ABSTRACT

FEDERALISM, ANTI-FEDERALISM AND THE ROLE OF THE NINTH AMENDMENT IN CONSTITUTIONAL DISCOURSES

by Gary L. Garrison

This thesis examines the Ninth Amendment as a compromise between Federalists and Anti-Federalists on two founding era discourses. The first discourse concerned rights and how to protect them. Anti-Federalists wanted a bill of rights included in the Constitution whereas Federalists feared such a bill would be incomplete and allow future tyrants to argue that rights not expressly enumerated therein were not to have Constitutional protection. The second discourse concerned the role of democracy in the new republic. Federalists were alarmed by state legislation which violated minority rights and Anti-Federalists were equally concerned that a national government would violate minority rights at the state level. This Thesis argues that the Ninth Amendment resolved these discourses by specifying that there are rights outside the Constitution which merit legal protection and by empowering the federal courts to strike down democratically passed legislation which violated minority rights.
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FEDERALISM, ANTI-FEDERALISM AND THE ROLE OF THE NINTH AMENDMENT IN CONSTITUTIONAL DISCOURSES

The language and history of the Ninth Amendment reveals that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

Associate Justice Arthur Goldberg, 1965

Introduction

The origins of the first ten amendments to the United States Constitution (collectively known as the “Bill of Rights”) are well known by most Americans. During the Constitutional Convention of 1787, our founders were principally concerned with the organization and structure of the government they were creating. Little attention was paid to enumerating the rights of the people. Indeed, few thought it necessary and some even thought it dangerous. Only near the end of the convention did a few delegates question whether a bill of rights should be included so as to ensure that the new government did not encroach on the rights and liberties of its citizens. The issue was summarily tabled, with no action taken, but concern over the absence of a bill of rights was seized on by Anti-Federalists, particularly in New York and Virginia, as a reason to oppose ratification. Anti-Federalist efforts to defeat the Constitution were ultimately unsuccessful but, in 1789, to appease their concerns and to circumvent any attempt they might make to call for a second convention, Representative James Madison introduced twelve amendments to the First Federal Congress – the last ten of which ultimately became the “Bill of Rights.”

The first eight of those amendments spell out specific rights the people retain against the federal government. The Ninth Amendment, however, is a little different. Rather than specify a right of the people, it provides a rule of construction for interpreting rights found in the first eight amendments and elsewhere in the Constitution. Specifically, it states that “[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” This reference to so-called “unenumerated” rights was virtually ignored for more

than a century and a half until it was resurrected by the United States Supreme Court as one of several potential sources for a “right to privacy.” The Court’s citation to the Ninth Amendment as a source for unenumerated rights ignited a firestorm of controversy both from those who tried to use it as authority for other rights as well as from those who argued it was either too vague and general to be of any real practical use or was little more than a restatement of federalism principles more clearly set out in the Tenth Amendment.

Scholars in law and political science have spent the last forty years vigorously debating the meaning and purpose of the Ninth Amendment. Some argue that it simply limits the federal government to powers expressly delegated in the Constitution and that the explicit statement of some rights in the Bill of Rights, or elsewhere in the Constitution, is not meant to imply that the

2 There were occasional judicial references by the Supreme Court, see *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939), and legal commentators, see Bennett B. Patterson, *The Forgotten Ninth Amendment* (Indianapolis: Bobbs-Merrill Co., Inc., 1955) 1. By and large, though, the Ninth Amendment languished in obscurity until resuscitated by the United States Supreme Court in 1965. During that time, scholarly references to the amendment were rarely taken seriously. See e.g. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) 34 (mention of the Ninth Amendment in sophisticated legal circles was a “surefire way to get a laugh”); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York City: Vintage Books, 1997) 289 (facetiously referring to it as a “constitutional joker”).

3 *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113, 152-153 (1972). Several years later, the Court would suggest, in a footnote, that the Ninth Amendment may also be the repository of other unenumerated rights including the right of association, the right to be presumed innocent, the right to be judged guilty beyond a reasonable doubt in criminal cases and the right to travel. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-580 (1980).

4 *O’Neill v. Dent*, 364 F. Supp. 565 (E.D. NY. 1973) (right to marry); *United States v. Charters*, 829 F.2d 479, 491 (4th Cir. 1987) (right to be free from unwarranted physical invasions); *Berryman v. Hein*, 329 F.Supp. 616, 618 (ID. 1971) (the right to control one’s own appearance); *Wadsworth v. Owens*, 42 Ohio Misc.2d 1,4 (Oh. Common Pl. 1987) (the right to move around freely without undue government restriction or interference). Although some may dismiss all this as nothing more than “liberal judicial activism,” a resurgent Ninth Amendment jurisprudence cuts across ideological lines. See U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General: Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and the Privileges and Immunities Clause*, 25 September 1987, 3-4 (a Reagan Justice Department memo noting that “scholars on the right” also used the amendment to promote “conservative judicial activism”); *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000) (gun rights activists citing the Ninth Amendment as support for a personal right to “bear arms”); *Troxel v. Granville*, 530 U.S. 57, 91 (Scalia, J., Dissenting) (Justice Scalia – hardly a bastion of liberalism – arguing that the right of parents to direct the upbringing of their children is among the other rights retained by the people under the Ninth Amendment).

5 The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
government has a delegated power in that area. Others argue that the amendment acknowledges the existence of rights and liberties outside the text of the Constitution, so-called unenumerated rights, that merit Constitutional protection and that those rights are, more than likely, “natural rights.” What has been lacking from the debate thus far, however, is a broader historical context for the amendment itself.

Providing such context is not easy. A complete history of the Ninth Amendment requires examination of three separate and distinct stages in its political and constitutional evolution. The first stage, circa 1760 to 1791, would address not just the drafting, passage and ratification of the amendment itself but also the broader philosophical background in which the Constitution was written and its first ten amendments were conceived. After all, it was the founders’ love of liberty and fear of tyranny that breathed life and meaning into the notion of “other” rights “retained” by the people. The second phase of its history, from 1791 to 1965, would address the years of disuse. For almost two centuries, the Ninth Amendment lay dormant and was never cited in support of the existence of other rights outside the body of the Constitution. Critics of a literal application of the amendment legitimately point to this inactivity and argue that, if the founders had intended there to be a repository of unenumerated rights, then the Supreme Court (many justices of which were part of the constitutional debates) would have cited the amendment to support the existence of a broader array of Constitutional rights. Finally, the third phase of


8 Barnett, “Implementing the Ninth Amendment,” 4-6.

9 The short response to that criticism, of course, is that the Supreme Court rarely struck down legislation as being in violation of individual rights before the 1960s. But, even this answer ignores the Court’s brief sojourn into the realm of substantive due process to strike down Progressive labor legislation at the dawn of the Twentieth Century.
the Ninth Amendment’s history is its “re-discovery” from 1965 to present. Privacy is the most obvious progeny of Ninth Amendment jurisprudence but it is not the only one. Advocates cite the amendment as support for everything from the right to control the upbringing of one’s child to a personal right to bear firearms. In other words, the Ninth Amendment is now a part of our Constitutional discourse and there is no indication that it will go dormant again anytime soon.

Fortunately, or unfortunately as the case may be, time and space constraints for my thesis simply do not allow for all three phases to be discussed here. Consequently, I have limited my study to the first phase and will only address the larger philosophical and constitutional context in which the Ninth Amendment was drafted, passed and eventually ratified. Though I personally agree with a literalist view of the Ninth Amendment, and believe that it was meant to incorporate non-textual rights into the body of the Constitution, I will not wade directly into the debate over the amendment’s “original intent” – a subject that is highly problematic at best. Scholars have long noted that the dual problems of originalism in constitutional interpretation are determining whose intent should govern – the framers, the delegates at the state ratification conventions, or both – as well as the difficulty of defining source materials. As to the latter problem, historians alternately argue that the record is either too meager to derive an understanding of original intent or is too large.10

Therefore, my thesis focuses on the largely unexplored historical context in which the Constitution and Bill of Rights, particularly the Ninth Amendment, were drafted, passed and eventually ratified. Understanding this context is important for two reasons. First, the Ninth Amendment was a byproduct of political and theoretical debates between Federalist and Anti-Federalists. These two groups had very different views on issues like rights and democracy and

10 As to the so-called “perils of originalism,” see Rakove, *Original Meanings*, 3-22; Leonard W. Levy, *Original Intent and the Framers’ Constitution* (New York: MacMillan Publishing, 1988) 1-29, 284-321. Leonard Levy argues that records “are not sufficiently ample.” He points out that James Madison’s notes, which were not even published until 1840, probably missed much of the debates, that Max Farrands’s Records of the Federal Convention (cited infra in this thesis) were based on notes deemed not entirely reliable and Jonathan Elliot’s series on the state ratification conventions, or both – as well as the difficulty of defining source materials. As to the latter problem, historians alternately argue that the record is either too meager to derive an understanding of original intent or is too large. Rakove, *Original Meanings*, 12-13.
we must understand their dialogue on these issues before we can conceptualize the Constitution and Bill of Rights as a series of compromises between them. In other words, it is necessary to understand the concerns of both groups in order to appreciate the “middle ground” they reached. Second, no single clause or provision in the Constitution can be interpreted in isolation without considering it in relation to the rest of the document as a whole. The reference to “rights” in the Ninth Amendment must be read in conjunction with the refined republican constitutionalism that is also made manifest in Articles I, II and III.

To that end, Chapter One of this thesis lays the foundation for this context and describes the events of the Constitutional Convention of 1787, the debates in state ratification conventions between Federalists and Anti-Federalists over bills of right and, finally, the proposal of twelve amendments to the First Congress. Chapter Two delves into the concept of rights themselves – both how they were conceptualized by the founders as well as the differing ideas on how best to protect them in the new government. Chapter Three will address what the founders perceived as popular democratic excesses during the Confederation period and how many, particularly James Madison, responded by advocating that Constitutional barriers against legislative encroachment of individual liberties be inserted directly into the Constitution.

