by the time the whole matter was settled, Roman law was to be included where it fit in with everything else.

One needs not look to the subtext of the code to find Roman influences. In Section 30 of the introduction to an earlier draft of the code it is stated that the King has not abolished Roman law, but has taken out the confusion so that, “consequently, the Roman law is reduced into an art and system; that is to say, it is proposed in the most natural and proper order....” Moreover, Part I, Book I, Title I, Section 10 of that same draft states, “We have indeed taken the Roman law for a foundation, in so far as its general principles appear to be drawn from natural reason.” The specific intuitions of Roman law taken up in the code may be seen in those provisions on property.⁶⁵ Though highly specific, this code managed to last until the Code of the German Empire of 1900.

C. *The Austrian Code*

Much like the other Codes discussed within this essay, the Austrian Code had a tumultuous gestation period. Holy Roman Emperor Charles VI wanted a comprehensive law of intestate succession based upon Justinian’s laws (in force from 1727 to 1747).⁶⁶ His successor to the empire, Maria Teresa, issued an order in 1753 to draft a code, which was to cover all of private law (as opposed to the Prussian code, which wanted to also cover public law). This *Codex Theresianus* was finished in 1766, and was a compromise of Roman law and customary law. Although written in the vernacular, the code spanned 8,367 articles and was grouped based on Roman law categories. This code was met with fierce public opposition as it removed too much power from the nobles, and was viewed by reformers as not being drastic enough.

65. STEIN, ROMAN LAW, *supra* note 6, at 112. Such a fact is not surprising, since Roman law has been called “a prolific parent of codes.” Edgar S. Shumway, *Justinian’s Redaction*, 49 AM. L. REG. 195, 197 (1901).

66. STEIN, ROMAN LAW, *supra* note 6, at 112.

A student of the great natural law thinker Martini, a man by the name of Johann Bernhard Horten, was hired to draft a new, shorter code. The code under the new emperor, Joseph II, went into force in 1787. The work of the previous commission was then thrown out and a new commission was ordered. This time, Martini was placed at its head (as he had been for the first draft of the *Codex Theresianus*). The code was eventually given actual force in 1811, some sixty years after the *Codex* was begun.

But Martini's effect upon the Code is felt in both Natural law and Roman law. For it is by his natural law work that the Roman law was allowed into both his code and the later final drafts.⁶⁷ He argued that Roman law was not bad, but was indeed reasonable: "Roman civil law consists to the greatest extent of natural laws. It is impossible to avoid all error if its shortcomings are complements according to the precepts of natural law and its dark passages illuminated."⁶⁸ One may see the primary effect of Roman law in this code in the notion that the private civil law made no distinction of social or economic status between freemen. One may also see the Roman law influence on the notion of suretyship.⁶⁹

In the end, Franz von Zeiller replaced Martini as head of the commission on drafting. His work is said to be a practical compromise between Roman law and the contemporary law. This shortened draft (1,502 articles) has remained in force to the present day, with some amendments occurring in 1914, 1915, and 1916 and was given the name of *Allgemeines bürgerliches Gesetzbuch*—ABGB.⁷⁰ One may view the document as a testament to the longevity and universality of both the Roman law and of the codes.

67. *Id.* at 113 (stating, "Thus, although Roman law as such was rejected, certain ideas of Roman law could be brought back under guise of natural law.").

68. *Id.*

69. Philip K. Jones, Jr., *Roman Law Bases of Suretyship in Some Modern Civil Codes*, 52 TUL. L. REV. 129, 148 (1977-1978) (noting that the Roman conception of suretyship was adopted into the Austrian Civil Code).

70. *Id.* at 114 (noting its longevity).

D. The Code Civil

Aside from the United States Constitution, few legal documents have ever had the global impact of the Napoleonic Code. Its theories and order were followed by codifiers in Louisiana,⁷¹ Italy, Latin America, and Canada (to name only a few)—not to mention throughout central Europe as a consequence of Napoleon’s wars.

Codification as such was nothing new in France. Indeed, centuries prior to the Revolution, King Charles VII had ordered that the customs of France be written down, which resulted in a codified and uncodified system. After the Revolution, however, the need for a comprehensive code on private law was more than obvious. The Revolutionary government had continuously promised such, but it had always failed to deliver it. In fact, the first three drafts of the code, written by Jean-Jacques Régis de Cambacérès, were all rejected for one reason or another.

However, when Napoléon became first consul, he envisioned a code covering all private law, and wanted it completed quickly and perfectly. To achieve this end, he appointed Jean Étienne Portalis and three jurists to head the Commission of 1800. To be sure, the prior attempts at codification were very useful to their endeavors. Moreover, the Commission was able to look to eighteenth century writers such as Domat and Pothier, and quoted them frequently.

In this manner Roman law was able to influence the French code. Both Domat and Pothier summarized the law that was in force in France at that time, which was itself heavily Roman. Even more importantly, Pothier had already done much of the primary work needed to draft a code. He had collected and organized the Roman law into a “rational and usable order,”⁷² and then divided the generally applicable laws gleaned from there into five

71. The Digest of 1808 was the first in a long list of civil codes inspired by the French model.

72. STEIN, *ROMAN LAW*, *supra* note 6, at 114.

categories: general rules, persons, things, actions, and public law. The rules on public law were left out of the *Code civil*. But Pothier was not solely a Roman scholar. He was also very familiar with French customary law, and was able to weave Roman law and custom together.

It is said that the Roman rules of law predominate the *Code civil*,⁷³ which is still in force (with some amendments) today. One example of Roman private law can be seen in the notion of lesion: in article 1118, lesion vitiates certain kinds of contracts; then article 1674 allows parties with full legal capacity to gain rescission of a contract where he has been injured by selling his property for less than seven-twelfths of the value of his immovable property. Moreover, the concept of good faith, which can be seen in all three of the great codes, stems from the Roman law of *bona fides*.⁷⁴ So, too, is the concept of favoring the debtor over the creditor derived from the Roman rule of wanting to protect the weak from the strong. Lastly, the distinctions between ownership and possession in the codes were, and continue to be in all civilian states, the Roman rule.⁷⁵

73. Others have noted the massive influence of Roman Law on the *Code civil*. See J.L. HALPERIN, *THE CIVIL CODE* 69 (David Gruning trans., 2001) (stating, “Roman law was also invoked as the source for the Code’s rules on successions and property.”). See also Olivier Moréteau, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1146 (2008-2009) (noting the “radical unity of the European law that found its grounding in Roman law.”).

74. See WATSON, *supra* note 14, at 166 (noting the Roman lesion concept in the codes). See Zepos, *supra* note 6, at 904 (noting that it is from this notion that the concept of abuse of right is derived. This rule of law is present in all civilian jurisdictions even where no provision for it exists.).

75. To be fair, several provisions of the codes do not derive from the Roman rules directly and are, in fact, responses to the Roman understanding. See Zepos, *supra* note 6, at 903-904.

*E. The Roman Law and the United States Constitution*⁷⁶

The framing generation had a wealth of sources pertaining to the Roman law.⁷⁷ This included, *inter alia*, numerous copies of Justinian's legal temple, the *Corpus Juris Civilis*—both translated into English and retained in Latin. They were taught in the classical style, and knew a great deal about Roman public law and its history.⁷⁸ It is indisputable that the same people who declared independence and drafted the American Constitution at Philadelphia both admired, to the point of nearly worshipping, the ancient republic, and wished to learn from its mistakes.⁷⁹ Their professors were civilians, their friends across the pond were civilians; and these civilians were all trained in the Roman law.⁸⁰ With this brief interlude in mind, we continue forth with ascertaining just how the late republic touched out national code.

1. Article I, Sections 1 & 3

What may at first seem to be a superficial connection to antiquity, may also be the most profound Roman influence on the

76. This section of the essay owes a substantial debt to Professor Mitchel Franklin of Tulane. Without his early study in the area of Roman law influences on the Constitution, I doubt I would have been able to have completed this essay.

77. It has also been noted that there was a “propaganda campaign” to establish the civil law in America. Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966) (cited in STEIN, CHARACTER AND INFLUENCE, *supra* note 58, at 413). Others have also noted this general civil law influence in the early United States. See Pound, *supra* note 5.

78. Richard M. Gummere, *The Classical Ancestry of the United States Constitution*, 14 AM. Q. 4-6 (1962) (noting that Jefferson was busy shipping ancient Roman law sources and contemporary Romanist writings by Mably to the delegates, also noting that Adams was said to have “thought in Latin;” and “Cicero’s ideas on [some subjects] run like a stream underground through our colonial writings.” See also David J. Bederman, *The Classical Constitution: Roman Republic Origins of The Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405, 407 (2007-2008).

79. R.H. Helmholtz, *supra* note 32. See also DANIEL R. COQUILLETTE, JUSTINIAN IN BRAINTREE: JOHN ADAMS, CIVILIAN LEARNING, AND LEGAL ELITISM, 1758-1775 (Colonial Soc. of Mass. 1984) (noting that Cicero has been called “a role model for early American lawyers” and calling John Adams a “barnyard Justinian.”).

80. Stein, *supra* note 77.

Constitution. It is well established that the framers looked to the Roman notion of public power as a guide as to how the same power ought to be handled.⁸¹ Indeed, perhaps one of the most famous comments to come from Rome seems to be reflected in our triune federal structure. In discussing the separation of governmental power into three parts, Polybius writes:

For when one part having grown out of proportion to the others aims at supremacy and tends to become too predominate, it is evident that, as for the reasons above given none of the three is absolute, but the purpose of the one can be counterworked and thwarted by the others, none of them will excessively outgrow the others or treat them with contempt.⁸²

Besides this separation of powers there is yet another structural connection to the ancient regime. It is this structural feature that bears a more pronounced Roman influence than the three-part separation of power. That feature is, of course, the Senate. Article I, Section 1 creates the Senate: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Section 3 further delineates the powers and functions of the body. Of particular note are a higher age requirement, a longer term, and a larger constituency than the House.

As any student of history should know this separation of legislative power was the result of the Great Compromise. Some delegates wished to have Congressional representation based upon statehood, and thus a set number of representatives per state. Others wanted Congressional representation to be based upon population. The solution to this crisis: split the difference. Thus, the bicameral legislature was born in the United States.

81. See generally Louis J. Sirico, Jr., *The Federalist Lessons of Rome*, 75 MISS. L.J. 431 (2005-2006) (The author outlines Roman law influences on multiple provisions of the federalist papers. Due to the constraints of this essay, I have been unable to address the full influence here. Thus I refer the reader to this most excellent work on the subject).

