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

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

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ABSTRACT

The Ninth Amendment clearly indicates that there are fundamental constitutional rights other than those in text of the Constitution and the Bill of Rights. The United States Supreme Court has recognized a number of these rights in its jurisprudence. However, the Court’s decisions have lacked a consistent historical baseline for rights, and as a result, the Court’s use of history has tended to devolve into cherry-picking from a variety of historical sources without regard to how much they would have influenced the Framing generation.

Legal scholars have also posited several theories regarding a baseline for rights. Some of the more popular theories focus on a baseline taken from natural law, either derived from the writings of specific natural law theorists such as John Locke, from a combination of different natural law theorists, or from some shared natural law idea of individual freedom. However, these theories generally overstate the influence of natural law theorists on the Framing generation’s concepts of rights, and understate the influence of English constitutionalism and common law. Although the Framing generation often spoke of rights in natural law terms, the rights they identified and talked about were all English rights.

This article examines the common understanding of rights at the time of the Framing of the Constitution and the Bill of Rights, and argues that the common understanding of rights at the time were not grounded in the high-minded abstractions of the natural law theorists, but rather derived from the rights the Framing generation assumed to be inherited from the English constitutional and common law, tempered by experience as American colonists. Further, for most Americans by the time of the Framing, their conception of these rights was formed by the readily accessible summary of the common law provided by Sir William Blackstone. It goes on to posit a theory for unenumerated rights based on custom and practice, using Blackstone’s Commentaries as a common law baseline from which to start, and then relying on the common law concepts of custom and practice to update rights from the "common law rights of Englishmen" to the "rights of Americans."

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INTRODUCTION

The Ninth Amendment explicitly states that "[t]he enumerated in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹ This seems to clearly indicate that there are rights other than those in the text that should be recognized as constitutional. Further, the United States Supreme Court has recognized a number of unenumerated rights under a variety of rationales.²

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

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¹ U.S. CONST. amend. IX.
² See Jeffrey D. Jackson, The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate, 75 MISS. L. J. 495, 524 (2006), see also WALTER F. MURPHY, ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1238-41 (3d ed. 2003) (listing various unenumerated rights recognized by the Court). The sources that the Court has used include the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses, as well as guarantees implicit in many of the other Amendments. See, e.g., Saenz v. Roe, 526 U.S. 489 (1999) (recognizing a Fourteenth Amendment right to travel within the United States and enjoy the rights and privileges of citizens in those states); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (recognizing a Fourteenth Amendment due process "liberty interest" in refusing unwanted medical treatment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (recognizing an implicit right under the First Amendment to attend and report on criminal trials); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a "right of privacy" implicit in the "penumbras" created by the First, Third, Fourth, Fifth and Ninth Amendments); Meyer v. Nebraska, 262 U.S. 390, 399 (1922) (recognizing that Fourteenth Amendment liberty includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."); Slaughter-House Cases, 83 U.S. 36, 79-80 (1873) (stating that the Fourteenth Amendment's Privileges or Immunities Clause protects the right of a citizen to come to the seat of government to assert any claim, transact business, seek its protection, share its offices, and engage in administering its function, the right of free access to seaports, substreasures, land offices, and courts of justice, the right to demand the protection of the Federal Government on the high seas or in foreign jurisdictions, the right to peaceably assemble and petition for redress of grievances, the privilege of habeas corpus, the right to use the navigable waters of the United States, and the privilege of all rights secured to citizens in treaties).
³ See U.S. CONST. AMEND. IX.
Ninth Amendment might be.\footnote{See Randy E. Barnett, \textit{The Ninth Amendment: It Means what it Says}, 85 TEX. L. REV. 1, 11-21 (2006) (identifying and discussing the various historical models).} Of these theories, the one that has the most support in the evidence is that the “rights retained” mentioned in the Ninth Amendment are personal rights belonging to the people as individuals, rather than collective rights of “the people” as citizens of the states.\footnote{See \textit{id.} at 79-80. \textit{But see} Kurt T. Lash, \textit{The Lost Original Meaning of the Ninth Amendment}, 83 TEX. L. REV. 331 (2004); Kurt T. Lash, \textit{The Lost Jurisprudence of the Ninth Amendment}, 83 TEX. L. REV. 597 (2005) (both arguing that newly interpreted historical evidence suggests that the Ninth Amendment refers to the collective rights of the states).} Thus, the rights retained are of the same character as the others in the Bill of Rights and of the fundamental rights recognized by the Supreme Court’s jurisprudence.\footnote{See \textit{U.S. CONST. AMEND. I - VIII}.}

If this theory is correct, however, the question still remains as to how these unenumerated rights might be identified and given force. The United States Supreme Court has attempted to set out doctrinal tests for identifying and enforcing rights in its substantive due process jurisprudence; however, no consistent test has emerged. Indeed, there seem to be almost as many tests to adjudicate unenumerated rights as there are justices to apply them.\footnote{See, e.g., \textit{Griswold}, 381 U.S. at 484 (Justice William Douglas finding justification for right to privacy through "emanations" of specific guarantees in the Bill of Rights that form "penumbras"); \textit{Id.} at 493-94 (Goldberg, J., concurring) (setting forth a test asking whether the right in question is "so rooted" in the "traditions and collective conscience" of the American people that it cannot be denied without violating "fundamental principles of liberty and justice", emanates from a specific constitutional guarantee, or is necessary to the "requirements of a free society"); \textit{Id.} at 500 (Harlan, J., concurring) (question is whether the right is "'implicit in the concept of ordered liberty'")); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (test, according to Justice Powell writing for the plurality, is whether right is "deeply rooted in this Nation's history and tradition"); Michael H. v. Gerald D., 491 U.S. 110, 122, 127-28 n.6 (1989) (test, according to Justice Scalia, joined by Justice Rehnquist, is whether the interest in question is one traditionally protected by our society, based on an inquiry "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"); Washington v. Glucksberg, 521 U.S. 702, 767 (1997) (Souter, J., concurring) (test is whether the right is "exemplified by the 'traditions from which [the Nation] developed' or revealed by contrast with the traditions from which it broke'", and whether it outweighs the competing governmental interest).}

In looking at unenumerated rights and considering whether they are fundamental, many of the tests employed by the Court in its substantive due process inquiries are
variants on a historical inquiry. Under these tests, the Court looks at various historical
sources regarding rights to see if a tradition regarding them can be established, and then
tries to evaluate this tradition against some sort of to test to ascertain its importance,
expressed using such statements as: whether the right in question is rooted in the
"collective conscience of the American people"\textsuperscript{8} or "traditionally protected by our
society."\textsuperscript{9}

The problem, however, is that these inquiries lack a coherent baseline from which
to begin. In the absence of any agreement regarding a baseline, a historical inquiry often
becomes an exercise in rummaging through the historical record and "cherry-picking"
different statements made by supposedly influential sources of rights at the time of the
Framing that support the conclusion that the particular justice wants to reach.\textsuperscript{10} As a
result, the Court's version of history tends to come from a hodge-podge of sources,
without regard to how much they actually influenced the way in which the right was
viewed by the Framing generation.

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

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\textsuperscript{8} Griswold, 381 U.S. at 493 (Goldberg, J., concurring).
\textsuperscript{9} Michael H. v. Gerald D., 491 U.S. at 122.
\textsuperscript{10} See Erwin Chemerinsky, Getting Beyond Formalism in Constitutional Law: Constitutional Theory
Matters, 54 OKLA. L. REV. 1, 9 (2001) (criticizing the Court's use of the historical record).
\textsuperscript{11} See, e.g., Mark C. Niles, Ninth Amendment Adjudication: An Alternative to Substantive Due Process of
Personal Autonomy Rights, 48 UCLA L. REV. 85 (2000); SCOTT DOUGLAS GERBER, TO SECURE THESE
As elegant as these theories are, they all suffer from some problems when placed in a historical context. Those theories arguing for rights based on natural law theorists generally overstate the influence of these theorists on the views of the Framers, Ratifiers, and most importantly the general public regarding their rights. Further, such theories underestimate the degree to which the rights existing at common law and the common law method of rights adjudication formed the basis for the general person’s conception of his or her rights at the time of the ratification of the Constitution and the Bill of Rights. Finally, these theories also suffer from a prudential problem. Because they would require a full-scale reworking of the Supreme Court's jurisprudence with regard to rights, they are unlikely to prove attractive to the Court anytime soon.

This article explores the common understanding of rights at the time of the Framing of the Constitution and the Bill of Rights. It argues that while the “rights retained” by the people as provided in the Ninth Amendment are individual rights, they are not natural law rights in the sense that they correspond to the idea of rights as articulated by any individual natural law theorist, or even a combination of such theorists. Rather, the common understanding of rights at the time were derived from the rights the Framing generation assumed to be inherited from the English constitutional and common law, tempered by experience as American colonists. While the framing generation would have considered these rights to be “natural,” in the sense that they were preexisting, the rights were not the “theoretical or philosophic classification” of rights by natural law

14 See infra notes 71 to 82 and accompanying text.
15 See infra notes 83 to 94 and accompanying text.
theorists, but instead rights based on their understanding of English constitutional law, common law, and tradition. Further, for most Americans by the time of the Framing, their conception of these rights was formed not by the musings of John Locke and other natural law writers, nor by the careful study of the common law decisions of Lord Coke, but by the readily accessible summary of the common law provided by Sir William Blackstone. Thus, if the goal is to determine what the general consensus among Americans was at the time of the Framing and the adoption of the Bill of Rights, the formulation of rights in *Blackstone's Commentaries* should form the baseline. From that baseline, however, the common law concepts of custom and practice should be utilized in order to establish present-day rights.

I. **Historically Construing the Ninth Amendment: Who's Views are Important?**

The first question that must be asked by anyone attempting to outline a historical theory of unenumerated rights is that of methodology: Who’s views of unenumerated rights should control? Divining who’s views are important presents a particular problem regarding unenumerated rights due to the peculiar way in which the Constitution deals with the concept of rights.

A phrase often referred to in interpreting the Constitution in a historical manner is the “original intent” of the Framers. This concept supposes that we can look at the Framers’ intentions in drafting the Constitution in the same way that we might try to divine the intent of the legislature in enacting a statute from the language used and the

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16 Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 313-314 (1936). In what is generally considered to be the first “modern” Ninth Amendment law review article, Kelsey theorized that the rights referred to in the Ninth Amendment were those “natural . . . rights of Englishmen” as exemplified by the writings of Blackstone. *Id.*

17 *See infra* notes 178 to 211 and accompanying text.

legislative history. While this method is quite useful in the field of statutory interpretation, it has much less utility for constitutional interpretation. The intent of the legislature works in the statutory interpretation arena because the legislature originates, debates, and then passes the legislation, subject to executive signing. The legislature is the decision-making body with reference to what the legislation means. Therefore, the statements of legislative intent and the debates surrounding a particular piece of legislation are highly probative in determining what that legislation was designed to do.

The main part of the United States Constitution, however, is fundamentally different from ordinary legislation because it is the product of both a constitutional convention and a state ratification process. While the Framers may have crafted the original language of the Constitution, this language had no force until ratified by the State ratification conventions. Because the State ratification conventions were the final decision-makers regarding the language of the Constitution, the views of the Framers regarding the meaning of a particular passage are only relevant to the extent that they can be said to have informed the members of the State ratification conventions' understanding of what that particular passage meant. James Madison recognized as much when he stated that “If we were to look, therefore, for the meaning of the instrument beyond the fact of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”

Thus, when dealing with original provisions in the Constitution, the pertinent question to ask is “what would the Ratifiers have thought that they were ratifying, informed as they

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19 See id. at 886.
20 5 ANNALS OF CONG. 776 (Gale & Seaton ed. 1797).
were by the language, the stated intent and debates of the Framers, and the debates at the ratification conventions?

Interpreting constitutional amendments from a historical point of view requires a different inquiry. Amendments to the Constitution, such as those contained in the Bill of Rights, are introduced and passed in Congress and then ratified by the states, either by state legislatures or by state convention.\footnote{See U.S. CONST. art. V.} In the same way that the Ratifiers were the final decision-makers on the original Constitution, the legislators and conventions were the final arbiters of the Amendments. Therefore, in determining what the particular language of an Amendment means, the true decision-makers were those persons in the state legislature or state convention that ratified the amendment. The intent of those members in Congress who introduced the amendment is relevant to the interpretation of the amendment in the same way that the intent of the Framers is relevant to the interpretation of the Constitution: the intent is relevant to the extent that it can be said to have informed the members of the legislature or state conventions that ratified the amendment. It is useful, but not dispositive. Instead of focusing on the drawers of the Amendment, the proper place to look is to the views of the "adopters."\footnote{See THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927) (stating that "the object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.").}

The unwieldiness of trying to discern intent, and indeed questions over whether that intent should matter, has led to a new form of originalist interpretation: public meaning originalism.\footnote{Lawrence Rosenthal, \textit{Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets}, 60 OKLA. L. REV. 1, 3-11 (2007) (discussing the rise of public-meaning originalism). See Barnett, \textit{The Ninth Amendment, supra} note 4 at 5-6 (discussing this model of constitutional interpretation).} The original public meaning method “looks to how a reasonable member of the public (including but not limited to, the framers and ratifiers) would have
understood the words of the text (in context) at the time of its enactment.”