Finally, my thesis will argue that the Ninth Amendment is best conceptualized in light of two interrelated, but nevertheless very distinct, Constitutional discourses that arose during the revolutionary and founding eras. The first of those discourses concerned the people’s rights and how to protect them. A frequent criticism of the literalist interpretation of the Ninth Amendment is that its provisions are so vague as to create a “bottomless well” from which the judiciary can endlessly dip to find new rights. Admittedly, as with much of the language in the Constitution, the meaning of “rights” in the Ninth Amendment is not entirely clear. I will argue that a review of revolutionary and confederation era polemics, shows that the founders almost certainly meant “natural rights.” Although natural rights theory, and its role in an emerging sense of American Constitutionalism, has been downplayed by some historians, others afford it a more important role in the founders’ political thought. I take the latter position and argue natural rights theory was, in fact, a fundamental source that informed the founders’ thinking on both politics and

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1 Rakove, *Original Meanings*, 11.
government. Indeed, terminology employed in both official documents and personal writings during the mid to late eighteenth century is literally suffused with the language of natural rights.

That said, the founders were faced with the problem of how best to protect those rights. Because of the amorphous nature of natural rights, this was no easy task and one of the primary arguments advanced against a bill of rights was the sheer impossibility of enumerating each and every natural right claimed by man. Had the founders only been concerned about protecting a handful of civil and political rights, as some have argued, then there would have been no debate over the futility of attempting a definitive enumeration. Both sides would have simply agreed on a “laundry list” of rights that deserved constitutional protection. Because they conceived of their rights and liberties as more substantial than that, the founders in general (and the Federalists in particular) were concerned with the ramifications of an incomplete enumeration. Nevertheless, Anti-Federalists were insistent on the inclusion of a bill of rights and Madison proposed what eventually became the Ninth Amendment to address any future problems that could arise from an incomplete enumeration.

The second discourse I will examine concerned the refinement of prevailing republican theory to guard against so-called “excess democracy” or “legislative tyranny.” Another criticism of a literalist interpretation of the Ninth Amendment is that “new rights” create “new disabilities” for democratic government and carve out policy areas where legislatures cannot tread.13 This is precisely the point. Orthodox Whig political theory at the time of the American Revolution saw tyranny emanating from overreaching executives and posited that the best way to guard against it was to vest all power in the hands of legislatures. From the very outset, however, there were problems with this vision of legislative sovereignty. Many founders discovered that popularly elected majorities could be every bit as tyrannous as overreaching executives and this caused a dramatic change in their thinking between 1776 and 1787.

I will argue that the founders grew wary of state legislatures as early as the Revolutionary War and their wariness only increased during the Confederation era as states passed a variety of laws that interfered with property rights. Federalists like James Madison were alarmed at what they perceived to be legislative excesses and were determined to put a stop to them in the new government. I will argue that they did so by inserting a number of explicit “brakes” on the
democratic process directly into the body of the Constitution. Some of those brakes included a
dlarge extended republic, an executive veto and a judiciary that could protect individual liberties.
A bill of rights, made even more expansive by a reference to unenumerated rights in the Ninth
Amendment, was simply another such brake on the democratic process.

When viewed in light of these two discourses, the desire to protect unenumerated natural
rights and concern over majority tyranny in the new Congress, a literal reading of the expansive
provisions of the Ninth Amendment makes perfect sense. The founders were nothing if not
prolific in their writings on both the fundamental nature of liberty as well as the threat of faction
in the new American polity. Debates between Federalists and Anti-Federalists over protection of
rights and restraint of popular will culminated in the adoption of a Constitutional amendment that
both affirmed the existence of liberty interests over which the democratically elected government
could not tread and recognized that the list of those liberties in the first eight amendments, and
elsewhere in the Constitution, were not meant to be exclusive. Finally, the founders designated
the federal judiciary as the branch of government which would enforce those rights and ensure
that the legislature did not infringe them. Confederation era law-making at the state level had
shown that legislative bodies could not police themselves on the question of protecting minority
rights and Federalists were not about to take the chance that Congress would do any better. The
federal courts were thus charged with the responsibility of ensuring that neither the executive,
nor the legislative, would infringe on individual rights.

These two discourses between Federalists and Anti-Federalists – on protection of natural
rights and restraint of majority tyranny in the legislature – ultimately culminated in the drafting,
passage and ratification of the Ninth Amendment. The specific language of the amendment was
meant to address Federalist concerns over an incomplete enumeration of rights in the first eight
amendments of the Bill of Rights but the clear import of its text was to recognize a broader array
of unenumerated natural rights that would warrant Constitutional protection against overreaching
majorities in the legislature. Though critics frequently charge that such an interpretation is anti-
democratic, or provides a bottomless well from which the federal judiciary can dip to find rights,
the historical record indicates that this was precisely what the founders intended.

Chapter I: Building a “More Perfect Union”

In America . . . the government of the Union has gradually dwindled into a state of decay, approaching nearly to annihilation.

Alexander Hamilton, 28 December 1787

Our actual confederation is defective from a want of energy . . . and . . . cannot preserve, either our tranquility, or our liberty, and exposes us to the invasions or to the contempt of foreign nations, which foresaw, with reason, our divisions and our next annihilation.

“Letter From a Delegate Who Has Caught Cold,” 18 June 1787

The Continental Congress operated by fiat the first five years after independence without any organic framework on which to base its governance. Finally, in 1781, enough states ratified the Articles of Confederation to make them operative and provide a basic system of government under which Congress and the states could then function. Almost from the outset, however, that structure was inadequate. The conventional explanation for that inadequacy was that the national government was made too weak and too ineffectual. While that may be true, it fails to address its own corollary which is that the state governments were too strong and given too much power.

In reality, the national government existed in little more than name only and depended on the states for nearly everything. The Confederation Congress had no power to levy taxes for its own support, no judiciary to enforce its laws (most notably, provisions in the Paris Peace Treaty) and no authority to intervene in conflicts between the states. With the nation frequently teetering on the verge of bankruptcy, unable to conduct effective foreign policy and impotent to respond to domestic crises like Shay’s Rebellion, it was patently obvious that “changes [were] necessary” if the new nation was to survive. The federal government was alternately described as insufficient, “incompetent,” or “imperfect.” John Jay, a past President of the Continental Congress and future Chief Justice of the United States Supreme Court, wrote that “errors in our national government”

threatened “to blast the fruit we expected from our tree of liberty.” Indeed, the “mortal diseases” that were said to infect the Confederation “tainted the faith of [even] the most orthodox republicans.”

In an attempt to address some of these problems, Virginia invited delegates from across the Confederation to attend a conference in Annapolis, Maryland, in the fall of 1786. The stated purpose of the convention was to discuss measures affecting trade and commerce but it was only attended by delegates from Pennsylvania, Virginia, Delaware, New Jersey and New York. New Hampshire, Massachusetts, Rhode Island and North Carolina appointed delegates but they never bothered to show up. South Carolina, Maryland, Connecticut and Georgia never appointed any delegates at all. With so few delegates in attendance, the convention adjourned without taking action but did make a recommendation that the Continental Congress “procure the concurrence of the other States” to send delegates to Philadelphia for a second convention the following May and empower them “to devise such further Provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union.” On February 21, 1787, the Confederation Congress passed a resolution calling for a convention of delegates to meet in Philadelphia that spring “for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures, such alterations and provisions” as would render said articles “adequate to the exigencies of government and the preservation of the union.”

A. The Constitutional Convention

That May, fifty-five delegates from twelve states began to arrive in Philadelphia for the

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express purpose of amending the Articles of Confederation. These delegates, despite absences of John Adams and Thomas Jefferson, were among the best and brightest of America’s political elite and they quickly came to the conclusion that what was needed was not an amendment to the articles of governance but a new set of articles altogether. Thus, in great secrecy, they set about drafting an entirely new framework of government. Most of their work that summer centered on the structure of government (Articles I, II & III) as well as the relationship between the national government and the states (Articles IV & VI). Little attention was paid to “rights” of citizens. In August, Charles Pinckney suggested several propositions be taken up by the Committee of Detail including proposals that liberty of the press be “inviolably preserved” and that soldiers could not be quartered in private homes during peacetime “without consent of the owner” (which language pre-figured what eventually became the First and Third Amendments) but the committee took no further action on the proposal.

The matter came up again, almost by accident, in the final days of the convention. On September 12, 1787, Hugh Williamson of North Carolina observed that the document they were debating made no provision for jury trial in civil cases. Elbridge Gerry of Massachusetts echoed his concern noting juries were necessary to guard against corrupt judges. At that point, George Mason of Virginia spoke up and voiced agreement with Williamson and Gerry and suggested the proposed constitution be prefaced with a bill of rights. Mason continued that such a bill would “give great quiet to the people” and could be prepared in just a few hours thereby not delaying adjournment of the convention. Roger Sherman of Connecticut questioned the need for a bill of rights. Though all for “securing the rights of the people where requisite,” Sherman noted the state constitutions and declarations of rights were not being repealed by the new proposed federal constitution and that they would suffice to protect the rights of the people. Mason answered that, while the state constitutions were not repealed, the new federal Constitution would nevertheless

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18 Rhode Island sent no delegates to the convention at all.


20 Ibid., 2:587-588. Mason may well have had himself in mind for the task of drafting a bill of rights in just a few hours. He had plenty of experience in similar endeavors given that he was the author of the Virginia Constitution of 1776 with its Declaration of Rights.
“be paramount to State Bills of Rights.” Gerry then moved the matter be referred to a committee where a bill could be quickly drafted. Mason seconded his proposal but, in the end, the motion was unanimously defeated with neither Virginia nor Massachusetts in support of the positions advocated by their own delegates.21

Gerry and Mason ultimately refused to sign the final draft of the proposed Constitution. On a blank page of his copy, Mason noted “[t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security.” So upset was Mason with these perceived defects, that he declared to his fellow delegates that he would “sooner chop off his right hand than put it to the Constitution as it stood.” Gerry was not so much troubled by the absence of a bill of rights as he was by eight other structural problems with the new government, all of which he said he could “get over” if the rights of citizens were not rendered insecure by the power of Congress to make whatever laws they pleased and then to establish tribunals without juries.22 The proposed constitution was nevertheless approved by the overwhelming majority of delegates who remained in Philadelphia until September. Only three delegates at the conclusion of the convention (Mason, Gerry and Edmond Randolph of Virginia) refused to give their assent to the document. The new frame of government was then sent to the states for their approval and ratification.