82. Cited in Bederman, *supra* note 78, at 416.

The body, as it exists in this nation, is undoubtedly based on the Roman constitutional scheme. The term “Senate” derives from the Latin *Senatus*, which means “council of elders.” If the framing generation had not wanted to base its conception upon the Roman system, it could have named the body anything else. Examples of such are “upper house” or “chamber.” Moreover, the type of reverence for this body, as opposed to other contemporary legislatures, is almost identical. The Romans looked to their council as a higher office; its members were allowed to wear purple sashes and make binding legislation. The same body has been charged with being “made up of the wisest, the best educated, the most respected, most experienced, most vigilant, most patriotic men of substance in the Roman republic.”⁸³ In much the same way, it is well known that the American Senate was designed to be more prestigious and deliberative than the House of Representatives.

2. Article I, Section 9, Clause 2

The Constitution provides in this section, “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.”⁸⁴ In reviewing ancient influences on the American Constitution, it has been explained that, “[a] Roman citizen’s right of *provocatio*, coupled with the tribunitial power of *auxilium*, was an ancient analogue of habeas corpus. Additionally, the exigent circumstances for the suspension of habeas corpus closely mirror those for the derogation of *provocatio* and *auxilium*.”⁸⁵ Although one may see correlation to the British model of habeas corpus, one should also realize that there exists a concept of habeas corpus that is not the sole concept of the clause at issue. Rather, it also provides under what circumstances the writ may be suspended. This method is in

83. ROBERT C. BYRD, *THE SENATE OF THE ROMAN REPUBLIC ON THE HISTORY OF ROMAN CONSTITUTIONALISM* at ix, xi (1995).

84. U.S. CONST. art. I, § 9, cl. 2.

85. Bederman, *supra* note 78, at 439.

stark contrast to the way the writ was suspended by the English. On that point, it has been noted, “[i]t is important to realize, however, that British law was rather less helpful to the Framing Generation in explaining the specific conditions or timing for the suspensions of habeas corpus.”⁸⁶ The English version was “less helpful” because the Parliament suspended habeas corpus only against a “limited class of persons declared to be treasonous or in rebellion against the Crown and were essentially bills of attainder, a form of legislation proscribed by the United States Constitution.”⁸⁷

If the item known as the “suspension clause” were to be thought of as referring to the British model of habeas corpus, then it would simply mean “bills of attainder.” But if the term contemplates bills of attainder, then we would be forced into a terrible position—the Constitution would have superfluity. For if the habeas corpus clause means “bills of attainder,” then the clause that follows the suspension clause is superfluous. For that clause states, “No Bill of Attainder or ex post facto Law shall be passed.”⁸⁸ The only way to avoid this superfluity is to suggest that the second clause overrules the first, but seeing that they were passed at the same time, this seems highly unlikely.

Lastly, it should be mentioned that throughout the ratifying era, in the State conventions, and in the Philadelphia convention, extensive attention was paid to the Roman republican use of temporary dictators in times of emergency.⁸⁹ When these dictators were declared, periods of time were set for the suspension of the aforementioned *provocatio* and *auxilium*.⁹⁰ Thus, the ratifying states certainly contemplated the clause as referring to the Roman legal concept. But one must be aware that both clauses are in the portion of the Constitution placing *limits* on Congressional power.

86. *Id.*

87. *Id.*

88. U.S. CONST. art. I, § 9, cl. 3.

89. Bederman, *supra* note 78, at 439-40.

90. *Id.* at 436.

Thus, the Roman influence is not only one of giving an example of a necessary power, but in giving a lesson of what ought not be done. A student of history would recall that the last Roman dictator never gave up power.

3. Article IV, Section 4

The Constitution states, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or if the Executive (when the Legislature cannot be convened) against domestic violence.”⁹¹ Few scholars have expounded on this text and courts have essentially overlooked it. And the American people have forgotten its meaning over time. But this section suggests something rather amazing. If it had been understood in a Roman law light, then: (1) The fourteenth amendment could have been accomplished by legislation, and (2) much of what was accomplished by an expanded commerce power could have been achieved by a Romanist-construed Guarantee clause. But those specific results are beyond the scope of this section of my essay. They will, however, be alluded to in what follows.

There was, in Roman public law, a concept of *intercessio*, whereby the plebeian tribunes could agree or veto acts passed by the patricians, when those actions had effect upon the plebeians.⁹² The main historical connection to the Roman doctrine can be found

91. U.S. CONST. art. IV, § 4.

92. The history of this power is much more complicated than I have made it here. A full discussion of Roman intercession is left for another time. However, one may note that the power of intercession is not confined to acts by the Congress; judicial review of State actions also bears a striking burden to the concept. Moreover, Professor Franklin has been able to connect the same principle discussed herein, intercession, and apply it to the veto power implicit within the Fourteenth Amendment. See Mitchell Franklin, *Problems Relating to the Influence of the Roman Idea of the Veto Power in the History of Law*, 22 TUL. L. REV. 443 (1947-1948). Since this paper primarily concerns the Philadelphia Constitution and the original ten amendments, I have refrained from discussing that point.

in writings between the French Romanist, Abbé de Mably, who was a very dear friend of both Adams and Jefferson, and whose works were read by Benjamin Franklin. On the issue of intercession against the States, Mably wrote to Adams:

With you, the authority of the Congress must supply the place of triunes, provided you give to this assembly the form and credit which it ought to hold. The rich, when they perceived a body empowered to sit in judgment upon their actions, would prove guarded in their enterprises; and the people would, certainly, feel less disquiet and suspicious.... [E]ither the hope of fear of a juridical decision would calm the raging of sedition in America.⁹³

Thus, it is said that Mably “gave the Continental Congress the power of interposition against anti-democratic state governments.”⁹⁴ Madison apparently took up this idea and, in Federalist Paper 43, described it as creating the power of “interposition of the general government.” That this *intercessio* was taken from Mably and ordered upon the United States Constitution is further shown by Madison’s writings to Jefferson. There Madison reveals his worries about state power in saying, “a check on the States appears to me necessary Without such a check in the whole over the parts, our system involves the evil of imperia in imperio.”⁹⁵

In discovering this connection, Professor Franklin noted:

In suggesting that the national government was capable of objective judgment concerning the genuineness of the republicanism of the states, Madison was following Mably. As has been shown [Mably] had proposed to John Adams that the Romanist interpositional or tribunitional power [as was named above as intercession] be given exclusively to the Continental Congress, because it would exercise its authority in accordance with legal method.⁹⁶

93. Franklin, *Concerning the Influence*, *supra* note 41, at 628.

94. *Id.*

95. *Id.* at 633.

96. *Id.* at 633-34.

To further drive home the Roman law influence on this portion of the Constitution, it is interesting to note that the Guarantee clause may have no English origin.⁹⁷

It is a sad gloss on history that the Southern States used “interposition” to protect their racist proclivities for decades, while the true power of interposition actually rested in the hands of the federal Congress.

4. *The Fifth Amendment and Infamy*

The Constitution provides that “No person shall be held to answer for a capital, or otherwise infamous crimes . . . nor be compelled in any criminal case to be a witness against himself.”⁹⁸ The understanding of that clause, today, is that a person cannot be forced to testify against himself on any matter that may eventually lead him to criminal liability. However, when this clause is understood in light of its Roman origin, it actually means that a person cannot be forced to testify at all in a criminal trial, when doing so may “infame” him.

Infamy stems from Roman feudal infamy.⁹⁹ This concept essentially causes a person to be ostracized by the community. The person, whether or not convicted of a crime or found liable for some action, could be deemed “civilly unworthy,” dishonored, or disgraced. The general term for this concept when translated into English is “infamy.”¹⁰⁰ From Rome, the concept was carried over into feudal Europe, under the guise of religious infamy/excommunication. John Calvin kept infamy/excommunication after Luther attempted to abolish it. The Puritans carried the concept with them to the New World, until it was abolished by popular demand as being “undemocratic.” Montesquieu wrote

97. *Id.* at 628-29.

98. U.S. CONST. amend. V.

99. See generally Franklin, *The Encyclopédiste*, *supra* note 3. The following is a summary of Professor Franklin’s findings on the subject.

100. *Id.* at 42 (explaining that there are some thirty-two other ways of stating infamy).

about infamy as being one of the most ruinous things that could happen to a person.¹⁰¹ A French *Encyclopédisme* idol, Cesare Beccaria,¹⁰² helped to develop and secularize Luther's attack on infamy. Jefferson and Edward Livingston are both known to have studied Beccaria in detail. It is from these men and their roles in the founding generation that infamy was brought into the Fifth Amendment.¹⁰³

Because informing, or testifying against one's neighbors and friends, may create just the type of infamy that was present in feudal Europe and ancient Rome, the Fifth Amendment must necessarily be understood as a right of any witness to refrain from testifying, even if it would not incriminate him for the crime charged or any future charges. Thus, self-incrimination should properly be understood as "self-infamy." A dissenting Justice of the U.S. Supreme Court recognized this point.¹⁰⁴

It is important to note that the concept of "infamy" mentioned in the Constitution, "[never] enjoy[ed] any real important role as such in [the] history of English Criminal law, perhaps because it was excluded or held down by Magna Carta."¹⁰⁵ Therefore, the

101. *Id.* at 43 (quoting Montesquieu as saying, "the hopelessness of infamy causes torment to a Frenchman condemned to a punishment which would not deprive a Turk of a quarter of our sleep.").

102. Beccaria himself was Italian, but his work on the philosophy of crime became world-famous, was read throughout Europe, and made its way to the United States. Richard V. Sipe, *Cesare Beccaria*, 22 *IND. L.J.* 29, 38 (1946-1947).

103. Franklin also shows how such an understanding would exclude "presidential and congressional infamy, such [as had] developed in the United States since the ending of the Second World War." *Id.* at 44.

104. *Ullman v. United States*, 350 U.S. 422, 450; 76 S. Ct. 497, 513 (1956) (Douglas, J., dissenting). That the Supreme Court would cite to the Roman law is of no surprise. After all, there have been literally hundreds of Supreme Court cases that have made mention of or relied upon Roman law. See Samuel J. Astorino, *Roman Law in American Law: Twentieth Century Cases of the Supreme Court*, 40 *DUQ. L. REV.* 633 (2001-2002).

105. Franklin, *The Encyclopédiste*, *supra* note 3. I would also note that this is another example of the common law system moving more toward human rights protection than the civil law system. By this statement, it is shown, that infamy was excluded from public life much sooner in England than on the continent.

most potent source of “infamy” is that which stems from the Roman law and not any that is present in the English law.

