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## Natural Rights, Positivism and the Ninth Amendment: A Response to McAfee

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# NATURAL RIGHTS, POSITIVISM AND THE NINTH AMENDMENT: A RESPONSE TO McAFFEE

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In modern constitutional law and theory, no issue is more fundamental — or controversial — than that of the existence of constitutional rights not expressly stated in the text of the Constitution. This issue is central, of course, to the ongoing debate over whether the Constitution guarantees a broad right of privacy.<sup>1</sup> For the most part, the controversy over such rights has focused on the doctrine of substantive due process. During the last twenty-five years, however, there has been growing interest in the implications of the Ninth Amendment for the existence of unwritten constitutional rights.

The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>2</sup> In recent years, a number of scholars have argued that this amendment reflects concepts of natural rights that were prevalent during the post-Revolutionary period.<sup>3</sup> On this reading, the “rights . . . retained by the people” refers to the natural rights that individuals retain when they enter into civil society and establish government. Understood in this manner, the Amendment points to a body of unenumerated rights that limit governmental power in the same way as the rights expressly stated in the Constitution.

In his contribution to this Symposium, Thomas B. McAfee challenges this view of the original understanding, and argues for

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1. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

2. U.S. CONST. amend. IX.

3. See, e.g., Randy E. Barnett, *James Madison's Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE* (Barnett ed. 1989); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *TOWARD A MORE PERFECT UNION* 145 (N. York ed., 1988); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

what he calls a positivist interpretation of the Ninth Amendment.<sup>4</sup> Elaborating the view that he advanced in an important recent article,<sup>5</sup> McAfee argues that the "rights . . . retained by the people" refers to the rights that the people retained when they adopted the Federal Constitution.

McAfee's argument may be summarized as follows. According to American constitutional theory during the late eighteenth century, all authority originally resides in the people. When the people adopt a constitution granting powers to government, the powers that are retained constitute the rights of the people.<sup>6</sup> During the debate on ratification of the Federal Constitution, the Antifederalists demanded that the document be amended to expressly reserve the people's fundamental rights, in the same way that those rights were declared in many of the state constitutions.

In response to these demands, James Wilson, followed by other Federalists, drew a basic distinction between the state and federal constitutions. Because the former established governments with general legislative authority, they were subject to the presumption that all powers not expressly reserved were granted to the government. The Federal Constitution, by contrast, delegated only particular, enumerated powers to Congress, and so the presumption was that all powers not expressly granted were reserved by the people. Accordingly, the Federalists contended, no bill of rights was necessary in the Federal Constitution, since the people's rights were effectively reserved by the scheme of enumerated powers. Indeed, a bill of rights might be dangerous, because it might imply that the national government had been granted all powers not expressly reserved in the bill of rights,

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4. Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267 (1992) (hereinafter cited as McAfee, *Social Contract*).

5. Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990) (hereinafter cited as McAfee, *Original Meaning*).

6. The framers' conception of the reciprocal definition of constitutional rights and powers — according to which powers were understood as the rights delegated to government by the people, and rights as the powers that they retained — reflected a more general theoretical conception of the relationship between liberty and power. In eighteenth-century thought, liberty was understood as power — the power to direct one's own actions. When individuals entered civil society, they ceded some of their liberty or power to the state in order to protect the rest. The liberty that they retained constituted their civil liberty or civil rights. On the eighteenth-century conception of liberty and power, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 21-25 (1969); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 526-30 (1991).

thereby undermining the scheme of enumerated powers as a mechanism for safeguarding liberty.

Of course, the demands for a bill of rights proved irresistible. Nonetheless, according to McAfee, the Ninth Amendment was added in order to guard against the danger feared by the Federalists — that the adoption of a bill of rights would effectively reverse the presumption that everything not granted was retained. Under McAfee's view, then, the unenumerated rights referred to in the Amendment are not a body of rights with independent content, such as natural rights; instead, they are the residuum of rights retained by the people when they granted particular powers to Congress. It follows that these unenumerated rights do not impose any independent limitations on the powers of the federal government. Whether a government action violates unenumerated rights must be determined solely by reference to the powers granted to the federal government, not by reference to any extratextual source of rights. This view is positivist in the sense that it rejects any recourse to natural rights and looks solely to the Constitution's written provisions defining the powers of government.