If Federalists expected the same muted reaction to the absence of a bill of rights at state ratification conventions as they received in Philadelphia, then they sorely underestimated the salience of that issue. Anti-Federalists, concerned with national intrusion on both individual and state’s rights, seized on the absence of a bill of rights as reason to oppose what they saw as an

21 Ibid.

22 Ibid., 2:637; 2:479 (remarks of Mason); James Madison, Journal of the Federal Convention, ed. E. H. Scott (Chicago: Albert Scott & Co. 1893) 740-741. Gerry’s specific objections to the structure of the Constitution included (1) duration and re-eligibility of the Senate, (2) power of the House to conceal their journals, (3) power of Congress over the places of election, (4) unlimited power of Congress over their own compensation, (5) Massachusetts was not given what he thought to be that state’s “due share of representatives,” (6) three-fifths of blacks were to be represented as if freemen, (7) monopolies could be established under Congressional powers over commerce and (8) the Vice President was made head of the Senate. Ibid.
emerging federal leviathan. This is not to suggest that the absence of a bill of rights was the only reason Anti-Federalists opposed the new constitution. As Saul Cornell has persuasively shown, few groups in history were as heterogeneous, and had such differing ideas on the inviolability of rights and the role of democracy in America, as Anti-Federalists. There were elite, middling and plebian strains of Anti-Federalism – each with its own philosophical concerns about the national government and oftentimes as suspicious of their Anti-Federalist colleagues as they were of their Federalist opponents. Nevertheless, the lack of a bill of rights was a more tangible point around which to rally than, say, differing views of democracy and republicanism.23

The ensuing struggle between these groups played out over both class and ideological battlegrounds. Progressive historians like Charles Beard cast Federalist and Anti-Federalist positions in terms of economics, with support for the Constitution coming from merchants, money lenders and securities holders while opposition originated with farmers, debtors and advocates of loose money. Subsequent scholarship demonstrated that the battle for ratification was far more complex and involved differing political ideologies and concepts of representative government. Federalists viewed good republican government as administered by the virtuous who arose from the ranks of the elites and would govern for everyone. Anti-Federalists were obsessed with what they saw as a Federalist cabal to govern through “aristocracy.” Elite Anti-Federalists, like George Mason of Virginia, were not so concerned about a “natural aristocracy,” but feared the new frame of government concentrated too much power in the hands of too few people who would eventually form a “governmental aristocracy” to rule everyone else. Their solution was a bill of rights to protect individual liberty. Middling Anti-Federalists, merchants,
mechanics and professional men, were wary of the very sort of natural aristocracy to which men like Mason belonged and resented the Federalist arguments that filtering mechanisms in the new Constitution were needed to ensure that these “better sorts” were the ones who rose to power in the new Congress. A bill of rights was all well and good but did little to relieve their concerns about the structure of the new government. The solution for these men was to strip power away from the national government and keep it at the state level where it could be controlled. At the far end of the Anti-Federalist spectrum were plebian populists, like farmers in the western back countries, who were the most class conscious and favored representation by “populist localism” where representatives more closely resembled the constituents they were supposed to represent. Thus, while the battle lines between Federalists and Anti-Federalists coalesced around the issue of a bill of rights, their differences were much more systemic and theoretical.  

While class and ideology were primary points of contention during the founding era debates, they were not the only ones. Gender and racial issues also fomented just below the surface. “Remember the ladies,” Abigail Adams entreated her husband as he helped steer the country toward independence, and “[d]o not put such unlimited power into the hands of [their] [h]usbands” as men “are [n]aturally [t]yrannical” and would abuse that power. Her entreaties fell on deaf ears. John Adams chided his wife stating he had no idea her “Tribe” had “grown [so] discontented.” Men were not about to give up their “Masculine systems,” Adams tried to soothe his marital and political partner, but he assured her such “systems” were in theory only and that, in reality, men were “the subjects” of their wives and were “obliged to go fair and softly” in their routines. No mention was made of “the ladies,” however, when the Declaration of Independence was issued several months later. The soaring rhetoric of “self-evident” truths and “unalienable rights” were confined to the male gender only. Matters became even worse during the Confederation period when those few states which actually extended voting rights to women rescinded them leaving women without any voice in the public sphere. As Linda Kerber

Anti-Federalist, 1:9.

notes, it was ironic that a generation of men fought a revolution against a British hierarchy that allowed rulers to oppress the ruled but found nothing wrong in ancient English Coverture laws that left intact a system where men oppressed women and subsumed their legal identities within their own.25

This is not to say women were wholly absent from Constitutional discourse. One of the better spokespersons for the libertarian strain of Anti-Federalism was *A Columbian Patriot* who, though initially thought to be Elbridge Geery, was later shown to be Mercy Otis Warren, the sister of famed colonial lawyer James Otis and a member in her own right of the Massachusetts political intelligentsia. Warren found many flaws in the proposed Constitution including the lack of a bill of rights to “guard against the dangerous encroachments of power” by the new national government. Echoing John Locke, Warren intoned that the principal aim of society is to protect individuals “in the absolute rights” vested in them by the law of nature. By not providing a bill of rights, the proposed Constitution failed to meet that objective. Even if not a participant in the discourse directly, women and their “delicate status” in society were not above being used for partisan purposes. In warning of the extensive powers that were proposed to be given the new national government, one Anti-Federalist invoked the specter of government agents who would “wait upon the ladies at their toilet, and will not leave them in any of their domestic concerns.”26

Racial conflicts – particularly in regard to African slavery – also simmered just beneath the surface of Constitutional debates. Chattel slavery was not easily reconcilable with founding era rhetoric on liberty and natural rights. As early as 1764, Boston lawyer James Otis argued that slavery and natural rights were incompatible. “The Colonists are by the law of nature free born,” reasoned Otis, as “all men are, white or black.” He described the slave trade as “the most shocking violation of the law of nature” and everyone who participated in it was a “tyrant” in his


own right. To “barter away other mens [sic] liberty” would soon result in them caring “little for their own.” Robert Cover further describes how natural right principles inspired some founders to become early advocates of abolition and empowered some slaves to successfully seek their freedom in state courts and legislatures. For the most part, however, chattel slavery was simply another issue which, if necessary, could be sacrificed to entice southern slaveholding states to ratify the new Constitution. Even after the Constitution and Bill of Rights were ratified, free blacks and native Americans saw an erosion of the few civil and political rights they actually possessed as many states revoked their voting rights.27

In short, no single issue – or even group of issues – dominated Constitutional discourses in the founding era. Federalists and Anti-Federalists were divided on many issues and, in many instances, were divided amongst themselves on those issues.28 For that reason, I emphasize that my thesis should not be misconstrued as asserting that natural rights and majority tyranny were the only concerns that occupied the founders’ attention during this time. Nevertheless, in order to fully understand the context of the Bill of Rights in general, and the Ninth Amendment in particular, these are the discourses on which we must focus.

B. State Ratification Conventions

Anti-Federalist objections to the absence of a bill of rights were both immediate and emphatic. The issue transcended differences in region and state-size as Federalists and Anti-Federalists in conventions from Massachusetts to the Carolinas debated the need to preface the

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28 Constitutional provisions on slavery, for instance, divided many Anti-Federalists. Massachusetts Anti-Federalists opposed the provision in Article I, Section 9, which prohibited Congress from regulating the slave trade until 1808. They argued the slave trade should be outlawed immediately as a “nefarious” and “monstrous” practice wholly inconsistent with the natural right principles discussed in Philadelphia. See Consider Arms, Malichi Maynard and Samuel Field, “Reasons for Dissent,” in The Complete Anti-Federalist, 4:259-265. By contrast, a North Carolina Anti-Federalist challenged the provision for even attempting to limit the slave trade at all arguing that his state would “degenerate into one of the most contemptible [in] the union” without “negroes.” See Rowland Lowndes, “Speeches in the South Carolina Legislature,” Ibid. 5:149-150.
Constitution with some degree of assurance that fundamental rights would not be infringed. That the issue could prove so virulent, after receiving so little attention in Philadelphia, caught many off-guard. An exasperated George Washington, who served as Honorary President of the delegates in Philadelphia, wrote the Marquis de Lafayette that “there was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates of a Bill of Rights and Tryal [sic] by Jury. The first, where the people evidently retained every thing which they did not in express terms give up, was considered nugatory.” James Wilson, a prominent lawyer and future Supreme Court Justice, surely expressed the dismay of many other Federalists when he addressed the Pennsylvania Ratification Convention on November 28, 1787. Wilson recalled the events of the Federal Convention to his fellow Pennsylvanians:

I am called upon to give a reason why the Convention omitted to add a bill of rights to the work before you. * * * I cannot say, Mr. President, what were the reasons of every member of that Convention for not adding a bill of rights. I believe the truth is, that such an idea never entered the mind of many of them. I do not recollect to have heard the subject mentioned till within about three days of the time our rising; and even then, there was no direct motion offered for any thing of the kind. I may be mistaken in this; but as far as my memory serves me, I believe it was the case.

He was mistaken, of course, as a motion was made to refer the matter to committee but Wilson’s comments sum up the surprise at the vehement opposition of Anti-Federalists. Because the issue was never really debated at the Philadelphia convention, Federalists were not put in the position of having to defend a decision to exclude a bill of rights. Instead, they were required to justify why they never seriously considered the issue at all. This may well have tempered their arguments. Federalists asserted that the American political system made a bill of rights unnecessary. While such measures may have been required in Great Britain, where

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29 Jonathan Elliot, ed., Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787 (Buffalo: William S. Hein & Co., Inc. 1996) 2:161 (remarks of Dr. Taylor of Massachusetts); Ibid. 4:168, 210 (remarks of Samuel Spencer and Joseph McDowall of North Carolina); Ibid. 4:315, 336 (remarks of Patrick Dollard and James Lincoln of South Carolina)


31 Elliot, Debates, 2:435-436.
monarchs once held absolute power, and rights were ceded to the people over time, this was not so in the United States which had no history of autocratic government. During debates in New York, Alexander Hamilton drew upon British history for *Federalist 84* where he wrote that bills of rights typically denoted “abridgments of prerogative” secured by sword from a sovereign as with *Magna Charta* from King John or the English Bill of Rights extracted by Parliament from William and Mary in 1688. These examples did not apply here, Hamilton argued, because the American people never surrendered anything to a monarch; the people retained all rights and powers unto themselves and only delegated specific powers to the government.32

James Wilson made a similar argument in Pennsylvania where he contrasted the proposed American system to the British constitutional structure. Because British subjects extracted their liberties from kings with pretensions to divine rule, rights had to be enumerated. By contrast, Americans retained their rights from the outset and only delegated specific enumerated powers to the new government. There was, in short, no need for a bill of rights in this country as there was in Great Britain or in many other European nations.33

