

REPUBLICANISM AND NATURAL RIGHTS AT THE FOUNDING

OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE. By Randy E. Barnett.¹ New York: HarperCollins Publishers. 2016. Pp. xiv + 283. \$26.99 (cloth).

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Americans mostly take constitutional legitimacy for granted, leaving the Supreme Court and its illustrious bar to do their work without concern for political philosophy. A great strength of Randy Barnett's scholarship, including his latest book, *Our Republican Constitution*,³ is his sustained effort to dislodge that philosophical complacency. Barnett calls on us to consider *why* our Constitution is legitimate before we decide *how* it should be interpreted.

In this sense, Barnett brings us closer to an eighteenth-century intellectual world commonly known as "the Founding." Constitutionalism at the Founding was intimately tied to questions of political philosophy, based in part on the idea of "natural rights." Constitutional historians have disparaged the importance of natural rights,⁴ but Barnett deserves credit for

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3. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

4. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 88–95 (1986); see also Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 629–35 (1982) (surveying how a generation of "republican" scholarship downplayed the influence of Lockean ideas at the Founding).

pushing back. Natural rights featured prominently in Founding-Era constitutional thought.⁵

But what were natural rights? Today we tend to think about natural rights as non-positivist claims to limits on governmental authority—typically claims derived from religion, morality, or logic. The claims might be legal (e.g., “natural rights are enforceable in court”), or they might simply be philosophical (e.g., “a government that disrespects natural rights is unjust or illegitimate”). But these “rights,” by their very definition, exist independent of governmental control. Indeed, that is what makes them “natural.”

Yet language often shifts over time, and it might turn out that “natural rights” carried a very different meaning over two centuries ago. As historian Jonathan Gienapp cautions, “the first key to understanding the American Founding is appreciating that it is a foreign world.”⁶

This Essay sketches an alternative—and perhaps quite unfamiliar—view of Founding-Era natural rights, their relationship to governmental authority, and their enforceability.⁷ With the exception of certain “rights of the mind,”⁸ natural rights were not really “rights” at all, in the sense of being determinate legal privileges or immunities. Rather, embracing natural rights meant embracing a *mode of reasoning*. And the crux of the idea—in stark contrast to the modern notion of “natural rights”—was to create a representative government that best served the public good.

5. See p. 67 (collecting invocations of natural rights in various state declarations of rights).

6. Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935, 942 (2015). Gienapp attributes this insight to the work of others, including Bernard Bailyn, Quentin Skinner, and Gordon Wood. *Id.* at 943, 945.

7. This Essay describes a historical system of thought based on the stated political philosophy of American political elites in the late eighteenth century. References to “the Founders,” their “goals,” and so forth should be read accordingly. This Essay does not defend the claim that this system of thought was universally accepted at the Founding, nor that it ought to be incorporated into modern constitutional interpretation. This Essay thus reacts to Barnett’s portrait of the Founders, but it does not engage in the same genre of historical writing. See Jack M. Balkin, *Which Republican Constitution?*, 32 *CONST. COMMENT.* 31, 38 (2016).

8. NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 174 (Rutland, J. Lyon 1793). This Essay largely ignores these rights, which I will address in future work.

Individual liberty mattered, of course, and the Framers indeed wanted to insulate politics from the whims of capricious majorities. But the overriding goal of their efforts was to improve representation, not lessen it, and to ensure that the general welfare was the government's paramount concern. The Founding-Era idea of "natural rights" thus called for judicial deference to legislative judgments, and it favored *broader* governmental power just as much as limits to that power. In short, natural rights called for good government, not necessarily less government.

SOCIAL-CONTRACT THEORY

The Founders spoke about their "natural rights" with a familiarity that Americans have long since lost. Recovering that concept requires going back to its origins in social-contract theory.

Social-contract theory, which underpinned most of Founding-Era constitutionalism,⁹ was organized around different stages of political development. The theory began by imagining what things would be like without a government—a condition known as a "state of nature." Properly understood, this inquiry was *hypothetical* rather than historical.¹⁰ The idea of a state of nature was "abstract," James Otis explained in his famous *Rights of the British Colonies Asserted and Proved*, acknowledging that "men come into the world and into society at the same instant."¹¹ Yet that idea remained useful, Otis insisted, because "the natural and original rights of each individual may be illustrated and explained in this way better than in any other."¹²

9. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* 112 (1991); Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as Conservative Instrument*, 22 WM. & MARY Q. 375 (1965).

10. See John Phillip Reid, *Law and History*, 27 LOYOLA L.A. L. REV. 193, 213 (1993) ("The social contract was a legal fiction explaining the stipulations under which individuals left the state of nature and created societies."); see, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* *47 ("This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted."); James Madison, *Essay on Sovereignty* (1835), in 9 THE WRITINGS OF JAMES MADISON 568, 570 (Gaillard Hunt ed., 1910) (describing the "hypothesis" that social-contract theory "supposes"); 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 14 (Windham, John Byrne 1795) ("I doubt whether a state of nature ever did, or can exist; but I can imagine such a state, and thence infer the advantages derived from a union in society.").

11. JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* 28 (Boston, Edes & Gill 1764).

12. *Id.*

In a state of nature, individuals were thought to have certain freedoms or liberties—commonly known as “natural rights.”¹³ By definition, these “rights” existed without reference to governmental authority. They were simply freedoms that individuals enjoyed vis-à-vis each other, subject only to the confines of “natural law”—roughly defined as the requirements of reason, justice, and morality.¹⁴ As James Wilson explained, “natural liberty” was the “right” of every person to act “for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick interests do not demand his labours.”¹⁵

Social-contract theory then hypothesized that individuals, recognizing the benefits of collective action, would “join in one body . . . to manage, with their joint powers and wills, whatever should regard their common preservation, security, and happiness.”¹⁶ This imagined agreement was a “social contract” (or “social compact”), and it required the consent of *every individual*.¹⁷ The result was a single entity—a *body politic*—composed of all the members of the political society. In the words of the Massachusetts Constitution of 1780, “The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”¹⁸

Like the state of nature, the social contract was imaginary but nonetheless had powerful implications for the proper scope of governmental power. “HOWEVER the historical fact may be of a

13. See, e.g., James Wilson, *Of the Natural Rights of Individuals*, in 2 COLLECTED WORKS OF JAMES WILSON 1053, 1055–56 (Kermit L. Hall & Mark David Hall eds., 2007).

14. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922–30 (1993) (describing natural rights).

15. Wilson, *supra* note 13, at 1055–56.

16. James Wilson, *Of Municipal Law*, in 1 COLLECTED WORKS OF JAMES WILSON 549, 553–54 (Kermit L. Hall & Mark David Hall eds., 2007); see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. 2, chap. 9, § 130 (5th ed.; London, A. Bettesworth 1728) (individuals surrender “as much . . . natural Liberty . . . as the Good, Prosperity, and Safety of the Society shall require”).

17. See, e.g., Madison, *supra* note 10, at 570; JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 6 (Philadelphia, Hall & Sellers 1787); Alexander Hamilton, *The Farmer Refuted* (Feb. 23, 1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 88 (Harold C. Syrett ed., 1961).

