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## Rights Done Right: A Critique of Libertarian Originalism

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# RIGHTS DONE RIGHT: A CRITIQUE OF LIBERTARIAN ORIGINALISM

Andrew C. Spiropoulos\*

## I. INTRODUCTION

As Richard Nixon might have said, it appears that we are all originalists now.<sup>1</sup> What was once the interpretive method only of academic renegades (if not pariahs) like Robert Bork and Antonin Scalia has become more than acceptable—it is almost fashionable.<sup>2</sup> When judicial progressives like Jack Balkin and Akhil Amar join Bork and Scalia in their belief that one must begin the interpretive task by inquiring into the original meaning of the Constitution, one begins to suspect that originalism must take radically different forms in different hands.<sup>3</sup>

It was inevitable that legal academics and other defenders of judicial progressivism would virulently oppose Bork and Scalia's version of originalism. Bork and Scalia, after all, turned to originalism in response to what they believed was the Court's illegitimate use of judicial power in the Warren and post-Warren Court era.<sup>4</sup> They believed the Court imposed its own moral opinions on the Constitution and the people, replacing the rule of law with its own moral ukases.<sup>5</sup> They sought an alternative to an interpretive method too reliant on the subjective opinions of judges and, thus, corrosive of the foundations of the rule of law. In their view, the rule of law is characterized by objective, predictable, and stable rules made by those with proper authority to make law, while modern constitutional interpretation is characterized by the arbitrary exercise of raw judicial power.<sup>6</sup>

The first modern originalists, then, had two primary interpretive goals. First, they sought an objective and legitimate source of stable, predictable constitutional rules.<sup>7</sup> Second, they sought an interpretive approach that would constrain judicial discretion by instructing judges that it was illegitimate both to interpret the Constitution to evolve with the times and to consult abstract precepts of moral philosophy in interpreting the more general terms of the document.<sup>8</sup> Restricting the judicial role to discovering and applying the original intent or meaning of the text would serve both purposes and also provide a standard for effectively critiquing the work of judges<sup>9</sup>. This aversion to both an evolving interpretation of the Constitution and the employment of abstract philosophic

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<sup>1</sup> ALFRED S. REGNERY, *UPSTREAM: THE ASCENDANCE OF AMERICAN CONSERVATISM* 137 (2008).

<sup>2</sup> See Antonin Scalia, *Foreword to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 43-44 (2007).

<sup>3</sup> See Jess Bravin, *Rethinking Original Intent*, WALL ST. J., Mar. 14, 2009, at W3.

<sup>4</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 129-32 (1990).

<sup>5</sup> *Id.* at 72-73.

<sup>6</sup> *Id.* at 143.

<sup>7</sup> *Id.* at 143-44.

<sup>8</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 44-47 (1997).

<sup>9</sup> BORK, *supra* note 4, at 144-46.

principles in constitutional interpretation led Bork and Scalia, in articulating their vision of originalism, to embrace the language and intellectual approach of legal positivism.<sup>10</sup> Their jurisprudence manifested a deep hostility to the thought and rhetoric of the natural law and natural rights traditions, which they saw as a cover for judges imposing their moral opinions on their fellow citizens.<sup>11</sup>

One expected that progressive defenders of an evolving Constitution incorporating contemporary moral judgment would criticize this antipathy to natural law and natural rights thinking. But Bork and Scalia have also been criticized by some of their ostensible allies in the conservative legal movement. In particular, political theorists in the natural law and natural rights traditions like Hadley Arkes and Harry Jaffa have criticized, often in strong terms, Bork and Scalia's positivist dismissal of the role of natural law and natural rights in constitutional interpretation.<sup>12</sup>

The natural law and natural rights thinkers do not quarrel with either the embrace of originalism or the rejection of judicial reliance on contemporary moral understanding. What they reject is the notion that an originalist understanding of the Constitution entails the rejection of natural law or natural rights thinking. Indeed, their argument is that a proper originalist understanding of the Constitution not only permits, but requires, reliance upon natural law and natural rights thought, even if this reliance leads to the increased exercise of judicial discretion. These thinkers, in other words, argue that the Framers intended that judges both seek the original meaning of the Constitution and rely, in doing so, on philosophic reasoning. The judges, however, are not to consult the principles of justice dominant in contemporary society; their role is to articulate and apply the philosophic principles that animated the Founding to current problems. These philosophy-oriented originalists are comfortable, as long as the right principles are applied, with expansive judicial interpretations, grounded in philosophic principles, of the more general provisions of the Constitution such as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

One variety of this philosophic originalism that has been much discussed and written about is what can be termed libertarian originalism. This version of originalism is not new. It was the reigning interpretive paradigm of what is often termed the *Lochner*<sup>13</sup> era of constitutional interpretation, characterized by the Court's aggressive application of substantive due process analysis in reviewing state regulation of liberty. Once thought permanently interred by the Court's

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<sup>10</sup> ROBERT H. BORK, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS (AMERICAN IDEALS & INSTITUTIONS) 328 (2008) ("When [a judge] is at work, his concern must be with positive law and positive law only.").

<sup>11</sup> See Bork's debate with Hadley Arkes regarding this issue. *Id.* at 306-20, 328-29.

<sup>12</sup> See, e.g., HADLEY ARKES, BEYOND THE CONSTITUTION 14-15 (1990) (Accusing Bork of accepting the "modern heresy" of legal positivism, so that "the cause of conservatism in politics has been attached to 'positivism' in the law, and that kind of marriage will be the undoing of political conservatism. For it will insure that, in jurisprudence, conservatism will be brittle and unworkable, and that on matters of moral consequence conservative jurisprudence will have nothing to say.").

<sup>13</sup> *Lochner v. New York*, 198 U.S. 45 (1908).

constitutional validation of the New Deal in 1937, it has been revived in the legal academy, most recently and persuasively in Randy Barnett's *Restoring the Lost Constitution: The Presumption of Liberty*.<sup>14</sup> The persistent intellectual attraction of libertarian originalism, particularly in the face of the conventional wisdom accounting it a practical failure, demonstrates the strength both of libertarian originalism's case for its superior fidelity to the foundational principles of the Constitution and its ability to generate convincing answers to constitutional questions.

In the first part of this article, I will explain the foundational principles and constitutional forms of libertarian originalism. Libertarian originalism, as one would expect, is rooted in the central principle of liberal political theory best expressed in the Declaration of Independence—all men are created equal. This idea of natural equality, as explicated in the political theory of John Locke, the thinker most relied upon by the Framers for their understanding of the foundational principles of free government, is founded on the insight that, unlike with nature's other creatures, no human being is so superior in kind that he or she possesses the right to govern another. As they are not by nature subject to another, all human beings are born free and equal. As free and equal beings, we Americans believe that we possess natural rights, including the rights to life, liberty, and the pursuit of happiness. We need government to secure these rights, but, because we all possess equal natural rights, this government must be established by the consent of the governed. If this government does not secure these rights, the governed have the right—and duty—to alter or abolish this government and establish another one that will protect these rights.

Most Americans who reflect upon our constitutional principles agree on these basic precepts. Disagreement, however, persists about the content of our natural rights and the kind of constitution that most effectively secures these rights. Libertarian originalists have distinct answers to these questions; answers they believe are derived from the political principles of the Framers of the Constitution and were embodied by these same Framers in the Constitution, a document they meant to be treated as law.

Libertarian originalists begin with the premise that, given natural human equality, there can be no legitimate government unless the people of a given society share a common understanding of the principles of liberty. In other words, unless we as a people can reach substantive agreement on the content of our rights, we cannot possibly form a legitimate government to secure these rights. A people dedicated to the true principles of liberty will adhere to a robust understanding of natural rights, one that understands natural rights both in abstract and near absolute terms. Libertarians understand natural rights as bright line limits on government action allowing each individual a distinct and substantial sphere of private action free from state coercion. These limits can be

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<sup>14</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); see Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L.REV. 1081 (2005) ("It is the best defense ever written of a libertarian or conservative/libertarian approach to constitutional law.").

best understood in light of what I call the libertarian principle. The libertarian principle posits that each human being has the right to think and act as one pleases as long as he does not harm another person or interfere with their equal rights. If we do not agree upon and construct a government based upon this understanding of rights, no person is obligated to obey the dictates of that government because it does not secure that person's rights and is therefore not legitimate. Only a constitution that is founded upon the proper understanding of rights is worthy of the allegiance of the people.

A legitimate constitution, one in which the people are obliged to follow the laws made under it, must do more than aspire to secure the natural rights of the people, properly understood. It must establish an effective structure for the protection of these rights. Libertarian originalists are skeptical that the protection of natural rights can be trusted to the routine workings of representative government. While they acknowledge the theoretical importance of consent in the formation of government, they have little confidence, given the natural selfishness of man, that any imaginable form of government by consent (other than a government in which each person must individually consent to any laws regulating their liberty) can sufficiently protect individual natural rights. These originalists contend that unless individuals are provided, by the constitution of their government, a plausible guarantee that their natural rights will be protected—which a merely representative government cannot supply—the people cannot be obliged to follow the laws made under that constitution.

Libertarian originalists contend that the only practical way to secure the rights of the people—and the method chosen by the Framers of the Constitution and the Reconstruction Amendments—is to provide the people with a constitutional guarantee, enforceable in court, that their natural rights, both written and unwritten, will be protected. In other words, natural rights are treated under the Constitution as positive legal rights. The Ninth and Fourteenth Amendments, in the libertarian originalist view, supply the textual authority for this constitutional structure and practice. If this authority did not exist, however, it would have to be invented because without direct judicial vindication of natural rights against the actions of a government seeking to deprive a person of these rights, no government is worthy of the people's obedience.

Libertarian originalists, and here Barnett's contribution is particularly vital, must then develop an approach to constitutional interpretation, focusing on the Ninth and Fourteenth Amendments, that will instruct judges on how to enforce these rights. Libertarian originalists agree that it would be prohibitively difficult, if not impossible, for judges to articulate a comprehensive list of natural rights that must be protected against illegitimate state invasion. Rather than take on this impossible task, libertarian originalists argue the Constitution requires that judges, in reviewing laws that either deprive or regulate the use of a person's natural rights, replace the presumption of constitutionality that is the current default rule for constitutional interpretation with a presumption of liberty. Application of this presumption would place the burden on the government to demonstrate that its action was both necessary and proper.

For libertarian theorists like Barnett, the key inquiry is whether a challenged state action is proper because his definition (which he attributes to the

Framers) of proper incorporates the libertarian principle.<sup>15</sup> No law, under this principle, is proper if it deprives a person of liberty when the exercise of liberty in question neither harms nor interferes with the liberty of another person. A universal and rigorously applied presumption of liberty will ensure that every state action burdening liberty will be meaningfully scrutinized by independent judges before any loss of liberty finally takes place. Only a constitution that provides this kind of institutionalized protection for individual liberty will command the allegiance of a people that recognizes and is determined to secure its natural rights. Without such protection, human beings are not morally obliged to obey the laws made by government.

In the second part of this article, I will demonstrate that libertarian originalism is flawed both as a descriptive account of the principles and the architecture of the Constitution and as a normative model for the effective protection of natural rights. To be sure, much of the libertarian originalist argument is an accurate description of the principles of the American regime. They are correct that America was founded upon the principles of liberal political theory, particularly the principle of natural equality. They are also correct that the end of our politics is the securing of the natural rights of the people. Originalists, however, misapprehend the Framers' understanding of natural rights and the relationship between these rights and the civil rights that is the actual subject of direct government protection. The Framing generation did not understand natural rights as do libertarians; their understanding of natural rights was far more modest than that produced by viewing these rights through the prism of the libertarian principle. Instead, the Framing generation believed that the exercise of natural rights must be subject to regulation emanating from a legitimate government, one established and operated by the consent of governed. Accordingly, the Framing generation, both in principle and practice, believed that the state legitimately possessed far more power to regulate, and even deprive, a person's liberty than do the libertarian originalists.

In addition, while the libertarian originalists are correct that our constitutional system was designed to protect unalienable natural rights, they misunderstand both the fundamental nature of our constitutional architecture and the role of natural rights in judging the legitimacy of government action. The essence of the libertarian originalist approach to government is a deep skepticism that liberty is safe in the hands of even a popular government. Human beings are, by their nature, far too tempted to serve their interests at the expense of others for a sensible person to trust the means of one's self-preservation—your natural rights—to an unconstrained majority. Only a constitution based on a firm, pre-existing commitment to the preservation of a particular set of natural rights, and a legal system, manned by politically independent judges, which consistently vindicates claims to these natural rights against attempts by the benighted majority to take them away suffices as a legitimate regime.

Whatever the merits of this regime, it is not the one created by the Framers. Their view of government by consent was far less jaundiced than that of the

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<sup>15</sup> BARNETT, *supra* note 14, at 2.

libertarians. In fact, the system they designed to protect natural rights relies upon the active participation of the people in the protection of their rights. Rather than rely upon judges to directly protect natural rights through litigation, the Framers, drawing on the political theory of Locke, Blackstone, Montesquieu, and other liberal thinkers, as well as their own political experience, conceived a structure of consensual government designed so that its regular operation would produce laws protective of rights. Judicial review, when spoken of at all, was seen as a marginally important institution. Far more important were the political structures, emanating from the consent of the governed, including a popularly elected legislature, the separation of powers, and the supremacy of law made by the people, both statutory and constitutional. This constitutional structure, if operated by officials committed to the protection of natural rights, under the watchful eye of an active citizenry, would lead to just government. And if, for some reason, government failed to secure these rights, a vigilant people would have the right and, indeed, the duty to overthrow the dysfunctional system and establish a new one—the ultimate expression of government by consent.