This argument carried little weight with Anti-Federalists. In Virginia, Patrick Henry scoffed at the historicism of Wilson and Hamilton. He observed that “European nations, and particularly Great Britain, [are] against the construction of rights being retained which are not expressly relinquished.” Henry went on:

I repeat, that all nations have adopted this construction – that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers. It is so in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the King’s prerogative. * * * This is the question. If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights. If the people do not think it necessary to reserve them, they will be supposed to be given up.34

A similar argument was made to the people of Virginia by the *Impartial Examiner* who


33 Elliot, *Debates*, 2:436. Similar arguments were raised in other states as well. See Ibid., 4:142, 147-148 (remarks of Samuel Johnston and James Iredell of North Carolina); Ibid. 4:315-316 (remarks of Charles Coatesworth Pinckney of South Carolina)
posited that those entering into a new body politic “should attend most diligently to those sacred
devoted rights, which they have with their birth, and which can neither be retained . . . nor transmitted to
their posterity, unless they are expressly reserved[.]” The Examiner went on to say it was a
universally acknowledged maxim that, “when men establish a system of government, in granting
powers therein they are always understood to surrender whatever they do not expressly reserve.”35

Anti-Federalists had other concerns as well. The “Supremacy Clause” mandated that the
Constitution, together with all laws of the United States and treaties entered thereunder, would be
the “supreme Law of the Land” and that judges in every state would be bound by them.36 This
almost caused the Impartial Examiner a fit of apoplexy:

[This] must be alarming indeed! What cannot this omnipotence of power effect? How
will your [state] bill of rights avail you anything? * * * [I]f you pass this new
constitution, you will have a naked plan of government unlimited in its jurisdiction,
which not only expunges your bill of rights by rendering ineffectual, all state
governments; but is proposed without any kind of stipulation for any of those natural
rights, the security whereof out to be the end of all government.37

It was not the supremacy clause but the “necessary and proper clause” and the “treaty
clause” which concerned An Old Whig. Addressing himself to the arguments of James Wilson
that the new government was one of delegated powers, thus making a bill of rights unnecessary,
An Old Whig pointed to the “undefined, unbounded and immense power” of Congress to pass all
laws that were necessary and proper to carry out delegated powers. Congress itself would decide
what was necessary and proper and no “power on earth can dictate . . . or controul [sic] them.”
Thus, there was nothing to stop them from passing laws that infringed on personal rights and
liberties so long as they could point to an enumerated power and say that the law passed was a
necessary and proper means to carry out that end. As to the treaty clause, An Old Whig asked

34 Ibid. 3:445-446.
36 U.S. CONST. art. 6.
what was to stop a cabal of senators from entering into a treaty with Great Britain “which would be inconsistent with the liberties of the people” and yet still be the supreme law of the land? The only solution for these sorts of problems would be a bill setting out the rights and liberties of the people which could neither be infringed by legislation nor abrogated by treaty.38

For some, it was not the power but the thought of who might wield it. Luther Martin, a prominent Anti-Federalist and long-serving Attorney General of Maryland, claimed that he too drafted a resolution in Philadelphia calling for a bill of rights to be prepared but could find no one to second it. Martin insisted that the “principal framers” were so blinded by ambition and interest that they created a system in which “they themselves might be exalted and benefitted” and that they sacrificed the freedom of the states and its citizens to attain it.39 Again, Anti-Federalists perceived that the Constitution would create an aristocracy that would challenge the integrity of the states and eventually result in both tyranny and destruction of the republican government they sought to achieve.

While Anti-Federalists failed in their efforts to defeat the proposed constitution, they came close. In the final days of the Virginia convention, James Madison, who had previously opposed including a bill of rights, conceded that, if it was necessary to obtain ratification by the remaining states, amendments could be proposed and considered after the constitution was adopted. Alexander Hamilton agreed and warned his fellow New Yorkers in Federalist No. 85 that it would be far easier to amend the Constitution after it was ratified that to go back and get all the states to agree on a more “perfect” frame of government – assuming that “perfect” work could be derived from “imperfect man” in the first place.40 These oblique concessions to the Anti-Federalist cause were apparently sufficient to win over enough delegates in Virginia and in New York. Both states voted to ratify but conditioned on the Federalist promise to revisit the issue of a bill of rights.

38 See U.S. CONST. art. 1, §8, specifying that Congress shall have the power to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing powers”; See Ibid. art. 6 “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . shall be the supreme Law” of the land; An Old Whig [pseud.], Essay in The Documentary History of the Ratification of the Constitution, 13:399-403; An Old Whig [pseud.], Ibid, 13:421-427.

Despite heated exchanges in many of the states, the Constitution was eventually ratified. Three states (Delaware, Pennsylvania and New Jersey) gave their assent before the end of 1787 and, the following year, eight more states approved the new frame of government as well. On June 21, 1788, New Hampshire became the pivotal ninth state to ratify thereby establishing the Constitution as the law of the land.\footnote{U.S. CONST. art. 7 provides that “[t]he [r]atification of the [c]onventions of nine States, shall be sufficient for the [e]stablishment of this Constitution between the States so [r]atifying the same.} Virginia, New York, North Carolina and Rhode Island eventually ratified as well.\footnote{Rhode Island was the last state to ratify and did not approve the Constitution until May 29, 1790, almost two years after New Hampshire.} On September 13, 1788, the Confederation Congress put itself out of business and passed a resolution that implemented the Constitution, called for selection of presidential electors and designated March, 1789, as the month that the first Federal Congress would convene.\footnote{Elliot, Debates, 1:332-333.} The arduous journey that had begun in Philadelphia in the spring of 1787 was now over.

The Anti-Federalist threat to the new government, however, was not. Several of the state ratification resolutions contained suggestions for amending the new Constitution. There were also calls for a second convention which many Federalist, particularly Madison, feared would wreak almost unimaginable havoc. Finally, while Federalist carried the day on ratification, Anti-Federalists maintained considerable influence in several states including Virginia and New York. Federalists feared that this gave their opponents a power base from which to elect representatives and appoint senators who would be in a position to oppose implementation of the Constitution.\footnote{In hindsight, this fear proved unfounded as Anti-Federalists “transformed” themselves from opponents of the Constitution to “loyal” political opposition in Congress. See Cornell, The Other Founders, 147-} It was clear that enacting a new frame of government was one thing but defending it from attack was another. Concerns over Anti-Federalist opposition to the Constitution ultimately led James Madison, who previously opposed a bill of rights in Philadelphia and the Virginia ratification convention, to change his mind and support the amendments that would form the Bill of Rights.

\footnote{Elliot, Debates, 3:629-630 (remarks of James Madison); Hamilton, “Federalist 85,” in The Federalist, 557-565.}
C. The First Federal Congress and the Bill of Rights

The first Congress of the restructured United States met in New York City in the spring of 1789 and immediately set about the task of filling in the framework of the new government. During that first session, Congress created a revenue system that made the national government financially independent of the states, set up a federal judiciary and created executive departments for state, treasury and war. Elections to that first Congress were profoundly influenced by the politics of ratification. Because of the election of a vocal minority of Anti-Federalists, it was necessary to address concerns over the absence of a bill of rights.45

On Monday June 8, 1789, James Madison of Virginia stood on the floor of the House of Representatives and offered nine amendments to the Constitution.46 What eventually became the Bill of Rights was set out in Madison’s fourth proposal which called for several “clauses” to be inserted into Article I, Section 9 of the Constitution.47 Though Madison had previously towed the Federalist line claiming that a bill of rights was unnecessary, if not outright dangerous, he nevertheless decided to support including such a bill in the first Congress. The evolution of his opinion can be attributed to a variety of factors.48

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47 We now take for granted that amendments to the Constitution are appended to the end of that document rather than made directly into its text. During the first Congress, though, it was unclear how this process would work. Madison’s proposals called for the amendments to be made directly to the text of Article I, section 9. After much debate, however, it was decided that the original tenor of the Constitution should preserved and that amendments should be appended at the end as supplements thereto. For a glimpse into the arguments raised on both sides of this issue, see Joseph Gales, ed., The Annals of Congress (Washington DC: Gales and Seaton, 1834) 1:707-710.

48 On the evolution of Madison’s thinking regarding the efficacy of a bill of rights, see Stuart Leibinger, “James Madison and Amendments to the Constitution, 1787-1789: ‘Parchment Barriers,” Journal of Southern History 59 (1993) 441-468. Leibinger argues that Madison was never opposed to a bill of rights per se but was simply opposed to amending the Constitution prior to its adoption. From the fall of 1787
First, as noted above, Madison conceded the previous year that if inclusion of a bill of rights was necessary to entice the remaining states to ratify the Constitution then amendments to that effect should be made. Madison was abiding by what he had previously suggested to his colleagues in Richmond. Second, he was no doubt influenced by Thomas Jefferson, who wrote from Paris telling him that he did “not like” the absence of a bill of rights from the Constitution. Jefferson cautioned that a bill of rights was something to which the people were entitled “and that no just government should refuse, or rest on inference.”49 Finally, several states had called for a new constitutional convention to correct perceived flaws in the original document. Rather than risk destroying the framework of government arrived at after so much careful deliberation and compromise in 1787, Madison thought it best to defuse the issue by offering to include a bill of rights.50

Whatever his specific reasons, Madison believed himself “bound in honor and in duty” to bring his proposed amendments before the House “as soon as possible and advocate them until they shall be finally adopted or rejected[.]”51 Though some Congressmen questioned the wisdom of tinkering with the fundamental law of the nation so soon after it had been adopted, and others argued that there were more pressing concerns for that body to address, Madison was adamant:

It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the [s]tate [l]egislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the

to the Spring of 1789, Leibinger asserts, Madison’s thinking went from ambivalence toward a bill of rights to a belief that such a bill would prove efficacious in protecting individual rights.