5. *The Fifth Amendment and Double Jeopardy*

On this point the Fifth Amendment declares, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”¹⁰⁶ Popularly called the Double Jeopardy clause, the Roman roots of this clause have long been established. In Justice Black’s dissent in *Bartkus v. Illinois*,¹⁰⁷ it was stated, “Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in Western civilization. Its roots run deep into Greek and Roman times.”¹⁰⁸ To prove this point, the Justice makes reference to Justinian’s Digest, which states, as translated by Scott, “The governor should not permit the same person to be again accused of a crime of which he has been acquitted.”¹⁰⁹

But Justice Black is not alone in finding the source of double jeopardy in antiquity. The same connection was made by Professor Paul Baier of LSU, who upon finding the connection stated, “[w]ho would have thought that certain of our Constitutional protections have come down to us from Rome?”¹¹⁰ Indeed, even other clauses, such as the right of confrontation expressed in the Sixth Amendment¹¹¹ have roots in Roman legal practice.¹¹²

106. U.S. CONST. amend. V.

107. 359 U.S. 121; 79 S. Ct. 673 (1959).

108. *Id.* at 151-52.

109. *Id.* at 152, n. 3 (citing to DIGEST OF JUSTINIAN 48.2.7.2).

110. Paul Baier, *The Supreme Court, Justinian and Antonin Scalia: Twenty Years in Retrospect*, 67 LA. L. REV. 494 (2007). Professor Baier also noted several other provisions of the United States Constitution which appear to have been lifted wholesale from the Roman text, and applied to the practical situations facing the framers. Among these are: the ex post facto prohibition in art. I, § 9, cl. 3, and the rule against the impairing the obligation of contracts found in art. I, § 10. *Id.*

111. U.S. CONST. amend. VI states, “In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witnesses against him.”

112. THOMAS JAMES NORTON, 1 THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 219 (1962).

6. *The Ninth Amendment and the Roman Legal Method*

As one will come to know upon completion of this essay, I believe that the Ninth Amendment ought to be considered the most robust Amendment of them all.¹¹³ Indeed, I believe that it (1) orders that the Roman method of analogical reasoning be used to interpret the Constitution, especially the Bill of Rights; (2) houses the natural law of the Enlightenment; and (3) should bring under its umbrella almost the entirety of substantive due process, while incorporating all that against the states, not via the Due Process clause, but via the Privileges or Immunities clause. However, this section of the essay aims only to show how the Roman legal method can be seen in the Ninth Amendment.

To briefly summarize the argument, the Ninth Amendment declares, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹¹⁴ The most important fact about this Amendment is that it says “the Constitution.” It does not say “these last eight Amendments.” Thus, it refers to *every* right listed in the Constitution. Moreover, one must read this clause from the negative to see its ordering of the Roman method. Because we are not allowed to use the listing of rights to deny any unwritten rights, we must use the listing to discover these unwritten rights protected by the Ninth Amendment.

The Civilian legal method is laid out in detail in the Louisiana Civil Code.¹¹⁵ Moreover, when there is a problem that is

113. I am not alone in believing that the Ninth was meant to serve multiple purposes. See Massey, *supra* note 43, at 50.

114. U. S. CONST. amend. IX.

115. Those articles read as follows:

Article 4: When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.

. . . Article 9: When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

“historically novel,”¹¹⁶ the Roman method orders that one make analogy, not to prior cases to develop the law, but to other provisions of the law. This method is usually summarized as “au-delà du Code civil mais par le Code civil.”¹¹⁷ This is the opposite of the common law method, which has at its helm the development of law by analogical reasoning from prior cases. An example of this can be seen above with the note on Roman emancipation. Essentially, this method locates multiple provisions of the written law, discovers their principles, and fashions a new rule implicit therefrom. I am not the first person to notice that the Ninth Amendment requires the civilian method be used in interpreting the Constitution.¹¹⁸ Indeed, the Supreme Court has used it even as late as the twentieth century.¹¹⁹

Article 10: When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.

Article 11: The words of a law must be given their generally prevailing meaning.

Words of art and technical terms must be given their technical meaning when the law involves a technical matter.

Article 12: When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Article 13: Laws on the same subject matter must be interpreted in reference to each other.

116. Mitchell Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TUL. L. REV. 487-88 (1965-1966) [hereinafter *The Ninth Amendment*].

117. Raymond Saleilles, *Preface to FRANÇOIS GENY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1913). (“Beyond the Civil Code, but through the Civil Code.” This is essentially the method that was used by Justice Goldberg in discussing the Ninth Amendment in *Griswold v. Connecticut*, 381 U.S. 479; 85 S. Ct. 1678 (1965)).

118. Franklin, *The Ninth Amendment*, *supra* note 116.

119. *Id.* (Generally discussing this method as used in *Griswold v. Connecticut*, 381 U.S. 479; 85 S. Ct. 1678 (1965)).

III. ARTICLE II: THE NATURAL LAW¹²⁰

There are few concepts that have caused as much debate and misunderstanding as natural law.¹²¹ It has, as Aristotle suggested, been appealed to when one had no chance with the law of the land.¹²² It has been argued as the basis for adopting the Roman law,¹²³ and has been supported on the notion of law originating from the Bible. As such, it has gone by many names: The law of nature, the law of God, the natural law, the law of reason. Its existence or non-existence would either mean that positive law was subordinate to another law, not crafted by human hands; or, provided it doesn't exist, would lead human beings to a sort of legal nihilism known as "positivism." Grounds for locating its principles have been argued on both an ontological and teleological basis—often arriving at the same conclusion. Others dismiss it as merely looking up into the clouds and discovering an answer.¹²⁴

However, by the time it appeared in the American Constitution, natural law had taken on a whole new model completely separate from its theological roots, although owing a great deal to the same.¹²⁵ The Enlightenment had secularized it and changed the focus from "natural law" to "natural rights."¹²⁶ Although in Catholic Spain, the idea of natural law still had not yet taken on the "individualist" approach of the other European states. Moreover,

120. For a more thorough discussion on the natural law, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

121. Massey, *supra* note 43.

122. Corwin, *supra* note 28, at 154. This quote is perhaps second in fame only to "Law is reason, free from passion."

123. See text accompanying note 60.

124. Or, as some have erroneously put it, "you can invoke natural law to support anything you want." ELY, *supra* note 36, at 50.

125. Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 *REGENT U. L. REV.* 33, 41 (1997) (discussing natural law in the context of law of reason and religion); see also Corwin, *supra* note 28, at 153 (discussing natural law as being from God); see also Lucke, *supra* note 9, at 10 (noting the transformation of the religious law of nature to the secular version).

126. Lucke, *supra* note 9, at 10.

the concept of natural law as obtained in England by that point was not the same theory as what was coming of age on the continent.¹²⁷ In England, the theory of natural law in the common law was not “universal reason” but “artificial reason.”¹²⁸ However, in practice, one could see that these two concepts were ultimately arriving at similar conclusions. Therefore, we will not take pains to separate which concepts derived from which place, because ultimately they are the same thing—a law higher than mere positive legislation.

A. The Natural Law and the Code of Prussia

The Prussian Code may well be called a “constitution for civil society,”¹²⁹ whose drafters saw no “insurmountable contradiction between positive law and natural law.”¹³⁰ Indeed, they brought them together under one roof in a way that could scarcely be imagined today: a world where legal positivism apparently rules and natural law gets laughed at.¹³¹ But at the time of the Prussian Code’s debate and existence, natural law was considered to be the one true law, a law that no one dared to laugh at.

127. Pound, *supra* note 5, at 4-5.

128. Mitchell Franklin, *A Study of Interpretation in the Civil Law*, 3 VAND. L. REV. 557 (1949-1950). I do not mean “artificial” as in fake. I mean artificial in the sense that the reason upon which this law is based—although influenced by the natural law—is largely built up by experience. This is in contrast to what is thought of in the continental “natural law” theory that law is “universal.” In that vein, the natural lawyers decipher a rule of law from “reason” and apply it to the circumstance in which it must do its work. An astute observer would note that this is very similar to what St. Thomas Aquinas believed as to how the natural law was to operate—finding a fundamental principle and then apply it to its particular setting. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I of the Second Part, Question XCV, art. 2 (comparing how the natural law is applied to particular situations in the same manner that the form of a house is applied to a particular construct of a house).

129. Glenn, *supra* note 5, at 769.

130. Cueto-Rua, *supra* note 4, at 655.

131. Although, many have suggested that natural law is making a comeback and will soon be welcomed with thunderous applause. *See* Thurston Howard Reynolds II, *Natural Law Jurisprudence of the Sermon of the Law*, 31 OHIO N.U.L. REV. 231 (2005) (stating, “Lately, Natural law seems to be regaining its rightful place of preeminence . . .”).

The influence of natural law on the Prussian Code can be seen in both its effects upon those who controlled its drafting and in the document itself. For example, the leading force for what ultimately became the code was Frederick II.¹³² He, in turn, was a great student of Voltaire and shared many of the same views: “religious freedom, the abolition of literary censorship and of slavery, [and] freedom of trade”¹³³ Moreover, other forces such as Suarez, who was to draft the final version of the code, was a great natural law student of Pufendorf. Indeed, the entire structure of the code is based on Pufendorf’s understanding of how the law should be.¹³⁴ Such influences do not even begin to cover the love the King had for Montesquieu, in fact the only idea of Montesquieu that seems to have been wholly rejected by the King in the ALR was the notion of separation of powers.¹³⁵

When time came to actually write a code, Frederick turned to Samuel von Cocceji, in 1746, ordering him to “draw up a legal code based solely upon reason and the constitutions of the provinces.”¹³⁶ Owing to wars and aristocratic opposition, work did not resume on the code until the late 1770’s.¹³⁷

Finally, we move to the text of the code and its initial draft to show what influence the natural law may have had. In Introduction, Section 1 of an earlier draft of the ALR, it is stated, “Roman law, being founded on natural equity, and the principles of sound reason, it is not surprising that the Christians have made it preferable to any other.” Moreover, the code tells us, “Our chief attention was to lay down the most natural principles”¹³⁸ and that

132. Lucke, *supra* note 9, at 13-24 (noting the King’s influence over the Code).

133. *Id.* at 13. Moreover, throughout the King’s control, he remained respectful of other religions. He even stated in 1740 that, “All religions are equal and good, provided only that the people who profess them are honest.” *Id.* at 17.

134. *Id.* at 14.

135. *Id.* at 16.

136. *Id.* at 17.

137. *Id.* at 18.