As to the direct role played by the natural rights in a properly functioning government, contrary to the assumptions that underlie Barnett's jurisprudence of a presumption of liberty, the Framers never intended, unless they were reduced to a written, positive legal protection, that natural rights be treated as directly enforceable legal rights. Only civil rights, natural rights domesticated by regulation for the common good, were enforceable in court. Unenumerated, but retained natural rights, play a far different role in the American regime. First and foremost, they serve as set of principles for both guiding political action and for holding political officials accountable to the people, normally by voting but, if necessary, by revolutionary action. Second, natural rights, when exercised in accordance with regulations for the common good, are transformed into enforceable common law rights. Rather than treating these rights as unenumerated constitutional rights deserving of maximum judicial protection against state regulation, they are instead default rights that the legislature may regulate if they speak clearly. It is this default rule in favor of common law rights that constitutes, in the true original structure, the presumption of liberty.

Libertarian originalism, because it advocates a constitutional regime different from that of the Framers, cannot succeed as a descriptive account of the original design. I will also explain why, normatively, the libertarian understanding of American constitutionalism fails as an effective system for the protection of rights. Putting aside the question of whether a constitutional system so reliant on judicial review will successfully protect rights, libertarian originalism, in order to provide the foundation for the specific and robust judicial enforcement of natural rights, must rely on a nearly universal consensus of the people on the meaning and content of these rights. In a society such as ours, no such consensus is likely, or even possible, and any attempt of the judiciary to impose such a strong understanding of rights on the unconvinced will polarize and disrupt society, threatening the social harmony necessary for the preservation of both liberty and order.

Most importantly, no regime dedicated to individual liberty can succeed if the individuals possessing rights do not play an active part in fighting for their

preservation. A government that denigrates the importance of the consent of the people and, instead, relies on an unelected, unaccountable aristocracy for the protection of rights, will not successfully protect individual rights. Only a regime that empowers and relies on its people, thus encouraging civic education and virtue, will succeed. In addition, by positing a somewhat flexible, if not vague, definition of natural rights and devising a system that relies on political action to define and secure them, our system (as opposed to the libertarian version of it) makes room for different understandings of liberty and allows those with different views to compete, within specific and well-defined limits, for the opportunity to implement their vision of liberty by winning political office. This pluralist approach to constitutional government not only encourages the participation necessary for the preservation of liberty, it also creates space for the principles or institutions, such as religion, that, while not themselves necessarily liberal, may be necessary for the survival of liberal constitutionalism.

## II. EXPLAINING LIBERTARIAN ORIGINALISM

### A. Natural Rights Regime

The first principle of any political theory must address the question of the principle of political obligation in the particular regime, or, to put it more simply, why should the people of this society obey the law?<sup>16</sup> In a state governed by divine right, the answer is easy—because God put the king in charge. A liberal regime, however, as Jefferson and his fellow revolutionaries explained, is founded on the idea of natural human equality, meaning that, unlike with bees, God has created all people equally, with no one put in charge by divine command or by nature.<sup>17</sup> In the words of Jefferson, “[t]he mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately by the grace of God.”<sup>18</sup> With no authority appointed by God or nature, it is difficult to understand why anyone should obey the command of a lawmaker.

The conventional liberal answer to the problem of political obligation is that if no one person or group is, by nature, in charge, then government only is legitimate if it is formed by the consent of the governed. As unanimous consent

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<sup>16</sup> See *id.* (framing his work as an answer to the question of “Why should anyone obey the commands issued by persons who claim to be authorized by the Constitution?”).

<sup>17</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Michael Zuckert explains that “[w]hen the Declaration says ‘all men are created equal,’ it means that neither God nor nature grants authority to some over others. God creates the species but appoints no one in particular to rule. Nature produces various human inequalities, but none of these, not even superior intelligence or wisdom, implies a right to rule.” MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* 213 (2002).

<sup>18</sup> *Id.* at 213 (quoting Letter from Thomas Jefferson, to Roger C. Weightman (June 24, 1826)).

is not possible, the next best alternative is rule by the majority.<sup>19</sup> Randy Barnett and other libertarians such as Friedrich Hayek, however, reject the notion that majority rule is sufficient to establish a duty to obey law.<sup>20</sup> They believe that unless consent of the government means that each person consents to each law, then, without more, consent is not sufficient to establish the legitimacy of government. As Barnett puts it:

For consent to bind a person, there must be a way to say “no” as well as “yes” and that person himself or herself must have consented. Unless we are speaking of children, incompetents or principals who have actually consented to be represented by an agent, no person can literally consent for another. This fact poses an insurmountable obstacle for all arguments that base the “consent of the governed” on anything less than unanimity.<sup>21</sup>

Any form of government by consent relying on less than unanimity—meaning every existing one—is founded on a “fiction” and therefore, without more, has no power to legitimately bind the people<sup>22</sup>.

Most would agree, however, that government by unanimous consent is neither practical nor desirable.<sup>23</sup> Libertarians respond that a legitimate regime can be founded on liberal premises without requiring government by unanimous consent. What the people must do is reach agreement on a set of general principles that regulate and limit the actions of any governing body established by the society so that “the will of the temporary majority on particular issues is based on the understanding that this majority will abide by the more general principles laid down beforehand by a more comprehensive body.”<sup>24</sup> Only if the society can form a real and durable consensus on principles of justice, principles that they can agree will control the actions of the state, can free and equal individuals confidently relinquish their right to consent or refuse to consent to laws governing their actions. The condition, in other words, for individuals to consent to rule of the majority is the agreement of all that this majority will rule

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<sup>19</sup> FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 106 (1960) (“The democratic and the liberal traditions thus agree that whenever state action is required, and particularly whenever coercive rules have to be laid down, the decision ought to be made by the majority.”).

<sup>20</sup> *Id.* at 181 (“Only a demagogue can represent as ‘antidemocratic’ the limitations which long-term decisions and the general principles held by the people impose upon the power of temporary majorities. These limitations were conceived to protect the people against those to whom they must give power, and they are the only means by which the people can determine the general character of the order under which they will live.”).

<sup>21</sup> BARNETT, *supra* note 14, at 21.

<sup>22</sup> *Id.* at 11 (“Though the ‘People’ can surely be bound by their consent, this consent must be real, not fictional—unanimous, not majoritarian. Anything less than unanimous consent cannot simply bind nonconsenting persons.”).

<sup>23</sup> Barnett is an exception; he does believe that it possible to devise a political system that operates by unanimous consent, but he does concede that no such constitutional system currently exists. *Id.* at 3.

<sup>24</sup> HAYEK *supra* note 19, at 180.

according to commonly held principles of justice.<sup>25</sup> If the majority does not do so, the agreement is void, and individuals no longer are obligated to obey laws to which they do not consent.<sup>26</sup>

In a liberal regime, however, these principles of justice cannot be just any principles—they must be principles affirming individual liberty. For libertarian thinkers (and, keep in mind, libertarian originalists bear the burden of demonstrating that the Framers adhered to the same principles of liberty), the principles of liberty are defined both concretely and rigorously. Starting again with the premise of natural human equality, human beings, given that God or nature has not provided for any superior to rule or care for us, must act to preserve themselves. Individuals can only take the necessary actions to preserve and advance themselves if they are free to act according to their own intentions, not the will of another.<sup>27</sup> Any person who is coerced, meaning that other people have sufficient control over an individual's circumstances so that "in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another," is "unable either to use his own intelligence or knowledge or to follow his own aims and beliefs"; these actions eliminate the "individual as thinking and valuing person and makes him a bare tool in the achievement of the ends of another."<sup>28</sup> If a society cannot agree as a matter of principle to sufficiently protect individuals from coercion so that they can make the most important choices in their lives, then that society has no real respect for the dignity of persons and cannot be called free.<sup>29</sup>

The next question, then, is how to define the nature and scope of the secured private sphere necessary for human dignity and flourishing. Again, libertarians offer a specific answer to this question: human beings ought to be free to act as they choose as long as they do not harm or interfere with the rights of another, particularly by violence and fraud.<sup>30</sup> If their actions only affect themselves, no other person's disapproval of those actions can justify state coercion of the individual even when it is clear that individuals' actions will

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<sup>25</sup> *Id.* at 106 ("[I]t is not from a mere act of the will of the momentary majority but from a wider agreement on common principles that a majority decision derives its authority.").

<sup>26</sup> *Id.* at 181 ("Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey.").

<sup>27</sup> *Id.* at 14 (Freedom "presupposes that the individual has some assured private sphere, that there is some set of circumstances in his environment with which others cannot interfere.").

<sup>28</sup> *Id.* at 21.

<sup>29</sup> *Id.* at 79.

<sup>30</sup> Hayek also would permit to state to regulate freedom through properly made rules. *Id.* at 144 ("[F]reedom demands no more than that coercion and violence, fraud, and deception, be prevented, except for the use of coercion by government for the sole purpose of enforcing known rules intended to secure the best conditions under which the individual may give his activities a coherent, rational pattern."). The rule of law, as opposed to the arbitrary rule of men, requires laws regulating liberty take the form of general abstract rules laid down in advance that apply equally to all. *Id.* at 153.

cause harm to themselves.<sup>31</sup> In particular, the state may not coerce an individual in order to foster private morality because “believing in freedom means that we do not regard ourselves as the ultimate judges of another person’s values;” individuals may pursue any value they please so long as they do not infringe the equal rights of others to do the same.<sup>32</sup>

To the Framers, according to the libertarian originalists, this idea of equal freedom was embodied in the concept of natural rights.<sup>33</sup> Barnett’s definition of natural rights precisely tracks Hayek’s description of the idea of freedom:

Natural rights define the moral space within which persons must be free to make their own choices and live their own lives. They are *rights* insofar as they entail enforceable claims on other persons . . . . And they are *natural* insofar as their necessity depends upon the (contingent) nature of persons and the social and physical world in which persons reside.<sup>34</sup>

Natural rights, thus, define an individual’s private sphere, in Hayek’s formulation, or in Barnett’s, moral space. Both phrases define liberty as the freedom of each person to pursue their vision of the good. It is important to understand, then, that unlike the theory of natural law, which seeks to instruct people on how to live their lives, the concept of natural rights instead defines the freedom each individual has to pursue their personal good without interference from the power of others, including the state, even when these others seek to act upon an individual for that person’s good.<sup>35</sup>

Libertarians take great care to make clear that they do not believe either that an individual has unlimited freedom to act as they see fit or that the state has no legitimate power to regulate the actions of individuals. What they defend is the proposition that the state’s power to coerce is limited to preventing individuals from invading the rights of others and to making general and fairly applied

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<sup>31</sup> *Id.* at 145 (“[T]he pleasure or pain that may be caused by the knowledge of other people’s actions should never be regarded as a legitimate cause for coercion . . . where private practices cannot affect anybody but the voluntary adult actors, the mere dislike of what is being done by others, or even the knowledge that others harm themselves by what they do, provides no legitimate ground for coercion.”).

<sup>32</sup> *Id.* at 79.

<sup>33</sup> Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 151, 159 (1996). Hayek makes it clear that, from his perspective, it makes no difference which terms are used to describe or derive the principles of freedom. All that matters is that, first, liberty is understood as the securing of a private sphere in which the individual makes, free from coercion from others, the fundamental choices shaping one’s life, and, second, that the society, as a whole, accepts this understanding. HAYEK, *supra* note 19, at 106 (“It is irrelevant that this view [of liberty] used to be expressed in terms of the ‘law of nature’ or the ‘social contract’ . . . . The essential point remains: it is the acceptance of such common principles that makes a collection of people a community.”).

<sup>34</sup> Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 *CONN. L. REV.* 853, 862 (1993).

<sup>35</sup> BARNETT, *supra* note 14, at 83-84.

regulations that help facilitate the exercise of liberty.<sup>36</sup> Actions that harm other individuals or otherwise violate the rights of others constitute license, not liberty, and not only may be controlled by the state, they must be to secure the natural rights of members of the society. Identifying what kinds of actions constitute violations of another's rights and therefore are subject to state regulation is not a particularly difficult task. Indeed, Barnett contends, the rules and principles of the traditional common law, which remain largely valid, serve as a reliable guide for distinguishing between rightful conduct, which must be protected from state (and private) coercion, and wrongful conduct which must be restricted.<sup>37</sup>

In sum then, libertarians contend that, under the principles of our regime, when we say we are free we mean all individuals possess natural rights and these rights empower us to engage in any conduct we choose so long as our conduct is rightful, meaning our conduct does not violate the rights of others, as understood and explicated by the traditional common law. Libertarian originalists argue, as one would expect, that this understanding of natural rights was incorporated into the text of Constitution. Only a commitment to the protection of natural rights, they argue, can make sense of the words of the Ninth Amendment that "[t]he enumeration in th[is] Constitution, of certain rights, shall not be construed to deny or disparage [the] others retained by the people."<sup>38</sup> After all, what can these unenumerated rights be other than the general right of liberty embraced by the concept of natural rights? Similarly, the Privileges and Immunities Clause of the Fourteenth Amendment indicates that there are rights, which are not and perhaps cannot be listed, that belong to Americans and cannot be denied or disparaged by the state—what else could these rights be other than natural rights?<sup>39</sup> In fact, the libertarians maintain, these provisions—as no other parts of the text are equally suitable—must be interpreted to require constitutional protection of natural rights or the legitimacy of the Constitution can be called into question.<sup>40</sup> We must now turn to how libertarian originalists understand the Constitution's method of securing natural rights.