50 Levy, Origins of the Bill of Rights, 34. Madison’s concerns were that a second a second convention “would naturally consider itself as having a greater latitude” than simply amending the system (just as the Philadelphia Convention had done), would agitate the public and would attract “violent partizans [sic]” with “insidious views” all to the detriment of the fragile new Union. Madison to G. L. Turberville, 2 November 1788, in The Writings of James Madison, 5:297-301.

adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a [r]epublican [g]overnment, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of very member of the community, any apprehension that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince the spirit of deference and concession for which they have hitherto been distinguished.52

There was an even more immediate concern to Madison. At that time, two states (North Carolina and Rhode Island) had yet to ratify the Constitution. Madison noted that if passage of a bill of rights was the final measure necessary to get them “to throw themselves into the bosom of the confederacy,” then they should undertake that step as soon as possible. On September 28, 1789, after receiving the requisite two-thirds vote in both houses of Congress, twelve proposed amendments were sent to the states for ratification. If Madison was hoping to appease Anti-Federalists, then it is not at all clear that these amendments met that objective. Senator William Grayson of Virginia reported back to Patrick Henry that the “amendments matters” turned out precisely as he expected. The “lower house sent up amendments which held out a safeguard to personal liberty in a great many instances, but this disgusted the Senate, and though we made every exertion to save them, they are so mutilated [and] gutted that in fact they are good for nothing, [and] I believe as may others do, that they will do more harm than benefit.” Thomas Tudor Tucker, a House member from South Carolina, was more sanguine and remarked that the amendments were “calculated merely to amuse, or rather to deceive.”53

On December 15, 1791, more than two years after the proposed amendments were voted

52 Ibid., 431-432.

53 Ibid., 432 (remarks of James Madison); Grayson to Patrick Henry, 19 September 1789, in Helen E. Veit, Kenneth R. Bowling and Charlene Banks Bickford, Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Baltimore: Johns Hopkins University Press, 1991) 300; Thomas Tudor Tucker to St. George Tucker, 2 October 1789, Ibid. Disillusion with the amendments stemmed not so much from what they covered, but what they omitted – namely, there were no provisions limiting congressional powers of taxation or outlawing standing armies which many Anti-Federalists saw as a
out of Congress, enough states ratified amendments three through twelve to make them part of the United States Constitution. There is, unfortunately, no record of the debates that occurred in the state legislatures relative to their consideration of these amendments. Thus, we are left with only the meager record of the First Congress and the larger historical context of the debates between Federalists and Anti-Federalists as a basis from which to extract a degree of historical understanding. As the following chapters demonstrate, however, the Bill of Rights in general—and the Ninth Amendment in particular—cannot properly be considered outside that context. Debates between proponents and opponents of the Constitution, over issues like rights and the place of democracy in American Constitutionalism, produced a set of amendments that not only acknowledged an expansive array of individual liberties but also placed them outside the reach of legislatures to alter or abridge.


54 The first proposed amendment sent by Congress to the states for ratification dealt with the number of representatives to be in the House of Representatives and the second specified that any law varying the compensation of Congress would not take effect until after the next election. See September 28, 1789 draft of the “Amendments to the Constitution” in *Creating the Bill of Rights*, 3-4. Although neither proposed amendment was ratified by enough states to become part of the Bill of Rights, on May 5, 1992, Alabama became the 38th state to ratify the second proposed amendment (over two hundred years after it was originally sent to the states) thereby making it the Twenty-Seventh Amendment to the Constitution.
Chapter II: Natural Rights and the Efficacy of “Parchment Barriers”

Enumerate all the rights of men! I am sure, Sir, that no gentleman in the late convention would have attempted such a thing . . .

James Wilson in the Pennsylvania Ratification Convention, 4 December 1787

It is clear that the founders, both Federalists and Anti-Federalists, were concerned about protecting the rights of citizens – or at least those of white male property owners – but what is less clear is what they meant by the term “rights” and what specific protections for those rights they thought necessary to included in the new polity. From the writings of Federalists and Anti-Federalists alike, it would appear that the “rights’ with which they were primarily concerned were, in fact, “natural rights.” Thomas Paine wrote that he considered the war against Great Britain to be the war of the people “for the security of their natural rights, and the protection of their own property.” Later, when arguing for adoption of the Constitution, John Jay admitted that it was “undeniable” that people must cede to the new government “some of their natural rights” but that this was necessary to vest government with requisite power to function and that the institution of government was “an indispensable necessity.” Indeed, to create a proper civil government, it was necessary “that a certain portion of natural liberty” belonging to man in a state of nature be surrendered. That said, Anti-Federalists like Richard Henry Lee thought it absolutely essential to expressly declare a “residuum” of “natural rights, which is not intended to be given up to society” upon entering the new polity.

Due to their amorphous and undefined nature, though, devising a means to protect the people’s natural rights was a primary point of contention between proponents and opponents of the Constitution. Anti-Federalists insisted that the only way to protect their rights was with a bill specifically setting out rights that could not be infringed by government. Federalists responded that it was impossible to enumerate all the natural rights of man and an incomplete enumeration

55 Farrand, Records of the Federal Convention, 3:162.
was even more dangerous than no enumeration at all. In proposing what ultimately became the
Ninth Amendment, Madison devised an ingenious compromise that addressed the arguments of
both groups.

A. Situating Natural Rights Within the “Republican Synthesis”

The concept of a “republican synthesis” has come to dominate both our understanding of
the founding era as well as writings on early American Constitutionalism. What is typically
lacking in this narrative, or what is relegated to a secondary role, however, is the part played by
natural rights theory. This is unfortunate as it provides an incomplete picture of the theoretical
sources that informed the founders as they built new polities and synthesized various strains of
European politics into a political theory which was distinctly American. Just as republics of
antiquity and radical seventeenth century revolutionary writings informed the founders’ thinking,
so too were they influenced by the concept of man’s rights in a state of nature. By emphasizing
the two former concepts at the expense of the latter, historians neglect the role that liberalism
played in state and federal constitution making.

As first suggested by Bernard Bailyn, and then later elaborated on by Gordon Wood,
republicanism is the progeny of a strain of radical Whig political theory that emerged after the
“Glorious Revolution” in England. That theory, popularized by polemicists like John Trenchard
and Thomas Gordon, never caught on in Great Britain, but was widely accepted in the North
American colonies. The primary tenets of radical Whig opposition were a belief in maintaining
civil liberty through parliaments and a near fanatical fear of government corruption and tyranny
as manifested by the existence of standing armies, a national debt and high taxes to service that
debt. After the Seven Years War, Great Britain sent an enormous number of soldiers and
administrative personnel to protect/administer the colonies. Parliament also passed various
revenue acts to finance both the war and the subsequent colonial administration. Americans,
schooled on this radical Whig political theory, were convinced that they were experiencing

Samuel Adams, 5 October 1787, Documentary History of Ratification, 13:323.
nothing short of a full frontal assault on their liberties under the British Constitution and, thus, rebelled against Great Britain.57

When it came time to construct their own governments, the founders looked not only to the basic tenets of Whig political theory but also antiquity and “classical republicanism.” A “republican government” is one where the people elect surrogates to represent their interests, as opposed to a pure democracy where the people represent themselves or a monarchy or oligarchy where they are governed by one or more of a select group of rulers. Because a democracy can too easily descend to anarchy, and because monarchies and oligarchies are too prone to tyranny, a republic was the preferred choice for a form of government. Oppositional Whig theory held that the best measure to guard against tyranny was for sovereignty to lie with the people’s elected representatives in Parliament. In Confederation America, this meant reposing sovereignty in the state legislatures with little, or no, check by governors which were left purposely weak so as to avoid overreaching magistracies.58

Republicanism and Whig political theory also affected American views on both politics and Constitutionalism. Republicanism called for “public virtue” and a willingness of citizens to sacrifice their own needs for that of the community. Thus, according to Wood, the essence of republicanism, was “[t]he sacrifice of the individual interests to the greater good of the whole.” The res publica (public good) was the polestar of government and meant that individual liberties must give way to public liberties and private rights must yield to public rights. In a republican form of government, personal rights could only be asserted against a ruler. Whig theory simply did not envision individual rights being asserted by one citizen against his fellow citizens and there was no way to protect a minority in society against majority tyranny.59

During the Confederation, however, many perceived a “sickness” or crisis developing in their idealized concept of republican virtue. People lived beyond their means, sought their own


59 Wood, Creation of the American Republic, 46-70.
self-aggrandizement to the detriment of the res publica and, most importantly, abused their civil liberties at the expense of their fellow citizens. Tyranny was no longer seen emanating from runaway magistrates but from factious legislative majorities which passed laws trampling on private liberties of fellow Whigs. A change in political theory was necessary if the new republic was to survive and that change came in the guise of the “republican synthesis.” The essence of this so-called republican synthesis included (1) a re-conceptualization of sovereignty in the “people” rather than legislatures, and (2) a re-thinking of divided government, not as the imperium et imperio solemism but as a principled decision by the “sovereign people” to divide their sovereign authority and parcel it out to different entities all acting in their name. Thus, old Whig notions of “public liberty” gave way to our more modern ones of “private liberty” and individual rights.60

Natural rights are typically afforded little space in this republican synthesis. Their near absence from that discourse, however, suggests a flaw in the republican syllogism. Without a violation of natural rights (particularly property rights) by factious legislative majorities during the Confederation period, there would have been no perceived sickness in republican virtue and no ensuing republican synthesis. Natural rights are, thus, an integral part of any discussion of republicanism. While not missing from their work entirely, natural rights theory has little place in the work of either Bailyn or Wood. Bailyn concedes natural rights factored into revolutionary thought but argues that it was only one of several sources which informed the founders’ thinking and was, in any event, subsumed by radical Whig oppositional thought which recognized few individual rights and saw absolute sovereignty resting in Parliament.61

There is even less room for natural rights in Wood’s analysis. As mentioned previously, classical republicanism favored public liberty over individual liberty and communal rights over private rights. Wood concedes that colonists saw their rights emanating “from . . . the laws of nature” but points out that the type of natural rights advocated by Whig oppositional theorists saw revolution, not a judicial declaration of statutory invalidity, as a remedy for governmental violation of natural rights. It was not until state legislatures passed laws violating property rights that the founders shifted their political thinking and saw that civil liberty must yield to private

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60 Ibid., 396-397, 414, 434-467, 609.
61 Bailyn, Ideological Origins of the American Revolution, 26, 34, 188.
liberty and that positive law could be held legally null and void when it conflicted with natural rights. In short, while Wood does not dismiss natural rights entirely, he also does not see them as playing much of a role in colonial thought until near the end of the Confederation period.