138. Introduction, § 11 of THE FREDERICIAN CODE, *supra* note 14.

the law's "end is justice which consists in giving everyone his own."¹³⁹

Further, the king began to adopt wholesale central doctrines of the Enlightenment natural law, most notably equality before the law.¹⁴⁰ In fact, the King brought his former order (that judges must apply natural equity without regard to person or statute) and transplanted it into his own introduction to the Code as Section 22, which states, "The laws of the state bind all its members, regardless of status, rank or gender."¹⁴¹ Other Enlightenment notions, such as neutrality of government towards religion, were brought into the Code, as Lucke observes:

The beliefs residents of the state hold of God and of things divine, their faith, and their internal worship, cannot be made the subject of strict laws. Every resident in the state is entitled to unqualified freedom of faith and conscience. Neither churches nor their parishioners are allowed to persecute or insult other churches or their parishioners.¹⁴²

Still further, the Enlightenment notion that property is an inherent right in being human is strongly apparent in the code. For Introduction, Section 75 orders, "The State is obliged to compensate a person who is forced to sacrifice his particular rights and advantages in the interest of the public welfare." These property rights are protected further in the code as well: "the state may force a person to sell his property only if the public welfare requires it."¹⁴³

Finally, there is one portion of the code that reflects a quintessential Enlightenment natural law theory that would not be recognized in our own nation's Constitution¹⁴⁴ until the end of the

139. Pt. I, Bk. I, tit. II, § 2 of THE FREDERICIAN CODE, *supra* note 14.

140. Lucke, *supra* note 9, at 18.

141. *Id.*

142. *Id.* at 21 (internal quotations omitted).

143. *Id.* at 23 (citing to Pt. I, tit. 11, § 4).

144. There has been blatant comparison between the Prussian Code and other Constitutional documents which protect "the basic law of freedom" *Id.* (citing to H. HATTENHAUER, ALLGEMEINES LANDRECHT FÜR DIE PREUBISCHEN STAATEN VON 1794 (Frankfurt & Berlin 1970)).

Civil War¹⁴⁵—slavery is in violation of the natural law. Part II, Title 5, sections 196 & 197¹⁴⁶ prohibit slavery in Prussia and prohibited anyone under its control from owning slaves. This rule flows necessarily from what is said in Part I, Title 3, Sections 26 & 27, “No one may force another to act or limit another’s freedom in some other way without a special legal justification for doing so. No one may force another to refrain from certain conduct only on the ground that the conduct would be harmful to the other.”¹⁴⁷

B. The Austrian Civil Code

The Austrian Code is without a doubt one of the great natural law codes of Europe.¹⁴⁸ To this end, one may see the natural law influences, like in all the codes studied in this essay, in both those people who influence it and in the written words that ultimately occupied its pages.

The influence on the code, drafted under Joseph II and Leopold II, began early in both of these ruler’s lives. Co-Empress of the Holy Roman Empire, Maria Theresa, had her children taught in the natural law by the most prominent thinker in the kingdom, Anton von Martini. After Joseph II came to power upon his father’s death, and received true political power after his mother’s passing, he openly opposed torture, and reserved the death penalty for only the most serious offenses.¹⁴⁹ He supported what some may call a due process rule by “defend[ing] the integrity of the ordinary courts.”¹⁵⁰ By 1776, the emperor had banned torture and soon thereafter ended the death penalty. It is even more important to

145. U.S. CONST. amend. XIII, § 1: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

146. Lucke, *supra* note 9, at 23-24. However, the author is careful to note that the institution of serfdom remained.

147. *Id.* at 23.

148. Cueto-Rua, *supra* note 4, at 650.

149. Lucke, *supra* note 9, at 24.

150. *Id.* at 24 (these actions were taken prior to the adoption of the Great Code).

note that based on his understanding of Enlightenment natural law, the Emperor allowed for a freedom of conscience much like that of Prussia, and sought to end censorship for the most part.¹⁵¹

The many drafts of the Austrian code shed light on the massive influence of natural law on the final version. It has been noted that the commission called to write the Code for Maria Theresa was instructed to write a code based simply on “the rules of reason and natural law,” and that the draft resulting from the order provided, “the state of liberty is given to all men by nature” and “liberty is a natural faculty to do what one chooses unless restricted by force of law.”¹⁵² After Francis II succeeded his brother Leopold II (who had succeeded Joseph II), he turned away Martini’s draft of a new code, and subjected it to more revision, with one of his own students heading the project.

However, Martini’s ideas did survive as an official code in other provinces (Eastern and Western Galicia). This code came into force when the main Austrian Code was still in the drafting stage. This draft became known as Martini’s “principles of public order” and are said to have “constitute[d] the philosophy of the natural lawyers in a nutshell. They also show[ed] their political timidity when faced with the power of monarchy.”¹⁵³ Of particular note for our purposes are the following provisions:

“Law” has two meaning: one is the rule which prescribes lawful conduct, the other the natural freedom or the permission to act which everyone has if he fits his conduct into the framework of the rules (§3). Rights and duties either flow from human nature in which case they are called natural or inborn rights and duties, or they are based on a particular society in which case they are called positive rights and duties, *i.e.*, those which have arisen by virtue of the life of the society. (§4) . . . This ultimate goal is the general welfare of the state, *i.e.*, personal safety,

151. *Id.* at 25.

152. *Id.* at 26. Also, it should be noted that the draft was declined not because of its natural law content but simply because it was too long. *Id.*

153. *Id.* at 27.

property and all the other rights of its members. (§7)¹⁵⁴

As noted above, the Austrian Code was not finished until sixty years after the Empress had begun its creation. The final version of the code did not contain most of the rules on public order. However, the final draft does have a provision that, as will be shown shortly, correlates heavily to the Ninth Amendment. Section 7 of the final version states:

If a case cannot be decided by applying the words or the natural meaning of a statute, one must take into consideration similar cases which are dealt with in other statutes in a definite manner and the reason behind such statutes, if doubt remains, the case must be decided by applying natural legal principles, having given mature consideration to the carefully gathered circumstances.

C. *The Code Civil*

In his address to the French assembly, Portalis openly announced his natural law influences for the entire world to recognize:

154. *Id.* at 27, n. 166. The same author has arranged these principles in a different manner. Stating that:

Communities are association of people who have united in accordance with certain rules in order to achieve a particular purpose (§5). The State is such a community, united and bound together under a common ruler to achieve an ultimate goal (§6). Thus ultimate goal, adapted to the nature of man and therefore unchangeable, is the general welfare of the state, *i.e.* the protection of the personal safety, property and of all the other rights of its members (§§6 & 7). Rights and duties are of two kinds: (1) those which are natural or inborn, flow from human nature and are unchangeable, *i.e.*, they cannot be changed by a positive law and (2) those which are positive in the sense that they flow from the life of the particular society and are articulated by the rule as prescriptions and rules, called laws, which are required to attain the ultimate goal of the State (§§ 4, 7 & 8). Rules which give guidance to people for their conduct and which prescribed their duties emerge from the whole body of the law (§2). Positive rules enacted by the ruler may be good or bad. They are good only when they contain something good according to the circumstances and consequences and when they contribute to general wellbeing (§1). The totality of all the laws that determine the mutual rights and duties of the inhabitant of *inter se* constitute its private law. The private law for West Galicia is contained in this law book (§9). *Id.* at 28-29.

Law is universal reason, supreme reason based on the very nature of things. Legislation is, or ought to only be, law reduced to positive rules, to specific precepts . . . reason, as it governs all men for all time, is called natural law . . . that which is not contrary to the laws is lawful . . . the judiciary, established to apply laws, needs to be guided in this application by certain rules. We have outlined them. They are such that the private reason of no man can prevail over the law, which embodies public reason.¹⁵⁵

Moreover, in his draft of the code, Portalis had written, “There exists a natural and immutable law, the source of all positive legislation: it is nothing but natural reason, in so far as it governs all men.”¹⁵⁶

What is even more important for the purposes of this paper is to whom the code was being addressed. The drafters were likely not as focused on the outcome of the code as they were with who was going to be reading it—Napoléon. Like all great leaders of his time, Napoléon was a natural law thinker, even if there is some disagreement as to the degree to which he accepted the more theoretical side of the movement. He is said to have been an admirer of King Frederick the Great (the ruler responsible for the Prussian Code) and of Rousseau.¹⁵⁷ And he opposed cruel and unusual punishment in the form of torture. Indeed, the French *Code civil* adopted the Revolution’s and the Enlightenment’s rally cry: liberty, equality and brotherhood.¹⁵⁸ It abolished classes and

155. *Id.* at 31; also a person schooled in the natural law will be able to see the influence of Domat in these statements. Others have noted the natural law influence on the *Code civil* as well. HALPERIN, *supra* note 73, at 69 (stating “Despite the silences and even denials of the drafters, the Code cannot be fully understood without taking into account the contribution of [] the natural law thinkers....”).

156. PROJET DE CODE CIVIL, PRESENTE PAR LA COMMISSION NOMMEE PAR LE GOUVERNEMENT, LE 24 THERMIDOR AN VIII (1801), Preliminary Book of Law and Legislation, tit. I, art. I (Special thank you to Professor John Randall Trahan for the translation).

It should be noted, however that this provision was ultimately left out of the *Code civil*, but did manage to appear in the Louisiana Digest of 1808 and in Civil Code art. 21, which is now art. 4 in the current Code.

157. Lucke, *supra* note 9, at 30.

158. *Id.* at 33.

privileges pertaining to the private law, and thus achieved (ostensibly) the foundation of the natural law—equality in the law.¹⁵⁹

Moreover, the *Code civil* was destined to essentially achieve the second most profound theory of the natural law era. This theory that natural law is universal and that such universal principles are “capable of extension beyond European societies”¹⁶⁰ needs only be adjusted to fit into the society in which they do their work, which was closely linked to Grotius’ understanding of international law. Owing to Napoléon’s military and political power, and the sheer acceptability of the *Code civil*, a number of other countries have been greatly affected by the French *Code civil*.¹⁶¹ Natural law became a basis for several areas of the code, such as obligations—being the means by which individuals transferred property and that whatever harm one causes by his fault, he is required to repair it.¹⁶²

D. *The Natural Law and The Constitution*¹⁶³

The Constitution itself is teeming with the natural law, so much so that one would be justified in suggesting that not only has it embraced the natural law, but also that it has become the natural law. By this I mean to suggest that the saying “an unjust law is no law at all” has become “an unconstitutional law is no law at all.”¹⁶⁴ Such a transformation is not unreasonable. After all, the framing

159. HALPERIN, *supra* note 73, at 70 (stating that the [code] “is imprinted with the Revolutionary principle of equality before the law.”).

160. Glenn, *supra* note 5, at 766.

161. Belgium, Luxemburg, Monaco, Italy, Romania, Portugal, Spain, Louisiana, Québec, Bolivia, Chile, Uruguay, Argentina, Japan, China, Turkey, Egypt, Lebanon, and Syria. Lucke, *supra* note 9, at 34.

162. HALPERIN, *supra* note 73, at 69-70.

163. Others have given more thorough discussion of the natural law influences on the Constitution than is appropriate or possible here. Kennedy, *supra* note 125, at 41; Corwin, *supra* note 28; Robert P. George, *The Natural Law Due Process Philosophy*, 69 *FORDHAM L. REV.* 2301 (2000-2001); Robert P. George, *Natural Law and the Constitution Revisited*, 70 *FORDHAM L. REV.* 273 (2001-2002); Massey, *supra* note 43.