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<sup>36</sup> *Id.* at 262. An example, Barnett comments, of regulation intended to facilitate the exercise of natural rights is the law governing the proper form of contracts.

<sup>37</sup> BARNETT, *supra* note 14, at 165 ([T]he common law of property, torts, contract, restitution, agency, etc. provides principles of right conduct to regulate the conduct of persons toward each other."). Barnett acknowledges that state legislatures do have authority (although he believes it constitutionally limited) to alter the common law, but he argues that they have done so quite rarely. *Id.* at 166.

<sup>38</sup> U.S. CONST. amend. IX.

<sup>39</sup> BARNETT, *supra* note 14, at 61 ("If the framers of the Fourteenth Amendment meant to protect natural rights—or even civil rights—why did they use the term 'privileges or immunities' instead? The short answer is that they did so because, while 'privileges or immunities' includes natural rights, it is a broader term that includes additional rights.").

<sup>40</sup> Barnett, *Getting Normative*, *supra* note 32, at 161.

## B. How the Constitution Secures Natural Rights

In a society that believes all persons are born free and equal and are therefore endowed with natural rights, if individuals are to be legitimately bound to obey the laws made by the state, it is not sufficient for a constitution to aspire to the protection of natural rights. Libertarian originalists argue that, in order to justify obedience to the laws, a constitution must provide sufficient assurance that the laws made under the constitution will be just, meaning that they will secure, and not abridge, the natural rights of the people.<sup>41</sup> The procedures devised for the protection of rights must be designed so that proposed laws are scrutinized before a person is forced to obey them.<sup>42</sup> In other words, the Constitution, to be considered legitimate, must establish an identifiable and effective process for the protection of natural rights.

Up until now, in explaining libertarian originalism, I have concentrated more on explaining these thinkers' libertarian principles than on their originalism. At this point in the argument, however, their case for originalism becomes important. If a constitution successfully creates and implements a process for the protection of natural rights, that process, for the constitution to be considered legitimate, must be protected against future alterations. We must, in Barnett's phrase, "lock in" the Constitution's protection of natural rights.<sup>43</sup> One way the Constitution advances this goal is by its nature as a written document; a written constitution helps provide assurance that the provisions establishing the process for the protection of rights will be followed over time.<sup>44</sup> But a written constitution is not enough to lock in a particular interpretation or process, if the political actors, including the judges, who are required to obey these words disregard them or the meaning of the words changes over time.<sup>45</sup> In order to assure that the legal process established by a written constitution for the purpose of securing natural rights is properly preserved, judges and other political actors must interpret the constitution according to the original meaning of its words.<sup>46</sup> Only by adopting an originalist theory of interpretation, therefore, can judges lock in the natural rights protections that legitimate a constitution.

An originalist theory of interpretation, particularly one that, as Barnett advocates, is centered on determining the original meaning of the words of the

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<sup>41</sup> *Id.* at 153 (Because citizens themselves cannot scrutinize every law to ensure that it respects the natural rights of the people, "there must be some procedural assurance that someone sufficiently impartial has attempted such an assessment" and for it to be legitimate, "law-making processes established by a constitution must (among other things) provide such an assurance.").

<sup>42</sup> BARNETT, *supra* note 14, at 9.

<sup>43</sup> *Id.* at 104-105.

<sup>44</sup> *Id.* at 117.

<sup>45</sup> *Id.* at 109.

<sup>46</sup> *Id.* at 88 ("Written constitutions are valuable to the extent they preserve or 'lock in' an initially legitimate lawmaking scheme, and such 'lock in' is not achieved if the meaning of the writing can be changed without formal amendment. While this rationale justifies interpreting the Constitution according to the original meaning of its words, it does not justify going beyond that meaning in an effort to recapture the original intent of its framers.").

text rather than the intent of its drafters, will not, in and of itself, always produce determinate answers to difficult and important constitutional questions.<sup>47</sup> The words of the Constitution, even when properly interpreted, often do not supply the answer to the particular constitutional question posed in a case. The original meaning of the Constitution may, for example, tell you which principle a constitutional provision is intended to vindicate—freedom of speech, for example—but it often does not and cannot provide the specific rules necessary to implement that principle. The judge, in deciding how a principle applies in a particular case, must develop and articulate rules that will faithfully implement that principle.

In explaining how constitutional principles are interpreted and applied, Barnett distinguishes between constitutional interpretation and construction.<sup>48</sup> Interpretation involves determining the original meaning of the constitutional text in light of the historical evidence regarding the meaning of the words used by the Framers. If such evidence is available and one can therefore determine the original meaning of the text in a sufficiently specific manner to answer a particular legal question, then interpretation suffices to decide a case. If however, as is often the case, either the text involved is too general or the historical evidence too sparse to produce a sufficiently concrete interpretation of the words to answer the question, a judge must go beyond interpretation of the words and instead construe them.<sup>49</sup> By constitutional construction, Barnett means that the judge must choose from a range of meanings that are consistent with, but not determined by, the original meaning of the text.<sup>50</sup> For a construction to be legitimate, it must not violate the original meaning of the text and it must enhance the legitimacy of the constitutional system as a whole.<sup>51</sup> From the libertarian perspective, such legitimacy will be enhanced if the construction at issue provides stronger protection for natural rights.<sup>52</sup>

This distinction between interpretation and construction is particularly relevant in understanding how the Constitution protects natural rights. One reason why it is difficult to understand the meaning of the constitutional provisions most directly protecting natural rights, the Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment, is that these provisions are quite general and the historical record, while the libertarians argue

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 128.

<sup>49</sup> *Id.* at 121 (“Owing to the vagueness of language and the limits of historical inquiry, originalist interpretation may not result in a unique rule of law to be applied to a particular case or controversy. When interpretation has provided all the guidance it can but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction—within the bounds established by original meaning.”).

<sup>50</sup> *Id.* at 121.

<sup>51</sup> *Id.* at 128 (A proper construction is one that is “consistent with the original meaning of the terms at issue and . . . furthers the constitutional principles of, for example, separation of powers and federalism, and enhances the legitimacy of the lawmaking process.”).

<sup>52</sup> *Id.* (A judge, if permitted by the original meaning should “adopt a construction that helps assure that valid legal commands are binding in conscience.”).

clearly establishes that they were intended to secure natural rights, does not reveal how, as a practical manner, these protections were to be enforced.<sup>53</sup> In other words, interpretation can tell us that the two provisions were intended to guarantee the people protection of their natural rights. It will require construction, however, to tell us how these rights should be protected.

In considering how the Constitution ought to be construed in order to devise the best process for the protection of natural rights, the libertarians argue that, as our constitutional system currently operates, government by consent cannot serve as the foundation for the protection of natural rights. The only form of the consent of the governed that will suffice to establish a legitimate government is government by unanimous consent, which, whether or not it is practically possible, is not likely to be adopted any time in the near future. As to the performance of our current system, Barnett argues our experience with the work of the federal and state legislatures over our history, and particularly since the New Deal, has demonstrated that our legislators do not show any particular solicitude for liberty; they instead are far more consumed with serving the interests of factions that can help them maintain power.<sup>54</sup> Indeed, one would be naïve to believe that legislators or executives, for that matter, could serve as a judge in their own cause; the protection of natural rights, after all, depends on limiting the power of legislators and executives.<sup>55</sup>

For libertarians, then, the only institution that can serve as a bulwark of liberty is an independent judiciary willing to exercise its power of judicial review to directly protect natural rights. As Barnett concludes:

When legislation encroaches upon the liberties of the people, only review by an impartial judiciary can ensure that the rights of citizens are protected and that justice holds the balance between the legislature or executive branch and the people. Without judicial review to see that Congress stays within its powers and refrains from violating the rights retained by the people, there is little reason to believe that legislation is binding in conscience on the people.<sup>56</sup>

The best construction, then, of the Constitution should produce an understanding of the power of judicial review that will provide the judiciary with the proper authority and tools to secure natural rights.

The largest hurdle in fashioning such a workable legal structure for the protection of natural rights is how difficult, if not impossible, it is to identify the specific liberties that should be protected under the legal rubric of either

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<sup>53</sup> *Id.* at 234 (“The Ninth Amendment has proved mysterious to many.”). It is also difficult to determine, from the historical record, how the two clauses were supposed to work together. *Id.* at 66 (“I have seen little in the historical record to suggest exactly how the rights ‘retained by the people’ referred to in the Ninth Amendment compared with the ‘privileges and immunities’ protected by the Fourteenth.”).

<sup>54</sup> *Id.* at 260.

<sup>55</sup> *Id.* at 267.

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

unenumerated rights or privileges and immunities. Indeed, the Ninth Amendment, which specifically states that unenumerated—and thus unidentified—rights should be protected, was added to the Constitution precisely because the Framers did not wish the protection of rights to be limited to those identified in the text.<sup>57</sup> Barnett suggests that we should address this problem by rejecting the notion that these provisions in particular or the necessary protection of natural rights in general require judges to identify a particular set of rights that must be protected, a task that Barnett characterizes as both unnecessary and dangerous.<sup>58</sup>

Instead, Barnett proposes that the recognition that the principal goal of our regime and our Constitution is the securing of natural rights requires us to change how we think about judicial review. Instead of the current presumption in favor of the constitutionality of laws, Barnett argues that judges, in reviewing laws that restrict liberty, ought to apply a presumption of liberty.<sup>59</sup> This presumption, instead of placing the burden on the person whose rights are at risk to show that the law ought to be struck down, would place the burden on the government to show that its proposed infringement of liberty is both necessary and proper.<sup>60</sup> Such a general presumption, applied to all potential infringements of liberty, will both eliminate the need to identify a list of protected rights and enable judges to provide substantive protection to all liberty.

Barnett's understanding of when a law is sufficiently necessary and proper to overcome the presumption of liberty incorporates the libertarian definition of natural rights. The most important inquiry is whether a law is proper. A restriction of liberty is only proper if it restricts only wrongful, not rightful, exercises of liberty or it regulates liberty only to facilitate the exercise of rights.<sup>61</sup> Whether conduct is considered rightful or wrongful depends on whether the conduct harms or interferes with the rights of another—a law is not proper simply because the majority dislikes the actions of the people subject to the law or because these persons are harming themselves. If the conduct regulated is not improper, then the person involved has a natural right to engage in that conduct that cannot be infringed. The determination of whether a law is necessary is intertwined with the question of whether the law is proper. A law is necessary if, under the facts and circumstances of a particular case, the challenged restrictions of liberty are truly necessary to achieve a proper end.<sup>62</sup>

Thus, the correct application of the presumption of liberty would find that the state does not possess legitimate authority to “prohibit any purely private

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<sup>57</sup> *Id.* at 259.

<sup>58</sup> *Id.* (“To respect the original meaning of the Ninth and Fourteenth Amendments from national or state abridgment, we need a way to protect the rights retained by the people without having to list them.”).

<sup>59</sup> *Id.* at 260.

<sup>60</sup> *Id.* Arkes, as well, advocates a presumption of liberty, arguing that “[I]n a regime of liberty, we have a presumptive claim to all aspects of our personal freedom. . . . Any one of our freedoms may be restricted when there is a justification, but the burden of justification falls on the government.”

ARKES, *supra* note 12, at 77.

<sup>61</sup> *Id.* at 262.

<sup>62</sup> *Id.* at 336.

activity *on the sole ground* that a majority of the legislature deems it to be immoral.”<sup>63</sup> Such a law would not be proper because it violates the natural rights of individuals. A law prohibiting the exercise of liberty will only be proper if an individual’s actions pose a risk of harm or violate the rights of another. Consequently, laws that outlaw possession of certain goods thought harmful to the possessor such as drugs, firearms, and pornography should be declared unconstitutional, unless it can be shown there is an unreasonable risk of harm to others.<sup>64</sup> The same result should apply to any law that regulates an individual’s actions in order to foster or protect principles of morality.<sup>65</sup>

The consistent and faithful judicial application of this presumption of liberty to all restrictions of liberty, by requiring government, each and every time it seeks to abridge someone’s natural rights, even if unenumerated, to demonstrate that the law is a necessary and proper restriction of liberty will provide the same kind of meaningful scrutiny judges now apply to laws restricting enumerated constitutional rights.<sup>66</sup> Only by the active protection of all liberty from improper abridgment by government can we have the legitimate Constitution the Framers intended—one that permits islands of government in a sea of liberty, not the opposite.<sup>67</sup>

### III. A CRITIQUE OF LIBERTARIAN ORIGINALISM

I find a great deal of the libertarian originalist argument persuasive and, in some ways, compelling. They are right that no originalist interpretation of the Constitution can be accurate or illuminating if it is not founded on the Framers’ belief in both natural rights and natural law. If originalists like Bork and Scalia truly do believe that theories of natural rights and natural law are irrelevant to constitutional interpretation, then their approach does deserve to be relegated to the dust bin of failed interpretive theories, in part, ironically, because such a narrow view of originalism would not be consistent with the moral, political, and legal principles of the Framers. Any approach that attempts to interpret the words of the text without reference to the philosophical principles that underlie them will not produce either, from an originalist perspective, accurate or, normatively just answers. As Arkes rightly concludes:

When we earnestly pledge to “preserve” the Constitution, we cannot pretend to undertake that project unless we can establish the essential character or the meaning of the thing we would seek to preserve. And that meaning of the Constitution cannot be established unless we can grasp again the moral understanding held by the Founders, antecedent to the Constitution—the

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<sup>63</sup> *Id.* at 331.

<sup>64</sup> *Id.* at 349.

<sup>65</sup> *Id.* at 334. Barnett, thus, is a defender of the Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>66</sup> BARNETT, *supra* note 14, at 264.