Not everyone agrees that natural rights played such a small role in development of the American polity. Joyce Appleby criticizes what she calls a “republican revision” for stressing classical republican thought at the expense of liberal thought and its emphasis on individual rights. Liberalism, according to Appleby, traces its pedigree back to the rise of free-market capitalism and replacement of mercantilism. By encouraging internal consumption over trade, and allowing workers to enter into labor contracts best suited to their own interests, capitalism fostered a concern for individual rights over collective rights of the nation as a whole. Between 1776 and 1800, Appleby argues that colonial Americans incorporated many of the “core liberal affirmations” like belief in the rule of law, recognition that positive law must protect natural law guarantees of life, liberty and property and opposition to tyranny over body and mind.

Other historians take issue with emphasizing classical republicanism over natural rights theory as well. Forrest McDonald argues that the founders came to republican theory “late” and “willy-nilly” without any real philosophical understanding of what they were embracing. While McDonald does not see an “age of liberalism” emerging in America until after 1792, he points out that state delegates to the Continental Congress cited natural law and natural rights before declaring independence and that, after independence, several states tried to secure property rights in their own constitutions by reference to natural rights principles. Similarly, Willi Paul Adams argues that the founders simply adopted whatever variant of Whig political theory best suited the particular circumstances of American life. He also points out that natural rights theory played a significant role state in the process of state constitution-making. Many states bills of rights after independence “delimited certain areas of individual behavior over which the sovereign majority relinquished control.” These bills were based on natural law traditions and the “Lockean triad” of life, liberty and property and at least six states afforded as much protection to rights of citizens as was later provided under the federal Constitution and Bill of Rights. Adams concludes that

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neither the state nor federal government ever declared the people’s will to be absolute and that, after 1776, popular government in America was always restrained by the rights of individuals. ⁶⁴

No historian really disputes that liberalism and natural rights informed American political thought in the latter half of the eighteenth century. Their differences are in the degree of that influence and when it came to predominate the founders’ thought. As discussed below, Bailyn and Wood underestimated the role natural rights played in moving toward independence. That said, even Wood agrees that by the late 1780s and early 1790s, the founders were very concerned over natural, unalienable, rights – particularly to property but, also, life and liberty. In that sense, their area of agreement is probably more significant than their areas of disagreement.

B. The Sources and Origins of Natural Rights

Having defined the parameters of republicanism and the republican synthesis, it is now appropriate to consider what is meant by the concept of “natural right.” In a “Lockean” sense, natural rights are nothing more than what man brings with him when he leaves a state of nature. John Locke wrote that a “state of nature” is a “state of perfect freedom to order [one’s] actions, and dispose of [one’s] possessions, and persons as they think fit” governed only by the law of nature which holds that no one ought to “harm another in his life, health, liberty or possessions.” An American variant on natural right theory, however, posits that such rights do not technically arise in a state of nature but when man leaves a state of nature and enters civil society. Nature endows man with the fundamental right of self-preservation and a right to acquire the means by which to accomplish that end (e.g. food, clothing, shelter). These “proto-rights” are not rights in the proper sense in that they are based on little more than force or selfish desire. That is to say, while someone may refrain from violating the rights of another man out of fear of greater force, there is no actual duty on the part of that person to respect the rights of his fellow man. Rights in the proper sense arise when man comes to the realization that, to protect his rights, he must also recognize the rights of others and refrain from violating them. This “rights reciprocity” gives rise to correlated duties to respect the rights of others. By entering civil society, man surrenders

some of his proto-rights but will do so because civil society now defends those natural rights he has not surrendered in leaving a state of nature.\textsuperscript{65}

Natural rights are possessed independent of government and the chief end of civil society is to protect those rights. While there has never been a definitive list of natural rights, the usual “Lockean triad” are life, liberty and property. Life and property are relatively self-explanatory but, like the concept of natural rights itself, liberty is more ethereal. By and large, liberty in this context is understood to mean what Thomas Jefferson declared, that -- “[n]o one has a right to obstruct another, exercising his faculties innocently for the relief of sensibilities made a part of his nature.” This would mean tastes, likings or pursuits which are not, strictly speaking, pursuit of needs and do not violate or infringe the needs or liberties of others.\textsuperscript{66}

C. Natural Rights Rhetoric in the Revolutionary and Founding Eras

Natural rights theory, contrary to the arguments of some prominent historians, was much more than just an ancillary factor in the founders’ thinking. Joyce Appleby traces the inception of the liberal “rights” tradition to the rise of English capitalism and, indeed, there is no shortage of rights rhetoric in British polemics. John Locke stated in his \textit{Second Treatise of Government} that man once existed in a “state of perfect freedom” and could do whatever he wished in “the bounds of the law of nature” without the consent of any other man. Only after entering civil society did man give up the liberty he enjoyed in the state of nature. Man then transferred his “executive power” to the hands of society, to be used by the legislatures, as the good of the society required. The power of society, or its legislature, however, “can never be supposed to


extend any further than the common good” and cannot be used to deprive men of those rights they did not surrender when they left a state of nature.  

Similarly, Sir William Blackstone – whose commentaries on the laws of England were more popular in the colonies than they were at home – wrote that the principle aim of society is to protect individuals in the enjoyment of those “absolute rights” which were vested in them by the immutable laws of nature but which could not be preserved in peace without the mutual assistance and intercourse of social communities. By “absolute rights,” Blackstone meant those rights which belonged to men in a state of nature and which men are entitled to enjoy whether in or out of society. The founders were well-read, well-educated and well-aware of these ideas. What they found important in Locke and Blackstone was the proposition that man retained certain inherent rights which could not be alienated (hence the concept of “unalienable” rights) through the machinations of government and civil society. This theory provided much of the intellectual firepower that went into both their revolutionary polemics against Great Britain as well as their writings on constitutionalism in the latter 1780s.

In describing the rights of American colonists, prominent Boston lawyer and head of the Massachusetts Committee of Correspondence, James Otis wrote in 1764 that the colonists were “by the law of nature, free born” and were equally entitled “to all the rights of nature” as any European. As members of British society, American colonists had not renounced “their natural liberty” to a greater degree than any other member of society and, to the extent it was taken from them, then they were essentially “enslaved.” The following year, in rebutting assertions by a “gentleman from Halifax” that colonists had only those rights granted to them in their colonial charters, Otis wrote that Englishmen had three “absolute” natural rights including the right of personal security, the right of personal liberty and the right of private property. These rights were vested in the colonists by law of nature, just as they were vested in Englishmen by the same law and were enjoyed by the colonists irrespective of colonial charters. “[T]he colonists,” wrote

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67 Locke, Two Treatises of Government, 116, 180.
Otis, “do not hold their rights as a privilege granted them, nor enjoy them as a grace and favour [sic] bestowed, but possess them as an inherent, indefeasible right.”69

As the crisis with Great Britain worsened, references to natural rights became more frequent and more emphatic. In outlining The Rights of the Colonists of Massachusetts in 1772, Samuel Adams clarified that the rights of which he spoke were natural rights and encompassed life, liberty and property. Natural rights, he explained, stemmed from a duty of self-preservation which was the first law of nature. “The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of many; but only to have the law of nature for his rule.” The “end of civil government,” Adams continued, was to protect and defend those rights. Similarly, when drafting the Virginia Declaration of Rights, George Mason specified that all men are by nature free and independent and have certain “inherent rights” and that those inherent rights included the right to life and liberty and the means of acquiring and possessing property.70

Several years later, in The Farmer Refuted, Alexander Hamilton wrote that “the origin of all civil government . . . must be a voluntary compact, between the rulers and the ruled; and must be liable to such limitations, as are necessary for the security of the absolute rights of the latter.” Citing Blackstone’s Commentaries, Hamilton went on to affirm that “[t]he principle aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature.” No human laws are of any validity if contrary to the laws of nature.71

Hamilton’s reliance on natural rights was taken up by his colleagues in the Continental Congress as they moved toward separation from Great Britain. Richard Henry Lee remarked that the rights of colonists were built on a fourfold foundation that included nature. John Jay agreed noting that it was “necessary to recur to the Law of Nature and the [B]ritish Constitution

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to ascertain our rights.” The rights of colonists were “bestowed by the Almighty,” Jay argued, and “no power on earth” – namely Parliament – had the right to divest them of those rights (particularly property rights) without their consent. In the end, the colonists came to view their rights as the “Natural Rights of Mankind” based on both the law of nature as well as the various principles set out in the English Constitution. Later, in declaring independence from Britain, Thomas Jefferson cited the “Laws of Nature” and its concomitant natural rights to life, liberty and property as being violated thereby justifying severance of ties with the mother country.72

All this demonstrates that, far from being a secondary consideration in the minds of the founders, natural rights theory – particularly Lockean natural rights theory – was very much in the forefront of political thought. Natural rights thinking underwent even further maturation during the 1780s as a result of what Wood characterizes as the republican “crisis.” While little mention is made of “rights” at the Constitutional Convention, the topic received a thorough discussion in the ratification debates where state delegates spoke freely of the “unalienable rights” of the people. Natural rights discussions were even more pronounced in the paper battle waged between Federalists and Anti-Federalists. Samuel Adams characterized that battle to his friend, Richard Henry Lee, as one for “the natural rights of man.” Lee agreed writing that the “corrupting nature of power” made it necessary to have an express declaration “of that residuum of natural rights, which is not intended to be given up to society; and which indeed is not necessary to be given up for any good social purpose.” Though securing “common good” may have been the primary reason man left a state of nature and entered “civil society, wrote one essayist, this did not mean “individuals should relinquish all their natural rights.” Some rights, like the right of conscience and the right of enjoyment of life, “are of such a nature that they cannot be surrendered.” The Federal Farmer pointed out that there was a hierarchy of rights: some were natural and unalienable, some were constitutional and fundamental and could only be altered by the sovereign “people” and some were mere common, or positive rights which can be

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altered by legislatures. Situated at the top of this hierarchy were natural rights which could not be infringed by factious majorities as was the case in state legislatures during the Confederation period.\footnote{As to discussions on natural rights during the state ratification conventions, see Elliot, Debates, 2:457 (remarks of Mr. Wilson of Pennsylvania); Ibid., 4:9 (remarks of Mr. Caldwell of North Carolina), Ibid., 4:337 (remarks of Mr. Dollard of South Carolina); Samuel Adams to Richard Henry Lee, 3 December 1787, The Documentary History of the Ratification of the Constitution, 14:333; Richard Henry Lee to Samuel Adams, 5 October 1787, Ibid. 13:323; Brutus [pseud.], in The Complete Anti-Federalist, 2:372-373; Federal Farmer [pseud.], Letters, ibid. 2:256-261.}