164. Lucke, *supra* note 9, at 37, (suggesting that *Marbury v. Madison*, 5 U.S. (1803) brought *lex injusta non est lex* to the Constitution).

generation viewed constitutions as statements of general rules of law that were meant to extend continuously forward¹⁶⁵ (just like the other Enlightenment codes). This is not to mention the fact that the framers themselves were brought up and educated in the heyday of the natural law/natural rights movement. This movement stressed identifying broad generally applicable rules of law. Thus, this section of the essay must examine exactly how the Constitution reflects the higher law.

1. The Designation of Rights in the Declaration of Independence

Perhaps no document better reflects the framer's understanding of natural law based rights than the Declaration of Independence. For in that document, it is clearly laid out that human rights do not come from governments, whether democratic or tyrannical, but are inborn in human beings as of their own existence, by God and by the natural law. This means that even though the framers took provisions of the English Bill of Rights for inspiration on their drafting of the Constitution, they certainly did not mean to create English control over them. That the beliefs announced in Declaration are natural law based is apparent from its very opening:

[A]nd to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them ... We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the

165. *Resolutions of the Town Meeting of Concord Massachusetts*, October 1776 (stating, "We conceive that a constitution in its Proper Idea intends a system of Principles Established to secure the subject.") (quoted in KAMMEN, *supra* note 20, at 9).

consent of the governed¹⁶⁶

The blanket statement of the laws of nature, coupled with the teleological idea of government, and the overarching equality, and respect for Life, Liberty, and Property, are all hallmarks of the natural law. It is important to note that there is no mention of the “Rights of Englishmen.” Therefore, the understanding of natural law as announced by the Declaration is not the English common law notion of “artificial reason” (the notion that the rights of Englishmen could be built in part on custom), but rather that ALL people have inborn rights. This gives credit to what was said above: the framers adored the common law, when it protected human rights, but not always. It is therefore sad that the framers did not embrace the ban on slavery right away. The realization of that fundamental law would only be established by our Constitution after the Civil War (1861-1865).¹⁶⁷

2. The Structure of our Federal Government is Born out of the Natural Law

The vast majority of Americans can recall that the federal government has three branches: The Congress, created by Article I of the Constitution; the Executive, created by Article II, and the Judiciary, created by Article III. This entire structure was created to help protect natural law-based rights.¹⁶⁸

The framing era had taken the broad “natural law” and turned it into a sweeping “natural rights” movement. From this transformation, the idea obtained is that the entire purpose of

166. Numerous others have pointed out the connection between the natural law of both the Church and of the secular Enlightenment, and the Declaration. See Kennedy, *supra* note 125, at 43.

167. U.S. CONST. amend. XIII.

168. By this statement, I suggest that because Montesquieu, an Enlightenment thinker, wanted to establish a better regime to protect human rights, it follows that a three-part separation of powers is intended to protect natural law-based rights. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748).

government was to secure the rights of one's people,¹⁶⁹ as is evident from the above quoted Declaration. Thus, many theories were proffered as to how to best protect one's people from an overreaching government. To answer this, Montesquieu developed his three separate, yet equal, branches of government. And instead of just having three separate departments of government that could check each other, he theorized that governmental power should be separate and distinct. Thus, he devised that the Legislative, Executive, and Judicial powers should be distinct. This separation was thought to be a way of protecting the natural rights of citizens. It is now widely accepted that the framers looked to Montesquieu and borrowed his ideas.¹⁷⁰ Thus, the natural law touched our federal Constitution by inspiring the way it divided power.

3. *The Natural Law and the Bill of Rights*¹⁷¹

It has been shown that the framing generation believed in a certain set of natural law principles that became evident in their writing of the Bill of Rights: (1) The rights revealed by natural law, including all rights under the rubric of the right to self-preservation; (2) the right to property (3) freedom of conscience; (4) freedom of communication; (5) freedom from arbitrary laws; (6) the rights of assembly and petition; and (7) the right to self-government.¹⁷² One may see in these concepts both cognates to

169. See Cueto-Rua, *supra* note 4, at 650 (noting that the Enlightenment idea was that the sole justification for the existence of government was the protection of individual rights).

170. Mitchell Franklin has pointed out that the Constitution as written in Philadelphia may properly be called, "the Montesquieian constitution, because its primary conception was the separation of powers." See Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendment to the Third Constitution*, 4 HOWARD L.J. 170 (1958) [hereinafter *Relation of the Fifth*]; see also Gummere, *supra* note 78, at 7.

171. Others have noted the Bill of Rights as having an influence in natural law. See Mark Hamilton Levison & Charles Sherman Kramer, *The Bill of Rights as Adjunct to Natural Law*, 1991 DET. C. L. REV. 1267 (1991).

172. Kennedy, *supra* note 125, at 46 (The author also points out that on these points, the Christian based natural law and the secularized natural law of the Enlightenment are in accord).

what has been said of the Enlightenment natural law codes and to what appears in our Constitution. Further, it has been stated that “[w]hile there is no textual ground on which one can conclude that the Constitution incorporates the whole of the natural law, certain passages indisputably attach to object right.”¹⁷³ Hence they connect to a natural law. A summarized and systematized explanation of these connections could be as follows:

(1) That there is a right to preserve one’s self, and that this right is protected under the Constitution is evident in the Second Amendment,¹⁷⁴ which has been declared to possess at its core a right to self-defense.¹⁷⁵ Moreover, even if one could interpret the Second Amendment to not protect a right to self-defense, this does not mean that the Constitution would not. For the Ninth Amendment tells us that other rights exist which the Constitution equally protects, one of which may be the right to self-defense. Others have pointed out the natural law influence on the Second Amendment.¹⁷⁶

(2) That there is a right to own property and that this right is somehow derived from nature without any intervention by government is evident in a number of places. But most importantly, it is evidenced in the Fifth Amendment,¹⁷⁷ which

173. David C. Gray, *A Prayer for Constitutional Comparativism in Eighth Amendment Cases*, 18 FED. SENT. R. 237 (2005-2006).

174. U.S. CONST. amend. II states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

175. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

176. Diarmuid F. O’Scannlain, *Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513, 1524 (2011). The same author has even suggested natural law influences on the Ex Post Facto clause and the Equal Protection clause. *Id.* at 1526.

177. U.S. CONST. amend. V stating:

No person shall be held to answer for a capital, or otherwise infamous crimes, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

protects property unless the taking of it would be for the public use, and then it can only be taken upon compensation. It is also found explicitly stated in the Fifth Amendment's Due Process clause. For that clause declares that no person shall "be deprived of life, liberty, or property without due process of law."

(3) Freedom of conscience is represented in the freedom to exercise one's religion.¹⁷⁸ One's religious beliefs are so close to their existence that a sudden denial of them may have severe psychological consequences. Moreover, religion, like greed for land and power, has caused wars and catastrophes throughout human history. Thus, the First Amendment¹⁷⁹ represents a principle of natural law discovered during the Enlightenment—that human beings should have the freedom to protect their innermost beliefs, but should not force those beliefs upon others.¹⁸⁰

(4) The Freedom of communication can be found within the confines of the freedom of speech and of the press in the First Amendment.¹⁸¹ It can also be found within the limited protection afforded a free press by the natural law even in the monarchies of England.

process of law; nor shall private property be taken for public use, without just compensation.

178. Another writer has noted the natural law influence on the First Amendment. Eugene C. Gerhart, *The Doctrine of Natural Law*, 26 N.Y.U. L. Rev. 76, 110 (1951) (citing Jefferson, *Notes on the State of Virginia* 242-44 (1788); THE PAPERS OF THOMAS JEFFERSON 302 ff. and 545 ff. (1950)).

179. U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

180. This rule has a cognate in what was said of the natural law's freedom of conscience influence on the Prussian Civil Code. See Lucke, *supra* note 9, at 21 (noting an absolute right to freedom of faith and conscience).

181. The natural law influence on the First Amendment has been shown before. Felix Morley, *The Natural Law and The Right to Self-Expression*, 4 NAT. L. INST. PROC. 75 (1951); see also Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 913 (1992-1993) (stating, "These older ideas about freedom of speech and press—so different from those which prevail today—illustrate the significance of the eighteenth-century natural rights analysis for our understanding of modern constitutional rights.")

(5) Freedom from arbitrary law can be found in a number of places. It can be found, most of all, in the Ninth Amendment,¹⁸² and can also be found in the Due Process clauses of the Constitution. Although I believe that the Due Process clauses ought to be limited to simple process and the Ninth Amendment should address of non-enumerated rights, persuasive authority has long decided that the Substantive Due Process of the Fourteenth Amendment and the Fifth Amendment create a host of different rights, protected under different conditions.¹⁸³ Moreover, other scholars have investigated the natural law foundations of the Fifth Amendment's Due Process clause.

(6) The natural rights of assembly and petition may be said to derive from the notion that the government's purpose is to protect its people, and that the government gathers its power from the consent of those governed and not simply by the fixing of laws.¹⁸⁴ This is so because a government concerned with the consent of its people must listen to their pleas for redress. Their textual home is the First Amendment proscriptions on prohibiting such rights.

(7) The natural right to self-government has its place in multiple parts of the Constitution. To show the example of this—based on text—requires using multiple provisions of the Constitution. First, it is evident that being able to petition the government tells us that people have some right to attempt to change their government. The other provisions that give a constitutional home to the natural right of self-government are not in the Bill, but in the original Constitution. Chief among these is the fact that both chambers of Congress are elected, that the Executive is elected, and that even the Judiciary must go through

182. U.S. CONST. amend. IX states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

183. See generally Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FL. L. REV. 519 (2008).

184. See Declaration of Independence (noting that the only just government is one that derives its powers from "the consent of the governed") available at http://www.archives.gov/exhibits/charters/declaration_transcript.html.

an elected body to be approved. Moreover, Article IV, Section 4 tells us that the Federal Government must guarantee to each state a republican form of government. As we all know, a republican form of government is self-governing.

(8) There is, moreover, another facet of the natural law that appears in the Constitution. This can be seen in the Eighth Amendment.¹⁸⁵ Another scholar has pointed out that “the Eighth Amendment prohibition on cruel and unusual punishment” is an example of the natural law being connected with the Constitution.¹⁸⁶ According to that scholar, the determination of what is cruel under the Amendment “is not the same as determining what the framers and other residents of late-eighteenth century America thought was cruel.”¹⁸⁷ But instead, determining what is cruel under the Eighth Amendment is to determine what is now and always has been cruel and unusual punishment. One may see cognates to cruel and unusual punishments in the European model of abolishing torture of war prisoners as a result of natural law theory.¹⁸⁸ For there, as in the Eighth Amendment, we are dealing with government confining people and subjecting them to a type of punishment for which they have not been convicted and, likely, do not deserve.