Through looking at the text itself rather than the specific intent of those enacting it, public meaning originalism seeks to avoid the problems associated with “original intent” originalism.

However, when looking at the substance of unenumerated rights in the Constitution, both “original intent” and “original public meaning” originalism come up short. Unenumerated rights occupy a unique position in constitutional interpretation. The text of the Ninth Amendment and the history surrounding the ratification of the Constitution and the addition of the Bill of Rights confirms their existence. However, they are by nature outside the text of the Constitution, and thus cannot be looked at in quite the same way as we might look at the meaning of Commerce in Article I, or even the meaning of the “right to keep and bear arms” in the Second Amendment.

The Commerce Clause confers a power on the federal government, and the central inquiry is what the Framers and Ratifiers of the Constitution intended the nature and extent of that power to be, or, for public meaning originalists, what the language used in the Commerce Clause would have meant. The Second Amendment evidences a right, and because it is affirmatively stated in the Constitution, its language and history can be probed to determine what the general understanding was of the nature and extent of that right.

The Ninth Amendment, on the other hand, does not confer a right. Rather, as shall be seen, it is simply evidence of a whole body of preexisting rights. Because these

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26 See U.S. Const. art I, sec. 8.; U.S. Const. amend. II.

27 See District of Columbia v. Heller, __ U.S. __, 128 S. Ct. 2783 (2008). Justice Scalia’s majority opinion in Heller used both text and history to determine that the Second Amendment contained an individual right to possess firearms and that this right was broad enough to encompass the right to possess a handgun in the home for self-defense. See id. at 2789-2812.

rights are not stated in the text, the determinative question is not what the Framers, Ratifiers, or members of Congress thought they were doing by their use of the language of the Constitution, or what the members of the state legislatures who ratified the Ninth Amendment thought they were ratifying. None of these individuals were the final arbiters of its substance. Rather, they were simply heirs to a tradition that recognized the existence of those rights. Further, the "original public meaning" of the text itself cannot answer the question; for all the text can do is point us in the right direction by confirming the existence of rights; it cannot give us their substance. Instead, the question of what rights are retained by the people is a broader one: What was the general understanding with regard to the rights possessed by individuals at the time of the Constitution and the Bill of Rights? In order to answer this question, it is necessary to start at the beginning.

II. THE NINTH AMENDMENT IN CONTEXT: WHO'S RIGHTS?

By now, even the casual reader of Ninth Amendment knows the thumbnail history of how the Ninth Amendment came to be. Nevertheless, understanding the historical view of unenumerated rights requires a close examination of the framing and ratification of the Constitution as well as the disputes that led to the adoption of the Bill of Rights, including the Ninth Amendment. In order to put this information into its proper context, it is first necessary to understand the preconceived views regarding rights that the Framers and Ratifiers of the Constitution, the members of Congress that crafted the Bill

29 See infra notes 167 to 168 and accompanying text.
30 This analysis is somewhat akin to the "original public meaning" method of historical interpretation employed by Randy Barnett. The strict definition of original public meaning historical interpretation is not really accurate with regard to interpreting unenumerated rights because, as I discuss above, there is no actual text to examine. However, the general idea is the same. Instead of looking at the text, we can look at what the general public would have understood their rights to be at the time. This is similar to the methodology actually employed by Barnett in his Ninth Amendment analysis arguing for an individual rights interpretation. See Barnett, The Ninth Amendment, supra note 4, at 7 (focusing on the purpose of the Ninth Amendment as shaping its text.)
of Rights, and the citizens of the young United States that ratified it possessed. These views developed from a long lineage of traditional English thought regarding rights, some of it grounded in fact, and some of it mythological.

A. The English Constitution and the Rule of Law

To begin to understand the thoughts of the Framing generation on rights, it is important to look at the way in which rights were perceived by them. As historian Jack Rakove notes, the language of rights was "the native tongue" of eighteenth-century Americans. One of the main ideas that the American colonists inherited from their English ancestors was that they had a certain body of rights and liberties, even if they were unsure exactly what those rights and liberties were. Of one thing they were certain: The rights and liberties were not new. According to a long-held tradition, these rights had as their source an “ancient constitution” made up of laws and customs brought to England by Saxons from Germany some 1300 years earlier. In this version of history, England before the coming of the Normans was an “agrarian paradise” where its inhabitants possessed perfect liberty to do as they chose, and where disputes were settled by “established custom and the common law, which all men understood and revered.” The major declarations of right in English history were not thought to have declared new rights, but rather to have reinstituted the rights of this earlier period that had been lost to Norman conquest or the wickedness of rulers.

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31 See Jack N. Rakove, Original Meanings 290 (1996) (detailing the prevailing views of rights among the American colonists).
32 See id. at 290-92.
33 See Forrest McDonald, Novus Ordo Secularum 76 (1985).
34 Id.
This original constitution creation story was, of course, fictional. Nevertheless, it was subscribed to by many persons who ought to have known better from a historical standpoint, including Thomas Jefferson and John Adams. One key reason was its utility as a political idea: If the rights were antecedent to kings and government, those rights did not depend upon kings or governments for their existence, and could thus serve as limits on governmental power. The actual historical accuracy was beside the point; rather, the purpose of the tale was to imbue rights with a basis that did not owe their creation to any governmental power, for what the government could create, it could deny. Only if the constitution preexisted the government could it serve as a standard against which to test the enactments of the government.

A second concept that had worked its way through English law and to the colonists was that of "the original contract." The original contract was also a legal theory that limited the power of the government. Under this theory, the king had contracted with the people, promising to recognize their rights and to not intrude upon them, and to govern according to the laws. That there had ever been an actual original contract was uncertain. However, as with the ancient constitution, the reality was less

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38 Id. at 170-71.
41 Id. at 134.
42 See id. at 137-38 (discussing the terms of the Original Contract).
43 Id. at 136.
important than the utility. The ancient constitution established rights, and the original contract bound the government, both king and Parliament, to respect them.\textsuperscript{44}

Americans at the time of the revolution assumed that the guarantee of the original contract extended to them due to the existence of a colonial contract, either express or implied.\textsuperscript{45} Under the terms of this contract, the colonists' ancestors had pledged to settle the New World in exchange for the promise that they would continue to be granted the rights of the ancient constitution and the original contract.\textsuperscript{46}

A concept intertwined with the ancient constitution and original contract was that of "the rule of law." The ancient constitution provided the basis for rights, and the rule of law gave the rights their vitality. Under the rule of law, the individual had the right to be governed by laws that applied to all rather than by arbitrary government action.\textsuperscript{47} Further, government was to be conducted through rules promulgated prior to their application in a particular case.\textsuperscript{48} This idea of rule of law would become part of what American constitutions would transform into the concept of "due process."\textsuperscript{49} However, the concept of rule of law was not limited to the procedural, at least not prior to the eighteenth century.\textsuperscript{50} Rather, the rule of law was also substantive, in that it was a

\begin{footnotesize}
\begin{itemize}
    \item[44] See id. at 136-38.
    \item[45] See id. at 139-145 (discussing the Original Colonial Contract).
    \item[46] Id. Reid quotes one anonymous writer in 1774 who envisioned the original colonial contract "as if both King and the people had assembled upon the sea shore, and the one had sworn to govern them according to the laws of the land, and the other to obey him in America as subjects within the realm." Id. at 150 (quoting ANON., AN ARGUMENT IN DEFENCE OF THE EXCLUSIVE RIGHT CLAIMED BY THE COLONIES TO TAX THEMSELVES; WITH A REVIEW OF THE LAWS OF ENGLAND, RELATIVE TO REPRESENTATION AND TAXATION. TO WHICH IS ADDED, AN ACCOUNT OF THE RISE OF THE COLONIES, AND THE MANER IN WHICH THE RIGHTS OF THE SUBJECTS WITHIN THE REALM WERE COMMUNICATED TO THOSE THAT WENT TO AMERICA WITH THE EXERCISE OF THOSE RIGHTS FROM THE FIRST SETTLEMENT TO THE PRESENT TIME 95 (1774.).
    \item[48] Id. at 5-6.
    \item[50] See Reid, The Rule of Law, supra note 47, at 78-79.
\end{itemize}
\end{footnotesize}
constraint on the power of the King and Parliament to infringe upon customary rights.\textsuperscript{51}

Under the rule of law, the rights that persons received by virtue of the ancient constitution and custom were superior to those enacted by Parliament. This is not to say that Parliament could not enact laws contrary to customary rights. However, if Parliament did so, then the laws were not law, but merely declarations of arbitrary power.

By the time of the American Revolution, the concept of the rule of law in Great Britain had gone away from a substantive notion of due process and towards a notion of parliamentary sovereignty that gave Parliament the ability to make law and rendered the rule of law procedural.\textsuperscript{52} However, in America, the concept of rule of law remained "more historically English than contemporary British,"\textsuperscript{53} and Americans still believed in a substantive rule of law that checked Parliament's power.\textsuperscript{54}

It is also imperative to understand how the Framing generation viewed the concept of bills of rights. The purpose of a bill of rights was not to categorically list all the rights that an individual or body of individuals possessed, for such rights existed whether listed or not.\textsuperscript{55} Rather, the purpose of a bill of rights was to reaffirm rights that had recently come under attack, or were likely to come under attack.\textsuperscript{56} The idea was that the listing of particular rights would serve as a reminder and reaffirmation of their existence. However, the existence of rights was not dependent upon this reaffirmation.

\textsuperscript{51} Id.
\textsuperscript{52} See id. at 78. Reid notes that by the late 1700's "for the English it had become enough that laws be promulgated and be certain to define what liberty meant for most individuals." The predominant view in Britain became that, while Parliament had no right to alter fundamental laws without the acquiescence of the people, "the very fact that the House of Commons votes a law 'supposes the acquiescence of a majority of the people." Reid, Authority of Rights, supra note 40, at 76 (quoting John Gray).
\textsuperscript{53} See Reid, Authority of Rights, supra note 40, at 76.
\textsuperscript{54} See id. According to Reid, the whole American Revolution was a fight between 17th Century constitutionalism on behalf of the colonists and 18th century constitutionalism on behalf of the British. Id. at 75.
\textsuperscript{55} See id. at 69-70 (regarding the purpose of the English Bill of Rights).
\textsuperscript{56} See id.
B. **The Influence of Natural Law**

Another major influence on the thinking of the Framing generation was the idea of natural law. The Framers, and many other learned persons of the Framing generation, were familiar with natural law theorists such as John Locke, Samuel Pufendorf, Emerich De Vattel, Hugo Grotius, Jean-Jaques Burlamaqui, and Thomas Rutherforth.\(^{57}\) Locke’s ideas regarding natural law were particularly influential in the language that was used at the time of the American Revolution. When Thomas Jefferson wrote in the Declaration of Independence that “all men” had “certain inalienable rights” such as “life, liberty and the pursuit of happiness,” he was borrowing from Locke’s formulation of the inalienable rights of man: life, liberty and property.\(^{58}\) Similarly, when Jefferson stated in the Declaration that, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it," he was referencing another Lockean ideal: that where the government acts against the trust reposed in it, the people have a right to dissolve it and enter into another.\(^{59}\)

Locke was similarly influential in the colonists’ conceptualization of the formation of governments. Locke posited a "compact theory" under which persons surrendered their natural rights, that is, rights that they possessed in the state of nature, to the community in return for its protection of their lives and property from others in the community and from outside forces.\(^{60}\) However, not all rights were surrendered. Rather,
only those rights necessary for the common good were surrendered, with all others being retained.61

Locke’s compact theory, with alterations, was echoed by other writers, including Pufendorf, Burlamaqui and Vattel.62 Each of these writers postulated some sort of theory whereby persons formed a government by agreeing to delegate their own sovereign powers and rights to the government to a certain extent, while retaining those that they did not delegate.63 The writings of these authors, in combination with Locke, provided a framework through which the colonists could justify their claim to rights, and their decision to revolt against British rule.64

There is no question that Locke and other natural law philosophers were highly influential for the Framers as well. Locke was the prime source for Madison's ideas of founding principles.65 James Wilson was also heavily influenced by natural law theory, a subject that he lectured in as a law professor.66 Other Framers similarly espoused natural rights principles.67

61 See id. at 72-73 (Parts 129-131).
62 See Grey, supra note 57 at 860-62.
63 Id. Pufendorf’s theory of Government stated that the people could condition their grant on compliance with a constitution, but that even if they did not, the ruler would be bound by natural law. Id. at 861. Under Burlamaqui’s theory, persons could delegate all of their rights if they chose to do so. See id at 862. Vattel wrote that power could be delegated to government, but that government could not change the fundamental laws of the state. Id. at 862-63.
64 See, e.g. James Otis, The Rights of the British Colonies Asserted and Proved, in Neil Cogan, Contexts of the Constitution 227-235 (citing Locke’s Two Treatises in arguing that the government’s power was limited to providing the security of life, liberty and property); Thomas Paine, Common Sense, in Cogan, supra, at 235-245 (advancing a Lockeian idea regarding the formation of government).
65 The Mind of the Founder: Sources of the Political Thought of James Madison xxii (Marvin Meyers ed. 1981). Madison was also influenced by Grotius, Puffendorf, and a host of other philosophers.
66 See Gerber, supra note 11 at 82-84 (discussing Wilson's natural law views).
67 See id. at 64-65 (discussing statements made by Roger Sherman, Gouverneur Morris and Robert Yates that Gerber characterizes as reflecting natural law principles). Alexander Hamilton’s oft-cited remark that the rights of man are “written as with a sunbeam” also makes reference to natural law ideas, although his sincerity in this regard is open to question. See 1 The Works of Alexander Hamilton 113 (H. Lodge ed. 1904).
The prevalence of natural rights rhetoric in the Declaration of Independence and in some of the works of the Framers has led many scholars to propose using natural rights as a foundation for unenumerated rights jurisprudence. Some of these approaches focus on using Lockean philosophy as a predicate test for rights, while others would look to the full panoply of natural rights philosophers for evidence of rights, or to a natural law-based theory establishing a "presumption of liberty." In each case, natural law principles, or a general theory derived from those principles, forms the constitutional baseline for determining rights.