It was placement of natural rights beyond the reach of legislatures, or even the sovereign people themselves, that most excited these polemicists. “Natural liberty” and “natural freedom” guaranteed man the “right to enjoy his person, life and property, free from all molestation.” The distinguishing characteristic of “free government,” wrote the Impartial Examiner, was that it had the power to exert itself but only so long as its actions are not inconsistent with the principles of “inherent rights” pertaining to all mankind in a natural state of liberty. The objective in forming any society is to secure “natural rights” and if civil government fails to secure life, liberty and property then it is unjust.\footnote{Impartial Examiner [pseud.], Essay in The Complete Anti-Federalist, 5:173-176; Republicus [pseud.], Essays, ibid 5:161-162.}

Along with their votes to ratify the Constitution, state delegates also proposed a number of amendments to the new frame of government and many of these focused on acknowledging inalienability of certain natural rights. North Carolina proposed the addition of a “Declaration of Rights” which stated at the outset that “there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” In Virginia, where the Anti-Federalists arrayed against the Constitution were particularly wary of infringement on personal rights, state delegates proposed amendments which included a “declaration of rights” stating that man had certain natural rights of which they could not be divested and that such rights included life, liberty and property as well as “pursuing and obtaining happiness and safety.”\footnote{As to discussions on natural rights during the state ratification conventions, see Elliot, Debates, 2:457 (remarks of Mr. Wilson of Pennsylvania); Ibid., 4:9 (remarks of Mr. Caldwell of North Carolina), Ibid., 4:337 (remarks of Mr. Dollard of South Carolina); Samuel Adams to Richard Henry Lee, 3 December 1787, The Documentary History of the Ratification of the Constitution, 14:333; Richard Henry Lee to Samuel Adams, 5 October 1787, Ibid. 13:323; Brutus [pseud.], in The Complete Anti-Federalist, 2:372-373; Federal Farmer [pseud.], Letters, ibid. 2:256-261.}
tyrannous and violative of man’s rights (particularly property rights) as a king. If property rights (not to mention life and liberty) were to be protected from infringement by factious majorities, then a political theory was necessary to explain why certain areas of life were beyond the reach of legislatures. Natural right was the appropriate vehicle to accomplish that goal. Though the concepts of natural law and natural rights had been a part of American political theory since the 1760s, the republican crisis of the 1780s gave them new importance and propelled them to the forefront of the nation’s thinking with respect to passage and ratification of the Bill of Rights. 

D. The efficacy of a bill of rights

Federalists and Anti-Federalists were in relative agreement with the proposition that man retained certain natural rights when he entered civil society and that those rights were beyond the reach of magistrates and legislatures. Where they disagreed was in how to protect those rights in the new polity. As discussed earlier, Federalists espoused several reasons for opposing a bill of rights in the Constitution. One argument centered on the nature of American Constitutionalism. Because bills of rights were typically secured from sovereigns by force, and because the United States had no prior history of such struggles but was essentially emerging from a state of nature, there was no need to list rights secured because colonists had not surrendered any to begin with. Federalists also argued that, in the end, bill of rights were worth no more than the paper on which they were written. Hamilton noted in Federalist 48 that Constitutional boundary lines, which kept one branch of government from intruding on another, were nothing more than “parchment barriers” and that the history of several states showed such barriers could easily be breached. The same argument was advanced by A Countryman in Connecticut who wrote that the sort of rights to be included in a bill of rights were “much too important to depend on mere paper protection.” No bill of rights ever bound a supreme power “longer than the honey moon [sic] of a newly married couple.” The answer was not to be found in a bill of rights but, rather, to ensure one did not “suffer any man to govern you who is not strongly interested in supporting your privileges.”

This sort of argument was hardly persuasive, however. If bills of rights were just mere parchment barriers without any real efficacy, Anti-Federalists could just as easily ask

75 Elliot, Debates, 4:243; Ibid. 3:657.
what would be the harm in including one?

The most convincing concern cited by Federalists for not including a bill of rights in the Constitution centered on the fact that natural rights were amorphous and incapable of any precise delineation. Many founders were well-schooled in law and were well-aware of the ancient legal maxim of *expressio unius est exclusio alterius* (the expression of one thing means exclusion of another). They were concerned that an enumeration of some rights could later be construed by tyrants as having been meant to exclude any other rights which were not so enumerated. James Wilson summed up the danger for his fellow Pennsylvanians:

> In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous. **[In] a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.**

On December 4, 1787, just days before Pennsylvania would ratify, Wilson again rose to emphasize what he saw as the futility of including a bill of rights: “[e]numerate all the rights of men! I am sure . . . no gentleman in the late convention would have attempted such a thing.”

Hamilton sounded the same clarion in *Federalist 84*:

> I go further, and affirm that bills of rights, in the sense and to the extent to which are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision

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would confer a regulating power; but it is evident that it would furnish to men disposed to usurp, a plausible pretence [sic] for claiming that power.\textsuperscript{79}

Future Supreme Court Justice James Iredell of North Carolina agreed and called the demand for a bill of rights nothing short of “absurd.” Iredell argued that no man, in all his ingenuity, could enumerate a list of rights that were not relinquished in the Constitution. Should a legislature violate an unenumerated right in the future, Iredell pointed out, the legislature could merely point to the fact that such a right was never included in the bill of rights and, thus, was not protected. A bill of rights in a government based on delegated powers was thus a “snare” for the unwary rather than a “protection.”\textsuperscript{80}

Anti-Federalists were unimpressed with the \textit{expressio unius} argument and, in fact, turned it around and used it against the Federalists. If the framers were so concerned that an incomplete enumeration of rights in the Constitution could be construed as an argument against recognition of other rights that were not enumerated, then why, asked Patrick Henry and William Grayson of Virginia, did Article I, section 9, guarantee that Habeas Corpus could not be suspended except in cases of rebellion or invasion?\textsuperscript{81} Henry was quick to note this inconsistency in the Federalist argument at the Virginia ratification convention:

\begin{quote}
It does not speak affirmatively, and say that it shall be suspended in all those cases. But that it shall not be suspended but in certain cases[.] * * * If the power remains with the people, how can Congress supply the want of an affirmative grant? They cannot do it but by implication, which destroys their [the Federalist] doctrine.\textsuperscript{82}
\end{quote}

Henry further warned his fellow Virginians that, under Congress’s general powers and without prohibition to the contrary, there was nothing to prohibit it from legislating against trial by jury,

\textsuperscript{79} Hamilton, “Federalist 84,” in \textit{The Federalist}, 550.

\textsuperscript{80} Elliot, \textit{Debates}, 4:149.


imposing excessive fines and bails or imposing cruel and unusual punishments. 83

The *Impartial Examiner* also charged that the Federalists misperceived the process by which the colonists were forming a new polity. Noting that man had certain “inherent rights” or “natural liberty” in a state of nature, but agreed to enter society through a “civil compact” so as to protect those rights, man must take care as “relations arising from this political union create certain duties and obligations to the state.” These duties and obligations should not be permitted to eclipse the very rights man meant to protect by entering civil society in the first place:

> [F]or it is a maxim, I dare say, universally acknowledged, that when men establish a system of government, in granting the powers therein they are always understood to surrender whatever they do no so expressly reserve. This is obvious from the very design of the civil institution, which is adopted in lieu of the state of natural liberty, wherein each individual, being equally intitled [sic] to the enjoyment of all natural rights, and having equally a just authority to exercise full powers of acting, with relation to other individuals, in any manner not injurious to their rights, must when he enters into society, be presumed to give up all those powers into the hands of the state by submitting his whole conduct to the direction thereof. * * * it follows, as a regular conclusion, that all such powers, whereof the whole were possessed, so far as they related to each other individually, are of course given up by the mere act of union. 84

The *Federal Farmer* agreed. Dismissing out of hand the Federalist claim that individual rights were too numerous to be listed in a bill of rights, the Farmer noted that powers to be given governments were also too numerous to be listed. The people were, thus, oftentimes considered to have granted “general powers, indeed all powers, to the government” and then “by a particular enumeration, take back, or rather. . . reserve certain rights as sacred, and which no laws shall be made to violate.” In Pennsylvania, the *Democratic Federalist* warned that, wherever the powers of a government extend to the lives, persons and properties of the subject, all their rights ought to be clearly and expressly defined – “otherwise they have but a poor security for their liberties.” 85

In proposing his amendments, Madison did not wholly abandon the Federalist concern over the *expressio unius* argument of an imperfect enumeration of rights later being construed to deny other rights that were not enumerated. To guard against it, the final paragraph of his fourth

proposed amendment provided that “[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people.” Madison explained the purpose of this paragraph as follows:

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

Thus, to prevent a partial enumeration of rights from being construed to deny protection to other rights not expressly set out in the Constitution, Madison proposed that which ultimately became the Ninth Amendment. There is little legislative history on what happened to the “last clause” of Madison’s “fourth resolution” as it wound its way through Congress. But, somewhere during its time in committee the language was re-shaped to read the way it does today. A House Committee Report on July 28, 1789, shows the language of the amendment as reading that “[t]he enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Elbridge Gerry moved to delete the word “disparage,” which he claimed was unclear, and to insert the phrase “deny or impair” but his motion was not seconded. There is no record of any further debate on that particular provision and it was sent to the states where it was ultimately ratified.

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87 Gales, *The Annals of Congress*, 1:439. Several weeks after introducing his proposals, Madison forwarded them to Jefferson in Paris stating that, while other amendments might have been made as well, everything of a “controvertible nature” that could have endangered passage in Congress and ratification in the states was avoided. Madison to Thomas Jefferson, 30 June 1789, *The Republic of Letters*, 1:618-624. Jefferson responded several months later and assured his protege that, while there were other amendments he would have liked to have seen included in Madison’s proposals, he had enough confidence in his countrymen that “we shall have them as soon as the degeneracy of our government shall render them necessary.” Jefferson to James Madison, 28 August 1789, Ibid., 1:627-631.
While the founders may not have conceived of it as such, there is no question liberalism was one of many arrows in their ideological quiver. Federalists and Anti-Federalists alike were in general agreement as to the broad Lockean rights to life, liberty and property. Indeed, natural rights theory literally permeates writings on both sides of the Constitutional debate. Where the two groups differed was over how best to protect those rights. Anti-Federalists, particularly elite Anti-Federalists, maintained that the only sure protection for rights was a bill of rights specifying certain liberties over which the government could not tread. Federalists maintained that such a bill was unnecessary and, perhaps, even dangerous. In the end, Federalists compromised and agreed to a bill listing specific rights which could not be infringed but only on the condition that there was also a proviso directing that the rights specified therein were not exhaustive and that there were other rights of Constitutional dimension. That proviso was the Ninth Amendment and was an integral part of the compromise which ultimately produced the Bill of Rights.