Finally, we arrive at perhaps the most apparent invocation of the natural law in the Constitution—the Ninth Amendment.¹⁸⁹ The Ninth Amendment has already been called the “natural law’s logical textual home within the Constitution.”¹⁹⁰ It has further been stated, “the founders intend the Ninth Amendment

185. U.S. CONST. amend. VIII states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

186. Gray, *supra* note 173.

187. *Id.*

188. Lucke, *supra* note 9, at 24 (noting the natural law-based opposition to torture).

189. The natural law content of the Ninth Amendment has been discussed many times before. *See* note 177, and *see* Thomas E. Towe, *Natural Law and the Ninth Amendment*, 2:2 PEPP. L. REV. 270 (1975).

190. Massey, *supra* note 43.

to serve multiple purposes, including a role as a judicially enforceable source of natural law rights.”¹⁹¹

Now, it may be horrifying to some to suggest that a court may look to the Ninth Amendment and simply create rules based on natural law. That fear is erroneous for two reasons. First, the natural law is not simply looking up to the clouds to find an answer, but is rather “reason, unaffected by desire.”¹⁹² By this I mean that the natural law is supposed to be discovered based upon rational, axiomatic principles. Second, we may curtail any attempts by the judiciary to create rules out of whole cloth by adopting the method by which the civil law has long handled the natural law as it relates to their written codes. This is the above-mentioned civilian method.

As spelled-out in detail by Professor Franklin, the natural law does not have to be formless.¹⁹³ Rather, we use the civilian method to control it. Thus, it is the natural law that a judge ought to compare to the provisions of the document to create new rules. The natural law and the understanding of the framing era may be used to “fill up” the broad provisions of the Constitution, but creating other rights that are not historically provided for should come through analogical development of the text. The Civilians call this method “*au-delà du Code civil mais par le Code civil*” (beyond the civil code but through the civil code).¹⁹⁴ Constitutional scholars, such as Professor Coenen of LSU Law, have unintentionally studied this method by calling it the “combination analysis.”¹⁹⁵

191. *Id.* at 50-51.

192. ARISTOTLE, POLITICS at Bk. III, ch. 16.

193. *See generally* Franklin, *The Ninth Amendment*, *supra* note 116 (explaining how the Ninth Amendment reflects the civil law method and how such a method may curb judicial attempts at simply making up rules).

194. I am leaving a full discussion of the civilian legal method and its effects on the Constitution to a possible later essay. This serves as a mere introduction to that topic.

195. *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PENN. L. REV. (forthcoming) (stating, “Most familiarly, the Court has indicated that multiple rights-based provisions of the Constitution might sometimes require the

Indeed, as stated before, the text of the Ninth Amendment supports such an interpretation—because we are not supposed to use the rights listed to deny those not expressly protected, we must use the enumerated rights to divine those that are not expressly protected.

4. *The Argument from Phraseology*

Further still, the very phrasing of all of these rights in the Constitution denotes a natural law. For all of these rights are not ones being granted by the Constitution or the government. They are phrased as “the right.” Meaning they are phrased as pre-existing rights.¹⁹⁶ They not only pre-date any laws that may apply to them, but they also pre-date the Constitution. Thus, one must ask, “where do these rights comes from?” The answer obviously cannot be the common law; for by declaring independence, the framers broke with the common law.¹⁹⁷ Even if one assumes a common law basis for these rights, he or she must also assume a natural law basis, as it is well-established that the common law had a substantial natural law basis, although generally drawn from the

invalidation of government action that each provision would permit in isolation.”).

196. My argument is strengthened by the words of Thomas Jefferson, who stated:

I deride with you the ordinary doctrine, that we brought with us from England the common law rights. This narrow notion was a favorite in the first movement of rallying to our rights against Great Britain. But, it was that of men who felt their rights before they had thought of their explanation. The truth is, that we brought with us the rights of men; of expatriated men.

See letter from Jefferson to Tyler, Monticello, 17 June 1812, in 6 THE WRITINGS OF THOMAS JEFFERSON 65 (H.A.Washington ed., 1854) (cited in Franklin, *Concerning the Influence*, *supra* note 41, at 645).

197. It should be noted that:

[I]mmediately after the Revolution, there was a widespread feeling that efforts should be made to develop a particular American jurisprudence, which would not be just a slavish imitator of the English common law, but would be eclectic—selecting the best principles and methods from whatever system they might be found.

STEIN, CHARACTER AND INFLUENCE, *supra* note 58, at 415.

facts of each case or situation. Moreover, they could not have come from the English crown, otherwise it would have been unjust for the revolutionaries to have broken away—if the rights were derived from the crown, then the crown would have had every authority to take them away. Moreover, the rights could not have come simply from their having been English subjects. Once they left the crown, they were no longer English subjects and thus would not have had these “rights.” Not only that, but as has been noted above, not everyone living in the United States was English.¹⁹⁸ Nor did they all consider themselves English. Even among the most politically powerful of the time were some not of English descent.¹⁹⁹ This means that those who ratified the Constitution (the people) would not have believed their rights came from being English. All of these reasons, combined with what was detailed above, conclusively show that the natural law of the Enlightenment had a profound impact upon the American Constitution.

Thus, one may say that reasoning from the Constitution’s text—a strictly positivist notion—leads to a complete refutation of legal positivism. If we are going to understand the Constitution at all, or understand it as an Enlightenment code, we must understand its natural law composition, and be able to apply it to our interpretation of the document.

Lastly, I must mention that like the civilians and their codes, the framers had to bow to political pressure. Just as the Prussian drafters and Martini wanted to limit the intrusion of the monarchy on human rights, but had to give way to the politically powerful kings at the time, so too did many framers want to curtail slavery under the natural law but were forced to yield to the politically

198. See text accompanying note 38.

199. For example, James Wilson, Associate Justice of the Supreme Court and a signatory of the Declaration of Independence, was born and raised in Scotland. See STEIN, CHARACTER AND INFLUENCE, *supra* note 58, at 415.

powerful slave-holding states. In any event, the Constitution is still influenced by the natural law.²⁰⁰

IV. ARTICLE III: THE FUNCTIONS OF THE CODES AND ITS CONSEQUENCES

The last two qualities of an Enlightenment era code are these: completeness and abrogation.²⁰¹ Abrogation, on one hand, is the theory that the new code does more than simply compile or restate the existing law, but rather terminates the existing law from having any force at all—even subsidiary force. The old law cannot even be used to fill in the gaps between the new written laws, although it may be used to help define terms and fill up broadly-written provisions. Completeness, on the other hand, means that the document covers the totality of civil society,²⁰² on either the whole spectrum of law or on a specific era of law and is meant to be such for a very long period of time.²⁰³ Completeness itself has two primary methods of obtaining this goal: specific enumeration or broadly written law. One may see that the Constitution uses both of these methods and fulfills both of these functions.

200. As Lucke stated, “Despite the unavoidable compromises forced upon the draftsmen by the political realities of their time, the ALR is a true child of the natural law tradition and of the Enlightenment.” Likewise, the sheer force of the slave-holding powers ought not be weighed against the natural law influences of the Constitution. *See* Lucke, *supra* note 9, at 24.

201. Professor Moréteau points out that the key difference between Codes and Digests is the abrogation clause. Moréteau, *De Revolutionibus*, *supra* note 13, at 37.

202. Glenn, *supra* note 5, at 766.

203. Napoléon summarized the theory of the codes lasting for extended periods by saying: “My true glory is not that I have won forty battles; Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally, is my Civil Code.” Alain A. Levasseur, *Code Napoléon or Code Portalis?*, 43 TUL. L. REV. 764 (1969).

*A. Abrogation*²⁰⁴

The notion of abrogation has been used since Justinian's *Corpus Juris Civilis*, when the Emperor released his lawyers from ever having to cite to the old law again, and that the new body of law was the sole source, complete in itself.²⁰⁵ This same idea carried over to each one of the great codes of Europe.²⁰⁶

The Louisiana Supreme Court summarized the need for abrogation in the now-infamous case of *Cottin v. Cottin*:²⁰⁷

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.²⁰⁸

Thus, in order to say that the Constitution is a code, in the vein of the Enlightenment, it must be shown that it decisively broke from the prior law. Now, there are many methods by which abrogation can be done. The most powerful is expressed

204. It may be best to give an overall summary of my "abrogation" discussion in a footnote: Abrogation essentially means that, for the area of law covered by the code, any former existing law is no longer controlling. This makes the code, in the understanding of the Enlightenment, entirely different from ordinary statutes. For if a code were to be passed dealing with private contract law, it would be presumed that any existing law on the subject—even that not in conflict with the code, is now abridged and the sole source of law is the code. This is distinguished from a statute, whose purpose is to address very specific situations, because one statute can be passed that touches on private contract law, which is not repugnant to the former statute on private contract law, and the former will still have force. Likewise, the American Constitution abrogated the common law on fundamental rules for government.

205. STEIN, *ROMAN LAW*, *supra* note 6, at 35 (noting that Justinian had forbidden any comments on his work, believing it to cover every possible situation).

206. WATSON, *supra* note 14, at 131 (noting that in the Codes of Europe, the prior law ceases to have even subsidiary force and stating, "What is wanted is the correct interpretation of the code provision, not its forerunners.")

207. 5 Mart. (O.S.) 93 (1817).

208. *Id.* at 94.

abrogation.²⁰⁹ This is, of course, an article of a code, which states that all prior laws are abrogated. The second method is tacit repeal, where something about the new law makes it obvious that all of the old law was repealed.²¹⁰ It is the second method by which the Constitution abrogates all prior public law.

First, I must admit that no rational person would even suggest that the Constitution did not abrogate the English and European rules on government. That is to suggest, no one would say when addressing a possible gap about what the powers of government are, or what the rights of persons are, by asking what is done in England or France. That question would only come into play in defining or filling up the broad provisions of the law. Moreover, this point is made even clearer by the rule that “all interpretation of the Constitution must begin with its text.”²¹¹ For if the document did not abrogate all prior law and there were a gap in the type of law covered by the Constitution, then that gap would have certainly been discovered by now; and for the answers to that question, the justices would have appealed to the pre-existing rules of law without reference to the Constitution.

Further, the Constitution creates a general government of enumerated powers. All those powers that the national government has are found in the Constitution, with others only coming in as necessary and proper to fulfill the government’s other powers.²¹² Thus, it is clear that the Constitution abrogated any common law rules on the powers of government. For example, in England the national government was able to establish a church, which is anathema to the American Constitution, and is expressly made so by the Establishment clause of the First Amendment.

209. Moréteau, *De Revolutionibus*, *supra* note 13, at 37 (noting that there is generally a requirement of an abrogation clause).

210. It is by this method that the modern Louisiana Code abrogates the old.

211. Indeed, even those who may be considered “living constitutionalists” must begin the analysis with the text of the Constitution even if they do not end there.