However, the influence of natural law philosophers such as Locke on the framing generation should not be overstated, particularly when it comes to the substance of unenumerated rights. First, although natural rights were one of the bases on which the American colonists asserted their claim to rights, this was due in large part to the prevailing practice at the time of asserting numerous bases for rights, so as to give them a firmer foundation. As historian John Philip Reid notes, the American colonists at the time of the Revolution asserted at least ten bases for the rights they claimed, including their rights as Englishmen, the original contract, the original American contract and principles of the customary British Constitution.

Second, using Lockean ideals as the basis for unenumerated rights overstates Locke's influence on the Framing generation's concepts of the substance of rights. There is no doubt that Locke’s theories provided significant justification for the rights claimed

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68 See, e.g., Niles, supra note 11 (arguing for a natural rights approach based on Locke); GERBER, supra note 11 (arguing for an approach based on Locke and the ideals in the Declaration of Independence).
69 See, e.g., Droddy, supra note 12 (arguing for using the writings of Locke, Vattel, Burlamaqui and others as evidence of original intent and avenues for adjudication).
70 See BARNETT, supra note 13, at 255-59.
71 See Reid, AUTHORITY OF RIGHTS, supra note 40, at 87-88.
72 Id. at 66.
by the colonists leading up to the revolution, and that, as Mark Niles and others have noted, Locke was second only to the Bible as a quoted source in American political writings between 1760 and 1775. This is due in large part to the usefulness of Locke’s theories in producing a clear rationale for independence. However, Locke’s influence on the American public did not long survive the Revolution. As historian Forrest McDonald notes, while Locke’s theories met the goals of the Revolution, they “did not accord with the desires of the society of acquisitive individualists that emerged afterward.” While many of the Framers continued to espouse Lockean ideals, no new edition of Locke’s Two Treatises was published in America after 1773.

Further, while Locke was a considerable influence on the Framers, he was far from the only natural law philosopher that they consulted regarding theories of government. Madison was also influenced by Montesquieu, especially on the subject of separation of powers, and by David Hume on the subject of the evils of factions. James Wilson was extremely well-versed in all of the natural law philosophers, and was heavily influenced by Burlamaqui and Frances Hutchinson, as well as Rousseau. As a result, the idea that any one natural law philosopher, even one as influential as Locke, can be made to serve as the guiding influence for unenumerated rights appears untenable.

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74 See id. at 65-66. See also Grey, supra note 57, at 860 (noting that “The very elements that made Locke’s theory so appropriate as the extra-legal break with England in 1776 at the same time lessened its usefulness in the disputes that led up to the break” because Locke did not mean for rights to operate as checks to legislation”).
75 Id. at 66.
76 Id.
77 See id. at 66.
79 See id.
80 See McDonald, supra note 33, at 188 (arguing that Wilson was most influenced by Burlamaqui and Hutcheson); PAUL MERRILL SPURLIN, ROUSSEAU IN AMERICA 1760-1809 66 (1969) (arguing for Rousseau’s influence on Wilson).
What then of the idea, suggested by Droddy and others, that we should use the
works of natural law philosophers as evidence of original understanding of unenumerated
rights? The problem in doing so is that it vastly overstates the degree to which the
ordinary person at the time of the formation of the Constitution was familiar with natural
law works, especially those of the more-obscure writers. To say that James Wilson was
intimately familiar with the works of the natural law theorists of the time is one thing.\textsuperscript{81}
To say that the ordinary person was as familiar with these works as James Wilson was is
quite another. It is true that many Americans at the time of the Revolution and the
Framing had some exposure and familiarity with the outlines of natural law philosophy,
whether through Pufendorf and Locke, or through textbooks distilling their ideas written
by Hutcheson or Rutherforth.\textsuperscript{82} However, the extent to which they considered these
natural law theories to be controlling on the content of rights is debatable.

Instead, what most people at the time of the Revolution thought of as "natural law
rights" were not those found in the treatises of natural law philosophers. Rather, they
were the rights "existing 'under English government'; that is, a right established and
recognized under the British constitution or English law. What exist[ed] under the
British constitution [was] natural, and it [was] natural because it exist[ed under the
constitution]."\textsuperscript{83}

\textsuperscript{81} See Knud Haakonssen, in \textsc{A Culture of Rights: The Bill of Rights in Philosophy, Politics and
Law, 1791 and 1991} 45 (Lacey and Haakonssen, eds. 1991) (discussing the multiple sources of natural law
theory with which Wilson was familiar).

\textsuperscript{82} See id. at 43-45 (discussing natural law as part of the classic school curriculum).

\textsuperscript{83} \textsc{John Philip Reid, The Concept of Liberty in the Age of the American Revolution} 29 (1988)
(quoting D.S. Rowland's Thanksgiving Sermon in 1766, in \textsc{Alice M. Baldwin, The New England
Clergy and the American Revolution} 178 (1928)). \textsc{See Reid, Authority of Rights, supra note 40
at 95 (stating that the natural law rights that British subjects on both sides of the Atlantic claimed to possess
were "a curious mirror of British constitutional law and English common law").}
More importantly, although the rhetoric of the colonists at the time of the revolution included many references to natural law, the rights they claimed were all English rights. 84 Reid notes that "[t]he fact of the matter is that the American whigs did not in any official petition or resolution claim a natural right that was not already extant in British constitutional theory or English common law." 85 The problem with using a natural law as a basis for the content of rights was that natural law philosophers spoke in generalities. They could provide a basis for claiming rights, but not the contents of the rights themselves. 86 Instead, when the colonists identified their rights, the rights they claimed mirrored English rights. 87

This concept of natural law rights did not change with independence. Under the ideas espoused by Locke and other the natural law philosophers, once the colonists had declared that they were free of the British crown, they reverted to a "state of nature" where they could reconstitute their governments as they wished. 88 Indeed, the statements of leading revolutionaries were replete with statements that emphasized this point. 89 However, almost immediately upon being given this opportunity, the colonists drafted new constitutions and declarations of right that, although they often included grand statements infused with natural rights rhetoric, 90 protected only traditional English

84 See id. at 90-92 (discussing the irrelevancy of natural rights to the American revolution.)
85 Id. at 92.
86 See id.
87 Id. at 94-95
89 See, e.g. Statement of Patrick Henry, September 6, 1774, stating that because of the actions of the Continental Congress, "We are in a state of nature". 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 124 (1961).
90 See, e.g. VIRGINIA DECLARATION OF RIGHTS, art. 1 (1776) (stating "THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity); PENNSYLVANIA DECLARATION OF RIGHTS, pt. 1 (1776) (stating that "WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy
rights.91 Further, many of these statutes and declarations explicitly reaffirmed the controlling status of English common law.92

The “Englishness” of the rights most Americans thought they possessed continued to the drafting of the Constitution.93 While rights were refined by American use of the common law, they still retained their essential English heritage, and English common law was often resorted to in order to determine what rights meant.94

C. The Framing

It is fair to say that the Framers of the Constitution were not exactly focused on individual rights during the drafting stages.95 Instead, they were focused primarily on the task at hand, which was increasing the power of the federal government.96 The federal government created under the Articles of Confederation was not powerful enough to threaten rights, or to effectively run the country.97 It is unsurprising that rights would get short shrift in such an environment.

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91 See MCDONALD, supra note 33, at 152-53; RAKOVE, supra note 31 at 306-07.
92 MCDONALD, supra note 33, at 153. See e.g., CONSTITUTION OF NEW JERSEY, art. XXII (stating that “the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature”).
94 Id. at 16. See also Lawrence M. Friedman, Introduction, in COMMON LAW, COMMON VALUES, COMMON RIGHTS: ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS 12 (2000) (noting that because there were relatively few legal materials available, “[l]awyers and judges had to lean, when they could, on English legal material.”)
96 Id. at 85.
97 See id. at 85-86.
The Framers did protect some rights during the drafting. Those rights that they protected share two important characteristics. First, they were individual rights. Second, they were overwhelmingly English rights, or responses to perceived violations of the rule of law in England.

The majority of the rights protected in the body of the Constitution had a long pedigree in English law. The right to trial by jury that eventually found its way into Article III, section 2 of the Constitution was included in Magna Carta, and was traditionally believed to have been a part of English law from its beginning. The privilege of the writ of habeas corpus found in Article I, section 9 was one of the traditional rights of Englishmen that Parliament identified in the Petition of Right in 1628, and its use as a tool for inquiring as to the cause of a person's imprisonment stretches as far back as the 14th Century. The prohibitions on bills of attainder in Article I, Sections 9 and 10 were a response to the political usage of such bills in both England and Colonial America. Bills of attainder were generally thought to violate the due process of English law, even though within the power of Parliament to enact. The prohibition on ex post facto laws in the same sections was generally thought to be a

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98 See Rakove, supra note 31, at 317 (1996); Leonard W. Levy, Original Intent and the Framers’ Constitution 150-52 (1988). Most of these protections were inserted by the Committee of Detail and were not discussed beforehand. Rakove, supra at 317; Levy, supra at 150.

99 See William Forsyth, History of Trial by Jury (2d ed. 1875). Sir William Blackstone stated that trial by jury had “been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof.” Id. (quoting Sir William Blackstone, Treatise on Trial by Jury in Civil Causes (in Scotland)). However, the perception of trial by jury as a right for the protection of the accused criminal did not come into favor until the 17th Century. Id.


principle of English law, although not always followed, and had been prohibited by five state constitutions at the time of the Framing.

There was very little thought to actually setting forth a bill of rights in the Constitution. The only mention of the possibility of a bill of rights in the convention record occurred three days before the end of the Convention, on the 12th of September, during the debate regarding whether the right to jury trial extended to civil cases. George Mason of Virginia noted that he “wished the plan had been prefaced by a Bill of Rights, & would second a Motion if made for the purpose.” He stated that such a bill would “give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.” Elbridge Gerry then moved for a committee to prepare a bill of rights; however, the motion was rejected after a vote. The only debate on the motion occurred when Roger Sherman of Connecticut stated that he was “for securing the rights of the people where requisite” but noted that “The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient. . .” In

103 See McDonald, supra note 33, at 38.
104 See Bernard Schwartz, The Great Rights of Mankind: A History of the American Bill of Rights 75-77 (1992) (examining the contents of state constitutions). This is not to say that all of the rights included in the body of the Constitution had roots in English law. Article I, Section 10’s prohibition on the states impairing private contracts has its roots in the unfortunate experiences of the Framers in living under the Articles of Confederation. See The Federalist No. 44, at 218-19 (James Madison) (Terence Ball ed., 2003). In explaining the restriction on the impairment of contracts, Madison stated that the “sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and legislative interferences with cases affecting personal rights, become jobs in the hands of enterprizing and influential speculators; and snares to the more industrious and less infomed part of the community.” Id. at 218.
105 See 2 The Records of the Federal Convention of 1787 587-88 (Max Farrand ed., 1937) (hereafter Farrand). By this time the Convention had already received copies of the proposed Constitution from the Committee of Style. See Levy, supra note 98 at 147.
106 2 The Records of the Federal Convention of 1787 at 587.
107 Id.
108 Id. at 588. Because the delegates voted by state, no vote was actually cast in favor of the motion. Id.
109 Id.
calling for the vote, however, Mason noted that the laws of the United States were to be paramount to the state laws.\footnote{Id.}

Exactly why the Framers chose not to include a Bill of Rights at this juncture is unclear. Many of the Framers did attempt to explain themselves on this score later; however, it is difficult to determine how much of these later statements were sincere, and how much was simply invented ad hoc as a way to rationalize the absence of a bill of rights and to argue that one was unnecessary.\footnote{See, e.g., the statements of Governor Thomas Randolph at the Virginia ratification convention. 3 ELLIOT'S DEBATES 191 (1937). Governor Randolph argued at ratification convention that a bill of rights would be "quite useless, if not dangerous to a republic" because bill of rights were designed to limit the perogative of the king. \textit{Id.} Leonard Levy contends that this position was "unpardonable" when compared to Randolph's actual understanding of the need for a bill of rights. \textit{LEVIY, supra} note 98 at 157. James Wilson chose to forget that there had ever been an attempt to include a bill of rights. In a statement to the Pennsylvania ratification convention, he said that "there was no direct motion for anything of the kind." 2 ELLIOT'S DEBATES 435-36 (1937). Wilson would repeat this assertion a month later at the Pennsylvania Convention, when he stated that "so little account was the idea of a bill of rights that it passed off in a short conversation without introducing a formal debate or assuming the shape of a motion. 3 FARRAND, \textit{supra} note 105, at 143.