In this Comment, I shall not attempt to fully explore McAfee's powerful and complex argument. Instead, I shall focus on what seems to me the crucial issue with respect to his positivist interpretation of the Ninth Amendment: whether, under the original understanding, unenumerated rights are to be identified solely by reference to the Constitution's positive grants of power to Congress.<sup>7</sup> I shall argue on the contrary that these rights were to be determined primarily by reference to an independent source of rights, natural rights theory. In particular, I shall suggest, first, that it is unlikely that the drafters

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7. Debate over the positivist reading of the Ninth Amendment has often focused on whether unenumerated rights impose affirmative limitations that "trump" delegated powers, or whether unenumerated rights and delegated powers are reciprocal, with rights defined as the powers not granted, and powers defined as the rights delegated to the government. When the issue is framed in this way, McAfee can make a powerful case that the original understanding supports the reciprocal view. See, e.g., Letter from James Madison to George Washington (Dec. 5, 1789), in 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1190 (1971) (quoted *infra* at text accompanying note 16); see also *supra* note 6 (discussing eighteenth-century conception of liberty and power). To my mind, however, this is not the decisive issue. As I argue below, even if McAfee is correct that rights and powers were understood to be reciprocal, the positivist position is untenable if unenumerated rights had content that was capable of being determined independently (e.g., by reference to natural rights doctrine), and not merely by negative implication from the power-granting provisions of the Constitution. I shall refer to this as the "independent rights" view of the Ninth Amendment, in contrast to McAfee's "residual rights" view.

meant to define unenumerated rights solely in residual terms; second, that the case for a natural rights interpretation is stronger than McAfee acknowledges; and, finally, that even if the residual rights view is correct, reference to natural rights principles might nonetheless play an important role in determining the scope of congressional powers.

### THE RESIDUAL RIGHTS INTERPRETATION

Within the framework of Federalist logic, McAfee's interpretation of the Ninth Amendment seems compelling. But the Federalist argument was directed toward the rejection of a bill of rights altogether. Those who supported a bill of rights were not persuaded that the constitutional scheme of enumerated powers provided adequate security for rights.<sup>8</sup> The basic point, as Madison expressed it, was that "all power is subject to abuse."<sup>9</sup> A bill of rights was therefore necessary to guard against abuse of the powers submitted to the federal government.<sup>10</sup> Moreover, supporters questioned whether federal powers were defined with sufficient precision to impose effective limits.<sup>11</sup> Finally, as Madison explained, under the Necessary and Proper Clause Congress had discretion as to the means required to accomplish the ends committed to it, and might abuse this discretion by adopting measures that infringed fundamental rights. For example, in order to collect the federal revenue, Congress might authorize the use of general warrants, in violation of the right to be free from unreasonable searches and seizures.<sup>12</sup>

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8. The supporters of a bill of rights do not appear to have taken the Federalist arguments as to necessity or the dangerousness of a bill of rights very seriously. For example, in a letter to Madison, Jefferson remarked that Wilson's argument that rights were effectively reserved by the scheme of enumerated powers "might do for the Audience to whom it was addressed [a popular meeting], but is surely gratis dictum, opposed by strong inferences from the body of the instrument. . . ." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 SCHWARTZ, *supra* note 7, at 606-07. Similarly, in his speech explaining the Bill of Rights to the House of Representatives, Madison observed that many Federalists had contended that a bill of rights was "not only unnecessary, but even improper, nay, I believe some have gone so far as to think it even dangerous," and concluded, "Some policy has been made use of perhaps by gentlemen on both sides of the question. . . ." Speech of James Madison (June 8, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONGRESS* 80 (Helen E. Veit et al. eds., 1991). This makes it doubtful that the Ninth Amendment was designed to meet these Federalist concerns.

9. Speech of James Madison (June 8, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 8, at 79.

10. See, e.g., *id.*; Letter from Thomas Jefferson to James Madison (March 15, 1789), in 1 SCHWARTZ, *supra* note 7, at 621.