<sup>67</sup> *Id.* at 1.

understanding that governed the judgments of the Founders as they sought to convey, in a legal structure, the principles of lawful government.<sup>68</sup>

The philosophical principles that underlie the Constitution, but are not incorporated in the text—lying, in Arkes's phrase, "beyond the Constitution"—must be consulted in order to understand and explain the workings of our constitutional order.<sup>69</sup>

The libertarians are also correct that the search for these principles must begin with the premise that our constitutional order is the product of a commitment to the principles of liberal political theory, beginning with the first self-evident truth of the Declaration, the principle of natural equality. If no person has been appointed a superior by nature or God, government cannot be natural—human beings must choose to leave their natural state of equality, or the state of nature, and form a government. Out of this idea follows the principles of the rights of man summarized so pithily in the Declaration, which Jefferson described as a deliberate representation of the "American mind."<sup>70</sup> Philip Hamburger, in his study of American political writing in the Revolutionary and Founding eras, found that Americans shared a common understanding of the derivation and general meaning of natural rights.<sup>71</sup> Americans believed, "[o]n the assumption that the state of nature was a condition in which all humans were equally free from subjugation to one another," that natural liberty was "the freedom of individuals in the state of nature" and "[a] natural right was simply a portion of this undifferentiated natural liberty."<sup>72</sup> In general, they characterized these rights as consisting of life, liberty, and property (or the pursuit of happiness).<sup>73</sup> The libertarians, finally, are right that "the Founders were clear that mission of the political order was nothing less than protection of natural rights . . . ."<sup>74</sup>

The hard part, however, is defining what these natural rights mean and devising a constitutional structure to protect them. On these two central questions, the case for the libertarian originalist constitution fails both as a descriptive account of the original understanding of natural rights and as a

<sup>68</sup> ARKES, *supra* note 12, at 17.

<sup>69</sup> *Id.* at 16.

<sup>70</sup> Letter from Thomas Jefferson to Richard Henry Lee (May 8, 1825), available at <http://teachingamericanhistory.org/library/index.asp?document=3> ("Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, [etc.] . . .").

<sup>71</sup> Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918-919 (1993).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 919. For an explication of the meaning of these rights, see ZUCKERT, *supra* note 17, at 281-282.

<sup>74</sup> ARKES, *supra* note 12, at 65.

normative argument for the best possible construction of the constitutional design. I will demonstrate the Framers' true understanding of natural rights and the constitutional system they constructed to secure those rights are superior to the libertarian originalist alternative.

### A. The Framers' Understanding of Natural Rights

The Framers did not understand natural rights or liberty as the libertarians do. Their understanding differs from the libertarian originalists in two ways. First, the Framing generation's understanding of the scope and extent of natural liberty is far narrower than that of the libertarians, who believe that government may only restrict liberty to either punish and deter the invasion of the rights of another or regulate the use, but not restrict, the exercise of liberty. The Framers allowed the community far more discretion to regulate or restrict the exercise of liberty. Second, the Framers believed that, once people, by their consent, leave the state of nature to form a government, while a portion of natural rights are retained, these rights are not, as unenumerated natural rights, legally enforceable. Rather, they believe that natural rights serve as the primary source of the principles of political justice. These principles provide political standards—not legal rules—for judging the justice and efficacy of state action, providing the people guidance in exercising both their institutional authority over political actors, such as in elections, or, in the worst cases, their right to alter or abolish a government that failed to secure their rights. To understand how the Framers reached these conclusions we must think through how the Framers understood the relationship between natural rights and two other closely connected, but significantly different, ideas, natural law and civil rights.

First, one must understand the Framers believed that, even in the state of nature, a person does not have the unlimited right to exercise one's natural liberty. Each person has the duty to exercise their liberty in conformity to the natural law, which "ordinarily was held to consist of reasoning—reasoning about how humans should use or enjoy their natural liberty."<sup>75</sup> Thus, even in the absence of government, one does not have the right to harm another. The problem of course, as Locke explains, is that even though the natural law should be "plain and intelligible to all rational creatures," human beings, because they are "biased by their interest as well as ignorant for want of stud[y] [of the natural law]," disagree about what the natural law requires and, in any event, are not apt to accept it as binding.<sup>76</sup> As the state of nature lacks any commonly accepted law that serves as the standard of right and wrong, as well as, even if there was binding law, an impartial judge to apply it and some agency to enforce it, the rights of all in such a state are insecure.<sup>77</sup> In order to secure their rights, people must agree to establish an institution—the legislative power—that, for rights to be secure, will make rules that must bind all. The people, however, will agree to

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<sup>75</sup> Hamburger, *supra* note 71, at 908.

<sup>76</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184 (1947).

<sup>77</sup> *Id.*

establish this power only if it is agreed the rules made by the legislature will serve the common good, meaning the laws are “directed to no . . . end but the peace, safety, and public good of the people.”<sup>78</sup>

The libertarians, at this point, would not disagree with any important aspect of this argument. What they contend, however, is that a law serves the common good only if it is consistent with their understanding of natural rights; a law, for example, restricting liberty is only directed to the public good of the people if it prevents or remedies a deprivation of another’s rights. The power to enforce or properly regulate natural rights—which is the only power that can be legitimately exercised for the common good—“is not the power to confiscate, prohibit, infringe, or prohibit [their] exercise.”<sup>79</sup>

The problem with this argument is there is little or no evidence that a consensus of the Framers adopted the libertarian definition of the common good. Rather, as Hamburger demonstrates, the Framers’ definition of the common good incorporated their understanding of the natural law.<sup>80</sup> The exercise of natural rights, thus, could be limited by laws that served the common good, meaning laws consistent with the natural law. In the words of one minister’s sermon, published in 1784:

Our natural rights are bounded and determined by the law of nature, which binds us to be subject to the will and authority of God, to love and worship him; to be just and benevolent to our fellow creatures, doing them all the good in our power, and offering no injury or abuse to any one. It is therefore no violation of our natural liberty and rights for us not be allowed to do wrong, and to be restrained by force and punishments, from invading the right and property of others.<sup>81</sup>

Put more directly by another minister, “[L]iberty consists in a freedom to do that which is right.”<sup>82</sup> On the more secular front, a chief justice of Vermont wrote that:

[L]iberty of action, common to sensible beings, is limited by their natural powers, by the obligations of morality, in a word by the laws of their whole nature. To give up the performance of any action, which is forbidden by the laws of moral and social nature, cannot be deemed a sacrifice.<sup>83</sup>

<sup>78</sup> *Id.* at 186.

<sup>79</sup> BARNETT, *supra* note 14, at 75.

<sup>80</sup> Hamburger, *supra* note 71, at 945 (“The position that civil law did not deny, violate, infringe, abridge, or diminish natural liberty depended upon the notion of a noninjurious or more broadly moral natural liberty defined by natural law.”).

<sup>81</sup> *Id.* at 945 (quoting MOSES HEMMENWAY, A SERMON 13-14 (1784)).

<sup>82</sup> *Id.* at 929 (quoting PETER POWERS, JESUS CHRIST THE TRUE KING AND HEAD OF GOVERNMENT 40 (1778)).

<sup>83</sup> *Id.* at 947 (quoting NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES F GOVERNMENT 74 (1793)).

Laws, then, that restricted liberty for reasons serving the common good, which included, for certain, protection of the rights of others, but also preventing a person from committing a moral wrong, were not considered invasions of rights at all.

So what is the content of this natural law? A libertarian would argue that the Framers' understanding of natural law is consistent with the libertarian originalist principles of liberty. One problem with this argument is that while the libertarians have a clear and theoretically coherent understanding of liberty and the permissible limits on that liberty, the Framing-era Americans "varied considerably in their accounts of natural law."<sup>84</sup> Some of the Framers defined the natural law as do libertarians, finding one's natural liberty could be limited only to preserve the equal rights of another.<sup>85</sup> Others, however, understood the natural law (and therefore the extent to which liberties could be restricted) differently. Assuming, in many cases, that human beings are social beings with duties to society, they defined liberty as the freedom only to do what is right, empowering the government to prohibit exercises of liberty that violate moral norms rooted in their particular understanding of the natural law.<sup>86</sup>

The Americans of this generation were conscious of these differences and therefore adopted an understanding of natural law that would "permit variations in civil laws to accommodate the different circumstances in which such laws would operate" so that the laws of different communities "could restrain natural liberty in varying degrees and ways and, nonetheless, could still be said to comport with natural law."<sup>87</sup> This pluralistic approach to defining and applying natural law depends upon an understanding of natural law "so vague and general as to leave societies or governments much discretion in choosing which particular laws were appropriate."<sup>88</sup> Thus, they disagreed about what the natural law required of members of society and, consequently, the extent of legitimate government authority to restrict liberty. There certainly was no consensus in favor of the libertarian understanding of natural rights.

Given the lack of consensus regarding the content of the natural law, but the general agreement that the exercise of natural rights must be subject to limits consistent with natural law, the Framers, following Locke, concluded that government, as long as it is politically accountable to the people, should have near plenary authority to determine which laws are necessary to advance the common good, or, put another way, which limits on liberty are required by the

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<sup>84</sup> *Id.* at 925.

<sup>85</sup> *Id.* at 927-928. Jefferson, albeit late in his life, clearly stated his understanding of liberty in close to libertarian terms, writing "No man has a natural right to commit aggression on the equal rights of another; . . . . When the laws have declared and enforced all this, they have fulfilled their functions." *Id.* at 946 n.104 (Letter from Thomas Jefferson to F.W. Gilmer (June 7, 1816)). Jefferson's opinion regarding the limits on government action does not, of course, mean that he concluded that natural rights ought to be treated as directly enforceable legal rights, as opposed as a standard for judging political action.

<sup>86</sup> *Id.* at 925, 929.

<sup>87</sup> *Id.* at 937.

<sup>88</sup> *Id.* at 954-55.

natural law. No person, therefore, is justified in objecting to a civil law restricting the exercise of that person's natural liberty if the law is consistent with that society's understanding of the natural law.<sup>89</sup> As Michael Zuckert, discussing Locke's thought, puts it, "[r]ights may be regulated for the public . . . good, that is, for the sake of the general security of rights, but the judgments of the legislature are mostly taken to be determinative as to whether the public good is being served."<sup>90</sup> It is the job, then, of the legislature to articulate, based on its understanding of the natural law, the necessary limits on the exercise of natural rights by the people.

This pluralistic understanding of the content of the natural law and the legitimate authority of particular legislatures to define and apply their understanding of the natural law in limiting the exercise of liberty is evident in the work of legislatures in the years before the Constitution and almost a century afterwards. Colonial, state, and local governments regularly enacted restrictions of liberty that are contrary to the libertarian understanding of natural rights. For example, American legislatures regulated the exercise of the rights of property and liberty in the pursuit of commerce by enacting restrictions against usury, instituting price fixing for important goods (e.g., bread), and by the granting of monopolies.<sup>91</sup> Worse yet, from the libertarian perspective, was the enactment of sumptuary laws intended to restrict individuals from making what the community believed was extravagant expenditures on luxuries.<sup>92</sup> Going beyond these laws were the numerous restrictions intended to foster individual morality such as restrictions on certain sexual relationships and activity, gambling, the purchase of liquor, and the patronizing or operation of "bawdy" houses; certainly few or none of these ubiquitous restrictions can be justified under libertarian principles.<sup>93</sup>

This acceptance of broad government authority to regulate the exercise of liberty was accompanied by a far narrower understanding of legally enforceable rights to liberty than that held by the libertarians. To understand how the Framers distinguished between which rights can be vindicated in court and those that may only be protected through political action, one must understand the distinction between legally enforceable civil rights and the political ideal of

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<sup>89</sup> *Id.* at 909 ("[U]nder civil government—that is, under secular government and its legal system—natural liberty was available only as permitted under civil law . . . if civil laws generally reflected natural law, and if . . . natural liberty was understood to be subject to natural law, then there was no tension or inconsistency between a natural right and the civil laws regulating it.").

<sup>90</sup> ZUCKERT, *supra* note 17, at 307.

<sup>91</sup> FORREST MCDONALD, *NOVUS ORDO SECLORUM* 14, 17 (1985).

<sup>92</sup> *Id.* at 15-16 ("In America, every colony exercised the power of passing sumptuary legislation . . . [i]n any of its forms, sumptuary legislation restricted private rights to property, for it required person to buy some things and prohibited them from buying or selling other things, whether they wanted them or not."). John Adams strongly supported such laws, writing that "the happiness of our people might be greatly promoted by [these laws] . . . . Frugality is a great virtue besides curing us of vanities, levities, and fopperies, which are real antidotes to all great, manly, and warlike virtues." *Id.* at 89 (quoting John Adams, *Thoughts on Government* (1776)).

<sup>93</sup> For a comprehensive survey of these moral laws, see WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 149-189 (1996).

natural rights. This distinction is premised upon a transformation of the nature of rights once a people leave the state of nature.