18. MASS. CONST. of 1780, Preamble.

social contract,” English jurist Richard Wooddeson explained, “government ought to be, and is generally *considered* as founded on consent, tacit or express, on a real, or *quasi*, compact. This theory is a material basis of political rights; and as a theoretical point is not difficult to be maintained.”¹⁹

At the next stage of political development, the body politic formed a system of government in an agreement known as a “constitution.” Unlike the social contract, which required unanimous consent, the constitution required only the consent of the body politic, based on majority rule.²⁰ Even after the formation of government, however, the body politic still retained supreme political authority, or “sovereignty.”²¹ James Wilson summarized the idea nicely in his law lectures:

While those, who were about to form a society, continued separate and independent men, they possessed separate and independent powers and rights. When the society was formed, it possessed jointly all the previously separate and independent powers and rights of the individuals who formed it, and all the other powers and rights, which result from the social union. The aggregate of these powers and these rights composes the sovereignty of the society or nation.²²

This was the crux of *popular sovereignty*—that sovereignty resided in the body politic, or “the people themselves,” and that

19. RICHARD WOODDESON, *ELEMENTS OF JURISPRUDENCE TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAW OF ENGLAND* 22 (London, T. Payne & Son 1783). Barnett nicely grapples with this tricky aspect of social-contract theory. See p. 74 (“[I]n the absence of such express consent, we must ask what each person could be *presumed* to have consented to.”).

20. See, e.g., Madison, *supra* note 10, at 570; ADAMS, *supra* note 17, at 6.

21. See, e.g., James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), in 1 *COLLECTED WORKS OF JAMES WILSON*, *supra* note 16, at 3, 5 n.c. (“The right of sovereignty is that of commanding finally—but in order to procure real felicity; for if this end is not obtained, sovereignty ceases to be a legitimate authority.”).

22. Wilson, *supra* note 16, at 556; see also, e.g., Theophilus Parsons, *Essex Result* (1778), in THEOPHILUS PARSONS, *MEMOIR OF THEOPHILUS PARSONS* 359, 366 (Boston, Ticknor & Fields 1861) (“When men form themselves into society, and erect a body politic or State, they are to be considered as one moral whole, which is in possession of the supreme power of the State. This supreme power is composed of the powers of each individual collected together, and VOLUNTARILY parted with by him.”); LOCKE, *supra* note 16, at bk. 2, chap. 8, § 96 (“For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to act as one Body, which is only by the Will and Determination of the *Majority*.”).

members of the government exercised power merely as *agents* of the people.

To be sure, as Barnett highlights, James Wilson’s opinion in *Chisholm v. Georgia* famously described individuals as “original sovereigns,” noting that “[t]he *sovereign*, when traced to his source, must be found in the *man*.”²³ But Wilson clarified that his use of the term “sovereign” was idiosyncratic,²⁴ referring to the source of governmental legitimacy rather than the possessor of supreme political authority. Putting aside terminology, Wilson’s point was conventional. The people, *as a collective body politic*—not legislatures or kings, and not individuals—possessed the supreme power under a social contract, even though that authority was founded on the presumed consent of every individual.²⁵

FOUNDING-ERA RIGHTS

In modern legal thought, the rights listed in the Constitution stem from a common source: their enumeration. For the Founders, however, bills of rights *declared* rather than *created* most rights.²⁶ And these declarations typically included two different types of rights, each with its own origin and structure. Declarations of rights, one commentator noted in 1787, combined protections for “natural liberty . . . retain[ed]” with “some particular engagements of protection, on the part of government.”²⁷ Or, as Thomas Jefferson put it, bills of rights

23. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456, 458 (1793) (opinion of Wilson, J.) (emphasis added).

24. *Id.* at 454 (“I intend not to substitute new [terms]; but the expressions themselves I shall certainly use for purposes different from those, for which hitherto they have been frequently used.”).

25. *See id.* at 454–58; Wilson, *supra* note 16, at 556–62; *Pennsylvania Ratification Convention Debates* (Dec. 4, 1787) (remarks of James Wilson), in 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 493–94 (Merrill Jensen ed., 1976) (“[I]n the United States the people retain the supreme power . . . and exercise it either collectively or by representation.”).

26. *See* Jack N. Rakove, *The Dilemma of Declaring Rights*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 181, 187 (Barry Alan Shain ed., 2007); John Phillip Reid, *The Authority of Rights at the American Founding*, in *THE NATURE OF RIGHTS*, *supra*, at 67, 97; Suzanna Sherry, *Natural Law in the States*, 61 *U. CIN. L. REV.* 171, 171 (1992).

27. *An Old Whig No. 4*, *PHILA. INDEP. GAZETTEER*, Oct. 27, 1787, in 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 497, 501 (John P. Kaminski & Gaspare J. Saladino eds., 1981); *see* REID, *supra* note 4, at 93 (although terminology was fluid, “there is no doubt that people in the eighteenth century

declared both “unceded portions of right,” like “freedom of religion,” and “also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right,” like “trial by jury, Habeas corpus laws, [and] free presses.”²⁸

These different types of rights corresponded to the different stages of political development in social-contract theory:

1. In a state of nature, individuals had *natural rights*. Natural rights were easy to identify because they were things that people could do without a government, like eat, pray, or speak. “A natural right is an animal right,” Thomas Paine succinctly explained, “and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals.”²⁹ Or, as Zephaniah Swift put it, natural rights were “the enjoyment and exercise of a power to do as we think proper, without any other restraint than what results from the law of nature, or what may be denominated the moral law.”³⁰

distinguished between natural rights and positive rights possessed by contract or prescription”); *see, e.g.*, BENJAMIN RUSH, OBSERVATIONS UPON THE PRESENT GOVERNMENT OF PENNSYLVANIA, IN FOUR LETTERS TO THE PEOPLE OF PENNSYLVANIA 3 (Philadelphia, Styner & Cist 1777) (noting the combination of “*natural* and *civil* rights” in the Pennsylvania bill of rights); *Federal Farmer No. 6* (Dec. 25, 1787), in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 979, 983–84 (John P. Kaminski et al. eds., 2004) (“Of rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; . . . and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.”); 1 ANNALS OF CONG. 437 (June 8, 1789) (remarks of Rep. James Madison) (noting the presence of “natural right[s] and “positive rights” in his proposed bill of rights). The first two volumes of the *Annals* were printed twice—first in the 1830s using headings that read “Gales & Seaton’s History of Debates in Congress” (as part of an effort described in 1843 as “the sample volume[s],” *The History and Debates of Congress*, N.Y. TRIBUNE, Jan. 27, 1843, at 2), and second in the 1840s using headings that read “History of Congress” (as part of a continuous series covering congressional debates from 1789 to 1824). Citations in this Essay are to the “History of Congress” volumes.

28. Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), in 18 THE PAPERS OF THOMAS JEFFERSON 131, 132 (Julian P. Boyd ed., 1971). Elsewhere, Jefferson referred to the latter category of rights as “instruments for administering the government, so peculiarly trust-worthy, that we should never leave the legislature at liberty to change them.” Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 676, 678 (Julian P. Boyd ed., 1958).

29. Common Sense [Thomas Paine], *Candid and Critical Remarks on Letter 1, Signed Ludlow*, PA. JOURNAL AND THE WEEKLY ADVERTISER, June 4, 1777, at 1.

30. 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 15 (New Haven, S. Converse 1822).

2. When forming a political society in a social contract, individuals agreed to retain some of their natural rights. These *retained natural rights*, William Blackstone noted, comprised “natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.”³¹

3. Either when forming a political society or when constituting a government, the people might also recognize certain *fundamental positive rights* to limit governmental power.³² These positive rights, unlike natural rights, were legal privileges or immunities defined in terms of governmental action or inaction, like the rights of due process, habeas corpus, and confrontation.

4. Finally, after the formation of a political society and government, lawmakers could create ordinary positive rights, which we now refer to as common-law or statutory rights. These “mere legal rights,” Federal Farmer explained, were “such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.”³³

Recovering the meanings and enforceability of Founding-Era rights thus requires attention to their type.