11. See McAfee, *Original Meaning*, *supra* note 5, at 1243-44.

12. Speech of James Madison (June 8, 1789), in *CREATING THE BILL OF RIGHTS*, *supra* note 8, at 82-83.

The adoption of the Bill of Rights thus implied a rejection of the Federalist position that rights were adequately secured by the structure of enumerated powers. Instead of defining rights residually by reference to powers, the basic approach of the Bill of Rights was to limit powers by reference to rights.<sup>13</sup> When the Ninth Amendment is viewed within the context of the Bill of Rights as a whole, rather than within the framework of Federalist logic, it seems probable that that Amendment was intended to follow the same approach — that is, to limit the powers of government by reference to the “other[ ] [rights] retained by the people.”

This interpretation receives some support from a letter written by Madison to President Washington during the debate over ratification of the Bill of Rights. Some early proposals for what became the Ninth Amendment had provided that the enumeration of certain rights should not be construed to expand the powers of the federal government.<sup>14</sup> In his draft of the Amendment, Madison had added that the enumeration of rights also should not be construed “to diminish the just importance of other rights retained by the people.”<sup>15</sup> In the final version of the Amendment, the reference to the expansion of powers was deleted, and only the reference to rights was retained. In late 1789, after learning that some objections had been raised in Virginia to phrasing the Amendment in terms of rights rather than powers, Madison wrote to Washington:

[T]he distinction . . . appears to me . . . altogether fanciful. If a line can be drawn between the powers granted and the rights retained,

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13. As Madison explained, “the great object in view [in adopting a bill of rights] is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.” *Id.* at 81.

14. For example, the seventeenth amendment proposed by the Virginia Ratifying Convention would have provided:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 661 (Jonathan Elliot ed., 2d ed. 1863) [hereinafter ELLIOT’S DEBATES].

15. Madison’s draft of the provision that became the Ninth Amendment declared:

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

MADISON RESOLUTION (June 8, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 8, at 13.

it would seem to be the same thing, whether the latter be secured, by declaring that they shall [not be violated], or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.<sup>16</sup>

This passage strongly supports the view that rights and powers were understood to be reciprocal.<sup>17</sup> Madison maintains that there is no difference in principle between defining rights with reference to powers, and limiting powers by reference to rights. Contrary to the residual rights view, however, he clearly assumes that the Ninth Amendment in its final form takes the latter approach.

### THE NATURAL RIGHTS INTERPRETATION

Of course, the Ninth Amendment could limit powers by reference to rights only if the "other[ ] [rights] retained by the people" derive from some independent source, and are not definable merely as the residuum of powers not granted to Congress. Unlike McAfee, I believe that a strong case can be made that these rights were understood to derive from the natural rights doctrine. Some crucial evidence for this view comes from Madison's speech explaining the proposed Bill of Rights in the House of Representatives. The object of the Bill of Rights, he stated, was to "expressly declare the great rights of mankind secured under this constitution."<sup>18</sup> Later in the speech, he elaborated on the contents of bills of rights, and distinguished five kinds of provisions (all of which, except for the first, he proposed to incorporate into the Federal Constitution):

[1] [I]n some instances, [bill of rights] do no more than state the perfect equality of mankind. . . . [2] In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. [3] In other instances, they specify *those rights which are retained when particular powers are given up to be exercised by the Legislature*. [4] In other instances, they specify positive rights, which may seem to result from the nature of the social compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the preexistent rights of

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16. Letter from James Madison to George Washington (Dec. 5, 1789), in 2 SCHWARTZ, *supra* note 7, at 1190.