Once the government has been established and charged with the responsibility of securing natural rights, a task it carries out, in significant part, by legislating and enforcing limits on the exercise of these rights, the nature of the people's rights must change. These rights are no longer natural rights, which are broad but incapable of being secured because of the lack of any common and effective authority over people with equal rights and equal power to enforce their rights. They become, by the fact they are both legally enforceable and limited by laws intended to foster the common good, civil rights, rights that are far more secure but subject to both limitation and regulation by the legislature.<sup>94</sup> One of the leading lawyers among the Framers, James Wilson, explained the distinction:

In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress[es] not those limits, which are assigned to him by the law of nature: in a state of civil liberty, he is allowed to act according to his inclination, provided he transgress[es] not those limits, which are assigned to him by the municipal law.<sup>95</sup>

Contrary to the libertarian argument, then, only civil, and not natural rights are capable of judicial enforcement. If, however, as I will explain, our civil rights are not sufficiently protective of our natural rights—which, while not directly enforceable in court, are unalienable—the government we have formed has abused its authority and resistance to it is justified.<sup>96</sup>

This transformation of the people's rights from natural rights to civil rights is best understood by turning to the legal theorist whose work instructed both the Framing generation and succeeding generations of American lawyers and

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<sup>94</sup> Harvey Mansfield explains the distinction with reference to the Founding documents:

*Natural rights* are the rights on which civil society is founded; *civil rights* are the ones it secures. Natural rights belong to natural man, who is understood as having a fixed nature worthy of certain rights; these would be the rights to life, liberty, and the pursuit of happiness, according to the Declaration of Independence. They are the rights for the sake of which we establish a Constitution. But the rights actually secured under this Constitution are civil rights, such as those in the Bill of Rights. They are more specific, but therefore also more limited than natural rights. The hallmark of civil rights is that you cannot be deprived of them without due process of law—but you can be deprived of them. Civil society secures rights precisely by *depriving* of their rights those who violate the rights of others, providing of course that this deprivation occurs by due process of law. You cannot be deprived of your natural rights, but you cannot secure them by yourself without a government either; the 'state of nature' in constitutional theory describes a situation in which rights are unlimited but very insecure. So it makes sense to deprive yourself of the exercise of natural rights in order to establish a Constitution that will secure civil rights.

HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 182-183 (1991).

<sup>95</sup> 2 *THE WORKS OF JAMES WILSON* 587 (1967).

<sup>96</sup> See MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY* 192, 197 (1996) (discussing lack of any limitation on legislature other than the right of revolution).

statesmen, William Blackstone. The significance of Blackstone to understanding the origins of the American constitutional system is that, in his *Commentaries on the Laws of England*, written from 1760 to 1765, he, as James Stoner writes, took on the “difficult task” of reconciling “not just in theory but in detail the principles of liberal political theory and the practices of English common law.”<sup>97</sup> Thus, Blackstone is the best source for understanding how the natural rights posited by liberal political theory are legally protected under our common law legal regime.<sup>98</sup>

We know that Blackstone builds his account of English law on a Lockean foundation because his discussion, particularly of public law, is suffused with Lockean ideas and terminology. For example, he holds that human beings equally possess “natural liberty”, defined as “a power of acting as one thinks fit, without any restraint or control, unless by the law of nature.”<sup>99</sup> That law of nature, as it does for Locke, commands a human being to use his natural liberty to “pursue his own . . . happiness” as the Creator “has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire . . . and pursue the rule of right, but only our own self-love, that universal principle of action.”<sup>100</sup>

In order to effectively pursue that happiness, however, one must enter into political society and “every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.”<sup>101</sup> The most valuable prize purchased by agreeing to be subject to law is secured civil liberties, which are “[the] *residuum* . . . of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.”<sup>102</sup> The English are especially, if not uniquely, fortunate their positive civil liberties, “the rights of Englishmen,” correspond to what ought to be and, in the past largely were, the proper rights of mankind, and while now these rights “in most other countries of the world” are “being . . . more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England.”<sup>103</sup> Here then is the link between the common law—meaning the positive law—and natural rights theory; the people of England, under their ancient constitution, are

<sup>97</sup> JAMES L. STONER, JR., *COMMON LAW AND LIBERAL THEORY* 163 (1992); see also Michael Zuckert, *Social Compact, Common Law, and the American Amalgam*, in *THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* 41 (2003).

<sup>98</sup> For a more comprehensive discussion of the proper relationship between liberal political theory and the common law, see Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 *VILL. L. REV.* 181 (2009).

<sup>99</sup> I WILLIAM BLACKSTONE, *COMMENTARIES* \*125 (1915).

<sup>100</sup> *Id.* at \*40-41.

<sup>101</sup> *Id.* at \*126.

<sup>102</sup> *Id.* at \*129.

<sup>103</sup> *Id.* at \*99.

entitled to their rights as positive law, granted to them in centuries past by the sovereign, but they are fortunate these positive rights are the proper civil embodiments of the rights they are entitled to by nature.<sup>104</sup>

Blackstone is equally clear that these positive rights may be regulated by the legislature, rejecting the notion that judges may legitimately use the power of judicial review to protect against laws they deem unreasonable. He writes:

I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set judicial power above that of the legislature, which would be subversive of all government.<sup>105</sup>

It should be no surprise that Blackstone rejects such an expansive notion of the judicial power—it would be utterly inconsistent with the fundamental tenets of the liberal political theory Blackstone so avidly wished to integrate with the common law.

<sup>104</sup> See ZUCKERT, *supra* note 17, at 42.

<sup>105</sup> BLACKSTONE, *supra* note 99, at \*91. Later in the century, the English statesman, and champion of the traditional common law, Edmund Burke, described the nature and scope of the judicial power in nearly identical terms:

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

FRANCIS CANAVAN, *THE PLURALIST GAME* 52 (1995) (quoting 2 WRITINGS AND SPEECHES OF THE RIGHT HON. EDMUND BURKE 235 (1981)). Much of the confusion regarding the alleged power, under the common law, of judges to declare legislative acts void arises from a misreading of Sir Edward Coke's opinion in *Bonham's Case*, where he states that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void." ELLIS SANDOZ, *REPUBLICANISM, RELIGION AND THE SOUL OF AMERICA* 58 (2006) (quoting *Bonham's Case*, 8 Coke's Reports 107a (1610)). It has been common to trace the rise of both judicial review and judicial supremacy to Coke's seeming elevation of common law rights over the authority of the legislature. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1687-88 (1994). James Stoner, in a close, meticulously argued reading of *Bonham's Case*, has shown that the common reading of the opinion is incorrect. STONER, *supra* note 97, at 49-68. Stoner argues, Coke did not invalidate the law as unconstitutional; rather he argued the statute at issue in the case should be read in accordance with the principles of the common law. *Id.* at 53. In modern legal terms, then, what Coke did in *Bonham's Case* should be understood more as statutory interpretation than as an application of constitutional law. *Id.* at 60. No doubt Coke intended to vindicate what he believed were the fundamental principles of the English constitutional order, but the fact remains that he did not find it necessary to invalidate the statute in question and, at very least, was not clear whether judges possessed the authority to invalidate statutes. *Id.* at 61-62.

Both the distinction between legally enforceable civil rights and legally unenforceable natural rights and, consequently, the practically plenary power of the legislature to regulate civil rights are confirmed by evidence we have of the judicial practice of the Founding era. Rather than a judiciary that employed the power of judicial review to protect natural or other unwritten rights against the legislature, the record demonstrates that “[j]udges did not invalidate statutes simply because they did not accord with the dictates of natural law” because “[d]oing so would have been inconsistent with prevalent understanding of what the law of nature authorized.”<sup>106</sup> The constitutional thinking of the era provided for the possibility that there could be rights endorsed by the law of nature beyond those enumerated in the Constitution that were not treated in the same manner as the legal rights protected by the exercise of judicial review.<sup>107</sup> It fell on the people, acting in their political capacity, to act to protect these rights.

What about, then, the libertarians would ask, the natural rights that are retained even after the establishment of civil society? It is true that the Americans did not believe all natural liberty was given up upon the establishment of civil government; individuals did retain the core of their natural rights—as the Declaration states, the “inalienable” rights.<sup>108</sup> The fact that natural rights are not entirely surrendered when government is formed does not, however, mean that they are capable of legal enforcement. What can be enforced in court are civil rights that are, as Blackstone says, what remains of natural rights once they have been limited for the sake for the common good. If the government has defined the limits correctly, meaning in accordance with the natural law, then the unalienable, core natural right will be protected, and a member of society will have no reason to complain of deprived rights.

If, however, the restrictions on liberty are excessive, or, put another way, unsupported by the natural law, an individual’s remedy is not (unless, as we will see below, a natural right has been transformed into a positive constitutional right) to file a lawsuit seeking to strike down the restriction on the basis of an unenumerated natural right. Rather, the Framing generation, again following Locke, believed that such an abuse of power, if it occurred systematically, would justify the people in invoking their right to alter or abolish their government. As Hamburger describes:

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<sup>106</sup> R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 418-19 (2007). Indeed, rather than serving as a source of principles for testing and invalidating government action, the natural law instead served a subsidiary role, mostly cited not to undermine positive sources of law but to support them. *Id.* at 416. “One expects the normal case . . . in which a statute or other local law was tested against the natural law. But on looking, one finds the reverse: the normal was one in which a statute was supported by the law of nature.” *Id.* at 417; see also Hamburger, *supra* note 71 at 955 (“[Americans] typically treated natural law not as an indication of what specific restraints could be adopted, but rather as a general justification for their restraints on the injurious use of natural liberty.”).

<sup>107</sup> Helmholz, *supra* note 106, at 421.

<sup>108</sup> ZUCKERT, *supra* note 17, at 304; Hamburger, *supra* note 71, at 930-32.

Even though [the Americans] said that some portions of natural liberty were inalienable and therefore ought not to be infringed, they tended to consider a government's infringement of an inalienable right a reason for questioning the legitimacy of the legal system that permitted such a violation rather than a basis for making a claim through such a system.<sup>109</sup>

Indeed, the entire point of liberal political theory, particularly the Lockean version of it so widely accepted among the Framers, is that the importance of the consent of the governed does not end with the establishment of civil government. The people, once they have established an agency for the protection of their rights, must remain vigilant and be ready to withdraw their consent from the government when it fails to carry out its appointed task. A, if not the, central tenet of Locke's teaching is that "rulers hold power on sufferance of the people, or, rather, that governments which do not operate within these bounds forfeit their claim to authority and allegiance," making Locke the "most clear-cut philosopher of revolution yet to appear in Western thought."<sup>110</sup>

The Framers were, of course, Locke's most consequential pupils, and they both believed and acted upon the principle that one must be prepared to defend one's natural rights by, when necessary, altering or abolishing an ineffectual or oppressive government. They believed that the right to revolution is the right that guarantees all the others and, thus, is the main protection for retained natural rights. Natural rights principles, then, serve two different, but essential functions in the Framers' liberal theory of government. First, as I will discuss below, they function as the standard for judging the actions of government and therefore guide the people in making their political decisions. Second, they provide the standard for judging when the people ought to invoke their right to revolution, the primary guarantee for their rights.<sup>111</sup> They do not, without having been reduced to enumerated constitutional rights, provide the basis for legal claims.

We therefore can summarize the American understanding of the nature of rights and the legitimate authority of government by stating four propositions: (1) when entering political society, one consents to regulation, for the common good, of one's natural rights and, in return, one receives secured civil rights; (2) these civil rights, which, in our legal system, are primarily articulated in the common law, protect the core of one's retained natural rights; (3) the legislature may

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<sup>109</sup> Hamburger, *supra* note 71, at 932.

<sup>110</sup> ZUCKERT, *supra* note 17, at 7. Blackstone, unlike Locke, has no clear answer about how one legitimately deals with a legislature determined to invade rights. Here his attempt to synthesize Locke and the English constitution reaches an impasse: the English constitution forbids a right to revolution but Locke's political theory is incomplete without it. Blackstone reluctantly concedes that extralegal resistance by the people may be the only practical method to limit abuses by government. FRANCK, *supra* note 96, at 204-05. He does not pretend (and, in fact, suggests Locke goes too far in his defense of the right) that revolution is legitimate or legal, but at bottom, ambivalence aside, his position is closer to Locke than not.

<sup>111</sup> ZUCKERT, *supra* note 17, at 284 ("Rights not only function as standards for the conduct of good and legitimate government, but they serve also, as the Declaration makes clear, as standards for the invocation of one of the important rights, the right to alter or abolish governments that are 'destructive of these ends,' that is, the security of the primary rights.").

regulate these rights as it believes necessary for the common good, but cannot take away the natural right entirely; and (4) the remedy for such an abuse of power is the right to revolution. The protection of unenumerated rights through judicial review is not, and, under the principles of our system, cannot be a central component of our constitutional system.

### **B. How the Constitution Truly Secures Natural Rights**

The libertarian originalists, particularly Barnett, argue that while the Constitution, no doubt, requires the protection of natural rights, it does not authoritatively determine how, as a matter of political structure and process, these rights are best protected. Barnett, as I have discussed, believes the question of how to best protect natural rights is one of constitutional construction, not interpretation—it is, in other words, an open question. Because it is an open question, judges interpreting the Constitution may and should choose to construct the best possible legal process for the protection of natural rights—the judicial application of a constitutional presumption of liberty.

I disagree with Barnett on both counts. The question of how the Constitution provides for the securing of natural rights is not an open one—the Constitution, properly understood, settles the matter as clearly as it establishes the protection of natural rights as the standard for just government. The Constitution, following the lessons of liberal political theory, relies on a properly constituted republican government—government by consent—to protect natural rights. A republican government, with the primary lawmaking power vested in a popular legislature and including a separation of powers, is the best possible institutional architecture for the protection of natural rights. This constitutional structure, when accompanied by a written constitution ensuring both that the constitutional forms are followed and providing additional protections for rights and a constitutionally legitimate interpretive presumption in favor of common law rights, protects natural rights far more effectively than the judiciary-centered approach advocated by Barnett.