212. U.S. CONST. art. I, § 9.

Put simply, abrogation is the reason why, in determining if the federal government can do some act, we ask (1) does the Constitution say the government can, and (2) if so, does the Constitution elsewhere say that the government can't? If the Constitution had not abrogated the prior law, the questions would be (1) does the Constitution say you can, (2) if not, do the other laws say you can (3) if so, does something else in the Constitution say you can't? Thus, the American Constitution is the sole source of foundational law that, at a minimum, the government must obey, and the sole source of that general government's powers.²¹³

There are, however, two clauses in the Constitution that may seem at first glance to defeat my argument for abrogation. The first is Article VI,²¹⁴ which tells us that all debts incurred by the national government under the Articles of Confederation are to be held to the same extent against the new government. One may suggest that if the new government is taking care of the debts of the old, then the old is not really gone. In response, I argue that taking on responsibilities of the former regime does not undo abrogation. In fact, it furthers my argument. For, by officially announcing that the former is gone and that the new will hold its debts, the charter is stating that the former is actually gone. Moreover, taking care of the other's debts does not mean that the former regime is not gone. Indeed, the Article is nothing more than an assurance that the people who created the federal government would not be defaulting on their promises to foreign nations. Lastly, the Confederation is long since dead. Any bond it had not paid back by the time of the Philadelphia convention has most certainly been paid back by now. Thus, if the Article could once

213. As will be evident below, this aspect of abrogation bleeds into completeness.

214. U. S. CONST. art. VI states in pertinent part: "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation"

have been read as defeating abrogation, it could not be so now, the target of clause itself is long resolved.

The second portion of the Constitution which may give abrogation trouble is the Seventh Amendment, which states that:

In suits at common law, where the value on controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

One may argue that the mention of the “common law” in the Amendment signify that the common law has not been abrogated for constitutional reasons. This argument fails to comprehend the fact that codes frequently adopt old rules. This clause does nothing but adopt the term “common law” in the first instance to described lawsuits, and merely adopts “common law” in the second instance to denote the procedure by which the jury verdicts may be reexamined.²¹⁵ Put another way, the Seventh Amendment merely reflects that the Constitution received a portion of the common law.

*B. Completeness*²¹⁶

If one understood the Constitution to simply be a super common law jurisdiction statute, it would have to be understood to have dealt solely with the problems of the time and to have been immediately actionable by the people at the time of the framing. However, if one understands the Constitution as a supreme code,

215. I thank my friend, Brian Strand, for pointing out these two arguments to me.

216. I believe it best to summarize “completeness” in a footnote for those unfamiliar with the concept: The Constitution’s arena of law is public law, setting the foundation of the government’s relationship with the people and vice versa. In this arena, the Constitution is complete. It covers everything that could possibly happen. Moreover, like the codes, it is complete in the sense that it is finished, i.e., it is capable of extending into the future without constant revision. This makes the Constitution different from regular statutes, whose rules cover only very small portions of law and are intended to deal with very specific incidents.

then it would in fact cover every situation placed before it. We have, since the beginning of our republic, interpreted the Constitution in the latter vein. For as the *Marbury* court noted, the Constitution is not some static legal code,²¹⁷ similar to one which could have seen in England at the time. Rather, it is meant to extend eternally forward and touch on every debate that may be presented to it.²¹⁸

The first method of extending eternally forward to every case is *generality*.²¹⁹ Portalis articulated the general rule that a code ought not to provide rules that are immediately applicable to every conceivable concrete case. On the contrary, it must lay down the rules of law broadly enough to regulate all situations of a certain type that may arise from human interaction and must not lay down specific solutions relating to particular circumstances.²²⁰ However, the code must also be practical and not abstract to the point that it would be worthless.²²¹ In solving this conundrum, Portalis stated:

How does one arrest the passing of time? How can one oppose the course of events or the imperceptible change of custom? How can one know and calculate in advance things which only experience can reveal? Can foresight ever extend to things our minds cannot grasp? . . . Many things are therefore necessarily left to the arbitration of judges. The function of the [Code] is to set down, in broad terms, the general maxims of law, to establish principles rich in consequences, and not to deal with particulars of the questions that may arise on every subject. It is left to the magistrate and the juriconsult, fully alive to the overall spirit of laws, to guide their application.²²²

217. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

218. *Id.* at 177.

219. See Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C.J. INT'L & COM. REG. 273, 275 (1994-1995) (discussing the use of broad generalities within the civil codes) [hereinafter *Codes as Straight-Jackets*].

220. Bergel, *supra* note 11, at 1082.

221. *Id.*

222. See Lucke, *supra* note 9, at 32.

The second method of covering every possible situation is specific enumeration. Simply put, this method held that a code could set forth the rule for every single possible situation. The Prussian Code is generally thought of as using this method. This is the same method that was used by Justinian and his CJS.²²³ However, both ultimately suffered the same consequences. The CJS needed frequent updating to the point that a fourth portion was added.²²⁴ Likewise, the Prussian Code needed almost constant updating, for specific enumeration cannot arrest the passage of time. That is, until the American Constitution's theory of the general government, specific enumeration could not arrest the passage of time. Thus, specific enumeration is maintainable if the powers given are specifically limited.

The genius of the Constitution is that it does not disregard specific enumeration for broad generality, nor does it do away with broad generality. Thus, it has accomplished the same feat as the European codes—it found the perfect middle ground between general and specific, theoretical and practical.²²⁵ Indeed, it has already been stated that, “[The] emancipation from particularism is characteristic, above all, in the succinct Constitution of the United States and in terse code of the modern civil law, such as that of France....”²²⁶ The same author noted, “the flexible texts of the Fourteenth Amendment and elsewhere may be called abstract . . . universals;” a comparison may thus be made between “due process” in the Constitution and “good faith” of the codes.²²⁷

These abstract universals and the broad generalities in which the Amendments are written, especially those on individual rights,

223. STEIN, *ROMAN LAW*, *supra* note 6, at 35.

224. This portion was called the *Novels*, which consisted of Justinian's own enactments. *Id.*

225. Gummere, *supra* note 78 (showing that the framers took general “principles into the instrument without trying to particularize too explicitly how they should be put into effect”).

226. Franklin, *Relation of the Fifth*, *supra* note 170.

227. *Id.*

allow for growth in the law.²²⁸ The framers believed that human rights were essentially innumerable. It follows that they would have written these provisions broadly to allow them to grow and morph to meet future situations. Such a connection between the goals of individual rights being construed broadly and the understanding of the codes in Europe was unmistakably given by Justice Story in the 1816 opinion of *Martin v. Hunter's Lessee*.²²⁹

The words are to be taken in their natural and obvious sense, and not in a sense unreasonable restricted or enlarged.²³⁰ The constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.²³¹ The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages the events of which were locked up in the inscrutable purposes of Providence.²³² It could not have been foreseen what new changes and modifications of power might be indispensable to effectuate the general principles of the charter.²³³

228. It has already been shown that these broad generalities are written for the purpose of allowing jurisprudence to adapt to changing situations, without breaking entirely from either the spirit or the letter of the law. This rule of the legislative drafting in the civil law, as opposed to legislative drafting in the common law world was summarized by Professor Moréteau, who has written, “[M]any people in common law jurisdictions tend to regard the law in a codified system as rigid, because they tend not to appreciate that the civil law legislature is content with enunciating general principles....” Moréteau, *Codes as Straight-Jackets*, *supra* note 219, at 275.

229. 14 U.S. 304, 327; 1 Wheat 304, 331 (1816).

230. This is a well-known code theory that the whole document was drafted to be understood by the common man. See Moréteau, *De Revolutionibus*, *supra* note 13, at 62 (discussing that in the context of civil code, the law must be accessible to the average person).

231. Just as the codes were (1) drafted in general language, (2) not meant to be immediately actionable or cover to a minute detail, and (3) did not provide for how their provisions are to be carried out entirely.

232. Just as the codes were meant to arrest the passage of time and provide the general rules for generations to come.

233. The fact that the Constitution was meant to extend eternally forward and be relevant for the same period is noted in the preamble, when it states, “And secure the blessings of liberty to ourselves and our Posterity.” If the framers had intended for the Constitution to act like a mere statute, placing the term

Therefore, the Constitution's broad general principles of law, combined with the methods of gap-filling discussed above, bring unforeseeable, historically unprovided-for situations under the purview of the Constitution, thereby making it complete.

Specific enumeration is taken up in the context of the enumerated powers of the Federal government. Aside from these powers and those procedures that are necessary and proper to fulfill the enumerated powers, no other authority exists for the federal government's actions.²³⁴ Not even a strong government interest²³⁵ is enough to generate government power—it must be specified in the Constitution. This presents a stark contrast to the problem faced by the Prussian Code and the *Corpus Juris*' use of specific enumeration. In those documents we find that the specific enumeration, setting forth very restrictive rules, lead to a need for constant revision and update. Other answers had to be provided for these minute situations because courts were unable to extend by analogy the very specific clauses. The Constitution does not face this problem. For even where it is silent, something that ostensibly could require the creation of new powers or new rules of law (as to the power of the federal government), it gives an answer. That answer is, “no, the federal government cannot not do this.”²³⁶ Thus, the Constitution was able to specifically provide for every possible instance of federal power, by making those (and those necessary and proper thereto) the only instances of federal power.

Moreover, the Constitution, like the codes of Europe, has devices that allowed for the document to extend continuously even

“Posterity” in the preamble would have been a terrible way of conveying the idea.

234. Here is where the two functions bleed into each other.

235. A strong government interest, however, may allow for the government to exercise its power against the rights of individuals—either by it being a “legitimate government interest,” “an important government interest,” or a “compelling government interest.” Or at least that is how the doctrine stands now. *See* note 211.

236. Likewise, for issues dealing with the states, the answer is, “yes, unless the Constitution says the states cannot.”

in the face of apparent gaps in the law. We have already discussed the Roman method above. But here, we will discuss it in the context of completeness. Here, we must steer clear of the full discussion on the civilian method of looking at the principles of law, and maintain focus on that clause of the constitution which declares that the analogical development of text be used—the Ninth Amendment.

The Ninth Amendment declares that there are other rights protected by the Constitution, even if they are not written down. It is sad that this Amendment has not yet shown its full potential. But by its existence the Ninth actually gives the judges who decide the case the power to locate and protect these rights. The text of the Ninth can actually do a great deal of work. As noted above, read to its negative, the Amendment tells us that a judge ought to use the rights enumerated in the Bill of Rights and elsewhere in the Constitution to discover previously unnoticed rights. Thus, the Constitution's listing of rights would not be confined to those broad principles of the eighteenth century.

Read in its ordinary meaning, the Amendment may even allow for reference to natural law in order to discover new rules on human rights. This would be beyond the context of simply saying that the natural law requires judges to rely upon the text.