RETAINED NATURAL RIGHTS

Retained natural rights were not determinate legal rights. Rather, with the exception of certain “rights of the mind” (i.e., the freedoms of conscience and thought),³⁴ these were aspects of natural liberty that were subject to regulation only *in the interest*

31. 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

32. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–34 (2004). Quite confusingly, some Founders occasionally referred to certain positive rights as founded on the “nature” of man or the “nature” of government, occasionally leading them to describe positive rights like the right to a jury as “natural.” See Reid, *supra* note 26, at 94; CHIPMAN, *supra* note 8, at 112 (“Both [natural rights and civil rights] are natural rights, and equally guaranteed to him by the laws of his nature.”); see, e.g., Virginia Ratification Convention Debates (June 16, 1788) (remarks of George Mason), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1328 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (describing “certain great and important rights” against legislative power as “the great rights of human nature”).

33. *Federal Farmer No. 6*, *supra* note 27, at 984.

34. CHIPMAN, *supra* note 8, at 174 (“[r]ights of the mind . . . can never justly be subject to civil regulations”).

*of the political society and its members, and only with the consent of the people.*³⁵

The Founders were emphatic that natural liberty could be restrained only in the public interest.³⁶ As Theophilus Parson explained, “Each individual . . . surrenders the power of controuling his natural alienable rights, ONLY WHEN THE GOOD OF THE WHOLE REQUIRES it.”³⁷ St. George Tucker put the point more dramatically, writing that whenever natural liberty “is, by the laws of the state, further restrained than is necessary and expedient for the general advantage, a state of *civil slavery* commences immediately.”³⁸ Indeed, many described the protection of natural liberty as “the principal aim of society.”³⁹

Yet the Founders were equally insistent that natural liberty *should be restrained* when doing so promoted the common good. Natural liberty, Nathaniel Chipman declared, “must be in a just compromise with the convenience and happiness of others.”⁴⁰ This was a common refrain. “[N]o government . . . can exist,” James Wilson asserted, “unless private and individual rights are subservient to the public and general happiness of the nation.”⁴¹

35. See, e.g., OTIS, *supra* note 11, at 30 (“The Colonists being . . . entitled to all the rights of nature . . . are not to be restrained in the exercise of any of these rights, but for the evident good of the whole community . . . and if [natural liberty is] taken from them without their consent, they are so far enslaved.”); ADAMS, *supra* note 17, at 123 (laws must be “made with *common consent* . . . for the *general interest*, or the *public good*”).

36. For discussions of the “common good,” “public interest,” and “general welfare,” see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 53–65, 608 (2d ed. 1998); WILLI PAUL ADAMS, *THE FIRST CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 216–27 (rev. ed. 2001).

37. Parsons, *supra* note 22, at 366.

38. St. George Tucker, *On the State of Slavery in Virginia* (1796), in *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS* 402, 407 (1999). Americans commonly referred to the deprivation of natural rights as “slavery.”

39. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *124.

40. CHIPMAN, *supra* note 8, at 174–75.

41. JAMES WILSON, *THE SUBSTANCE OF A SPEECH DELIVERED BY JAMES WILSON, ESQ. EXPLANATORY OF THE GENERAL PRINCIPLES OF THE PROPOSED FEDERAL CONSTITUTION* . . . 8 (Philadelphia, Thomas Bradford 1787); see, e.g., New York Ratification Convention Debates (June 24, 1788) (remarks of Alexander Hamilton), in 22 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1863 (John P. Kaminski et al. eds., 2008) (“There must be a perpetual accommodation and sacrifice of local advantage to general expediency.”); Civis [David Ramsay], *To The Citizens of South Carolina*, CHARLESTON COLUMBIAN HERALD, Feb. 4, 1788, in 16 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 21, 22 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (“[I]n society, every individual must sacrifice a part of his natural rights; the minority must yield to the majority, and the collective interest must controul particular interests”); Noah Webster, *An Oration on the Anniversary of the*

Individual liberty mattered, of course, but the ultimate object—“the *first* law of every government”—was “the happiness of the society.”⁴² “True liberty,” James Iredell noted, “consists in such restraints, and no greater, on the actions of each particular individual as the common good of the whole requires.”⁴³

Proper respect for the public interest meant that lawmakers had to consider *everyone’s* interests, and not merely those of particular individuals or factions.⁴⁴ The government, in other words, should not be “*adverse* to the rights of other citizens,” as James Madison put it in *Federalist No. 10*, or act by “*disregarding* the rights of another.”⁴⁵ But this principle required only equal consideration of and respect for of the natural rights of others; it did not make those “rights” absolute or immutable. During the First Congress, for instance, Federalist leader Theodore Sedgwick explained that he “felt no difficulty” in defending governmental authority “to interfere with contracts, public and private,” whenever failing to do so would endanger “the public welfare.”⁴⁶ Indeed, Americans reiterated over and over again that the common good often required the sacrifice of individual rights.⁴⁷

To be sure, the Founders disagreed at times about how much natural liberty to maintain. But for the most part, the “liberal” and “republican” traditions that Jack Balkin highlights in his

Declaration of Independence (1802), in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 1220, 1228 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (“Of course, by the very constitution of society, the will of each member is restrained by the laws of general utility, or common good, the details of which are to be regulated by the supreme power.”).

42. Wilson, *supra* note 21, at 5.

43. James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Massachusetts (Oct. 12, 1792), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 308, 310 (Maeva Marcus ed., 1988).

44. See, e.g., ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 125 (2d ed., London, J. Darby 1704) (“The Laws that aim at the publick Good, make no distinction of Persons.”); *The Impartial Examiner No. 1*, VA. INDEP. CHRONICLE, Feb. 27, 1788, in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 420, 420 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (government officials should have “no other view than the general good of all without any regard to private interest . . . [and] take equal care of the whole body of the community, so as not to favor one part more than another”).

45. THE FEDERALIST NO. 10, at 57, 60 (James Madison) (Jacob E. Cooke ed., 1961) (emphases added).

46. 1 ANNALS OF CONG. 1169 (Feb. 10, 1790) (remarks of Rep. Theodore Sedgwick).

47. See *supra* notes 40 to 43 and accompanying text. But see BARNETT, p. 75 (“[T]he common good . . . consists of the protection of each person’s life, liberty, and property.”).

contribution to this symposium⁴⁸ were simply different conceptions of how to pursue the public good—and were not yet competing theories about the first principles of government.⁴⁹ Only later did many Americans shift “from a commitment to the public welfare to an interest in wealth accumulations,”⁵⁰ making libertarian policies not just a means of pursuing the general welfare but an end in themselves.

For some Founders, legislative authority to restrain natural liberty in the public interest effectively meant that individuals surrendered *all* of their natural liberty to the control of the political society. “[M]ankind have found it necessary to give up [natural] liberty,” Connecticut jurist Zephaniah Swift wrote, “and unite in society for mutual assistance, protection, and defence: hence the origin of civil rights.”⁵¹ Or, as Melancton Smith asked rhetorically at the New York ratification convention, “What is government itself, but a restraint upon the natural rights of the people?”⁵² Yet others insisted that Americans had given up *none* of their natural rights. In a republic, Alexander Hamilton declared in *Federalist No. 84*, “the people surrender nothing.”⁵³ Federalist commentaries frequently echoed this theme.⁵⁴

48. See Balkin, *supra* note 7, at 31.

49. See Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 339 (1982) (contrasting the idea of “a uniform general interest” with the view “that the competing ambitions of self-interested individuals would produce the greatest public benefit”); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* 183 (1992) (describing self-interest, from a liberal perspective, as a “benign regulator of human conduct”); see also WOOD, *supra* note 36, at xi (“It is important to remember that the boxlike categories of ‘republicanism’ and ‘liberalism’ are essentially the inventions of us historians, and as such they are dangerous if heuristically necessary distortions of a very complicated past reality.”).