To understand how the Constitution secures natural rights and why its original design effectively carries out its purpose, I begin with the premise that one's conception of natural rights largely determines the institutional structure best suited for their protection. This premise is neither obvious nor universally accepted. Barnett, for example, argues that positing the protection of natural rights as the purpose of a constitution does not necessarily determine the institutional method for their protection; thus, he states that one need not conclude, as he ultimately does, that natural rights should be relied upon by judges to decide actual cases or controversies.<sup>112</sup>

Once, however, you define natural rights as Barnett and the libertarians, this conclusion is, in fact, inevitable. If natural rights are defined as a particular,

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<sup>112</sup> BARNETT, *supra* note 14, at 75-76 (“[I]t would not be inconsistent with the conception of legitimacy presented here to maintain that unenumerated natural rights are best protected by mechanisms other than direct judicial enforcement.”).

concrete right to exercise one's liberty as long as you do not interfere with the rights of another, the only plausible way to guarantee this definite right is for the courts to vindicate it against any attempt to unnecessarily regulate or deprive someone of it. One can analogize my argument to the common law concept of a vested legal right. Once one perfected a legal right, under property or contract law, for example, a court was obligated to enforce that right. The libertarians treat natural rights as specific, vested legal rights—they have no doubt about either the specific nature and scope of the protected rights or the absolute obligation of government to protect these rights. The necessity of judicial enforcement becomes especially clear when one recalls that the guaranteed enforcement of natural rights (properly understood) substitutes for society's refusal to operate government by unanimous consent. As all other forms of consent are defective, it only makes sense to rely upon the institution of government least reliant upon these misguided notions of consent and most capable, because of both its political independence and particular expertise, of articulating and enforcing natural rights against intrusion by the other institutions of government. In sum, while, in theory, natural rights can be protected by various constitutional forms, the libertarian derivation and definition of these rights requires, as a practical matter, enforcement through judicial review.

Locke also appears to conclude that a commitment to the protection of natural rights does not entail a commitment to particular forms of government. He distinguishes, for example, between "the original of societies and the rise and extent of political power" and "the art of governing men in society."<sup>113</sup> Locke's priority, in his political theory, is certainly the former—he describes his *Second Treatise of Government* as "An Essay Concerning the True Original, Extent, and End of Civil Government."<sup>114</sup> Locke, then, is concerned primarily with how government arises, its purpose, and what obliges the members of society to obey its laws—questions regarding what I call the principles of political obligation. He appears to be less concerned with the forms by which these purposes are carried out, or questions regarding political practice. Indeed Locke states that a people emerging from the state of nature can choose to form a democratic government, a monarchy, an oligarchy or a combination of any of these forms.<sup>115</sup> All that matters is that, whatever form is chosen, the rights of the people are secured.

Once one delves deeper into Locke's argument, it is apparent that adherence to the genuine understanding of natural rights and the other principles of political obligation significantly constrain a society's choice of political forms or, put more positively, Locke indeed prescribes how a government dedicated to the protection of natural rights should be properly structured. To take the most important example, Locke does say that a society may choose to have the laws made by one man, a few, or the many. Because the legislature is the "supreme

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<sup>113</sup> STONER, *supra* note 97, at 144 (quoting JOHN LOCKE, SOME THOUGHTS CONCERNING READING AND STUDY FOR A GENTLEMAN).

<sup>114</sup> LOCKE, *supra* note 76, at 119.

<sup>115</sup> *Id.* at 187.

power” in any government, the form of legislature chosen determines the form of government the society has established.<sup>116</sup> Locke does not mince words about the extent of that supremacy:

[The] legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of anybody else, in [any] form soever conceived or by what power soever backed, have the force and obligation of law which has not its sanction from [the] legislative which the public has chosen and appointed.<sup>117</sup>

If that government, however, no matter its form, wishes to raise any revenue, the only legitimate method to exercise that power is by the consent of the governed themselves or by their representatives; any government that taxes “without such consent of the people” or their representatives “invades the fundamental law of property and subverts the end of government.”<sup>118</sup> Thus, while Locke appears to argue that a society may choose to structure its legislature any way it pleases, in reality the principles of natural rights require that one of the indispensable powers of the legislature be exercised by a popular or republican body. In fact, it is unlikely any government instituted by the people will completely divide the lawmaking and the taxing power—it is difficult to effectuate the first without the second.

It is clear, then, that while Locke, on the surface, wishes to appear agnostic on the form of government, he is an avid proponent of both republican government and legislative supremacy.<sup>119</sup> He believes the legislature, to wield its core powers, must be a representative body that answers to the people and that the decisions of that legislature must govern the actions of the rest of the government, provided the natural rights of the people are sufficiently secured. It is the duty of both government officials and the people to follow the rules made by the legislature that constitutes the rule of law. As Zuckert, citing Harvey Mansfield, explains, “[t]he rule of law for Locke clearly means the rule of the law-making power, not the ascendancy or inviolability of certain laws and even less the legal ascendancy and inviolability of certain unwritten moral principles.”<sup>120</sup> Locke’s approach to constitutional government, therefore, is clearly opposed to that of the libertarians, whose entire constitutional vision is founded on the notion of the supremacy and inviolability of unwritten moral principles.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 188.

<sup>118</sup> *Id.* at 193. Any legislature, Locke avers, must also govern by established (or standing), promulgated laws that apply to all equally. The legislature may also not delegate their power, as they are the body to whom the power to make laws was entrusted by the people. Finally, these laws, as we have discussed earlier, must be designed to achieve the common good. *Id.* at 194.

<sup>119</sup> ZUCKERT, *supra* note 17, at 8, 306.

<sup>120</sup> *Id.* at 306.

Locke's counsel on constructing constitutional institutions does not end with his argument for a supreme, primarily republican legislature. He also recommends that the power to execute the laws and conduct foreign affairs be vested in a body separate from the legislature—the principle of separation of powers.<sup>121</sup> He also insists that a government designed to effectively protect natural rights must have “indifferent and upright judges, who are to decide controversies by [the] laws.”<sup>122</sup> Locke, though, is not referring to the power of judicial review or any other kind of judicial supervision of the legislature. He means that the government needs an independent judiciary to interpret and apply the laws made by the legislature. It is, in fact, important to note that, contrary to our modern assumptions about constitutionalism, Locke does not articulate any legal rules a legislature is bound to follow or call for an institution like our Supreme Court to enforce them.<sup>123</sup> As Matthew Franck comments, “[T]he judicial power is nearly invisible in the *Second Treatise*.”<sup>124</sup>

The absence of judicial review in Locke's political science does not mean the legislature's power is unlimited or that people are without remedy if an abusive or weak government does not secure their natural rights. That Locke's solution to the problem of oppressive government seems radical to modern sensibilities—although obviously it did not to those who led the American Revolution—makes his argument no less clear. He instructs that while:

there can be but one supreme power which is the legislative, to which all the rest are and must be subordinate, yet, the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them; for all power given with trust for the attaining of an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust necessarily be forfeited and the power devolve into the hands of those [who] gave it, who may place it anew where they shall think it best for their safety and security.<sup>125</sup>

The remedy, then, for a government that fails to secure natural rights is not a body of Platonic Guardians set above the legislature—it is the right and responsibility of the sovereign people to replace that government, primarily through elections and, if necessary, by revolution.

There can be little doubt that, contrary to the libertarian dismissal of republican government, the liberal political science that guided the Framers was animated by the principle of consent. Under Locke's theory of government, the consent of the governed is required to legitimately establish government, to

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<sup>121</sup> LOCKE, *supra* note 76, at 194-96.

<sup>122</sup> *Id.* at 186.

<sup>123</sup> ZUCKERT, *supra* note 17, at 306.

<sup>124</sup> FRANCK, *supra* note 96, at 196.

<sup>125</sup> LOCKE, *supra* note 76, at 196-97; see FRANCK, *supra* note 96, at 196 (“The only recourse Locke provides in the case of a government gone consistently astray from the law of nature is the threat of the dissolution of the government.”).

operate it in accordance with the common good of the people, and, finally, to ultimately ensure, through the active supervision of a vigilant people, that the government effectively secures rights. As Locke concludes:

[N]o government can have a right to obedience from a people who have not freely consented to it; which they can never be supposed to do, till either they are put in a full state of liberty to choose their government and governors, or at least till they have standing laws, to which they have by themselves or their representatives given their free consent.<sup>126</sup>

The fundamental importance of consent to liberal political theory follows directly from the true liberal understanding of natural rights. Rather than understanding natural rights as having a concrete, unchanging meaning embodied in legal rights that must be protected against government intrusion, liberals like Locke believed that while natural rights could be generally defined as the rights to life, liberty, and property, the specific content of these rights is more amorphous than the libertarians allow. As I have discussed, the legitimate limits on the exercise of natural rights depend on the particular society's understanding of natural law and those understandings do differ, requiring a community to deliberate and debate before deciding on these limits. The definition and scope of one's natural rights is therefore a political, not a legal, matter. The people must articulate and secure their rights through their political institutions, and the only way, in a world in which no one is born to rule, to ensure that these institutions secure the rights of the people is make them responsible to those people. Locke and his liberal followers conclude that the only form of government that is responsible to the people is the republican form, one that is established and operated by the consent of the governed. Locke's principles of political obligation do much more than determine the origin and purpose of government; their logic also determines the best political practice.

These Lockean principles of political obligation formed the core of the political science of the Framers. These principles were the theoretical foundation of both the Declaration and other formal statements of political principle such as those included in the Revolutionary Era state constitutions.<sup>127</sup> They also shaped and permeated the rhetoric of the philosophically diverse members of the Framing generation; it did not matter if the work in question was a minister's sermon or a political tract, the Lockean principles of political obligation repeatedly informed the writer's argument.<sup>128</sup> These principles served as the glue of the Revolution, the foundation for what Michael Zuckert has so aptly called the "American amalgam," the blend of Protestant theology, English constitutionalism, and liberal political theory that together produced the theory of

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<sup>126</sup> LOCKE, *supra* note 76, at 219.

<sup>127</sup> See Andrew C. Spiropoulos, *Natural Right and the Constitution: Principle as Purpose and Limit*, 13 ST. LOUIS U. PUB. L. REV. 285, 288-90 (1993).

<sup>128</sup> See Spiropoulos, *supra* note 98, at 225.

the American constitutional system, a theory most concisely and eloquently expressed in the Declaration of Independence.<sup>129</sup>

As with Locke, adherence to these principles of political obligation not only determined what the Americans believed about the origins and purpose of government; the principles also dictated the form of government that would best suit a regime dedicated to the securing of natural rights. Again as with Locke, the Americans concluded only a republican government, one based on the consent of the governed, was consistent with their principles of political obligation. There can be no better support for this proposition than the words of Publius: "It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government."<sup>130</sup> The Framers did not believe there was any conflict between their commitment to the protection of natural rights and their dedication to government by consent; in fact, they believed their allegiance to the former required the latter. They so believed because the natural equality of human beings required both that government be established by the consent of the governed and that this government be dedicated to the protection of natural rights and the fostering of the common good. The only way to make sure the government remained dedicated to this purpose is for it to be responsible to the people it was pledged to serve.<sup>131</sup>

The Framers, painfully aware of the long history of failure of popular governments, were not naïve about either the passions of self-love that drive people to use their power to deprive others of their rights or the difficulty of structuring a republican government in a way to prevent or remedy the inevitable attempts to abuse power.<sup>132</sup> They, as discussed in abundant detail in *The Federalist* and other writings of the period, believed the path to designing a republican government that would effectively secure natural rights lay in devising a complex set of structures, not to replace, but to channel a popular

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<sup>129</sup> ZUCKERT, *supra* note 17, at 18-19. Zuckert describes the Declaration as a document that "yields up an essentially Lockean understanding of the first principles of politics, but that also shows how thoroughly the Americans blended Lockean political philosophy with Whig constitutionalism and natural theology." *Id.* at 19. Lockean thought is able to combine such seemingly disparate elements it acted "a bit like the carbon atom, entering readily into compounds with a wide variety of other, sometimes apparently inconsistent, elements and producing new molecules of great power in the world." *Id.* at 18. Much of what gave Lockean thought this quality was its general, almost vague understanding of natural rights and natural law, and the consequent delegation of the task of defining and enforcing both rights and limits on rights to the political community. This refusal, unlike in libertarian thought, to lock in a particular and absolute meaning of natural rights, allowed this kind of liberalism to make common cause with different ways of looking at the world, ways that might be represented in different communities.

<sup>130</sup> James Madison, *The Federalist No. 39*, in *THE FEDERALIST PAPERS* 240 (1961).

<sup>131</sup> ZUCKERT, *supra* note 17, at 290-91.

<sup>132</sup> See James Madison, *The Federalist No. 10*, in *THE FEDERALIST PAPERS*, *supra* note 130, at 78-79.

government toward making laws that benefit the common good while providing the means, both internal and external, for checking it when it seeks to abuse its power.<sup>133</sup> The inspiration for these new structures could be found in the work of the fathers of the “new science of politics,” including Locke, Blackstone, and Montesquieu. Again, Publius makes certain we are not confused about which new constitutional forms best serve the Constitution’s end:

The science of politics . . . like most other sciences, has received great improvement . . . . The regular distribution of power into distinct departments; the introduction of . . . legislative balances and checks; the institution of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election . . . . They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.<sup>134</sup>

None of these structural innovations—all of them suggested by Locke—undermine the principle of government by consent; they are designed to vindicate it in a world too often hostile toward advancing the common good. The same cannot be said about the kind of judicial review proposed by the libertarians. Judicial supervision of all law-making on the basis of unwritten, unenacted political principles treated as authoritative constitutional law directly contradicts the primacy the Framers and other liberals placed on the consent of governed. This excessive reliance on the power of the judiciary is not only inconsistent with the theory of the Framers; it is also inconsistent with what we know of their practice. For example, only in the years after the Founding did the judicial protection of rights become a significant feature of the regime.<sup>135</sup> Even if some exercises of judicial review were accepted, judicial review did not entail a power to void laws in order to protect natural or other unwritten rights.<sup>136</sup> The reluctance to protect these rights did not mean that they did not exist; their unwritten nature, however, made it the duty of the people, acting in their political capacity, to protect these rights.<sup>137</sup>

The subordinate role of judicial review in liberal constitutionalism in general and our constitutional scheme in particular does not mean that the judiciary plays no role in protecting constitutional rights. The judiciary, of course, has the charge of interpreting and applying those natural rights the people have decided to treat as positive legal rights by including them in the text of the Constitution. As Philip Hamburger found in his study of the Framing generation:

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<sup>133</sup> See MANSFIELD, *supra* note 94, at 147-48.