Of course, this sort of later rationalization was not exclusive to Federalists. George Mason, who refused to sign the Constitution, made the lack of the Bill of Rights the first sentence of his "Objections to this Constitution of Government." \textit{See} RAKOVE, \textit{supra} note 31 at 318. However, at the convention, when his objection might have done some good, he made no real argument for a bill, instead only offering to second a motion for one if made. \textit{See LEVIY, supra} note 98 at 147.

The most plausible explanation is that the Framers saw a bill of rights as unnecessary at the beginning of the process because they were not creating a new society, but simply rearranging powers within it without affecting the fundamental rights of the people.\footnote{See \textit{LEVIY, supra} note 98 at 149. The basis for Levy's argument is a statement in the notes of the Committee of Detail, attributed Randolph, that there was no need for philosophic statements of government in the preamble because "we are not working on the natural rights of men not yet gathered into society, but upon those \textit{rights}, modified by society, and (supporting) \textit{interswoven with} what we call (states) the rights of states . . . " \textit{See} 2 FARRAND, \textit{supra} note 105 at 137. \textit{See also} RAKOVE, \textit{supra} note 31, at 317 (arguing that the Framers may have thought that a bill of rights was not necessary because the federal government was not interfering with the fundamental rights of the citizens, but only "acquiring from the states and the people the resources and authority necessary to exercise its essential tasks). Once the Committee of Detail had finished its work, and it became apparent that the relationship between the people and the
government was altered in significant ways, the Framers were simply too far along in the process to risk having it be derailed by arguments over rights.\textsuperscript{113}

\textbf{D. The Ratification}

This would prove to be a huge problem when the Constitution was sent to the states and the lack of a Bill of Rights became the main objection to ratification.\textsuperscript{114} Prominent opponents of the Constitution immediately objected to the omission of a Bill of Rights, arguing that its absence endangered many important rights.\textsuperscript{115} Some of these opponents were really not as interested in seeing a bill of rights added as they were in seeing the Constitution defeated.\textsuperscript{116} For them, the lack of a bill of rights was simply an expedient ground on which to attack a Constitution that they felt gave too much power to the federal government at the expense of the states.\textsuperscript{117} However, many of the Constitution's opponents were sincere in their desire to protect rights, and their arguments carried great weight in the ratification conventions.\textsuperscript{118}

The Federalist supporters of the Constitution attempted to counter these objections by arguing that a Bill of Rights was unnecessary.\textsuperscript{119} These arguments generally took two forms. The first argument was that, while a bill of rights might be appropriate in England because it wrested rights from the king, it was not appropriate for

\textsuperscript{113} See \textsc{David O. Stewart}, \textit{The Summer of 1787: The Men Who Invented the Constitution} 225-26 (2007) (noting that by September 12, it was “well beyond late” to introduce any major changes.)

\textsuperscript{114} See \textsc{Rakove}, \textit{supra} note 31, at 318.

\textsuperscript{115} See 13 \textsc{The Documentary History of the Ratification of the Constitution} 238-40 (reprinting Richard Henry Lee's objections and proposed amendments to the constitution); \textsc{See The Essential Bill of Rights, supra} note 100, at 278 (setting forth the political motives of the Antifederalists).

\textsuperscript{117} See \textit{id.}

\textsuperscript{118} See \textit{id.}

\textsuperscript{119} See \textit{id.} (setting out the Federalist arguments).
a republic founded upon the power of the people.\textsuperscript{120} This argument was unpersuasive, however, because the "dominant theory" in the United States was that a bill of rights was appropriate and even necessary in a compact creating a government.\textsuperscript{121}

The other argument was that a bill of rights was unnecessary because the Constitution established a government of limited powers. Therefore, any power not delegated to the federal government was reserved.\textsuperscript{122} Further, according to this argument, the enumeration of certain rights in a Bill of Rights would actually be dangerous, in that it would be presumed that only the rights enumerated were retained and all others ceded to the national government.\textsuperscript{123} As articulated by Alexander Hamilton, "Why . . . should it be said, that the liberty of the press should not be restrained, when no power is given by which restrictions may be imposed?"\textsuperscript{124}

This argument also failed to impress the Constitution's opponents. They noted that, although the new Constitution purported to be one of limited powers, it actually contained clauses of expansive powers, such as the power to act for the "general welfare" or where "necessary and proper."\textsuperscript{125} Further, the very convoluted nature of the argument

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\textsuperscript{120} See RAKOVE, supra note 31 at 156. An example of this assertion was made by Alexander Hamilton in The Federalist, wherein he stated that "bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince . . It is evident, therefore, that according to their primitive signification, they have no application to constitutions founded upon the power of the people, and executed by their immediate representatives and servants." THE FEDERALIST NO. 84 (Alexander Hamilton) (Terrence Ball ed., 2003). James Wilson also put forth this contention in the Pennsylvania ratification convention. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 115 at 383.

\textsuperscript{121} See LEVY, supra note 98 at 156-57. This theory was reinforced by the fact that eight states had adopted bills of rights. Id.

\textsuperscript{122} See id. at 153.

\textsuperscript{123} Id. at 153-54. Charles Wilson also made this argument at the Pennsylvania ratification convention, stating that "A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete." 2 ELLIOT'S DEBATES 436 (1937).

\textsuperscript{124} THE FEDERALIST NO. 84 420 (Alexander Hamilton) (Terence Ball ed. 2003).

\textsuperscript{125} See CECILIA M. KENYON, THE ANTIFEDERALISTS lxx (1966).
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put forth by proponents of the Constitution that a bill of rights was unnecessary worked to convince its critics that some deception was afoot. The fact that the Constitution did explicitly protect some rights also served to convince its opponents that the Federalists’ contentions were not made in good faith.

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

127 See Rakove, supra note 31, at 320. For an example of a view opposing the Federalist argument, see Brutus, Essay II, November 1, 1787, reprinted in The Essential Bill of Rights, supra note 103, at 299.
128 See The Essential Bill of Rights, supra note 100 at 308-310.
129 See Joseph M. Lynch, Negotiating the Constitution: The Earliest Debates on Original Intent 39 (1999); Levy, supra note 98, at 162. As Levy notes, these were really the only two recommended provisions that actually belonged in a bill of rights. Id. The other recommended amendments were actual changes to the powers of Congress, such limiting the power of direct taxation and fixing the number of representatives at one per thirty thousand people in the state. See Massachusetts Ratifying Convention Proposed Amendments , reprinted in The Essential Bill of Rights, supra note 100, at 311-13.
Although Maryland ended up ratifying the Constitution as it stood, the convention attempted to recommend a bill of rights, and then to recommend amendments.\textsuperscript{130} These proposed amendments were eventually published in pamphlet form, and included provisions for trial by jury in all cases, a prohibition on double jeopardy, a prohibition on general and oathless warrants, a prohibition on the quartering of soldiers, a prohibition on the establishment of religion and guarantee of religious liberty, and a provision protecting freedom of the press.\textsuperscript{131}

South Carolina and New Hampshire also ratified with recommended amendments.\textsuperscript{132} South Carolina recommended four amendments, one of which would have recognized that the states retained every power not expressly vested in the Federal Government.\textsuperscript{133} New Hampshire's recommended amendments paralleled those recommended by Massachusetts, and added a ban on troop quartering, laws infringing freedom of religion, or laws infringing the right to bear arms.\textsuperscript{134}

The fierce ratification fight in Virginia coalesced over the absence of a bill of rights and the implications of the new powers of the federal government over the States.\textsuperscript{135} The Bill of Rights issue was particularly strong in Virginia because its state

\textsuperscript{130} See 4 THE ROOTS OF THE BILL OF RIGHTS 729-30 (Schwartz ed. 1980).
\textsuperscript{131} Id. at 730-731.
\textsuperscript{132} See LYNCH, supra note 129 at 39.
\textsuperscript{133} See 4 THE ROOTS OF THE BILL OF RIGHTS 756-57.
\textsuperscript{134} Id. at 758-61.
\textsuperscript{135} Id. at 762-63; LYNCH, supra note 129 at 41. Several other economic and practical factors were also played a part in the reluctance of Virginia to ratify. These factors included fears that the federal government would allow claims of prewar debts owed by Virginia's to British creditors, the loss of revenue from taxing interstate commerce, and the loss of legislative influence because of the equality of the Senate. Lynch, supra at 39-41. However, the controversy over the absence of a bill of rights soon eclipsed these factors. See id. at 41.
constitution contained a Declaration of Rights that was enforceable by the courts through judicial review.\textsuperscript{136}

Virginia eventually ratified the Constitution, but not without compromise. A motion by Patrick Henry to make ratification contingent on the passage of amendments was narrowly defeated.\textsuperscript{137} However, in order to secure ratification, the supporters of the Constitution were forced to accede to the public sentiment for a bill of rights by taking steps to make recommendatory amendments after ratification.\textsuperscript{138} The day after ratification, a drafting committee including proponents of the Constitution such as Madison and John Marshall, as well as opponents of the Constitution such as Henry and George Mason, went to work on proposed amendments.\textsuperscript{139} Two days after ratification, the committee reported a proposed bill of rights of 20 articles to be added to the Constitution.\textsuperscript{140} These rights included the right to know the nature and cause of accusation, the right to confrontation, the right to present evidence, the right to a trial by jury, the privilege against self-incrimination, no deprivation of property unless by "the law of the land", the right to trial by jury in civil cases, a prohibition against excessive bail or fines, a prohibition against cruel and unusual punishment, a prohibition against unreasonable searches and seizures, the right to assemble and petition for redress of grievances, the right to freedom of the speech and press, the right to bear arms, a prohibition against quartering of soldiers, and a right respecting freedom of religion.\textsuperscript{141}

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\textsuperscript{136} See 4 THE ROOTS OF THE BILL OF RIGHTS 762-63.
\textsuperscript{137} \textit{Id.} at 764.
\textsuperscript{138} \textit{Id.} at 764-65. \textit{See also} LEVY, supra note 98 at 163. A motion by Patrick Henry that a declaration of rights and other recommendations first be referred to other states for consideration prior to ratification was narrowly defeated, 88-80. LYNCH, supra note 129, at 46-47.
\textsuperscript{139} 4 THE ROOTS OF THE BILL OF RIGHTS 764-65.
\textsuperscript{140} \textit{Id.} at 765.
\textsuperscript{141} \textit{Id.} at 765-66.
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Once Virginia had ratified, New York followed suit.\footnote{Id. at 852-55.} However, in order to win ratification, the Federalists in New York had to agree to recommend a bill of rights based on a draft by Antifederalist John Lansing.\footnote{Id. at 854-55.} This recommended bill of rights was quite similar to that recommended by Virginia, except that it contained, for the first time in an American constitution, the phrase "due process of Law."\footnote{Id.}

The rights recommended by the state ratification conventions lend further support to the argument that most people at the time thought of rights as English in origin. Many of the proposed rights that would later find their way into the Bill of Rights have a long pedigree in English law. The prohibition on quartering troops in the homes of private citizens without consent, found in the recommended amendments of New Hampshire, Virginia and New York, as well as in Maryland’s attempted amendment, was a staple of English common law, and a statutory prohibition against it was provided in the 1689 Bill of Rights.\footnote{See R.B. Bernstein, “Third Amendment,” in CONSTITUTIONAL AMENDMENTS 1789 TO THE PRESENT 60-61 (Kris E. Palmer ed. 2000). Justice Story, in his Commentaries on the Constitution, referred to this amendment as securing “that great right of common law, that a man’s house shall be his own castle”. STORY, COMMENTARIES ON THE CONSTITUTION.} The right to indictment by grand jury, recommended by Massachusetts and New Hampshire, can be traced back to Henry II’s enactment of the Assize of Clarendon in 1166.\footnote{See Frederick K. Grittner, “Fifth Amendment,” in CONSTITUTIONAL AMENDMENTS 1789 TO THE PRESENT 93 (Kris E. Palmer ed. 2000).} The prohibition against double jeopardy was a concept of English Law applied to capital offenses, albeit in a narrower form.\footnote{Id. at 94.} Its abuse by English royalty caused the American colonists to expand it to all crimes.\footnote{Id.} The prohibition on excessive bail recommended by Virginia and the Pennsylvania minority was also a descendent of
English common law and was expressly included in the 1689 Bill of Rights.\textsuperscript{149} Rights such as the right to petition for redress of grievances and the right to bear arms also have their beginnings in the English Bill of Rights of 1689.\textsuperscript{150} The prohibition against illegal seizures of the person, the right to due process of law, and the right to trial by jury can be traced to Magna Carta.\textsuperscript{151}

Even those lesser-known rights discussed at the ratification conventions reflect an English origin. The rights championed by the Pennsylvania minority, "the liberty to fowl and hunt in seasonable time" and to "fish in all navigable waters" seem curious to us today. However, these rights had their genesis in English “forest-laws,” under which the King could designate any land within the kingdom as a “forest,” and thereby prevent anyone but himself from hunting on them.\textsuperscript{152} Federalist supporters such as Noah Webster ridiculed these suggested rights as “absolutely trifling” given the state of property laws in the United States.\textsuperscript{153} Nonetheless, they reflect the Englishness with which Americans at the time thought of their rights.