Thus, the Ninth Amendment allows for the Constitution to cover every possible situation which may arise involving individual rights that are not covered in the text elsewhere. In so discovering those rights, a court ought to look to the principles announced in the other provisions, by reading them together to create new rules, and by reference to the natural law when the text of the Constitution fails to provide a solid answer. Thus, in assuming control of the natural law, the Constitution's protections on the issue of individual freedoms are literally universal and complete, because all possible protections of rights are given effect

by the Constitution, and only an appropriate government interest²³⁷ can abrogate those protections. In so being, the Amendment is similar to the former Section 7 of the Austrian Civil Code, which stated:

If a case cannot be decided by applying the words or the natural meaning of a statute, one must take into consideration similar cases which are dealt with in other statutes in a definite manner and the reasons behind such statutes. If a doubt remains, the case must be decided by applying natural legal principles, having given mature consideration to the carefully gathered circumstances.²³⁸

Therefore, the Constitution is functionally a code, because the document abrogates the prior law and is complete over its specific era of law. The similarities between the framing document and the codes of Europe can no longer be ignored. The Constitution is an Enlightenment code.

C. Consequences

Showing that the Constitution functions like an Enlightenment code and has the requisite other features would be a moot task, if there were not some consequence that would result from such a revelation. A full delineation of the consequences is saved for another essay. However, it feels appropriate to briefly address a few of such consequences here.

237. Because the entire purpose of the government is to protect its people, I believe that the only interest that could weigh against a person's rights is the rights of others. A similar philosophy, that government's only purpose is to protect individual rights can clearly be seen in the French Declaration of the Rights of Man, Article II, which clearly puts forth the Enlightenment's thought on the "goal" of political association, which is the preservation of natural rights.

238. This passage is very similar to current the art. 4 of the Louisiana Civil Code, which states, "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages," and to former article 21 of the Civil Code of 1870, which stated: "In all civil matters, where there is no express law, the judge is bound to proceed according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

1. Jurisprudence

First and foremost, it cannot be denied that the Supreme Court and the lower federal courts have the power to interpret the Constitution and to declare acts null under its provisions. Such a power is blatantly obvious with the “arising under the Constitution” rule in Article III. What sort of suits would “arise under the Constitution” except for those challenging acts as not being constitutional? The answer is none. This may, however, be incompatible with the notion of *stare decisis*. It has already been noted by prominent scholarship that the text and form of the Constitution is anathema to *stare decisis*.²³⁹ The courts have just not realized that fact yet.

As it stands now, the only way the Supreme Court will overturn inaccurate precedent is if it is wrong *enough*.²⁴⁰ Not if it is wrong, but only if it is wrong enough. This ought to seem absurd to anyone familiar with the concept that judges are supposed to interpret and apply the law, not make it. Moreover, even if lower courts notice massive errors in the Supreme Court’s decisions, they are bound by those prior cases. The only way a lower court may get away with not applying the rule developed by the high court is by somehow distinguishing the cases.

Just imagine, if there had been no binding authority to the Supreme Court’s erroneous decision in the *Slaughter House Cases*,²⁴¹ then the States would likely not have gotten away with as many atrocities as they did until the incorporation of substantive due.

239. Franklin, *The Encyclopédiste*, *supra* note 3, at 61 (stating, “*stare decisis* is not justified by the content of the Constitution.”).

240. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 854 (1992) (showing that a prior decision will not be overruled absent showing that the court must consider “prudential and pragmatic considerations,” before overruling erroneous precedent).

241. 83 U.S. 36 (1872) (holding that the Privileges or Immunities clause of the Fourteenth Amendment did not incorporate all of the Bill of Rights against the States).

If we do adopt the idea that the Constitution is a supreme code, then the decisions of the United States Supreme Court would not be binding upon the lower courts or the Court itself. Of course, those decisions would be binding upon the parties who happen to be in the suit. And, of course, those decisions may help other courts decide cases, so long as they adopt the appropriate understanding of jurisprudence.

There are a few theories of jurisprudence in civil law jurisdictions. The first is that of “probable doctrine,”²⁴² where an issue has been decided so many times by a higher court that it is probably the right way to rule. The second is “*jurisprudence constante*”²⁴³ meaning that precedent only becomes strongly influential after it has been almost universally agreed to being the right interpretation of the law. This is the method which is supposed to be used in Louisiana and is widely used in civilian jurisdictions. Considering that the majority of jurisdictions have adopted the third method, and considering it was that method that was ruling the day in Europe at the time of the Enlightenment, and that it was to be used by our founders’ greatest ally, France, it seems appropriate to state that it should be the method used.

I understand the concern about whether such a situation would be appropriate; after all, would we want lower courts allowing States to bypass decisions such as *Brown v. Board of Education*?²⁴⁴ Moreover, one may point out that in civilian jurisdictions, the Constitutional Courts’ rulings are binding. It may be due to a pragmatic development.

242. Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law*, 21 B.U. INT’L L.J. 29, 47 (2003).

243. *Doerr v. Mobile Oil Corp.*, 774 So. 2d 119, 128: “Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a constant stream of uniform and homogenous rulings having the same reasoning, *jurisprudence constante* applies and operates with considerable persuasive authority.” (internal quotations omitted).

244. 347 U.S. 483 (1954).

2. *Implications for Several Current Doctrines*

(1) Since this theory focuses heavily on the natural law, and argues that there may be some sort of general jurisprudence ordained by the Constitution, this would certainly have an impact on the *Erie*²⁴⁵ doctrine, which appears to be based on the notions that (1) there is no natural law, and (2) there is no general law discoverable or which may be applied by the federal courts.

(2) This theory asserts that the Constitution adopted the Enlightenment notion that government has only one purpose—the protection of human rights. If this is so, then the only legitimate government interest (as hinted at above) is the protection of individuals from others and the government. Such a consideration would have massive implications for weighing government interest against human rights in the context of equal protection, and substantive due process.²⁴⁶

(3) Since this theory would require comparison of the text and discerning fundamental principles embedded in the text, we would be forced to review the notion of constitutional protections for juridical persons. By this I mean that in reading the Bill of Rights it is clear that “persons” within the meaning of the Constitution have the capacity to enjoy all the rights listed in the document, and are protected under it, even though they cannot yet exercise those rights, until they are taken away after due process is given. Thus, it cannot be that one may start out with enjoyment of some rights and not others. But this is exactly what the American corporate personhood doctrine suggests—that there are some constitutional persons that may have the capacity of enjoyment for some but not all of these rights initially,²⁴⁷ even before they are taken away with

245. *Erie Railroad v. Tompkins*, 304 U.S. 64; 58 S. Ct. 817 (1938) (overruling the general federal common law).

246. See generally *Dragovich v. U.S. Dept. of the Treasury*, 845 F. Supp. 2d 1091 (U.S. N.D. Cal. 2012) (discussing rational basis review and strict scrutiny review for substantive due process).

247. For example, corporations do not have the right against self-incrimination. *Hale v. Henkel*, 201 U.S. 43 (1906).

due process. Therefore, if my theory is adopted, either corporations have the capacity of enjoyment for every single right, both enumerated and non-enumerated (as natural persons) or they have none. But since it has already been agreed that it is logically impossible for corporations to enjoy some rights (the right against self-incrimination, since corporations lack an actual “self”), then that means they cannot be considered “persons” within the meaning of the Constitution. Thus, they have no constitutionally protected rights; they have only those created by ordinary statute.

(4) Substantive due process will be a thing of the past under my theory, because we are to give an average person reading to the words of a law. But a provision that speaks to “process” means only that: “process.” The only way to logically get “substance” out of “process” would be if there were really no difference between them.²⁴⁸ Moreover, all the work of substantive due process would already have been done by the Privileges or Immunities clause incorporating all of the rights held by the federal government against the states.²⁴⁹ This would also mean, of course, that the Privileges or Immunities clause would have to incorporate all of the unwritten rights of the Constitution.²⁵⁰

(5) Because we would likely adopt other code based theories,²⁵¹ we would likely adopt the use of foreign law to help fill up the broad provisions on human rights, so long as that foreign law had a similar basis in its development as our constitutional provision. I can think of no better example than the Eighth

248. If that were so, then the *Erie* doctrine would be wrong for yet another reason.

249. The Supreme Court has basically “incorporated” all of the Bill of Rights against the states. The most recent being the right to bear arms of the Second Amendment. *McDonald v. City of Chicago*, 561 U.S. 742; 130 S. Ct. 3020 (2010).

250. In relation to this idea and to what was written about the *Slaughter House Cases* above, another writer has shown the influence of civilian theory on the Fourteenth Amendment. Jared Bianchi, *Anything but Common: The Role of Louisiana’s Civilian Tradition in the Development of Federal Civil Rights Jurisprudence under the Fourteenth Amendment*, 6 J. CIV. L. STUD. 177 (2013).

251. One of which would also be “abuse of rights,” but this is left to another essay.

Amendment's ban on cruel and unusual punishment.²⁵² However, because we must relay back and forth between the texts of the Constitution, I must sadly admit that such use of foreign law could not abolish the death penalty. However, it could end imprisonment for drug offenses, as many other nations have begun to abolish such actions. The more that other nations change their treatment of drug offenders and users, the more the United States would become increasingly "unusual" in its treatment of drug offenders. Such a disparity between the United States and other nations could inform our understanding of what is cruel and unusual.

(6) Original intent would be dead. The intent of the framers—by that, I mean their original application of the Constitution—would only be one part of the puzzle in interpreting the broad provisions of the Constitution. However, resort should be made to the original understanding in "defining" what the words mean. For example, if the Constitution contained the word "fence," but that word actually meant what we call today a "dog," it would be imperative to know what the framers definition was in order to help locate the appropriate principle.

With this in mind, I realize that there would be an insurmountable amount of disinterest in adopting my idea as a whole. Even though conceptually the Constitution is an Enlightenment code, many would likely not wish to adopt all of these consequences.

V. CONCLUSION

Two centuries ago, at the height of the Enlightenment age, our founders set forth the national charter—a document filled with natural law influence and lessons from Roman legal history. Its passages distilled these higher and ancient laws—derived from religion, reason, and nature—through practical experience into a

252. I am glad to see that this has already been done in part. *Roper v. Simmons*, 543 U.S. 551 (2005).

Constitution that abrogated control of the prior regimes and gave answers to all questions relevant to the fundamental law of our nation. All of these facts make the Constitution conceptually identical to the great codes of Europe, and like those legal titans, our Constitution has survived war, national poverty, and unpredictable social changes. But what has been overlooked is this: the Constitution has not had to undergo the full scale changes of the Enlightenment codes, it does not have the danger of an auxiliary code that may draw it out of the center of our national legal structure, and instead of merely adopting the natural law, it has become the natural law. Therefore, not only can we say that the Constitution is *a* code in a small compass, but we may also be justified in saying that it is the *best* code of them all.