<sup>134</sup> Alexander Hamilton, *The Federalist No. 9*, in *THE FEDERALIST PAPERS*, *supra* note 130, at 72-73. In the same paper, Hamilton also notes the devising of the extended republic, which could be broadened to include federalism. *Id.* at 73.

<sup>135</sup> Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1435-36 (1999).

<sup>136</sup> Helmholtz, *supra* note 106, at 418-19.

<sup>137</sup> *Id.* at 421.

Americans who discussed natural liberty and constitutions typically assumed that only such natural liberty as was reserved by a constitution would be a constitutional right. Even though they said that some portions of natural liberty were inalienable and therefore ought not to be infringed, they tended to consider a government's infringement of an inalienable right a reason for questioning the legitimacy of the legal system that permitted such a violation rather than a basis for making a claim through such a system. Consequently, for legal restraints on the power of government, they depended upon constitutions.<sup>138</sup>

To put it simply, to make a legal claim for a violation of a natural right, that right must be protected in the text of a constitution. If that right is unwritten, but still a legitimate natural right, one's remedy must come from the political realm. If you are systematically deprived of your natural rights, your remedy is the right to alter or abolish the government.

There can be no doubt the adoption of a written constitution, including specific protections for particular rights, enforced by an independent judiciary is one of the Framers' distinctive contributions to the science of government, and one that is not suggested by Locke. However, it cannot be said that this new institution is incompatible with or a departure from liberal political science—it is the culmination of it.<sup>139</sup>

In fact, I would argue the written constitution, enforced as law, is the liberal solution to the legitimate concerns posed by the doctrine of legislative supremacy. It is certainly true the Framing generation did not accept, as did Locke and Blackstone, that the legislature could not be subject to any legal check.<sup>140</sup> The solution, however, was not to empower judges to invalidate laws based on unwritten natural rights; it was for the people to protect their rights by specifying them in a written constitution, the provisions of which could then legitimately be the subject of judicial review.

The case for judicial review made by Hamilton in *The Federalist*, for example, demonstrates that this institution is consistent with Lockean political principles. Judges are not empowered to enforce constitutional guarantees because there are supratextual principles that trump the consent of the majority. Rather, the power of judicial review is meant to vindicate a more definitive statement of the consent of the governed. As Hamilton puts it, a judge will exercise his power to declare a statute void where “the will of the legislature,

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<sup>138</sup> Hamburger, *supra* note 71, at 932-33.

<sup>139</sup> I disagree, for example, with Michael McConnell's statement that “Locke's key assumption of legislative supremacy no longer holds under a written constitution with judicial review.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1444 (1990). There is no reason to believe that Locke would have objected to the enforcement of written law adopted by the consent of the governed that could only be changed by a special process of consent.

<sup>140</sup> JAMES R. STONER, JR., COMMON LAW LIBERTY 13 (2003) [hereinafter STONER, LIBERTY] (“[I]t was understood that [Blackstone's] account of parliamentary sovereignty was inapplicable here—it might even be said that the American Revolution was fought against the assertion of that principle in the colonies . . .”).

declared in its statutes, stands in opposition to that of the people, declared in the Constitution . . . .”<sup>141</sup> In other words, the legitimacy of judicial review is grounded in the formal process of the adoption of the Constitution by the people. The Constitution is simply a law enacted by a more authoritative expression of the consent of the governed than that expressed by either the adoption of a statute or establishment of a common law rule. Thus, under the liberal principles adhered to by the Framers, the legitimacy of judicial review depends upon the judge basing his decision on the text consented to by the people. If a particular right is not protected in the text adopted by the people, then it cannot be treated as a constitutional right subject to judicial protection.

As we have seen, Barnett and other libertarians respond to this argument by arguing that the text of the Constitution, in both the Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment,<sup>142</sup> does in fact empower judges to protect unwritten natural rights. Certainly, Barnett is correct that the Ninth Amendment, at the very least, must mean that the people possess natural rights beyond those protected in the text of the Constitution. He is also correct that one of the purposes of the Ninth Amendment is to establish that our natural rights cannot be conclusively enumerated. But as he himself concedes, the Constitution is not clear about either the particular nature of these rights or how they should be protected. Barnett constructs the presumption of liberty as the most effective method of protecting natural rights because this doctrinal formulation recognizes both the broad scope of liberty the Framers intended to secure and the impossibility of reducing that liberty to a set of specific rights.

I agree with Barnett that a presumption of liberty is a reasonable method of both protecting natural rights and making sense out of the Ninth and Fourteenth Amendments. I disagree, however, with the nature of his presumption of liberty. I do believe that these provisions, particularly the Ninth Amendment, provide for a presumption of liberty, but I do not think it is a constitutional presumption. Such a presumption, in which the judiciary would void a law if the government cannot demonstrate to the judiciary’s satisfaction that a law is necessary and proper, is inconsistent with the liberal political principles of the Framers. Their commitment, which, to put it mildly, is not shared by the libertarians, to the primacy of consent would not permit judges to invalidate laws enacted by the people’s representatives on the basis of unwritten rights. Liberal political science

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<sup>141</sup> Alexander Hamilton, *The Federalist No. 78*, in *THE FEDERALIST PAPERS*, *supra* note 130, at 468.

<sup>142</sup> As Steve Calabresi points out, however, the traditional understanding of protected privileges and immunities provides that they may be subject to restraints for the common good, thus bringing us back to the question of what is, under the principles of liberal political theory, the legislature’s authority to limit the exercise of liberty to foster the common good. Calabresi, *supra* note 14, at 1087. In addition, the best way to read the Fourteenth Amendment, and a way that would certainly be consistent with the political theory that underlies the Constitution, may be to conclude that Congress, not the courts, was intended to exercise the power to define the privileges and immunities states could not infringe. See Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment: The Original Understanding of Section Five*, 3 *CONST. COMMENT* 123 (Summer 1986).

does permit, and should require, however, that judges presume unwritten natural rights are protected unless the legislature clearly decides otherwise.

I contend, then, that the Ninth Amendment, in particular, requires judges to apply a presumption in favor of the protection of natural rights as they are embodied in common law rights, meaning natural rights limited legitimately under the natural law principles incorporated in the traditional common law.<sup>143</sup> Barnett, it should be recalled, does maintain that natural rights are subject to the principled limits contained in the traditional common law. I agree with Barnett that, under the principles of our constitutional regime, the common law serves as the background or presumptive source of legal rules and thus is the foundation of the people's rights and responsibilities.<sup>144</sup> Where we differ is that I believe that, under the liberal principles of our regime, when a democratic majority, after due deliberation, decides to modify or even deprive a person of their common law rights, a court, unless a specific constitutional provision says otherwise, must affirm the decision of the people.

Thus, courts can help secure natural rights without relying on an illegitimate expansion of the power of judicial review. What courts can do, consistent with the liberal principles of the Framing, is presume that, unless the legislature speaks clearly, the common law right will prevail. This statutory interpretation approach protects customary rights against ill-considered actions by the legislature; if the legislature simply neglected to consider the common law right when it made the offending law, the statute will be interpreted as if they meant to protect the right.<sup>145</sup> If a legislature, after its initial attempts to regulate certain rights, has been rebuffed by the courts, it may reenact the statute to state its will more clearly. If the legislature, after sufficient deliberation, makes its intent clear, the court must allow the modification or even deprivation of the right. The importance of the common law right is recognized by the presumption in its favor, but the Constitution's liberal principles are vindicated by allowing the legislature—and hence the people—to make the ultimate decision.

There is strong evidence the Framers intended that judges employ such an interpretive approach in order to protect common law rights. In *The Federalist*,

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<sup>143</sup> See *STONER, LIBERTY*, *supra* note 140, at 21.

<sup>144</sup> Michael McConnell is, thus, correct that the common law, and the natural law principles it embodies, was the primary source of law Americans relied upon to determine their rights and responsibilities. He is also correct that the legal and constitutional order the Framers created was designed to protect these rights from thoughtless invasion by legislatures. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197-98. Indeed, consistent with the idea that these common law rights were the civil embodiment of one's natural rights, the Framers believed that the central task of government is to protect this preexisting body of rights and obligations. Modifications of these rights "should be permitted only by the clearly expressed will of the people, in a process that promotes careful deliberation." *Id.* at 198. Our legal system, in other words, should be structured so that the common law rule will be preferred against any contrary principle.

<sup>145</sup> For a more detailed discussion of this approach from the statutory interpretation perspective, see Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915; see also Spiropoulos, *supra* note 98, at 181.

for example, in a separate discussion from that justifying judicial review, Hamilton advocates precisely such an approach. He argues that judges “may be an essential safeguard against the effects of occasional ill humors in society.”<sup>146</sup> Some of the effects of these “ill humors” include “the injury of the private rights of particular classes of citizens, by unjust and partial laws.”<sup>147</sup> In these circumstances, the decisions of judges are of “vast importance in mitigating the severity and confining the operation of such laws.”<sup>148</sup> By interpreting the laws in this fashion, judges not only prevent the short-term deprivation of rights, but they also force the legislature to seriously deliberate the propriety of the laws in question.<sup>149</sup> At no point, in this discussion, however, does Hamilton argue that judges may declare these laws void; they may confine their operation, not eliminate it. The application of an interpretive presumption in favor of common law rights, rather than the libertarian constitutional presumption, will enable the judiciary to secure many of the benefits of Barnett’s presumption of liberty while maintaining its legitimacy under the liberal principles of our constitutional system.

In sum, whatever normative case may be made for the libertarian originalist interpretation of the Constitution, it certainly fails as an account of the original design of the Constitution. The argument for the presumption of liberty depends on the proposition that the Constitution does not conclusively provide for any particular structure or process for the protection of natural rights. Because the Constitution does not authoritatively provide a method for the protection these rights, judges may legitimately construe the Constitution to include Barnett’s presumption of liberty.

This argument is false. The Framers’ understanding of natural rights, contrary to the libertarians, led them to conclude that only a well designed republican government—one founded on the principle of consent—could effectively protect natural rights. To that end, the Framers, following teachers like Locke and Blackstone, devised specific constitutional forms that would most likely produce laws intended to benefit the common good while providing effective checks against the abuse of power. These forms include: (1) a popularly elected legislature, whose rules govern the actions of both the rest of the government and the people; (2) the separation of powers; (3) an independent judiciary; (4) a written constitution establishing the structure and powers of government, as well as including protections for particular rights, that is treated as law; (5) the judicial application of an interpretive presumption in favor of common law rights; and (6) the right to alter or abolish the government if it does not secure rights. The Framers, on the other hand, did not accept the legitimacy of enforcing unwritten natural rights by judicial review. This form, unlike the others, cannot be reconciled with the principle of consent, and therefore was never accepted by the Framers either in theory or in practice.

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<sup>146</sup> Alexander Hamilton, *The Federalist No. 78*, in *THE FEDERALIST PAPERS*, *supra* note 130, at 469.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 470; *see also* Spiropoulos, *supra* note 98, at 956.

### C. The Normative Case Against Libertarian Originalism

Libertarian originalists make two major claims in favor of their approach to constitutional interpretation. First, they claim their approach is consistent with the knowable original meaning of the Constitution, a criterion, I agree, any approach must satisfy in order to be considered legitimate. Second, they claim their construction of the Constitution provides the best possible method for the protection of natural rights. As we have seen, a proper understanding of the political theory of the Constitution clearly demonstrates that the first claim is false; the constitutional presumption of liberty is inconsistent with the original design and, thus, cannot be sustained on originalist grounds. Their second claim is false as well. In fact, the original design of the Constitution, which, as I have explained above, is founded on a commitment to government by consent, is a superior vehicle for the protection of natural rights than the constitutional presumption of liberty.

The first problem with the libertarian originalist approach is that while, ironically, they criticize any constitutional theory that relies upon the consent of the governed to establish the duty of the people to obey the law, in fact, libertarian originalists expect and require an unrealistic degree of consensus among the members of society. The cornerstone of libertarian constitutionalism is that people will agree to forego their right to consent or refuse to consent to any proposed action by a government and instead submit to majority rule only upon the condition that the society agree the state will be limited by what I have called the libertarian principle, meaning that government may only deprive an individual of their liberty if they are violating or interfering with the rights of another. Free people, libertarians argue, must be able to make choices that others find immoral or that do harm to themselves.