50. James L. Hutson, *Virtue Besieged: Virtue, Equality, and the General Welfare in the Tariff Debates of the 1820s*, 14 J. EARLY REP. 523, 525 (1994).

51. SWIFT, *supra* note 30, at 15; see 1 WILLIAM BLACKSTONE, *COMMENTARIES* *125 (“[E]very man, when he enters into society, gives up a part of his natural liberty.”); LOCKE, *supra* note 16, at bk. 2, chap. 9, § 131 (“Men when they enter into Society, give up the Equality, Liberty, and executive Power they had in the state of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require.”).

52. New York Ratification Convention Debates (June 25, 1788) (remarks of Melancton Smith), in 22 DOCUMENTARY HISTORY, *supra* note 41, at 1879.

53. THE FEDERALIST NO. 84, *supra* note 45, at 578 (Alexander Hamilton).

54. See, e.g., Remarker, INDEP. CHRONICLE, Dec. 27, 1787, in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 527, 529 (John P. Kaminski & Gaspare J. Saladino eds., 1998); Virginia Ratification Convention Debates (June 16, 1788) (remarks of George Nicholas), in 10 DOCUMENTARY HISTORY, *supra* note 32, at 1334.

Based on these statements, we might suspect that Americans sharply disagreed about the scope of retained natural liberty. But this conclusion would be mistaken. The conflict was semantic rather than substantive, with broad agreement that the government could restrict natural liberty in the public interest.

Ostensible disagreements about the retention of natural rights stemmed partly from differing views about the scope of natural liberty in a state of nature. In particular, the idea that people sacrificed some of their natural rights upon entering society came under attack from those who thought that man was “sociable by the laws of his nature” and thus had “no right to pursue his own interest, or happiness, to the exclusion of that of his fellow men.”⁵⁵ Consequently, because natural rights were already circumscribed by social obligations, it was unnecessary to give up *any* natural rights upon entering a political society. “To give up the performance of any action, which is forbidden by the laws of moral and social nature,” Nathaniel Chipman insisted, “cannot be deemed a sacrifice.”⁵⁶

Others thought that natural liberty was fully preserved because of the *representative* structure of the government.⁵⁷ An example will illustrate the point. Does a person who sells land give up a right? In a sense, yes—the seller no longer owns the property. But in another sense, no—a right of alienation is *exercised*, but the seller has not given up the right to own land. Discussions of natural rights at the Founding straddled the same linguistic ambiguity. And the reason why is crucially important: *representative institutions could consent to restrictions of natural liberty on behalf of individuals.*

To be sure, natural rights were *individual* rights. Indeed, the Founders widely viewed the rights to life, liberty, and property as among the *inalienable* natural rights of individuals. Thus, as the

55. CHIPMAN, *supra* note 8, at 75; see Hamburger, *supra* note 14, at 945–46; see also, e.g., 1 THOMAS RUTHERFORD, *INSTITUTES OF NATURAL LAW* 36 (Cambridge, J. Bentham 1754) (“It is therefore the law of [man’s] nature, that he should live in society with others of his own species[,] . . . that he should join with them in a common interest, [and] that he should bind himself to them in such a manner as to labour with them for a general good.”).

56. CHIPMAN, *supra* note 8, at 74.

57. See *supra* notes 53–54 and accompanying text.

Virginia Assembly declared in 1774, an individual's property could not be "wrested from him . . . without his own Consent."⁵⁸

But the Founders equally accepted that an individual's "own Consent" could be granted by a *representative* legislature. "[Social-contract] theory," James Madison explained, "supposes, either that it was a part of the original compact, that the will of the majority was to be deemed the will of the whole, or that this was a law of nature, resulting from the nature of political society itself."⁵⁹ Therefore, "the sovereignty of the society as vested in & exercisable by the majority, *may do anything that could be rightfully done by the unanimous concurrence of the members.*"⁶⁰ Some aspects of natural liberty, like having thoughts, were understood to be beyond an individual's control and therefore could not properly be restrained *even with consent*.⁶¹ But an individual's other retained natural rights were subject to restraint through "laws to which he has given his consent, either in person, or by his representative."⁶²

58. Virginia House of Burgesses, *Memorial to the House of Lords*, VA. GAZETTE, July 21, 1774, at 2.

59. Madison, *supra* note 10, at 570.

60. *Id.* (emphasis added); *see also* James Wilson, *Of Man, as a Member of Society*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 16, at 621, 639 ("In society, when the sentiments of the members are not unanimous, the voice of the majority must be deemed the will of the whole. That the majority, by any vote, should bind not only themselves, but those also who dissent from that vote, seems, at first, to be inconsistent with the well known rule[] . . . that no one can be bound by the act of another, without his own consent. But . . . society is constituted for a certain purpose; and . . . every thing necessary for carrying it on shall be done."); SIDNEY, *supra* note 44, at 69 ("[W]hen a People is, by mutual compact, join'd together in a civil Society, there is no difference as to Right, between that which is done by them all in their own Persons, or by some deputed by all, and acting according to the Powers receiv'd from all.")

61. *See, e.g.*, Madison, *supra* note 10, at 571 ("[T]he reserved rights of individuals (of conscience for example) in becoming parties to the original compact [are] beyond the legitimate reach of sovereignty, wherever vested or however viewed."); N.H. CONST. of 1784, pt. 1, art. 4 ("Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE."); Parsons, *supra* note 22, at 365 (identifying inalienable rights as "the rights of conscience," or "duties, for the discharge of which we are accountable to our Creator and benefactor, which no human power can cancel"); JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS . . . 11 (New York, Johnson & Stryker 1801) ("All men are endowed, by nature, with the power of thinking; yet have they no controul over their thoughts."). Notably, the Founders used the term "inalienable" in different ways—sometimes referring to natural rights that could not be controlled without consent, and other times referring to a narrower set of natural rights that could not be restrained *even with consent*.

62. Alexander Hamilton, *A Full Vindication of the Measures of the Congress* (Dec. 15, 1774), in 1 PAPERS OF ALEXANDER HAMILTON, *supra* note 17, at 45, 47. Barnett attributes to the Founders the view that implied consent was valid only so long as the

Consequently, most retained natural rights were *individual* rights that could be *collectively* defined and controlled. The Declaration of Independence referred to the inalienability of natural rights in this sense.⁶³ Property was an inalienable natural right, for instance, and therefore Americans could not divest control of their property to an unaccountable king or Parliament.⁶⁴ But the Declaration's invocation of natural rights had nothing to do with constraints on the powers of representative legislatures. Inalienability undergirded the American stance about *who* could collect taxes and regulate property, but labeling something as a "natural right" did not suggest well-defined limitations on governmental power.⁶⁵

In sum, although American elites spoke in radically different ways about how much natural liberty was retained in the social contract, they widely agreed on the substance—that retained natural rights could be regulated in the public interest by the people or their representatives.

FUNDAMENTAL POSITIVE RIGHTS

In contrast to retained natural rights, some positive rights imposed firm obligations and constraints on governmental authority. These fundamental positive rights included a slew of

natural rights of individuals were preserved. *See* pp. 74–78. But natural rights were preserved by having a representative legislature act in the public interest, not necessarily by making portions of natural liberty immune from governmental control.

63. *See* MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* 112 (1996); *see also, e.g.*, OTIS, *supra* note 11, at 37 (“*The supreme power cannot take from any man any part of his property, without his consent in person, or by representation.*”).

64. The standard American definition of representative consent required that each *geographical* area have *actual* representatives, thus rejecting the British notion of *virtual* representation. *See generally* JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011). Yet American elites generally held fast to virtual representation with respect to other characteristics like age, gender, race, and property ownership.