17. See *supra* note 6 and accompanying text.

18. Speech of James Madison (June 8, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 8, at 78.

nature. [5] In other instances, they lay down dogmatic maxims with respect to the construction of the Government; declaring that the legislative, executive, and judicial branches shall be kept separate and distinct. Perhaps the best way of securing this in practice is, to provide such checks as will prevent the encroachment of one upon the other.<sup>19</sup>

At first glance, the italicized phrase in Madison's speech seems to support McAfee's interpretation of the language "rights . . . retained by the people" in the Ninth Amendment. In context, however, it is clear that in the third and fourth categories, Madison is drawing a distinction between natural rights, on one hand, and positive rights deriving from the social compact, on the other.<sup>20</sup> Madison's speech thus contains a clear instance of using the term "those rights which are retained" to refer to natural rights. Moreover, Madison's use of this paraphrase strongly indicates that he believed that his auditors would understand the phrase in the same sense. Taken together with other similar evidence of the use of "retained rights" language in this sense,<sup>21</sup> this seems to strongly support the claim that the "other[ ] [rights] retained by the people" were understood to be natural rights.

In the quoted passage, Madison refers to natural rights as "those rights which are retained when particular powers are given up to be exercised by the Legislature." This highlights a further point: that

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19. *Id.* at 81 (paragraphing omitted and emphasis added). Among Madison's proposed amendments were declarations that all power was derived from the people and should be exercised for their benefit, as well as a provision articulating the doctrine of separation of powers. These provisions, of course, were not included in the Bill of Rights as ultimately adopted.

20. This point is confirmed by Madison's notes for the speech, which lists the following under the heading "contents of Bill of Rhts.":

1. assertion of primitive equality & c.
2. [ditto] of rights exerted in formg. of Govts.
3. natural rights. retained as speach [illegible].
4. positive rights resultg. as trial by jury.
5. Doctrinl. artics vs. Depts. distinct electn.
6. moral precepts for the administrn, & natl. character — as justice — economy & c.

Madison's Notes for Amendments Speech (1789), in 2 SCHWARTZ, *supra* note 7, at 1042. Except for the last point, which Madison omitted, these notes clearly set forth the structure of his discussion of the contents of bills of rights in his House speech.

21. For example, Roger Sherman's draft of the Bill of Rights contained a provision which declared that "[t]he people have certain natural rights which are retained by them when they enter into Society." CREATING THE BILL OF RIGHTS, *supra* note 8, at 267 (Roger Sherman's Proposed Committee Draft, July 21-28, 1789). For differing views of the light shed by Sherman's draft on the meaning of the Ninth Amendment, see Barnett, *supra* note 3, at 7 n.16; McAfee, *Social Contract*, *supra* note 4, at text accompanying notes 90-108.



there is no necessary inconsistency between the view that holds that the Ninth Amendment refers to the natural rights that individuals retain when they enter into civil society, and McAfee's view that it refers to the rights retained by the sovereign people when they delegate powers to a government.<sup>22</sup> Americans during this period often drew no clear distinction between the formation of a social contract and the establishment of a particular governmental order. Instead, the early American constitutions were often regarded as themselves social contracts.<sup>23</sup> Consequently, the rights retained in entering society and those retained when granting legislative powers were the same rights.

On the natural rights interpretation of the Ninth Amendment, these retained rights need not be inferred from the delegated powers, but may be ascertained independently. One way to make this point is by means of the following thought experiment. In late eighteenth-century America, it was universally held that individuals had an inalienable natural right to be secure against unjustified invasion of their persons and property, whether by the government or by private parties.<sup>24</sup> Suppose (to adapt Madison's example) that the right to be secure against unreasonable searches and seizures had been overlooked, and hence omitted, when the Bill of Rights was drafted. Suppose further that Congress subsequently considered legislation authorizing the use of general warrants to collect the federal revenue, and that this legislation was objected to in Congress, or challenged in court, on the ground that it infringed the "other[ ] [rights] retained by the people" that are referred to in the Ninth Amendment. It seems difficult to imagine that consideration of this objection would be confined to whether the power to authorize general warrants was within the scope of the constitutional grant of power to raise revenue, coupled with the Necessary and Proper Clause, and would not extend to whether the legislation would violate one of the natural rights retained by the people. In other words, it seems probable that when legislation was objected to under the Ninth Amendment, the inquiry

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22. For further discussion of this point from a somewhat different perspective, see Philip A. Hamburger, *Natural Rights and Positive Law: A Comment on Professor McAfee's Paper*, 16 S. Ill. U. L.J. 307 (1992).