Now, it is true that liberal constitutionalism, meaning any political theory that reasons from the premise of natural equality, generally relies upon a social consensus—the social contract—as the foundation for the establishment of government. It is also true, under liberal political theory, that any reasonable person would not agree to the establishment of government if all do not agree to limit the powers of that government. One way of articulating these limits is the concept of natural rights; one will not agree to establish government without an agreement that one's rights to life, liberty, and property will be secured. The difference between liberal and libertarian constitutionalists is that the latter argue that the social consensus that leads to the establishment of government also provides a particular definition of natural rights, one that is quite contestable. Many who believe that government ought to be both limited and dedicated to the purpose of securing natural rights do not believe that liberty, properly understood, includes a right to commit immoral acts even if these acts only involve oneself. Liberal constitutionalists are willing to define natural rights quite broadly, even vaguely, and leave the task of defining the legally enforceable meaning of these rights to political deliberation and choice and, thus, allowing people with a wide range of views on the proper limits on liberty to fully accept the social consensus in favor of both establishing government and the primacy of natural rights. Libertarians, on the other hand, insist that the

people, in forming the social contract, have adopted (or should be construed to have adopted) their more rigorous, concrete, and I would argue, more debatable definition of natural rights.

The problem with this argument is that it is difficult to find plausible that a people, even one dedicated to liberty, would reach the degree of consensus necessary to adopt a definition of natural rights that has as much “bite” as the libertarian understanding of natural rights. If it is unlikely the people as a whole accept the libertarian understanding of natural rights, then any attempt to enforce that understanding, particularly through judicial review, would require the adherents of the libertarian vision of natural rights to force those people who object to that view to accept it as the basis of government. The attempt, however, to force the libertarian principle upon the recalcitrant will deeply polarize society and threaten the very consensus that is foundation for both a limited government and the protection of natural rights. Thus, forcing people to be free is more than hypocritical; it is self-defeating.

Conversely, liberal constitutionalism, because its understanding of natural rights is both more general and articulated as principles for judging the justice of political action, not as legally enforceable rights, proves far more capable of facilitating the social consensus necessary to establish a government dedicated to the protection of natural rights. A pluralistic understanding of natural rights, as opposed to the narrow libertarian definition of them, makes it more likely that individuals and groups in a society, despite their different views regarding how to balance liberty and order, will agree to cooperate. Those with different political theories (or views of natural law) will hesitate to establish government based on the principle of natural rights if a certain view of natural rights will be imposed upon them and place legal limits on government which they did not vote for or advocate. If, on the other hand, those of different views can have confidence that a precise meaning of natural rights will not be imposed on them but instead will be determined by a deliberative and consensual process, they will more likely agree to establish a government whose purpose is to protect natural rights. Determining the concrete meaning of natural rights through government by consent also makes it more likely that the consensus in favor of the primacy of natural rights and, consequently, limited government can be maintained over the long term. People are more likely to support a constitutional system that provides them an opportunity to advance their political opinions than one that rejects them on the basis of an unbending principle enforced by a counter-majoritarian body.

Adoption of the libertarian originalist approach to constitutionalism will also result in less effective protection of natural rights because its overly legalistic, judiciary-centered approach will sap people of the civic virtue necessary for the vigilant protection of freedom. A realistic understanding of human nature reveals both that some human beings, because of their passion to benefit themselves, will seek to deprive others of their rights, and other human beings, because of fear for their self-preservation, will be prone to sacrifice their liberty in the interest of their security. Only a populace that recognizes their rights and is both capable of fighting for them will be able to maintain liberty over the long run. The progenitors of liberal political theory and their American

disciples sought to design a system that would not simply, as do libertarians, attempt to posit a conclusive definition of natural rights that could be enforced in the courts, thus enabling people to entirely bypass the forms and work of republican government and passively depend on the courts to protect their rights. Rather, they thought a commitment to the protection of natural rights and a commitment to republican government were inseparable.<sup>150</sup> They believed that participation in government by consent was essential in forming the character of a citizenry capable and prepared to use their freedom well. Only a person whose capacity to reason is sufficiently developed to make intelligent choices is truly free, and only those who can persuade and are capable of being persuaded are rational creatures; government by consent both depends upon and fosters these capacities.<sup>151</sup>

A foundational component of how a both liberal and republican government fosters the civic virtue necessary for the protection of liberty is the reluctance to treat natural rights as concrete, legally enforceable rights. By treating natural rights as more of a political ideal rather than a concrete legal right, liberal constitutionalism creates a gap between the ideal of natural rights and the reality of the civil rights that one truly possesses and can legally enforce. It is this gap that libertarians find intolerable and wish to close by application of the presumption of liberty. But as Harvey Mansfield explains, liberal constitutionalism not only does not see this gap between ideal and reality as a problem, it is in fact its solution for the problem of fostering civic virtue:

The gap between the ideal and reality was deliberately planned and fixed in our Constitution. It arises from the right of consent, since that right both obliges us to respect the rights of others and enables us to insist on our own. . . . A free society is necessarily imperfect; if it became perfect, citizens would no longer have to exert themselves to be free.<sup>152</sup>

The perfectionism of the libertarians, in a sincere effort to guarantee the maximum amount of individual liberty, leads them to rely upon a purely legal process for the protection of liberty, thus reducing active citizenship to the filing of lawsuits and the begging for judicial favor. Such an excessive reliance on the least republican elements of our regime results in a people both incapable of and uninterested in laboring for their own rights.

Finally, a libertarian constitution would ineffectively protect natural rights because its overly rigid and legalistic definition of natural rights would tend to deprive the regime of both the political support and cultural sustenance of those individuals and communities who agree that the purpose of legitimate government is the protection of natural rights but disagree with the libertarian

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<sup>150</sup> ZUCKERT, *supra* note 17, at 290-91.

<sup>151</sup> MANSFIELD, *supra* note 94, at 95 ("The right of consent presupposes that each adult is worthy of being taken seriously as a rational creature capable of choice, hence worthy of being persuaded and not taken for granted. His dignity requires that his consent be sought through persuasion, and neither ignored nor presumed.").

<sup>152</sup> *Id.* at 97.

understanding of these rights. For example, as we have seen, the libertarian view of natural rights would prohibit a community from enacting laws that prohibit individuals from engaging in behavior the community considers immoral if that behavior did not result in the deprivation of or interference with the rights of another. As I discussed in connection with the variety of interpretations of natural law among the Framing generation (which certainly continues to this day), there are many individuals and communities who do not subscribe to this view of natural rights. Many religious Americans, to give the most obvious example, believe the survival of liberty requires individuals who are capable of exercising that liberty without hurting themselves and others and that only those who have a proper understanding of morality will be capable of such self-restraint.<sup>153</sup>

Many libertarians, of course, would agree the cause of liberty would be advanced if individuals learn how to control their worst instincts and engage in socially responsible behavior. They deny, however, that government rightfully possesses the authority to coerce someone to be moral; it is the responsibility of families and private associations, not the state, to foster morality. However, many Americans disagree, and have always disagreed, with this proposition. As I demonstrated by noting the history of sumptuary and public morality laws, Americans have commonly enacted legislation regulating individual morality. The libertarian disapproval, and, remember, legal invalidation of this kind of legislation will alienate Americans who strongly believe that the protection of liberty requires such moral tutelage from the regime in general and the Constitution in particular. In the long run, the withdrawal of active support for our constitutional system of a significant number of Americans harms the prospects for liberty far more than the incremental gains in individual liberty gained by voiding laws regulating individual morality.<sup>154</sup>

Perhaps most importantly, adoption of the libertarian approach to natural rights will prevent, or at least inhibit, those with opinions, traditions, and ways of life that differ from libertarianism from participating fully in our public life and therefore will impoverish our political culture. By limiting the constitutional exercise of public authority only to the protection against the deprivation or burdening of the rights of others and, thus, preventing those with different understandings of natural rights and natural law from embodying their views in law, libertarian constitutionalism ignores the real possibility, if not likelihood, that if a liberal regime is to flourish—or even survive—it needs support from other, less liberal elements of the society. Again, the best example is the role of religion in a liberal society. As Tocqueville explained about how and why popular government succeeded in America, a society dedicated to the preservation of liberty must depend on a culture that will cultivate virtue in order

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<sup>153</sup> See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

<sup>154</sup> For an exploration of the possible withdrawal of support from the American constitutional system due to the allegedly illegitimate judicial expansion of liberty rights at the expense of justice, see *THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS* (1997).

to both combat the excessive concern with self too often engendered by a liberal society and foster concern for the common good.<sup>155</sup>

Libertarian constitutionalism makes it difficult for religious communities, as well as for groups that cultivate other kinds of virtue that are scarce in a liberal regime (for example, the virtues of courage, honor, and duty fostered by a military culture), to effectively communicate and inculcate their distinct culture. Because these communities cannot embody their values in legislation, depriving them both of the benefits to education of moral principles carrying the imprimatur of law and the sanction for wrong behavior that is often necessary for the cultivation of virtue, these values too often dissipate over time, weakening and even leading to the practical disappearance of these communities and their culture. This loss is not simply that of the particular community; all of society is diminished when it is deprived of a source of virtue that may be necessary for the exercise of responsible freedom.

The founders of liberal political science recognized the danger of dismissing or neglecting ways of life that, while they may in tension with some of the values of a liberal society, may provide a liberal regime with necessary goods that it cannot supply on its own. By leaving the precise meaning of natural rights open to political deliberation and decision, Locke, for example, enabled a liberal regime to more easily assimilate people and communities of different perspectives, both bonding a greater portion of society to the regime and adding their distinctive culture to the storehouse of social capital. The great absorptive powers of Lockean thought produced a liberalism that could incorporate the values of religion, morality, and family convincing Americans that “the inherited legal and social order was not only compatible with but also served remarkably well the Lockean politics they endorsed.”<sup>156</sup> The assimilative quality of liberal constitutionalism is just as valuable today as it was at the time of the Revolution. The nature of liberalism requires the existence of institutions and values that moderate liberalism. A constitution that provides a space for these goods will enable liberalism to save itself from itself.

#### IV. CONCLUSION

Almost twenty years ago, Robert Bork warned of the “tempting of America,” which he defined as the temptation of judges and the people to sacrifice law and democratic legitimacy in order to serve their own idea of political justice.<sup>157</sup> The foundation of the rule of law is the commitment of the judge to decide cases according to the law. To Bork, this commitment requires a judge to adhere to the original understanding of the law, whether the law at issue

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<sup>155</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290-301, 442-49 (1969).

<sup>156</sup> ZUCKERT, *supra* note 17, at 18.

<sup>157</sup> BORK, *supra* note 4, at 1 (“In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He then must choose between his version of justice and abiding by the American form of government.”).

is either a statute or a constitution.<sup>158</sup> If a judge rejects the original meaning of the law, in favor of an interpretation of the law that “evolves” to align with present mores, then that “law” becomes indistinguishable from the judge’s political preferences, thus separating it from the only legitimate source of its authority—the people who enacted it—and causing it to lose all its power to bind.

It is surely gratifying to Bork and the other pioneers of originalism that so many now in the bar, bench, and, especially, the legal academy agree that the touchstone of interpretation ought to be the original understanding of the law. Whether, however, this professed commitment to originalism results, in reality, to fealty to the rule of law depends upon whether the account of the intentions of the Framers relied upon by the interpreter is a genuine effort to understand the Framers as they understood themselves or is an attempt instead to recast the Framers in the image of the interpreter.

I have no doubt that Randy Barnett and other libertarian originalists are sincere in their commitment to an originalism that is truly faithful to the actual legal and political understanding of the Framers. I also am confident that the libertarians are correct that the Framers’ theory of just government and constitutionalism was founded upon a belief that all human beings were endowed by their Creator with natural rights and that a people established a government to secure these rights. Certainly, as well, many Framers believed that government ought to be limited only to those regulations of liberty that are truly necessary and proper under the principles of our regime.

Barnett and the other libertarians, however, neglect the Framers’ equally important commitment to republicanism—government by consent. This commitment was not separate from or ancillary to their commitment to natural rights; both commitments went hand in hand and, in fact, the commitment to republicanism directly derived from the belief in natural rights. The preservation of liberty, meaning the securing of natural rights, is only possible under a constitution in which the people govern themselves.

Government by consent, however, is not an achievement easily won. It depends upon a people endowed with particular virtues, some dealing with the private realm and others with the public. A free people, for example, must have the individual character to use liberty well. If the people of a society do not use their liberty to develop themselves and their capacities, but instead fritter it away on diversions that harm or degrade themselves, the damage is not limited to them alone; society too is diminished. As to public virtues, the preservation of liberty requires a people who do not simply tend to their private pursuits; it requires a society made of individuals who are willing to act publicly to serve the common good. Active public engagement not only leads to laws that serve the common good; it helps develop the habits, such as the capacity to persuade and the openness to being persuaded, that support government by consent.

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<sup>158</sup> *Id.* at 5 (“What does it mean to say that a judge is bound by law? It means that he is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment.”).

The establishment, however, of a stable and effective government by consent depends upon how one defines natural rights. Rather than relying upon the libertarians' overly rigid and legalistic definition of natural rights, the theory of our constitutional system is founded on the idea that the members of the society must deliberate and act together in order to both define as well as secure fundamental liberties. Because the Constitution largely leaves open the specific meaning of natural rights, thus leaving it to the people to decide the scope of their rights, the process of defining and securing these rights both bonds people of different opinions and ways of life to the regime and teaches them that they must fight continuously to secure their rights. Free government does not survive because of the efforts of others—freedom is not simply a set of legal rights that the courts are willing to vindicate.<sup>159</sup> We are free because we are willing and able to govern ourselves and in doing so limit government to its necessary and proper place in our society.

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<sup>159</sup> MANSFIELD, *supra* note 94, at 191 ("The way back to limited government cannot be found by denying or minimizing the need for government or by setting off government against liberty. Rather, limited government is free government, in which a people is free because it governs itself freely.").