65. Thus, for instance, recognition of the inalienable right of conscience did not necessarily conflict with governmental support for religion, use of religious oaths, and so forth. To be sure, some invoked natural rights in arguing “that Religion is wholly exempt from [governmental] cognizance.” James Madison, *Memorial and Remonstrance against Religious Assessments* (ca. June 20, 1785), in 8 *THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES* 295, 299 (Robert A. Rutland & William M. E. Rachal eds., 1973). But this position turned on a series of intermediate arguments, not simply the inalienability of conscience. *Cf.* Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 384 (“It is indeed stressing the obvious to conclude that, in [Madison’s] mind at least, . . . the establishment of a religion by law is not per se an infringement of the equal rights of conscience.”).

customary rules, like the guarantee of a jury trial, the right of habeas corpus, and the ban on press licensing.⁶⁶ They were, as Thomas Jefferson put it, “certain fences which experience has proved particularly efficacious against wrong, and rarely obstructive of right.”⁶⁷ These rights operated more in the mode of “rights as trumps” that is familiar to modern lawyers.

Not all common-law or statutory rights enjoyed “fundamental” status. In general, legislatures could change laws whenever they liked. What typically made rights “fundamental” in the English tradition was, somewhat circularly, a widespread belief that they were inviolable—a consensus that often emerged fully only *after* political contests over the fundamentality of the right, like debates about confrontation in the sixteenth and early seventeenth centuries or about press licensing in the late seventeenth century. “Like other forms of customary law,” Larry Kramer observes, this fundamental law “was uncertain and open-ended” in some respects, but “[i]t did not follow that nothing was fixed.”⁶⁸ In the United States, the enumeration of rights in written constitutions or declarations of rights also became an important indicator of their fundamentality.⁶⁹

For present purposes, though, the crucial point is that some positive rights had fundamental status and were very similar to our modern notion of constitutional rights. These rights, like the right to a jury trial and the ban on *ex post facto* laws, operated as legal privileges or immunities that could be defended in court against legislative encroachment.

USING RIGHTS TO CONSTRUE POWERS

Barnett uses the “prior existence” of natural rights to favor a narrow construal of governmental power—and especially federal

66. Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), in 18 PAPERS OF THOMAS JEFFERSON, *supra* note 28, at 132.

67. *Id.*; see also KRAMER, *supra* note 32, at 9–34. At least in theory, these rights had a positivist origin—they were not simply philosophical abstractions. See *Federal Farmer No. 16* (Jan. 20, 1788), in 20 DOCUMENTARY HISTORY, *supra* note 27, at 1051, 1057–58 (referring to positive rights as “stipulated rights” that “individuals acquire by compact” and must be claimed “under compacts, or immemorial usage”).

68. KRAMER, *supra* note 32, at 14.

69. See, e.g., *Federal Farmer No. 6*, *supra* note 27, at 984 (defining fundamental positive rights as ones that “individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so strengthened by long usage as not to be repealable by the ordinary legislature”).

power (pp. 78, 172-173, 189-195). Founding-Era evidence, however, shows a more complicated relationship between rights and powers, depending largely on the type of right at issue.

Many Founders thought that *fundamental positive rights* limited governmental authority even when unenumerated.⁷⁰ Consider, for instance, the rule against press licensing—a principle commonly known as the “liberty of the press.”⁷¹ This freedom, one commentator explained during the ratification debates, was “a privilege, with which every inhabitant is born;—a right . . . too sacred to require being mentioned.”⁷²

Americans had two different accounts of why it was unnecessary to enumerate fundamental positive rights. Some thought that the *social contract* guaranteed positive rights in return for individuals’ sacrifice of control over their natural liberty.⁷³ Consequently, these rights were guaranteed at a pre-constitutional stage, making their constitutional enumeration unnecessary. Meanwhile, others thought that these positive rights were implicitly excepted from constitutional grants of power.⁷⁴ Enumerated powers, in other words, were more like slices of Swiss cheese, with the holes representing a lack of authority to abridge certain rights, than like slices of American cheese, with

70. See KRAMER, *supra* note 32, at 41; Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

71. See Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (remarks of James Wilson), in 2 DOCUMENTARY HISTORY, *supra* note 25, at 455 (“what is meant by the liberty of the press is, that there should be no antecedent restraint upon it”).

72. *Uncus*, MD. JOURNAL, Nov. 9, 1787, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 76, 78 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

73. See, e.g., 1 ANNALS OF CONG. 437 (remarks of Rep. James Madison) (referring to certain “positive rights, which may seem to result from the nature of the compact”); Parsons, *supra* note 22, at 367 (referring to “the equivalent that every man receives [in the social contract] as a consideration for the rights he has surrendered,” which positive rights are “unassailable by the supreme power” even prior to the creation of a constitution); cf. John Adams, Reply to *A Friendly Address to All Reasonable Americans*, in 2 PAPERS OF JOHN ADAMS 193, 195 (Robert J. Taylor et al. eds., 2003) (“There are therefore certain fundamental Laws, and certain original Rights, reserved expressly or tacitly, by every People in their first Confederation in Society, and erection of Government.”).

74. See, e.g., *Fæderal Constitution*, PA. GAZETTE, Oct. 10, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 27, at 362, 363 (“[T]he *Liberty of the Press* would have been an inherent and political right, as long as nothing was said *against* it.”); A Citizen of New-York [John Jay], *An Address to the People of the State of New York* (Apr. 15, 1788), in 20 DOCUMENTARY HISTORY, *supra* note 27, at 922, 933 (mentioning in a discussion of press freedom and jury rights that “silence and blank paper neither grant nor take away any thing”).

authority to do anything that might facilitate the use or effectiveness of those powers.

Not everyone held this view about the non-necessity of enumeration. Some Founders favored an equitable construction of *statutes*—not of *constitutional* powers—to avoid conflicts with certain unenumerated rights,⁷⁵ without giving these rights the status of supreme law.⁷⁶ When recognized, however, positive rights with fundamental status restricted governmental power.

By contrast, retained natural rights did not impose strict limits on the powers of representative bodies. Rather, with the exception of the freedoms of conscience and thought,⁷⁷ individuals surrendered control of their natural rights *for the common good*. Consequently, some Founders plausibly used social-contract theory to favor *broader* governmental power than the “literal meaning” of constitutional text might otherwise suggest.⁷⁸

A notable example is Alexander Hamilton’s defense of federal power to charter a national bank. The scope of federal power, he argued, was “a question of fact to be made out by fair reasoning & construction upon the particular provisions of the constitution—*taking as guides the general principles & general ends of government*.”⁷⁹ It was thus a “sound maxim of construction,” Hamilton insisted, “that the powers contained in a constitution of government . . . ought to be construed liberally, in advancement of the public good.”⁸⁰ The *ends* of federal power, he

75. See, e.g., *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805) (“Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.”); cf. Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation*, 5 N.Y.U. J.L. & LIBERTY 1, 20–21 (2010) (supporting this approach but without fully using this Essay’s taxonomy of rights).

76. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398–99 (1798) (opinion of Iredell, J.).

77. As rights that could not be given up *even with consent*, the Founders treated the freedoms of conscience and thought as unique among natural rights. See *supra* note 61.

78. Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 *THE PAPERS OF ALEXANDER HAMILTON* 97, 106 (Harold C. Syrett ed., 1965).

79. *Id.* at 100 (emphasis added).