The proposed Bill of Rights Madison submitted to Congress in 1789 continued this theme. Madison and other Federalists faced the thorny question of how to satisfy the public sentiment for a Bill of Rights and at the same time prevent wholesale changes to the Constitution that would wreck its essential structure.\textsuperscript{154} Their solution was to focus

\textsuperscript{149} See James Heiberg, “Sixth Amendment,” in \textit{Constitutional Amendments 1789 to the Present} 129 (Kris E. Palmer ed. 2000).

\textsuperscript{150} See \textit{Schwartz, The Great Rights of Mankind}, supra note 109 at 197-200.

\textsuperscript{151} \textit{Id.} at 198-200.

\textsuperscript{152} See \textit{McDonald}, supra note 33 at 32-33 (discussing forest laws regarding hunting).


\textsuperscript{154} See James R. Stoner, Jr., \textit{Common Law and Liberal Theory} 221 (1992). The controversy over the failure of the Constitution to include a Bill of Rights had quieted down by the time the first Congress met in April of 1789. See \textit{Rakove}, supra note 31, at 330. Once ratification had been accomplished and the new government was in operation, the Antifederalist opposition that had seized upon the idea of the Bill of Rights as a means to defeat the Constitution collapsed, and many Federalists believed that it would be
on guaranteeing individual rights, rather than on suggested amendments that altered the Constitution's distribution of power between the states and the federal government. 155

Operating in accordance with this plan, Madison drew up a list of proposed amendments, many of which were taken from Virginia's recommended amendments. 156 Madison’s original conception was that the rights would be inserted at what he considered proper places within the Constitution. At the beginning of the Constitution he would have inserted language explicitly stating that the purpose of the Government is the benefit of the people in the enjoyment of life and liberty, with the right of acquiring and using property, and pursuing and obtaining happiness and safety. 157 The precursors of what became the first eight amendment of the Constitution were to be inserted between the clause in Article I, Section 9 that prohibited bills of attainder and ex post facto laws and the clause prohibiting nonproportional direct taxes. 158
Madison’s proposed amendments also included a prohibition on the states violating “the equal rights of conscience; or the freedom of the press; or the trial by jury in criminal cases”, which would have been inserted in Section 10 of Article I, and a provision to be inserted in Article III that would guarantee, inter alia, that the trial of all crimes except in cases of impeachment or the military be by an “impartial jury of freeholders of the vicinage”, and would have stated that in civil suits under common law “the trial by jury . . . ought to remain inviolate.\textsuperscript{159} Finally, Madison proposed the insertion of an entirely new article in the Constitution that would make clear the separation of powers delegated by the Constitution, as well as the fact that the powers not delegated by the constitution, nor prohibited by it to the states, would be reserved to the states.\textsuperscript{160}

These proposed amendments themselves are instructive. In his notes for his speech proposing the amendments, Madison set out what he considered to be proper subjects to be included in a bill of rights: 1) “assertion of primitive equality & c.”; 2) “do. of rights exerted in formg. of Govts.”; 3) “natural rights retained as speach”; 4) “positive rights result. as trial by jury”; 5) “Doctrinal artics vs. Depts. Distinct electn.”; and 6) “moral precepts for the administrn. & natl. character - as justice - economy - &c.”\textsuperscript{161}

These notes, and the amendments proposed, represent an interesting window on Madison’s thinking, and reflect a mixture of common and natural law. Madison’s proposed preamble was taken almost entirely from Virginia’s proposed bill of rights.\textsuperscript{162}

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS; A DOCUMENTARY HISTORY 1042 (1971).
\textsuperscript{162} See Barnett, The Ninth Amendment, supra note 4 at 39, n. 160.
It has a clear natural rights origin, reflecting most particularly John Locke’s formulation of the inalienable rights, and Locke’s determination that where a government does not properly protect those rights, the people may reform of change it. 163 Similarly, Madison’s proposal regarding separation of powers also reflects the thought of a natural law theorist, this time Montesquieu. 164 Madison’s fourth proposal, which included the rights that became the first eight amendments, however, reflects more pragmatic concerns. Madison’s notes classify these either as “natural rights retained”, or “positive rights result[ing] and necessary for the protection of the retained rights.” 165 While Madison calls the retained rights “natural”, the rights included in this proposal were all personal rights either derived from traditional English law, or modified from traditional English law as a reaction to perceived abuses of the law by Crown and Parliament. 166

Madison’s last proposal of the fourth section, which became the precursor to the Ninth Amendment, stated that “[t]he exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely

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163 See LOCKE, SECOND TREATISE, Section 243. Virginia’s proposed amendment made this connection with natural law even more explicit, stating that these were the “certain natural rights of men.” See Montesquieu, The Spirit of Laws, Book 11, chapter 6 (1748). Montesquieu noted that “When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty”. Id.

164 See B. SCHWARTZ, THE BILL OF RIGHTS supra note 161 at 1042.

165 See BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND supra note 104 at 197-200 (1992) (noting the English origins of the right to petition for redress of grievances and the right to bear arms); supra notes 145 to 153 and accompanying text (discussing the English law origins of state proposed amendments that were included in the Bill of Rights). Although Schwartz argues that the other rights contained in what became the first eight amendments were American in origin, this argument understates the extent to which they were influenced by English precursors. See supra notes 145 to 153 and accompanying text.
for greater caution.” Madison was quite clear about the purpose of this amendment and its genesis in answering one of the problems associated with a bill of rights:

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

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

That the Bill of Rights was simply a declaration or preexisting rights and did not itself confer rights appears to have been beyond dispute. Roger Sherman, in arguing for the placement of the Bill of Rights at the end, stated that this would not hinder the understanding of the document because “[t]he amendments reported are a declaration of rights; the people are secure in them, whether we declare them or not.”

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167 James Madison, Speech before the House of Representatives (June 8, 1789) reprinted in 1 THE FOUNDER’S CONSTITUTION 482 (Kurland & Lerner, eds. 1987).
168 Id. at 483.
169 See id. at 174-78. This ultimately resulted in the amendments being attached to the Constitution rather than incorporated with the existing provisions. Id.
The exact scope of these preexisting rights and their potential for abridgment, however, engendered many disagreements. In the discussion concerning what would later become the First Amendment, Representative Theodore Sedgwick of Massachusetts took issue with the language guaranteeing the freedom to assemble, not because he disagreed with the right, but because it was unnecessary to enumerate it, for: “If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend in such minutiae.”\footnote{Debate in the House of Representatives, August 15, 1789 (statement of Rep. Sedgwick), 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1834).} When Representative Benson reminded him that the committee had proceeded on the principle that the rights were inherent, and had simply sought to provide against their infringement, Sedgwick retorted that, under that principle, the committee “might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper,” but that such a lengthy enumeration of rights was unnecessary “in a Government where none of them were intended to be infringed.”\footnote{Id. at 759-60.} Other representatives disagreed, however. Most notably, John Page of Virginia stated that, while Sedgwick might think that the right to assemble was “no more essential than whether a man has a right to wear his hat or not . . . let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of
rights. If the people could be deprived of the right of assembling under any pretext whatsoever, they might be deprived of any other privilege contained in the clause.”

Other discussions on the amendments highlight the effect of customary English practice and abuses on the Representatives’ understanding of rights. Elbridge Gerry cited Great Britain’s attempt to prevent the formation of militia in Massachusetts prior to the Revolution in support of his skepticism of allowing conscientious objector language in what would become the Second Amendment. Similarly, other representatives invoked British custom in the debate over the quartering of soldiers in private homes.

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

The history of the drafting and ratification of the Constitution and the Bill of Rights confirms the particular “Englishness” of the rights that most Americans thought

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173 Id. at 760 (Statement of John Page). Page’s statement that “a man has been obliged to pull off his hat when he appeared before the face of authority” was a reference to the trial of William Penn in 1670, where Penn had been fined for appearing in court without his hat on. SCHWARTZ, THE GREAT RIGHTS OF MANKIND, supra note 104, at 175.
174 See 1 ANNALS OF CONG. 778 (Statement of Elbridge Gerry).
175 See id. at 781 (Statements of Reps. Sumter, Sherman).
176 See Report of the House Select Committee (July 28, 1789) reprinted in THE ESSENTIAL BILL OF RIGHTS, supra note 100, at 345. This included Madison's preamble reflecting the language of the Declaration of Independence, including the right to dissolve government. See THE ESSENTIAL BILL OF RIGHTS, supra note 100, at 344 (noting that Madison "was unsuccessful in altering the preamble to the Constitution to incorporate the principles of the Declaration of Independence").
177 See SCHWARTZ, THE GREAT RIGHTS OF MANKIND, supra note 104, at 181-84. In the course of reducing the House's seventeen amendments to twelve, the Senate also deleted the provision prevented States from infringing on freedom of conscience, speech and jury trial, and combined other amendments., Id. at 182-83. Because the Senate held debate behind closed doors, there is no record of the reasons for these changes. See id. at 181. Senate debate remained closed until 1794. Id. Of the twelve amendments recommended, ten passed. Only the first two amendments, dealing with apportionment of Representatives and compensation for Senators and Representatives were not ratified. Id. at 184-91. As noted by Schwartz, there is surprisingly little on record as to the debates regarding the Bill of Rights in the states. See id. at 186-87.
they possessed. The rights that were adopted in both the Constitution and the Bill of Rights were personal rights that had their genesis in either English tradition, or in American refinement of the English practice. The Bill of Rights emerged from the state legislatures stripped of its natural law flourishes, and instead enshrined the most important rights handed down from the English Constitution.

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

III. WHO'S COMMON LAW?

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

Most lawyers in the United States at the time of the Revolution had studied Coke, and the principles laid down in his Institutes informed their view of rights. In *The First Institute of the Lawes of England, or a Commentary on Littleton*, Coke wrote to summarize and update the work of Sir Thomas de Littleton’s Fifteenth Century treatise.

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on Tenures, which was the first English textbook on the law, and the book studied by law
students prior to Coke.\footnote{See Block, supra note 178, at 345.} Although Littleton had dealt mostly with property law, Coke
took Littleton’s work as a point of departure from which he then proceeded to talk at
length about the whole of common law.\footnote{Id.} Thomas Jefferson noted, with regard to Coke
on Littleton, that “a sounder Whig never wrote, nor of profounder learning in the
orthodox doctrines of the British Constitution, or in what was called British Liberties.”\footnote{12 Writings of Thomas Jefferson iv. See Corwin, supra note 37 at 366.}

Coke followed his work on Littleton with his Second Part of the Institutes, which
was a commentary and gloss on the Magna Carta and other famous statutes, his Third
Part, which dealt with criminal law, and his Fourth Part, which dealt with court
jurisdiction.\footnote{See Coquillette, supra note 178, at 317.}

Coke’s Institutes were the source for the American lawyer’s view of the common
law and rights in the Revolutionary Period.\footnote{See Harold Gill Reuschlein, The “Ante-Taught Law Period” in the United States, 32 Va. L. Rev. 955, 956 (1946). Reuschlein quotes Roscoe Pound’s statement that the common law of the colonies was “Coke’s common law. English case law and English Legislation prior to Coke were summed up for us and handed down to us by the indefatigable scholar in what we have chosen to consider an authoritative form; and we have looked at them through his spectacles ever since.” Id. at n. 7 (quoting Roscoe Pound, The Place of Judge Story in the Making of the American Law, 48 Am. L. Rev. 676 (1916)).} However, it was not readily accessible to
the general population. His comments on Littleton’s Tenures were written in the margins
of the text alongside the Latin and English translations.\footnote{See Coquillette, supra note 178, at 317 n. 18; see generally Sir Edward Coke, The First Part of
the Institutes of the Lawes of England, or a Commentary Upon Littleton (13th ed. 1775)
available at www.constitution.org/18th/coke1st1778/coke1st1778_001-050.pdf.} Further, his writing was
difficult to understand.\footnote{See Corwin, supra note 37 at 366. Corwin characterizes Coke’s method as “irritatingly fragmentary, with the result that his larger ideas have often to be dug out and pieced together from a heterogeneous mass.” Id.} Thomas Jefferson, who would later speak of Coke in glowing
terms, said as a law student that: “I do wish the Devil had old Coke, for I am sure I never was so tired of an old dull scoundrel in my life”.

By the time of the Revolution, the popular view of the law in the United States had shifted, and the source for information regarding the common law of England became Blackstone. Rather than a gloss on previous sources of law or statutes as in Coke’s Institutes, Blackstone’s Commentaries were the first comprehensive attempt to state the whole of English Law as substantive rules. It had a structure that classified and compiled the common law in a usable form, rather than the “ad hoc” nature of earlier works. Further, “the most important feature of Blackstone’s Commentaries was that it could be read and understood by intelligent laymen”.