23. See Wood, *supra* note 6, at 288-90. The Massachusetts Constitution of 1780, for example, expressly characterized itself as a "social compact." MASS. CONST. of 1780, preamble, reprinted in 5 SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS 92-93 (William F. Swindler ed., 1973-79). The resolution by which Massachusetts ratified the Federal Constitution referred to it in the same terms. 2 ELLIOT'S DEBATES *supra* note 14, at 176.

24. For a classic (if somewhat later) statement of this position, see 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*1-37 (1826).

would resemble that engaged in by the framers and ratifiers of the Bill of Rights when they considered whether each proposed amendment was necessary to secure a right retained by the people.

#### USING NATURAL RIGHTS TO INTERPRET THE SCOPE OF CONGRESSIONAL POWERS

Finally, even if McAfee is correct that the “other[ ] [rights] retained by the people” were to be defined by reference to delegated powers, it does not follow that natural rights principles would have no role to play in cases implicating the Ninth Amendment. Although on this view natural rights would not constitute a barrier against the exercise of governmental powers, they might nonetheless have an important role in determining the scope of those powers.

A classic articulation of this approach may be found in Justice Story’s opinion in *Wilkinson v. Leland*.<sup>25</sup> Story wrote:

The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.<sup>26</sup>

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25. 27 U.S. (2 Pet.) 627 (1829).

26. *Id.* at 657. Similarly, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Chase wrote:

I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state. . . . The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. There are acts which the federal, or state Legislature cannot do, without exceeding their authority. . . . A law that punished a citizen for an innocent action . . .; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B: *it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it.*

*Id.* at 387-88 (Chase, J.) (emphasis changed).

The approach articulated by Chase and Story had deep roots in the natural rights tradition. It reflected what Richard Tuck has called the principle of “interpretive charity.” As Tuck has shown, one important line of natural rights thought — which ran from Grotius through the English Commonwealthmen and Whigs — held that although the people might have the power

In the general warrants hypothetical posed above, Justice Story's approach would allow an appeal to natural rights principles in order to argue that the general grant of power to pass revenue laws should not be interpreted to authorize Congress to infringe the natural right to security of person and property through the use of general warrants. Again, it is difficult to believe that, under the original understanding of the Ninth Amendment, such an argument would be impermissible, and that the issue must be decided purely by a positivist construction of the grant itself.<sup>27</sup>

McAfee argues against the natural rights view on the ground that both Antifederalists and Federalists subscribed to the positivist assumption that the people forfeited any natural right that they did not secure within the written constitutional order. Whether or not this is true, it misses the mark. After the adoption of the Bill of Rights, both sides believed that all of the people's essential rights were secured under the Federal Constitution, including not only the rights contained in the first eight amendments, but also the unenumerated rights referred to in the Ninth. The difference between the independent-rights and residual-rights views relates to the *mechanism* by which unwritten rights were secured — whether by recognizing an independent body of unenumerated rights, or by reaffirming the constitutional scheme of enumerated powers. Whatever the method by which they were protected, however, it seems clear that the *content* of these rights derived primarily from natural rights doctrine. Accordingly, these rights were subject to debate on their own terms, and not solely by reference to positive grants of governmental powers.

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wholly to alienate their natural rights to the government, they should not be presumed to have done so. See RICHARD TUCK, *NATURAL RIGHTS THEORIES* 79-81, 143, 149-56 (1979). Similarly, Locke argued against arbitrary power on the ground that no rational creature could be supposed to have consented to such power. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, §§ 131, 137, in *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

It should be noted that *Wilkinson* and *Calder* did not involve the Ninth Amendment, but rather challenges to state legislation under the fundamental law of the state, or under other provisions of the Federal Constitution. As a part of the federal Bill of Rights, the Ninth Amendment was not regarded as applicable to the states.

27. McAfee might respond that, under his positivist approach, the scope of the congressional power would be determined by reference not only to the language of the provision, but also to other factors such as the original understanding, and that the original understanding might be that general warrants were not contemplated. The basis of this understanding, however, would be that general warrants violated natural or traditional legal rights. Thus, such a response would simply allow such rights in through the back door.