80. *Id.* at 105. Indeed, Hamilton argued that some federal powers flowed “from the nature of political society”—that is, from the existence of a national body politic—rather than from particular enumerated powers. *Id.* at 100. James Wilson had taken a similar position under the Articles of Confederation. See James Wilson, *Considerations on the Bank of North America* (1785), in 1 *COLLECTED WORKS OF JAMES WILSON*, *supra* note 16, at 60, 66 (“The United States have general rights, general powers, and general

was arguing, should be construed to promote “the general interests of the Union.”⁸¹ Moreover, Hamilton wrote, the existence of federal sovereignty indicated federal authority “to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of [its] power.”⁸²

In a way that scholars have previously overlooked, the implicit reservation of natural rights in the Ninth and Tenth Amendments reinforced Hamilton’s conclusion. To be sure, these amendments proved that federal power was limited,⁸³ thus

obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole.”). A “further criterion” when construing federal power, Hamilton continued, was to ask: “Does the proposed measure abridge a preexisting right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality” Hamilton, *supra* note 78, at 107. These “preexisting right[s]” of individuals likely referred to longstanding *positive* rights, not natural liberty. *See supra* notes 70–74, *infra* note 105, and accompanying text. In any event, Hamilton never suggested a paramount concern for individual rights. Hamilton, *supra*, at 109 (noting that Congress could “alter the common law of each state in abridgement of individual rights”).

81. This quotation is from Resolution VI, which set out the scope of federal legislative power prior to revisions in the committee of detail. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911); *see* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996). Modern proponents of national power have invoked Resolution VI either in defense of freestanding federal authority to solve problems that require collective action, *see* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010), or as a structural principle that “underlies and should inform the proper construction of all of Congress’s enumerated powers,” JACK M. BALKIN, LIVING ORIGINALISM 377 (2011). In response, Kurt Lash criticizes nationalists for drawing on the *private intentions* of the Framers rather than the *public meaning* of the Constitution, pointing out that Resolution VI did not survive the drafting process and played virtually no role in shaping public understandings of the Constitution. Kurt T. Lash, “Resolution VI”: *The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123 (2012). This Essay shows how the general principles of social-contract theory supplied Federalists with a stronger basis for claiming federal power to address federal problems.

82. Hamilton, *supra* note 78, at 98; *see also, e.g.*, A.B., HAMPSHIRE GAZETTE, Jan. 2, 1788, in 5 DOCUMENTARY HISTORY, *supra* note 54, at 596, 597 (the “[federal] government is to possess absolute and uncontrollable powers” but those powers extend only to “national objects: such as concern the whole in union, and therefore ought to be under the government and controul of the whole”); THE FEDERALIST NO. 31, *supra* note 45, at 195 (Alexander Hamilton) (“A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, . . . free from every other control, but a regard to the public good and to the sense of the people.”).

83. *See* 2 ANNALS OF CONG. 1901 (Feb. 2, 1791) (remarks of Rep. James Madison). It seems to me that Madison was arguing simply that enumerated federal powers should be construed to maintain limits on federal authority—not that those powers ought to be construed “strictly” whenever liberty is restricted. *Cf.* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 242 (rev. ed. 2014); KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 68–69 (2009).

answering the Anti-Federalist objection that “appoint[ing] a legislature, without any reservation of the rights of individuals, surrender[s] all power . . . to the government.”⁸⁴ The absence of an enumerated power over the liberty of locomotion,⁸⁵ for instance, meant that the federal government lacked *plenary* authority to restrict individual movement in the public interest. Nonetheless, because locomotion was a retained natural right of *individuals*, it was not within the exclusive domain of state control either. Rather, Congress and state legislatures could each restrict individual movement when pursuing their respective powers. The implicit reservation of natural rights in the Ninth and Tenth Amendments thus suggested parity in the means of federal and state authority.⁸⁶

ENFORCING RIGHTS

Today we tend to think about the judicial enforcement of unenumerated or indeterminate rights through the lens of the “counter-majoritarian difficulty.”⁸⁷ Because these rights constrain majority rule without the benefit of textual clarity, their judicial definition and enforcement can exist only in uneasy tension with the core democratic principle of self-rule.⁸⁸

Quite brilliantly, then, Barnett opens his historical account by embracing the Constitution’s *undemocratic* origins. The Founders, he writes, “blamed the problems in the states under the Articles of Confederation on an excess of democracy” (p. 26). With this move, Barnett uses our undemocratic past to turn the counter-majoritarian difficulty into a virtue. The Founders’

84. *Agrippa No. 12* (Jan. 15, 1788), in 5 DOCUMENTARY HISTORY, *supra* note 54, at 720, 722.

85. See 8 ANNALS OF CONG. at 2097 (July 5, 1798) (remarks of Rep. John Allen) (mentioning “the liberty of locomotion, of going where I please”).

86. In this way, I tend to agree with Barnett that the Ninth Amendment directly protects only *individual* rights, not *collective* states’ rights, see Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty*, 60 STAN. L. REV. 937 (2008), but because federal powers were limited and because retained natural rights could generally be collectively defined and controlled, the reservation of rights implicit in the Ninth Amendment could readily have had a state-empowering effect, cf. Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008) (arguing that the Ninth Amendment protects both individual rights and collective states’ rights).

87. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

88. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (“[J]udges are unelected and unaccountable, and . . . the legitimacy of their power depends on confining it to the exercise of legal judgment.”).

apparent scorn for democracy bolsters his originalist case for the primacy of rights and for their judicial enforcement.

Missing, however, is any evidence that the Founders actually supported the judicial protection of retained natural rights, either directly or through a narrow construal of governmental power. Instead, the historical record shows that they preserved retained natural rights principally through constitutional structure, giving legislators, not judges, nearly complete responsibility for determining their proper scope. In this way, the standard approach to guarding retained natural rights diverged significantly from the enforcement of fundamental positive rights.

It is certainly true that by the late 1780s American political elites were deeply skeptical of majoritarian politics and had largely abandoned the British view that elected assemblies were “the full and exclusive representatives of the people.”⁸⁹ Instead, Americans embraced the idea that legislatures represented the people only *imperfectly*, that other governmental officials were also agents of the people, and that the people themselves had an active role to play in exercising sovereignty.⁹⁰ At the same time, cynicism grew among elites regarding the capacity of the people themselves to pursue the common good. People frequently cared only about their individual interests, James Madison wrote in 1787, thus leading to “unjust violations of the rights and interests of the minority” because of a lack of neutrality toward the various interests in society.⁹¹ As Madison later put it, “the great danger lies rather in the abuse of the community than in the Legislative body.”⁹²

89. WOOD, *supra* note 36, at 597. “In America,” Wood explains, “the people were never really represented in the English sense of the term.” Rather, “representation of the people” was “always tentative and partial.” *Id.* at 600.

90. *See id.* at 597–600; KRAMER, *supra* note 32, at 35–72; Wilson, *supra* note 16, at 556–58. On the importance of constitutional ratification conventions, see Tate, *supra* note 9, at 379–85. *But see* Giles Hickory [Noah Webster], *Government*, N.Y. AM. MAG., Feb. 1, 1788, in 20 DOCUMENTARY HISTORY, *supra* note 27, at 738, 739 (“The sense of the people is no better known in a convention, than in the Legislature.”).

91. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 345, 355, 355–57 (Robert A. Rutland & William M. E. Rachal eds., 1975); *see also* THE FEDERALIST NO. 10, *supra* note 45, at 60–61 (James Madison) (“When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.”).

92. 1 ANNALS OF CONG. 437 (June 8, 1789) (remarks of Rep. James Madison).