The reaction to Blackstone’s Commentaries in America was immediate. The first four-volume English edition was published from 1765 - 1770, and over 1000 copies of this first edition were sold in the American colonies. A pirated edition by Robert Bell was published in America in 1771, adding another 1400 copies to the mix. Among the avid subscribers readers of Blackstone during this period were revolutionaries and founders such as James Otis, John Adams, James Madison, Thomas Jefferson and Alexander Hamilton, as well as Thomas Marshall, who subscribed to the American

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189 COQUILLETTE, supra note 178, at 438.
190 See id. at 371; Alschuler, supra note 188 at 5.
191 COQUILLETTE, supra note 178 at 371, 437; Alschuler, supra note 188 at 5. Bell noted that the reason for the pirated edition was to “produce mental improvement and commercial expansion, with the additional recommendation of positively (sic) saving thousands of pounds to and among the inhabitants of the British Empire in America”. Subscription notice of Robert Bell, reproduced in COQUILLETTE, supra, at 421.
edition for his eldest son, John Marshall.\textsuperscript{192} In 1775, member of the House of Commons Edmund Burke, in urging conciliation with the American Colonies, stated that “In no country perhaps in this world is the law so general a study [as in the Colonies] . . . I hear that they have sold nearly as many of Blackstone’s Commentaries in America as in England.”\textsuperscript{193} By that time, Blackstone’s Commentaries had become “the chief if not the only law books in every colonial lawyer’s office, and the most important if not the only textbooks for colonial law students.”\textsuperscript{194} Further, because the language of Blackstone was written for the layman, it was "approachable for the colonists with limited legal skills but a great thirst to learn of their legal rights."\textsuperscript{195}

The Commentaries became even more entrenched in America in the time between Independence and the framing of the Constitution.\textsuperscript{196} As Blackstone’s Commentaries became the chief methods of legal education, they also became the language of the common law.\textsuperscript{197}

This is not to say, of course, that the Commentaries went without criticism, or that all of the Framers were unhesitatingly enthusiastic about Blackstone himself. As a member of Parliament, Blackstone was unsympathetic to the claims of the American

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\item \textsuperscript{192} \textit{Id.} at 371. James Iredell, a Framer who later became one of the first Justices on the Supreme Court, wrote his father in London asking him to procure a copy. William D. Bader, \textit{Some Thoughts on Blackstone, Precedent, and Originalism}, 19 VT. L. REV. 5, 7 (1994).
\item \textsuperscript{193} Edmund Burke, Speech on Conciliation with America, March 22, 1775.
\item \textsuperscript{194} DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 170 (1938); see also Bader, supra note 192 at 6-10 (describing the influence of Blackstone on the colonies).
\item \textsuperscript{195} Guy I. Seidman, \textit{The Origins of Accountability: Everything I Know About the Sovereign's Immunity I Learned from King Henry III}, 49 ST. LOUIS U. L. REV. 393, 479 (2005).
\item \textsuperscript{196} See Corwin, supra note 37 at 404-05; Dennis R. Nolan, \textit{Sir William Blackstone and the New American Republic: A Study of Intellectual Impact}, 51 N.Y.U. L. REV. 731, 744 (1976) (noting that while claims that Blackstone's Commentaries were the principal inspiration for the Constitution are overblown, the "Commentaries' position as an authority on the common law was more firmly established in 1787 than in 1776).
\item \textsuperscript{197} See DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941) (noting that, in the first century after Independence, Blackstone’s Commentaries "constituted all there was of the law" for most lawyers).
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He was an apologist for the Crown and Parliament, and maintained that the colonists were not entitled to the common law rights of British subjects. Further, Blackstone was a proponent of Parliamentary supremacy, a doctrine that, although triumphant in Great Britain, was repugnant to Americans. Thomas Jefferson accused Blackstone of being a disciple of Lord Mansfield, who was one of the architects of British Colonial policy, and later in life decried the extent to which the “honied Mansfieldism of Blackstone” had replaced Coke on Littleton as the primary teaching tool for law students, causing the legal profession to “slide into toryism”. James Wilson criticized Blackstone’s assertion of Parliamentary supremacy and argued that Blackstone had failed to properly recognize that rights were natural in origin rather than created by government. St. George Tucker attempted to limit Blackstone’s influence on American law students, an endeavor which led him to publish a “republicanized” version of the Commentaries in 1803, showing where Blackstone’s Commentaries were not suited to American law.

198 See Alschuler, supra note 188 at 9, 15. Blackstone voted to maintain the Stamp Act, among other things. See id. at 15.
199 Id. at 9. In his original version of the Commentaries, Blackstone stated that the common law did not run to “conquered territory,” and described the American colonies as such. See 1 WILLIAM BLACKSTONE, COMMENTARIES *108.
200 See REID, RULE OF LAW, supra note 47, at 78-79 (describing the American Revolution as a battle between the British ideal of Parliamentary sovereignty and the American view of the supremacy of the rule of law.)
201 Letter of Thomas Jefferson to James Madison, February 17, 1826 in WRITINGS, supra note 186 at 1513-14. For more criticisms of Blackstone by Jefferson, see Julian S. Waterman, Thomas Jefferson and Blackstone’s Commentaries, 27 ILL. L. REV. 629, 649-52 (1933). For the view that Jefferson’s views were colored by his connection of Mansfield and Blackstone, see Alschuler, supra note 188 at 9 n.49; Waterman, supra at 642-45. Jefferson also criticized the Commentaries themselves, stating that they were only a digest of what students might acquire from “the real fountains of the law.” Letter from Thomas Jefferson to Judge Tyler, May 26, 1810, in 9 THE WRITINGS OF THOMAS JEFFERSON 277.
202 See Waterman, supra note 201 at 650-51.
203 Craig Evan Klafter, The Americanization of Blackstone’s Commentaries, in ESSAYS IN ENGLISH LAW AND THE AMERICAN EXPERIENCE 49, 52 (Cawthon & Narrett eds. 1994)
Further, the Commentaries were not entirely an accurate representation of the state of British common law at the time they were published.\textsuperscript{204} Blackstone’s Commentaries were published at a time when the British legal system was in flux, with the common law itself giving way to Parliamentary authority.\textsuperscript{205} The Commentaries straddled both sides of this time period, with Blackstone stating at once that “no human laws are of any validity, if contrary to [the law of nature]” and that “[Parliament] can, in short, do every thing that is not naturally impossible . . . So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.” As a result of trying to paper over this changing nature of the common law, the legal theory in the Commentaries is often "contradictory, muddled, and disorderly."\textsuperscript{206}

Despite these criticisms, however, for the average American citizen at the time of Framing, the Commentaries formed “the principal means of . . . information as to the state of English law in general.”\textsuperscript{207} The Commentaries stood in for the body of the common law, and became the principle source of the law itself for many courts, who did not have access to other materials.\textsuperscript{208} For law students and courts alike, “the easiest course to pursue was to follow Blackstone in all cases where constitutions and

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\textsuperscript{205} See id.
\textsuperscript{206} See Joseph W. McKnight, Blackstone, Quasi-Jurisprudent, 13 SW. L. J. 399, 402-03 (1959) (discussing problems with Blackstone’s theory of the law.)
\textsuperscript{207} PLUCKNETT, supra note 187, at 207.
\textsuperscript{208} See Waterman, supra note 201, at 631; McKnight, supra note 206, at 401 (attributing Blackstone’s influence to the fact that "it was the only general treatise available in a land where well-trained layers were almost non-existent"). St. George Tucker was concerned with Blackstone’s influence on the Virginia Bar even though Virginia, due to the efforts of Thomas Jefferson, had succeeded in passing many law reforms contrary to Blackstone’s version. The problem was that most lawyers and judges might continue to rely on the Commentaries because they did not have access to the revised laws. Klafter, supra note 203, at 52.
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legislatures had not spoken.”209 This reliance on Blackstone as an authority for English law extended even to those who had many other sources available: The Commentaries became the reference source for English common law among some of the Framers, who resorted to it to determine the state of the law in England regarding, among other things, whether the term “ex post facto” applied to civil as well as criminal cases.210 The use of Blackstone as a sourcebook on the common law continued during the ratification debates.211

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

In order to understand the view of rights in Blackstone’s Commentaries, it is necessary to understand the context in which those rights are fixed, including Blackstone’s ideas of the nature of the law in general. According to Blackstone, there are three types of law. The first is the law of nature, by which he means not so much natural

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211 See Nolan, supra note 196 at 745-46 (discussing some of the references to Blackstone in the state ratifying conventions). Nolan is careful to note, however, that the references were directed toward the state of the common law as it stood rather than as it should be.) Id. at 745.
law as envisioned by philosophers, but rather the “eternal immutable laws of good and evil,” which are binding on all persons.\textsuperscript{212} The second type of law is revealed law, found in the holy scriptures.\textsuperscript{213} Blackstone considered these two types of law to be superior to human law, and not dependent upon it for their force.\textsuperscript{214} Included in these laws were what Blackstone considered to be “moral wrongs,” such as murder.\textsuperscript{215} A third type of law is that of nations, which is governed only by the law of nature and certain compacts and agreement.\textsuperscript{216}

Blackstone’s fourth type of law is the municipal law, which is that body of law that covers those things to which “the divine law and the natural law leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits.”\textsuperscript{217} Liberty could be restrained in certain instances by municipal law, but municipal laws had to have certain qualities. First, they had to be rules, that is, they had to be “permanent, uniform and universal” rather than an attainder addressed to a particular person.\textsuperscript{218} They also had to prescribe rules of civil conduct, as opposed to simply moral conduct.\textsuperscript{219} This did not necessarily mean that the legislature could not legislate on moral conduct, but the conduct had to have a civil component or benefit.\textsuperscript{220}

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\item \textsuperscript{212} 1 BLACKSTONE at *39-40.
\item \textsuperscript{213} \textit{Id.} at *42.
\item \textsuperscript{214} \textit{Id.} at *42.
\item \textsuperscript{215} See \textit{id.} at *42-43. Of murder, Blackstone states that “this is expressly forbidden by the divine, and demonstrably by the natural law; and, from these prohibitions, arises the true unlawfulness of the crime. Those human laws that annex a punishment to it do not at all increase its moral guilt, or superadd any fresh obligation, \textit{in foro conscienciatue}, to abstain from its perpetration.” \textit{Id.}
\item \textsuperscript{216} \textit{Id.} at *43.
\item \textsuperscript{217} \textit{Id.} at *42-43.
\item \textsuperscript{218} \textit{Id.} at *44. Blackstone explained that “a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation this act is spent upon Titius only, and has no relation to the community in general . . . But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency ;, uniformity, and universality, and therefore is properly a rule.” \textit{Id.}
\item \textsuperscript{219} \textit{Id.} at *45.
\item \textsuperscript{220} See \textit{id.}
\end{itemize}
The rule also had to be prescribed, that is, published in some manner, and could not be ex post facto. Finally, the rule had to be made by what Blackstone termed to be “the supreme power in a state,” by which he meant Parliament.

According to Blackstone, personal rights are either absolute or relative. Absolute rights are not “absolute” in the sense that they cannot be taken away, but rather absolute rights are those which belong to every man, either in or out of society, while relative rights are those that result from the formation of society. Relative rights, on the other hand, are those that arise from relationships in society, such as the rights of Parliament, the King, the magistrates, the people, the rights of the clergy, the civil state, the military, master and servant, husband and wife, parent and child, guardian and ward, and corporations. Blackstone stated that the principal aim of society is to protect individuals in the enjoyment of absolute rights, and secondarily, those rights that are relative.

Blackstone divided the absolute rights of individuals are divided into three categories: 1) the right of personal security; 2) the right of personal liberty; and 3) the right of private property. This iteration of common law rights left such an impression on the American legal mind that Joseph Story and James Kent used it verbatim in their treatises on American constitutional law.

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221 Id. at *45-46.
222 See id. at *46.
223 1 Blackstone at *123
224 Id. at *123-24.
225 Id. at *146-485.
226 Id. at *124-25.
227 Id. at *128
228 See 3 Joseph Story, Commentaries on the Constitution of the United States 748 (1823) (noting that the Fourth Amendment “seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property”; 2 James Kent, Commentaries on American Law 1
The right of personal security included the right of a person to enjoyment of his life, limbs, body, health and reputation. Of these rights, the rights to life and limbs are the most important. These rights belong to each person at the quickening in the womb, and include the right to self-defense and to void contracts completed under duress. Blackstone also seems to suggest that there is a right of persons to demand from society the minimal necessities of life, which he thought adequately protected by the “poor statutes” in England.

The personal security rights of the preservation of the body, health, and personal reputation were thought to be less important. They were included because, without them, it is “impossible to have the perfect enjoyment of any other advantage or right.”

The right to personal liberty is the right to move or change situation without restraint or imprisonment, unless by due course of law. This includes a right to be free from arbitrary imprisonment or other confinement, and Blackstone thought that it was well protected by the right to trial, the right to legal indictment, and the right to habeas corpus. It also includes the right to void any contract made under duress of confinement, and the right to be free from banishment.

(1827) (stating “the absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property”).

1 BLACKSTONE at *129.

See id. at *134 (stating that the rights of security of body, health and reputation are “of much less importance than those which have gone before”).

Id. at *129-31.

Id. at *131.

Id. at *134.

Id. at *134.

Id. at *134-35.