Yet for the Founders, addressing these challenges called for *better representation*—not less of it. After all, restrictions of life, liberty, and property required the consent of the people. The goal of reform, therefore, was to find “a *Republican* remedy for the diseases most incident to Republican Government.”⁹³ For instance, Madison famously speculated that an extended national sphere would break the society “into a greater variety of interests, of pursuits, of passions, which [would] check each other.”⁹⁴ He also sought “a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains.”⁹⁵ The government, he hoped, would represent the entire society, and not simply the private interests of the majority.

In this way, the Founders’ “anti-democratic” efforts did not reflect an understanding of “natural rights” as rigid constraints on governmental power. The good of the whole still took priority over private rights and interests. Rather, the Founders wanted to create a system of government that best pursued the public interest while retaining its representative form. And this effort, in turn, prompted creative thinking about institutional roles.

With the demise of legislative sovereignty, for instance, American judges assumed a greater part in enforcing fundamental positive rights.⁹⁶ The justification for this shift was straightforward. If judges identified a conflict between the will of the people (the principal) and the will of their representatives (the agents), the will of the people took priority.⁹⁷ But constitutional commands were often unclear, and legislatures were much closer than judges to the people themselves. Judges in the Founding Era thus widely deferred to legislative judgments absent *clear* constitutional violations.⁹⁸ (Importantly, the clarity of

93. THE FEDERALIST NO. 10, *supra* note 45, at 65 (James Madison) (emphasis added); see KRAMER, *supra* note 32, at 46–49.

94. Madison, *supra* note 91, at 357. See generally Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611 (1999) (exploring Madison’s ideas on this topic and their broader reception, or lack thereof).

95. Madison, *supra* note 91, at 357.

96. See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

97. See, e.g., THE FEDERALIST NO. 78, *supra* note 45, at 525 (Alexander Hamilton).

98. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140–42 (1893); Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 172–83 (2015); John McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 880–904 (2016).

constitutional commands did not depend solely on text but “drew on well-established principles of the customary constitution as well.”⁹⁹) When a constitutional provision was unclear, Alexander Hamilton indicated in *Federalist No. 84*, its meaning “must depend on legislative discretion, regulated by public opinion.”¹⁰⁰

Consequently, judicial review at the Founding was not all or nothing. Some constitutional provisions, like the jury guarantee and the ban on ex post facto laws, functioned as legal rules governed largely by judicial decisions. Even without a bill of rights, judges sometimes viewed these principles as implied limitations on governmental power.¹⁰¹ (With enumerated rights, the will of the people was reflected in the enumeration of the right; with unenumerated rights, some thought that the will of the people was demonstrated by longstanding respect for the right.)¹⁰² Meanwhile, other constitutional disputes—including many involving federalism—typically were not judicially managed and instead were left to political resolution.¹⁰³

It is no surprise, therefore, that judicial applications of retained natural rights were virtually nonexistent. Some judges still occasionally invoked social-contract theory.¹⁰⁴ Justice Samuel Chase, for instance, used the theory to defend a presumption that *fundamental positive rights* implicitly limited legislative authority.¹⁰⁵ But “natural rights” remained purely abstract. As Chase explained to a jury in 1803,

I have long since subscribed to the opinion, that there could be no rights of man in a state of nature, previous to the institution of society. . . . It seems to me that personal *liberty* and *rights*, can only be acquired by becoming a member of a community, which gives the protection of the whole to every individual. . . .

99. KRAMER, *supra* note 32, at 99.

100. THE FEDERALIST NO. 84, *supra* note 45, at 580 n.* (Alexander Hamilton). Hamilton was writing about the scope of constitutional provisions in favor of the liberty of the press, which he described as lacking “any definition which would not leave the utmost latitude for evasion.” *Id.* at 580.

101. See *supra* notes 70–73 and accompanying text.

102. See, e.g., *Federal Farmer No. 6*, *supra* note 27, at 984; *Federal Farmer No. 16*, *supra* note 67, at 1057–58.

103. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see also *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 895–96 (1824) (Johnson, J., dissenting) (noting that powers Congress had exercised that were “not foreseen at the adoption of constitution” were nonetheless “within the range of [Congress’s] discretion, [and] aloof from judicial control, while unaffectedly exercised for the purposes of the constitution”).

104. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798) (opinion of Chase, J.).

105. See KRAMER, *supra* note 32, at 42–43.

2017] *REPUBLICANISM AT THE FOUNDING* 107

[L]iberty, and rights, (and also property) must spring out of civil society, and must be forever subject to the modification of particular governments.¹⁰⁶

Thus, while some Founders used social-contract theory to defend implied constitutional boundaries, natural rights were not a source of determinate, judicially enforceable law.

To be sure, social-contract theory required lawmakers to pursue only the public interest, thus imposing a substantive constraint on legislative power.¹⁰⁷ Passing laws without regard for the general welfare, it bears emphasis, violated a central tenet of social-contract theory. But the difficulty of applying that standard left very little room for judicial oversight. According to Brutus, who described judicial review in more latitudinous terms than anyone else at the Founding,¹⁰⁸ the principle that legislatures had to pursue the general welfare was “found, in practice, a most pitiful restriction” because “there [was] no judge between [the government] and the people,” and therefore “the rulers themselves must, and would always, judge for themselves.”¹⁰⁹

On rare occasion, judges hinted that their enforcement of legislative acts would, in the words of Spencer Roane, be bounded “by the constitutions of the general and state governments; *and limited also by considerations of justice.*”¹¹⁰ Suzanna Sherry asserts that Roane was embracing “broad judicial review and the principle that unjust or unreasonable legislation should not be enforced by judges.”¹¹¹ But Roane clarified that only a “crying

106. Jury Instruction of Samuel Chase (May 2, 1803), in CHARLES EVANS, REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE . . . 60, 61–62 (Baltimore, Samuel Butler & George Keatinge 1805).

107. See *supra* notes 35–38 and accompanying text.

108. See *Brutus No. 11* (Jan. 31, 1788), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 514 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“[Federal judges] will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications.”).

109. *Brutus No. 6* (Dec. 27, 1787), in 15 DOCUMENTARY HISTORY, *supra* note 108, at 110, 115.

110. *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. (4 Hen. & M.) 315, 346 (1809) (opinion of Roane, J.) (emphasis added).

111. Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBS. 15, 17 (1998).

grade of injustice” would warrant judicial invalidation.¹¹² The standard rule at the Founding was that judges could not answer questions “of mere expediency or policy.”¹¹³ Nor could judges overturn a statute because of an impermissible legislative purpose absent a “high degree of certainty,” based principally on the statute itself.¹¹⁴ The combination of these principles meant that, both in theory and in practice, legislatures had virtually unfettered authority over most retained natural rights.¹¹⁵

CONCLUSION

In thinking about original meaning, *Our Republican Constitution* usefully counsels attention not merely to

112. *Currie’s Adm’rs*, 14 Va. at 350 (opinion of Roane, J.); see also *Calder*, 3 U.S. at 388 (opinion of Chase, J.) (“There are certain vital principles . . . which will determine and overrule an *apparent and flagrant* abuse of legislative power.” (emphasis added)); *Bank of State v. Cooper*, 10 Tenn. (2 Yer.) 599, 603 (Special Ct. 1831) (opinion of Green, J.) (“Some acts, although not expressly forbidden, may be against the *plain and obvious* dictates of reason.” (emphasis added)).

113. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 501 (David B. Mattern et al. eds., 2009); see, e.g., *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 88 (1805) (“[T]he judiciary are only to expound and enforce the law and have no discretionary powers enabling them to judge of the propriety or impropriety of laws.”); 1 ANNALS OF CONG. 438 (June 8, 1789) (remarks of Rep. James Madison) (“it is for [Congress] to judge of the necessity and propriety” of laws).

114. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1796 (2008).

115. Barnett criticizes this conclusion as overlooking diversity in Founding-Era thought. See Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People*, 32 CONST. COMMENT. 209, 210 (2016). With respect to judicial application of principles of “natural justice,” however, historical evidence seems to range from complete deference to legislative judgments, see, e.g., *Calder*, 3 U.S. at 399 (opinion of Iredell, J.); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 81, at 78 (remarks of George Mason) (“[Judges] could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it free course.”), to robust deference to legislative judgments, see *supra* note 112 and accompanying text. In short, legislators had *discretion* with regard to how far natural rights should be restrained in promotion of the public good, and judges could, at most, step in only when it was clear that legislators had abused that discretion. For further discussion, see Jud Campbell, *Judicial Review and the Enumeration of Rights*, GEO. J.L. & PUB. POL’Y (forthcoming 2017). Rather than addressing whether and how judges could limit legislatures to good-faith pursuit of the public interest, the evidence in Barnett’s response focuses on whether and how judges could require a nexus between enumerated and implied powers. See Barnett, *supra*, at 210–13. The relationship between these inquiries—each of which might involve assessing pretext—is worth further thought. Cf. Nelson, *supra* note 114, at 1796 (noting the limited nature of Founding-Era judicial inquiries about legislative pretext).

constitutional text but also to Founding-Era political philosophy. For the Founders, constitutional interpretation often began with principles derived from social-contract theory.

The Constitution's preamble thus had a significance that we have largely forgotten. "We the People . . . do ordain and establish this *Constitution*."¹¹⁶ These words emanated from social-contract theory, indicating the formation of a national body politic with sovereignty independent of the several states. As William Findley put it, "In the Preamble, it is said, 'We the People,' and not 'We the States,' which therefore is a compact between individuals entering into society, and not between separate states enjoying independent power and delegating a portion of that power for their common benefit."¹¹⁷

Exactly how a national body politic had emerged was puzzling. A social contract required the *unanimous* consent of individuals,¹¹⁸ and the Constitution certainly failed that test. Some nationalists insisted that a national body politic had existed ever since the Revolution. Others argued, perhaps more plausibly, that the sovereign people of the several states had voluntarily parted with some of their sovereignty and thereby formed a national body politic for certain collective purposes. And many proponents of states' rights simply rejected the premise.¹¹⁹ The Constitution, Thomas Jefferson famously insisted in 1798, was merely a "compact under the style & title of a Constitution."¹²⁰

This debate had profound importance. If the Constitution was merely a compact among sovereign states, and not a "constitution" within the meaning of social-contract theory,

116. U.S. CONST., Preamble (emphases added).

117. Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (remarks of William Findley), in 2 DOCUMENTARY HISTORY, *supra* note 25, at 447–48; see also Luther Martin, *Genuine Information No. 4* (Jan. 8, 1788), in 15 DOCUMENTARY HISTORY, *supra* note 108, at 296, 297 ("It is in its very *introduction* declared to be a compact between the *people* of the United States as *individuals* . . . [rather than] by the *States* as *States* in their *sovereign* capacity.").

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

119. For historical debates about the nature of the union, see Bernadette Meyler, *Between the States and the Signers: The Politics of the Declaration of Independence Before the Civil War*, 89 S. CAL. L. REV. 541 (2016); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995); H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689 (1994); Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467 (1900).

120. See The Kentucky Resolutions of 1798, in 30 THE PAPERS OF THOMAS JEFFERSON 536 (Barbara B. Oberg ed., 2003).

federal powers would have to be construed narrowly. The Federalist argument for broad incidental powers, Virginia congressman William Branch Giles commented during the 1791 bank debates, “seem to me to apply to a government growing out of a state of society, and not to a government composed of chartered rights from previously existing governments, or the people of those governments.”¹²¹

Indeed, Virginia jurist St. George Tucker used compact theory to justify a federal presumption of liberty. A “strict construction” of federal power was warranted, he insisted, “wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute.”¹²² Far from basing this idea on a libertarian understanding of natural rights, however, Tucker defended his presumption of liberty on the fact that each individual had already “submitted himself” to the authority of state government, and federal power “might endanger his obedience” to state law.¹²³ As Joseph Story noted, Tucker’s “whole reasoning [was] founded, not on the notion, that the rights of the *people* are concerned, but the rights of the *states*.”¹²⁴

On the other hand, if John Marshall was right that “it is a *constitution* we are expounding,”¹²⁵ founded on an implicit national social contract, that conclusion potentially supported a broader construal of federal powers, and perhaps even the implied abrogation of some state authority. “[T]he powers contained in a constitution of government . . . ought to be construed liberally, in advancement of the public good,” Alexander Hamilton wrote in 1791.¹²⁶ “This rule,” he continued

121. 2 ANNALS OF CONG. 1942 (Feb. 7, 1791) (remarks of Rep. William Branch Giles).

122. St. George Tucker, *View of the Constitution of the United States* (1803), in *VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS*, *supra* note 38, at 101–02. Later in the same work, Tucker wrote that “every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution,” *id.* at 246, without mentioning how to treat putative powers that impinge upon liberty while promoting security and happiness.

123. *Id.* at 102.

124. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 411 (1833). A presumption against powers “touch[ing] the rights of property, or of personal security, or liberty” was inappropriate, Story insisted, “in construing a constitution of government, framed by the *people* for their own benefit and protection.” *Id.* at § 413.

125. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

126. Hamilton, *supra* note 78, at 105.

“does not depend on the particular form of a government or on the particular demarkation of the boundaries of its powers, but on the nature and objects of government itself.”¹²⁷

Far from settling methodological questions, however, construing powers “in advancement of the public good” intensified constitutional instability. As Joseph Priestley wrote in his *Essay on the First Principles of Government*,

That the happiness of the whole community is the ultimate end of government can never be doubted, and all claims of individuals inconsistent with the public good are absolutely null and void; but *there is a real difficulty in determining what general rules, respecting the extent of the power of government, or of governors, are most conducive to the public good.*¹²⁸

Priestley’s description of this effort as “a real difficulty” was putting it lightly. “According to this rule,” Joseph Story later observed, “the most opposite interpretations of the same words would be equally correct, according as the interpreter should deem it odious or salutary.”¹²⁹ Social-contract theory thus fueled constitutional conflict, stimulating extraordinary debates in Congress and among the broader American public over interpretive methodology and the proper scope of federal authority.¹³⁰

Lurking in the background of these debates was a silent harmony between republicanism and natural rights. With the exception of certain “rights of the mind,” natural rights were not determinate legal privileges or immunities that imposed fixed limitations on governmental power. Rather, retained natural rights were aspects of natural liberty that an individual could give up only through his own consent, either in person or by his

127. *Id.*

128. JOSEPH PRIESTLEY, AN ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT, AND ON THE NATURE OF POLITICAL, CIVIL, AND RELIGIOUS LIBERTY 57 (2d ed., London, J. Johnson 1771) (emphasis added).

129. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 411 (2d ed., 1851); see also 1 STORY, *supra* note 124, at § 411 (using the word “interpretator”). Story criticized this vacillating interpretive principle and preferred, within the “fair sense” of the text, an interpretation “which best follows out the apparent intention” of the people. *Id.* at § 413.

130. For congressional debates, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997). For broader constitutional and political debates, see JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS (1993). For debates about interpretive methods, see Gienapp, *supra* note 6.

112 *CONSTITUTIONAL COMMENTARY* [Vol. 32:85

representative, and only in the public interest. Most retained natural rights were therefore *individual* rights that could be *collectively* defined and controlled by legislatures, with virtually no room for judicial oversight. In the end, Founding-Era natural rights were not really “rights” at all, in the modern sense. They were the philosophical pillars of republican government.