Id. at *136-37.
The third absolute right was the right to property, which consists of the free use, enjoyment and disposal of all acquisitions without control or diminution.\textsuperscript{237} This right protects the person from having property taken arbitrarily, from having property taken for public use without just compensation, and from taxation without consent or representation.\textsuperscript{238}

In addition to these absolute rights, there were other “subordinate” rights whose purpose was to “protect and maintain inviolate the three great and primary rights.”\textsuperscript{239} The first of these was the “constitution, power and privileges of parliament,” which literally means the way that Parliament is constituted and its power.\textsuperscript{240} The second was, as a corollary, the limitation of the power of the king.\textsuperscript{241} The third is the right that each English subject has to the applying to the courts for redress of injuries, without delay.\textsuperscript{242} Fourth, each person had the right to appeal to King and Parliament for redress.\textsuperscript{243} Finally, the each person has the right to “hav[e] arms for their defence (sic), suitable to their condition and degree, and such as are allowed by law.\textsuperscript{244}

These rights, however, were not absolute in all applications. Rather, they are bound by “the laws of the land,” that is, by the valid laws enacted to protect and regulate society.\textsuperscript{245} However, the valid laws were not \textit{all} laws. Instead, they were only those laws that comport with “the law of the land,” which is due process, both procedural and substantive.

\begin{footnotesize}
\begin{enumerate}
\item Id. at *138.
\item Id. at *139-40
\item Id. at *140-41.
\item See id. at *141.
\item Id.
\item Id. at *141-43.
\item Id. at *143.
\item Id. at *143-44
\item See id. at *129, *134, *138.
\end{enumerate}
\end{footnotesize}
In order to be valid, laws had to be reasonable rather than arbitrary. Blackstone thought a law reasonable if it advanced the public good, for then it increased rather than restrained liberty by benefitting the civil society that protected liberty. Reasonableness was not the only test of a law’s validity, however. The absolute rights of an individual could be restrained only “so far . . . (and no farther) as necessary” for the needs of civil society. The idea was to find the correct balance between the liberty of the individual and the needs of society, and the key to this determination was custom and tradition. There were traditional and customary limitations on what government could do and how far government could go. These limitations were the rights retained by the people.

Blackstone’s format of rights implies a hierarchy, with absolute rights occupying a higher plane than relative rights, and subordinate rights guaranteeing the absolute rights. However, even absolute rights could be infringed upon, provided that the infringement was in accordance with due course of law; that is, due process. On the definition of such due process, however, the Blackstone of England and the Blackstone as understood by Americans diverge, although not as much as might be thought. As noted above, Blackstone’s Commentaries straddle the line between the old English notion of due

\[ \text{See id. at *126. By way of contrast, a law that restrained conduct without any good aim was destructive of liberty. Id. Blackstone used the statute of Edward IV prohibiting the wearing of pikes of more than two inches in length on the boots of those persons who were under the rank of lord as an example of an arbitrary law, because such a prohibition served no public purpose. However, he cited the prescription of Charles II that all persons were to be buried in woolen garments as an example of a reasonable law, in that it advanced the governmental objective of benefitting the wool trade. Id. Although this may seem to be a low threshold for public benefit, the wool trade was of vital economic importance to Great Britain, and the degree to which its protection was a matter of public interest should not be understated. See W. J. Ashley, The Early History of the English Woollen Industry 14 (1887) (Publication of the American Economic Association available at http://www.archive.org/details/earlyhistoryofen00ashlrich). Ashley noted that the woolen trade was referred to as the source of England’s wealth and comprised two-thirds of its exports by the end of the Seventeenth Century. Id.} \]

\[ \text{See 1 BLACKSTONE at *125-26.} \]

\[ \text{See, e.g. id. at *133-134 (describing the right of personal liberty as subject to infringement only by "due course of law" and the right of life as subject to infringement under English law only by "the law of the land" or "due process of law").} \]
process and the rule of law and the new British notion of Parliamentary sovereignty; between what was and what would be. 249 Blackstone's Commentaries were firmly on the side of Parliamentary sovereignty, but there were also echoes of the old common law notion of due process as well. Blackstone would never admit that Parliament could not pass a law to do anything, for it was sovereign. 250 However, he was forced to admit that some things, if done by Parliament, were arbitrary or tyrannical. 251

In contrast, in America the idea of Parliamentary sovereignty was rejected; instead, due process still had substantive meaning rather than being simply procedural. 252 In America, the term "due process of law" embodied the common law and its general rights and privileges, and could be asserted against the legislature and executive alike. 253 While Americans of the Framing era accepted Blackstone's exposition of the substance of the common law and rights, they did not rely on his theories regarding the power of Parliament. 254

Using English constitutional and common law, especially as expressed in Blackstone's Commentaries, as the chief source of the "common understanding" of rights at the time of the Framing leads to several conclusions regarding unenumerated rights. First of all, recognizing the common law and English constitutional basis for rights should put to rest the idea that enforceable constitutional rights can somehow be limited to those listed in the Bill of Rights, or to discrete lists set forth at various times by certain

249 See supra notes 205 to 206 and accompanying text.
250 See 1 BLACKSTONE at *91 (stating that "if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it").
251 See, e.g id. at 133 (stating that laws directing the death penalty for "light and trivial causes" were tyranny, although to a lesser degree than the taking of life by a government without laws at all).
252 See REID, RULE OF LAW, supra note 47 at 78-79.
253 See MOTT, supra note 49, at 141-42.
254 See, e.g. Nolan, supra note 196, at 742 (noting how Alexander Hamilton used Blackstone's ideas regarding the absolute rights of individuals to buttress legal arguments against Parliament).
revolutionaries or Framers. If the existence of the Ninth Amendment alone were not enough to contradict this idea, a historical analysis of the English common law method and the English constitution should. Bills of rights were simply not thought of as ways to enumerate all of the rights that persons possessed. Rather, their purpose was to reaffirm those rights that had most recently been under attack, or that were considered most likely to be infringed by the government at the time.255 This is not to say that the enumeration of rights was of no consequence, because it could serve as a way to highlight the special importance of certain rights; however, enumeration was not the determinant of a right's existence.

For the same reason, various lists of rights put forth by revolutionaries such as James Otis or Framers such as James Wilson cannot be regarded as conclusive lists of rights. They were not attempts to enumerate all of the rights that Americans possessed, but were rather aimed at claiming certain rights that were in danger. As a result, though the presence of such rights on these lists is persuasive evidence that they were regarded as existing rights, the absence of certain rights is not proof of the reverse.256

A recognition of the English common and constitutional law as the basis for unenumerated rights will also invariably frustrate those looking for a neat and tidy "bundle" of rights that can be easily listed and referenced. The rights listed by Blackstone, and in English common and constitutional law in general, are maddeningly vague and imprecise. In the main this is because there was no Supreme Court with judicial review power in Great Britain that could settle controversies over the meaning of

255 See Reid, Authority of Rights, supra note 40, at 69-70.
256 See supra notes 55 to 56 and accompanying text.
specific rights. As a result, most rights remained abstract as general arguments, and only became definite when they were applied to specific situations, and even then no boundaries were established. However, it was also because there was some idea that it was dangerous to be too specific about rights, for fear of imposing too narrow an interpretation on them. Thus, rights were only clarified when threatened.

Because rights were vague categories, and because courts were in the business of discovering them rather than creating them, it was simply not possible to know ahead of time all of the rights that people possessed. Further, new rights, or at least new interpretations of them, could emerge over time. This was not to say that Americans at the time of the Framing believed in a "living Constitution" whose meaning would change, but rather that they were heirs to an English common law tradition that treated all rights, even those recently "discovered," as timeless. If the exact content of the rights might change, still the rights themselves had always existed.

IV. WHAT DOES IT MEAN?

These conclusions, taken together, mean that trying to compile a full list of the rights of Americans, to "enumerate the unenumerated rights," would be as futile now as it

257 Reid, Authority of Rights, supra note 40, at 10.
258 See id. at 10-11. Reid quotes one reviewer of the Scots Magazine as saying that "It perhaps would be dangerous to inquire too curiously into the strict and punctual legality of all the powers exercised by government, and all the privileges claimed by the subject . . . There are mysteries in politics, as well as in religion, which a good politician, and a good Christian, should endeavour to believe, without attempting even to understand." Id. at 11.
259 See Reid, Authority of Rights, supra note 40, at 25. Reid gives as an example the British "discovery" of the right against general search warrants in the 1760's. As Reid notes: "They did not, of course, discover the right. What they discovered was that it could be abused in ways previously not suspected or understood." Id.
260 See id. at 25-26.
261 See Reid, Ancient Constitution, supra note 36 at 3-7, 72 (analyzing the ahistorical view of "lawyer's history"). An example of this line of thinking is the statement by John Cartwright that "our object is, to ascertain how [the ancient constitution] was, or must have been, according to the Constitution at its origin. It is only by ascending to that point, we can know what it now is; because, whatever it originally was it continues to be; no change ever having been made, notwithstanding the numerous changes which have occurred in the practice of government." Id. at 72.
was in 1787. Any listing would necessarily be incomplete. It would also be against the
color law tradition, which depends on an orderly development of the law on a case by
case basis. Instead, what can be developed is a mechanism for historically identifying
rights as they are challenged. In many respects, the system is similar to the historical
analysis that some members of the Court have often engaged in. The distinction here lies
on the baseline. Rather than cherry-picking from a variety of sources, a historical
analysis of the proposed right should begin with a determination of the right's status in
practice and tradition at the time of the Framing. The baseline for this determination
should be the collective common law at the time. As I have suggested above, this should
be discerned by looking to Blackstone's commentaries and the categories of rights
contained there, and also looking to see how those rights had been modified by American
practice.

However, the baseline formed by Blackstone and the American practice at the
time of the framers is just that: a place to start. A proper historical analysis must take
into account the manner in which the rights established at the framing have changed
throughout this country's history in response to threats from government. It was taken for
granted in the common law tradition that rights, or at least their interpretations, could
change, and that new rights could be discovered. The question to be asked is whether the
right asserted is one that can truly be said to become part of American custom, that is, has
it come to be thought of as part of the "residuum of natural liberty . . . not required to be
sacrificed to public convenience".262 In this regard, the test should be similar to that
enunciated by Justice Harlan in his concurring opinion in Poe v. Ullman,263 wherein he

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262 See 1 BLACKSTONE at *128.
stated that due process represented "the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."\(^{264}\)

It is important to distinguish this standard from the other standards that the Court has used in talking about substantive due process. The common law standard is not one that seeks to protect only those rights ""'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"\(^{265}\) Nor is it a standard that protects only those rights that are "so deeply rooted . . . as to be fundamental principle[s]."\(^{266}\) On the other hand, the common-law standard is not one which goes so far as to provide a "presumption of individual freedom" for all rightful conduct,\(^{267}\) or one that protects generalized rights such as "the right to personal freedom and autonomy."\(^{268}\) Rather, the question is where the balance between the interests of the individual and the interests of society are struck. This balance must be decided on a case by case basis.

A. Some Conclusions . . .

Nevertheless, there are some conclusions that can be drawn regarding unenumerated rights using common law, and especially Blackstone, as a baseline. First, there are a number of rights currently recognized as fundamental that would be easily recognized as fundamental to some extent under this baseline, either explicitly or

\(^{264}\) Id. at 542.


\(^{267}\) See BARNETT, supra note 13 at 259-62.

\(^{268}\) See Niles, supra note 11 at 122.
implicitly. These "easy cases" include *Pierce v. Soc'y of Sisters*\(^{269}\) right to educate children in private schools so long as minimum standards are met, which can be inferred from the general control granted to parents over education for their children.\(^{270}\) The right to engage in a lawful profession from *Meyer v. Nebraska*\(^{271}\) also falls within the ambit of Blackstone's common law.\(^{272}\) The same is true for *Allgeyer v. Louisiana's*\(^{273}\) right to acquire, hold and sell property,\(^{274}\) and *Edwards v. California's*\(^{275}\) right to travel.\(^{276}\)

Second, there are rights that, although not "easy cases," can nevertheless be inferred from the common law baseline, or from the development of custom since. An example of this would be the right to refuse unwanted medical treatment established in *Cruzan v. Director of the Missouri Department of Health*.\(^{277}\) While Blackstone reported that suicide, whether assisted or not, was ranked "among the highest crimes," and resulted in criminal liability for the person committing suicide and anyone aiding him, no such prohibition was extended to the refusal of treatment.\(^{278}\) Under such circumstances, a right to refuse medical treatment can fairly be said to fall under Blackstone's more general right to personal security, which includes the "security from corporal insults" and

\(^{269}\) 268 U.S. 510 (1925).

\(^{270}\) See 1 *BLACKSTONE* *at* *450-52* (explaining the obligation of the parent to educate the child). However, this right was not entirely without consequence. As Blackstone notes, a parent who sent his child overseas for the purpose of attending a "popish college" or being instructed in the "popish religion" was liable for a fine of 100 pounds. *Id.* at *451.

\(^{271}\) 262 U.S. 390 (1923).

\(^{272}\) See 1 *BLACKSTONE* *at* *428* (noting that, at common law, "every man might use what trade he pleased"). Blackstone noted that some statutes limited certain professions to those who had apprenticed in them, but stated that these statutes were strictly construed. *Id.*

\(^{273}\) 165 U.S. 578 (1897).

\(^{274}\) See 1 *BLACKSTONE* *at* *138* (detailing the right to property).

\(^{275}\) 314 U.S. 160 (1941).

\(^{276}\) 1 *BLACKSTONE* *at* *134-35* (defining personal liberty in part as the right of "moving one's person to whatsoever place one's own inclination may direct").


\(^{278}\) See 4 *BLACKSTONE* *at* *189-90* (explaining the crime of "self-murder").
the "preservation of a man's health from such practices as may prejudice or annoy it."  

Although it may seem odd to speak of refusal of treatment in terms of "preservation of health," the point to remember is that the right is a personal one, and should be judged from the perspective of the one asserting it.

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

A definitive answer, however, require an examination of the customs and traditions of the nation regarding state regulation of the marital relationship. Such an examination provides more evidence in support of the right. As Justice Harlan noted in his dissent in the earlier case concerning a similar statute, *Poe v. Ullman*, enforcement of the prohibition would require the State to invade the privacy of the marital relationship, a relationship recognized as “an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in

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279 See id. at *132-34.
280 381 U.S. 479 (1965).
281 See 1 BLACKSTONE at *432-445.
282 Id. at *442.
283 Id. at *443-44.
284 See 4 BLACKSTONE at *223 (noting that "the law of England has so particular and tender a regard for the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity.").
every age it has fostered and protected.” Harlan noted that Connecticut’s statute was an “utter novelty,” in that no other State had ever chosen to forbid the use of contraceptives by married persons through a criminal statute. Indeed, Connecticut itself had apparently enforced its statute only one time in 82 years, a development which led the Court to dismiss the declaratory judgment action filed in Poe for lack of justiciability. Further, practice in America has extended the traditional common law bias in favor of private conduct in the home.

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

Harder questions arise, however, in cases where the common law baseline is in fact not favorable to the existence of the right. An example of such a case is the situation in Lawrence v. Texas, wherein the court found that same-sex couples had a liberty interest in private sexual conduct. There is no question that, at common law,

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285 367 U.S. at 553-53 (Harlan, J., dissenting).
286 Poe, 367 U.S. at 554.
287 Id. at 501, 507-09. In making the determination that fear of enforcement was unfounded, the Court noted that “[t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the books bespeaks more than just prosecutorial paralysis.”
288 See id. at 549-553 (Harlan, J., dissenting) (detailing protections provided for the home by the Constitution).
289 Whether that right to possess contraception could extend outside the marital relationship, is a different question that requires a different analysis. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court held that a law prohibiting the distribution of contraceptives to an unmarried person. However, that case was decided under the Equal Protection Clause on a rational basis standard.
291 539 U.S. at 578-79.
homosexual conduct was considered a crime that government was free to prohibit.\footnote{292}{See 4 BLACKSTONE at *215-216. Blackstone refers to homosexual conduct as "crime against nature." Id. at 215.} Further, throughout America’s history, states have passed laws prohibiting this conduct.\footnote{293}{See Brief Amicus Curiae of the Center for the Original Intent of the Constitution for the Respondent in Lawrence v. Texas, 11-12.} On the other hand, there is a good deal of evidence suggesting that such prohibitions were rarely enforced as they applied to private conduct.\footnote{294}{See Brief Amicus Curiae of Professors of History for the Petitioner in Lawrence v. Texas, 7-9; Brief Amicus Curiae of Law Professors for the Petitioner in Lawrence v. Texas, 24-25; Brief Amicus Curiae of the American Civil Liberties Union and ACLU of Texas for the Petitioners in Lawrence v. Texas, 15-23.} In fact, the statute at issue in \textit{Lawrence} had never been enforced, and a previous case in equity challenging it had been dismissed by the Texas Supreme Court on the basis that the appellant had not demonstrated a threat of imminent enforcement.\footnote{295}{See State v. Morales, 869 S.W. 2d 941, 942 (Tex. 1994).}

\textit{Lawrence} represents a constitutionally close case, one that pits a tradition of regulation, although not necessarily enforcement against a tradition of non-interference in private relationships. Although \textit{Lawrence} shares some similarities with \textit{Griswold}, in that the class of statutes regulating the conduct at issue affect private conduct in the home and were sparsely, if ever, enforced, there are significant differences. Common law had very little to say on the matter of possession of contraception.\footnote{296}{See supra note 280 to 284 and accompanying text.} The same cannot be said regarding homosexual relations, which were extensively prohibited.\footnote{297}{See supra note 292 and accompanying text.} Thus, the baseline is different. Further, unlike the situation in \textit{Griswold}, the strong traditional common law bias in favor of marital relations does not apply to same-sex relations. Therefore, under the common law methodology I propose, in order to establish an unenumerated right to private relations broad enough to encompass same-sex relations, the petitioners would have had to establish that the tradition of respect for private relations within the home had

\footnote{292}{See 4 BLACKSTONE at *215-216. Blackstone refers to homosexual conduct as "crime against nature." Id. at 215.}
\footnote{293}{See Brief Amicus Curiae of the Center for the Original Intent of the Constitution for the Respondent in Lawrence v. Texas, 11-12.}
\footnote{294}{See Brief Amicus Curiae of Professors of History for the Petitioner in Lawrence v. Texas, 7-9; Brief Amicus Curiae of Law Professors for the Petitioner in Lawrence v. Texas, 24-25; Brief Amicus Curiae of the American Civil Liberties Union and ACLU of Texas for the Petitioners in Lawrence v. Texas, 15-23.}
\footnote{295}{See State v. Morales, 869 S.W. 2d 941, 942 (Tex. 1994).}
\footnote{296}{See supra note 280 to 284 and accompanying text.}
\footnote{297}{See supra note 292 and accompanying text.}
evolved in the traditions of American society, such that the long-standing tradition of regulation at common-law was not longer truly the tradition and custom of the nation. Given the evidence relating to the non-enforcement of anti-sodomy statutes to private parties, such a showing would still be possible, but it certainly would be a near-run thing.

A more extreme example is the right to abortion recognized in *Roe v. Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The baseline for the right to abortion is clear. Blackstone's version of the common law held that abortion after the infant was able to stir within the womb, usually thought to be at 16 to 18 weeks of pregnancy, but possibly as soon as eight to ten weeks, was a violation of the right to life of the child. Although Justice Blackmun's majority opinion in *Roe* did attempt to infuse some doubt into the status of the common law crime of abortion, stating at one point that research into common law abortion "makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus," his opinion was based on faulty history and was quickly debunked by scholars.

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300 See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORD. L. REV. 807, 823 (1973). The confusion stems from the different terminology employed by Coke and Blackstone. Coke used the term "quick with child," which has been interpreted to mean "quickening," which occurs when the mother can feel the child move. However, Blackstone uses both this term and "when the infant is able to stir," which occurs sometime earlier. See *Id.*
301 See 1 BLACKSTONE at *129*. Blackstone stated that the right to life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb. . . If a woman is quick with child, and by a potion or otherwise, killeth it in her womb . . this though not murder, was by the ancient law homicide or manslaughter." However, he noted that "the modern law doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor." *Id.* The criminalization of abortion extended to those who aided and abetted an abortion attempt. See 4 BLACKSTONE at *215.*
302 See 410 U.S. at 132-36 (discussing abortion at common law).
303 See, e.g. Byrn, *supra* note 300 at 815-827 (pointing out the historical errors in *Roe*'s analysis of the common law on abortion).
Moreover, in the years following the Framing the majority of the states, who had previously followed the common law, enacted statutory prohibitions on abortion. Many of these statutes criminalized even abortions occurring before quickening. A large number of antiabortion statutes continued in effect until the Court's decision in Roe. Further, post-Roe, states have continued to pass legislation to regulate abortion to the extent allowed by the Supreme Court's decisions. Thus, the common law baseline, combined with American tradition allowing such regulation, both pre-and post-Roe, strongly suggests that there is no customary right to an abortion, at least prior to quickening.

The status of the right to an abortion pre-quickening, however, is a different matter. The time when an infant could stir in the mother's womb marked the time at common law when a fetus, at least according to Blackstone, was deemed to have a "right to life." Prior to that time, it seems that the fetus might be considered to be part of the mother, in which case Blackstone's right to personal security might give the mother the right to abort. This is by no means clear, however. Certainly, under the common law, abortion was not regulated before quickening. Whether this is because of the problems related to actually proving pregnancy pre-quickening, or because of the distinction

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304 See Reva Siegal, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 282 (1992). Siegal argues that the statutory prohibitions were part of a campaign by physicians based partially on the idea that abortion at any stage was an unwarranted destruction of human life. Id.
305 Id.
306 See Roe, 410 U.S. at 118 (chronicling statutes in effect at the time), 175-76 (Rehnquist, J., dissenting) (chronicling the statutes enacted before the adoption of the Fourteenth Amendment that remained in effect unchanged at the time of Roe).
307 See Janessa L. Bernstein, The Underground Railroad to Reproductive Freedom: Restrictive Abortion Laws and the Resulting Backlash, 73 BROOKLYN L. REV. 1463, 1463-65 (2008) (noting that "Since almost immediately after the United States Supreme Court's landmark decision in Roe v. Wade, state legislatures have continued to impose, and the Court has consistently upheld, restrictions on a woman's ability to obtain an abortion").
308 1 BLACKSTONE at *129.
309 See id. at *131.
between when the right to life actually began is a subject of some controversy.\footnote{Compare, e.g. Byrn, supra note 300, at 824 (arguing that the quickening standard was established for evidentiary reasons) with Martin J. Buss, The Beginning of Human Life as an Ethical Problem, 47 J. RELIGION 244, 245 (1967) (arguing that English common law "located the beginning of the human soul at quickening").} Adding to the controversy is the tradition in pre-\textit{Roe} American law of attempting to regulate abortion pre-quickening.\footnote{See supra notes 304-306 and accompanying text (noting the history of abortion regulation in the States pre-\textit{Roe}).} From a historical standpoint, all of these things need to be taken into account in order to determine whether and under what circumstances an abortion right exists. It is difficult to see how a court could make such a determination without addressing the thorny legal issue of when the right to life, from a legal standpoint, exists.

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

\textbf{B. . . . And Some Criticisms}

There are a number of criticisms that can be leveled against the method that I have set out. On the one hand, it can be argued that it does not sufficiently constrain judicial discretion. One of the supposed attractive qualities of the historical analysis of rights, after all, is that it will meaningfully constrain judges to the law rather than allowing them the discretion to enact their own moral or political judgments.\footnote{See \textsc{Daniel A. Farber and Suzanna Sherry}, \textsc{Desperately Seeking Certainty} 10-14, 34-36 (2002) (summarizing the originalist viewpoints of Robert Bork, Frank Easterbrook, Steven Calabresi, Gary Lawson and Justice Scalia).} If there is room in a historical theory for judges to insert such judgments, then this attractiveness is diminished.
It is admittedly true that there is room in a common law-based historical theory for judicial discretion. This, however, is historically accurate, in that the common law expected judges to make such judgments in discovering the law. Decisions that were incorrect could be worked out of the law in the fullness of time. Whether or not this is appealing as a construct is beside the point. It is simply not historical to try to use history to constrain judges in a way in which they were not historically constrained. If we accept the historical basis for rights, we have to accept the method as well.

Further, there is less discretion in the common law-based theory than might be supposed. Because it requires judges to start with a common law baseline, and then to address any evolution of tradition regarding the purported right, judges are not free to decide cases based on their own moral or philosophical leanings. Rather, a large part of the judicial discretion instead comes in determining the "level of abstraction" at which the right should be viewed. This level of abstraction problem has been one that has continually vexed courts, and is a major problem for almost all historical theories of rights that rely on tradition. To a certain extent, however, reliance on Blackstone as a common-law baseline helps to ameliorate this problem. Where the activity is expressly regulated by Blackstone's interpretation of the common law, as is assisted suicide, there is no level of abstraction problem; rather, the level is provided by the baseline. The level of abstraction problem only comes in where, as in the case of the right to refuse medication or nourishment, Blackstone is silent. At that point, a judge would have to make a

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313 See McConnell, supra note 265, at 15-17 (discussing Corfield and Justice Harlan's Poe concurrence as being based on historical rather than moral or philosophical judgments).
314 Compare, e.g. Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (characterizing the right at issue as the right "of homosexuals to engage in sodomy") with Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) (characterizing the right at issue at one point as the liberty of adult persons in deciding how to conduct their private lives in matters pertaining to sex). See also Chemerinsky, supra note 10, at 12 (discussing the level of abstraction problem in looking at tradition).
decision regarding the scope of the right of personal security. However, this is the type of question that judges are qualified to make, and the way is not without guideposts.

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

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

The method is also vulnerable to charges that it is not a "desirable" interpretation of the Constitution. However, desirability is beside the point. I make no claim that a method based on tradition is one that will result in decisions that are the "best" public policy, or even that align with my personal views regarding what a constitution should

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315 See, e.g. Niles, supra note 11; GERBER, supra note 11; BARNETT, supra note 13.
316 See supra notes 83 to 94 and accompanying text. On the other hand, the method that I describe is much more expansive with regard to rights than those historical methods suggested by originalists such as Justice Scalia, who would apply a restrictive test to the evolution of traditions. See FARBER AND SHERRY, supra note 312 at 52 (discussing Scalia's narrow interpretation of tradition).
317 See Chemerinsky, supra note 10, at 12 (arguing that the focus on tradition confuses descriptive and normative inquiries).
Rather, my claim is simply that starting from a common law baseline, using Blackstone, and then surveying tradition in the time since gets close to what the general understanding and philosophy the people at the time of the framing of the Constitution and the adoption of the Bill of Rights had regarding their rights. And from a historical standpoint, that is what matters.

**CONCLUSION**

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

However, accepting Blackstone as the common law baseline for rights only goes part of the way. Just as Americans at the time of the Framing were heirs to the common law understanding regarding what rights existed, they were also heirs to the common law

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318 For instance, I tend to favor individual privacy rights to a greater degree than does my proposed method.
understanding that the full extent of their rights had not been discovered. Although they did not and could not know the full extent of their rights, nevertheless, they believed that courts would adjudicate the boundary between the power of the government and the rights of the individual, and that tradition would form the basis of such an adjudication.

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