88 House Committee Report, in *Creating the Bill of Rights*, 31.
Chapter III: The Problems of “Excess Democracy” and Majority Tyranny

It has been observed, by an honorable gentleman, that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved that no position in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure, deformity.

Alexander Hamilton in the New York Ratification Convention, 21 June 1788

Polemics from the latter half of the eighteenth century make clear that the founders, both Federalists and Anti-Federalists alike, agreed that man possessed certain natural rights and that those rights required protection. Where they disagreed was over how to defend those rights and what threatened them in the first place. In 1776, Americans perceived that the preeminent threat to liberty emanated from unchecked magistrates. They responded by creating republican state constitutions which vested enormous power in legislatures and provided for weak executives. It never occurred to orthodox Whigs drafting those constitutions that representative bodies could be just as tyrannous as executive ones or that the problem lay not with the body in which power was reposed but the lack of institutional safeguards to check the exercise of that power.

Between 1776 and 1787, however, there occurred a series of events which transformed republican thinking and re-focused attention onto the state legislatures as a source for tyranny. Proliferation of paper money and debtor relief statutes with their effect on “republican virtue,” not to mention the value of property interests, caused political elites to reorient their thinking as to the origins of tyranny. It was not just magistrates that were capable of violating the people’s rights, legislative assemblies could be equally tyrannical. This change in thought – the so-called “republican synthesis” – manifested itself in a movement to strengthen the national government and to check state governments. Although Madison’s proposed national veto of state legislation never came to fruition, the founders succeeded in prohibiting states from any further effort to coin money or impair the obligation of contract. More importantly, though, the founders crafted a frame of government which significantly cut back the power of the legislative branch.

89 Elliot, Debates, 2:253.
and instituted checks against popular majoritarianism. As a further check on overreaching legislatures, Federalists like James Madison who had in the past opposed inclusion of a bill of rights, were willing to adopt them as a check on “excess democracy” and legislative tyranny.

As noted previously, the groundwork for the “republican synthesis” was first laid by Bernard Bailyn who pointed out that Whig Oppositional thought, inherited from the Glorious Revolution and transplanted into colonial America, advocated free and independent parliaments as the best guardians of liberty. What made this belief problematic, however, was the colonial conception of British Constitutionalism and the place of Parliament in that sphere. Constitutions were perceived by Whigs as simply arrangements of institutions or frames of government. They were not viewed, as we view them today, as written documents specifying rights which cannot be infringed by popular government. The British Constitution did not check Parliament because Parliament was, in fact, a part of that constitutional system and laws passed by Parliament were ipso facto constitutional. After independence, Americans carried these views over into their initial experiments with republicanism in state governments. Representation in the new state governments was based on direct consent of the governed and the former colonists tried to make government, particularly the legislatures, more reflective of the people who gave their consent. Indeed, these new state governments “had no separate existence apart” from the people. Only after the turbulent years of the 1780s would Americans begin what Bailyn described as a process of disengaging popular assemblies from fundamental law so that, by the time of the Philadelphia convention, the founders would conceive of government not as a part of such law but subordinate thereto.90

The task fell to Gordon Wood and subsequent scholars to elaborate on that process of disengagement and explain how legislatures came to be viewed, not as part of the fundamental organic law of the land, but as constrained by it. This process began, according to Wood, in the 1780s and was attributable to two factors – the first was the systemic defects in the Articles of Confederation which made the national government weak and dependent on the states and the second was what Wood calls “excess democracy” or legislative tyranny in the state governments. The defects in the Articles of Confederation are well known and require little elaboration – the

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national government had no power to tax, no power to regulate foreign or interstate commerce and no power to enforce its treaty obligations with Great Britain. The crisis in state government is a little more complex and was a natural outgrowth of what Bailyn described as a concerted effort to make legislatures more reflective of the people. The problem was that, in the process, state legislatures became more populist and passed legislation which reflected popular interests thereby running contrary to the concept of disinterested republican virtue which disdained such parochial interests.  

The Revolutionary War, with its vast government expenditures and easy money policies to finance the war effort, precipitated great prosperity which came to an end with the Paris Peace Treaty of 1783. Consumers who had grown used to being flush with available cash, middling traders who wanted to unload their inventories, debtors who needed easy money to repay loans, farmers and planters who wanted to finance future crops and current consumption all petitioned their state governments to issue its own paper money and the states were all too eager to oblige. Emissions of paper money proved inflationary, though, and creditors tried to avoid accepting the devalued currency as payment for debts. States responded by passing legal tender laws requiring creditors to accept depreciated currency in satisfaction of their debts. If that was not enough, states also passed relief legislation allowing debtors to repay their debts in several installments over time.

Of all the problems that precipitated the calling of the Philadelphia convention,

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scholars agree that these interferences with property interests were among the most significant.93

The solution to these democratic excesses lay in a reorientation of political thinking that has come to be called “the republican synthesis.” There are several aspects to these changes in republican theory but, for our purposes, we need only concentrate on two. The first was a realignment of the political system and distribution of power within that system. The colonial experience had proven to Americans that too much power given to the executive led to tyranny. Likewise, the Confederation experience proved that too much power given to elected assemblies also led to violation of rights. The founders eventually concluded that perhaps the problem was not who held power but that too much power should never be vested in a single body no matter what the body. The solution was to divide power, to spread it over several bodies, and then to institute systems of checks and balances. To that end, the founders devised various “brakes” on democracy. Those brakes included not only the concept of an extended republic but also more concrete measures like an executive veto, a supreme court and filtering mechanisms such as an electoral college and the appointment of senators by state legislatures.

The second important change in the “republican synthesis” was a reconceptualization of the role of constitutions in the American polity. As Bailyn and Wood have shown, the British model of constitutionalism perceived the constitution as merely a system of government with Parliament as part of that system. Parliament could not violate the constitution because it was a part of that constitution and all of its actions were therefore constitutional. By the time of the revolution, however, Americans undertook what Wood calls a “crucial divergence” from their British counterparts and envisioned the British Constitution as constraining Parliament. Indeed, it was the perceived violation of their rights under the British Constitution which justified the revolution in the minds of the colonials. But, even as Americans reconceived of constitutions as being above positive law passed by legislatures, they hesitated in taking the next step of putting constitutions entirely beyond the reach of legislatures. State constitutions were largely drafted states that had passed them, see James Madison to Thomas Jefferson, 12 Aug. 1786, in The Papers of James Madison, ed. Robert A. Rutland (Chicago: University of Chicago Press, 1975) 9:93-95.

93 Wood, Creation of the American Republic, 393-425; Beard, An Economic Interpretation of the Constitution, 178 (of the forces which created the Constitution, “those property interests seeking protection against omnipotent legislatures were the most active.”); McDonald, Novus Ordo Seclorum, 180 (considerable numbers of Americans began to talk of Constitutional monarch as a better safeguard to liberty and property than republicanism);
by state legislatures and during the Confederation era were frequently revised and rewritten by
the state legislatures to accommodate their own needs. A significant part of the “republican
remedies” for the crisis of the 1780s was a realization that constitutions must be put beyond the
power of the legislatures so that they could only be changed by the sovereign people acting in
convention.94

This changed view of Constitutionalism would have a profound effect on the proceedings
both in the Philadelphia Convention and in the First Congress. Federalists and Anti-Federalists
alike were suspicious of government. For Federalists, the danger lay in state governments which
proved only too willing during the Confederation period to pass legislation which trammeled on
the natural rights of property owners. For Anti-Federalists, the danger lay in a distant national
government which could pass laws violating the rights of their citizens. The one point on which
both sides could agree was the necessity of inserting “brakes” on democratic government at the
national level.

A. The Problems With State Government

In the eleven year interval between declaring independence, and calling for a convention
to revise its articles of governance, the thirteen former British colonies underwent a tumultuous
period of political maturation. The most immediate need after severing ties with Great Britain
was to prosecute the war effort and this required a centralized government. General Washington
noted that the “great business of war” could not be conducted until Congress had real power to
requisition supplies for the army from the various states. To that end, articles of confederation
were drafted soon after independence but Delaware, New Jersey and, in particular, Maryland,
held off ratification thus giving “hope” to Great Britain of dividing the nation. The articles were
finally ratified by all the states on March 1, 1781, thus prompting great optimism among the
political elite. Jefferson remarked that a “firm bond of union” was drawn between the states
thereby enabling our friends to “repose confidence in our engagements” and depriving our
enemy of any hope of dividing us. John Jay viewed the union as an “insurmountable obstacle” to

certain issues beyond the reach of legislative amendment or required action above and beyond the vote of
state legislatures. For a discussion of differing requirements for alteration of state constitutions, see
ever again becoming British subjects.\textsuperscript{95}

That optimism was short lived. Barely a month after Maryland ratified, an exasperated Madison wrote that the Articles of Confederation were inadequate to deal with “the shameful deficiency of some of the states” to provide for their share of military supplies and funding. Hamilton concurred noting that the predominant defect in the new confederation was a “want of power in Congress” either to carry out its will or to reign in the will of the individual states. This became even more pronounced after the war. Between 1784 and 1785, state payments necessary to fund Congress fell short of what was needed by $400,000. The failure of the states to comply with their requisition duties was listed by Madison at the top of his list of \textit{Vices of the Political System}. States were also seen as too meddlesome in the military and inhibiting maintenance of commerce conventions thus causing the United States “not to be respected or apprehended as a nation in matters of commerce.” Madison warned Jefferson that Congress had kept the ship of state “from sinking, but [only] by standing constantly at the pump, not by stopping the leaks which have endangered her. All their efforts for the latter purpose have been frustrated by the selfishness or perverseness of some part or other of their constituents [the states].”\textsuperscript{96}

It is important to remember that while these problems were typically considered defects of the Confederation, the relative powerlessness of the national government would not have been so disastrous had the states not been willing to exploit that impotency. Without any mechanism to enforce their monetary contribution, cooperation in commerce and compliance with terms of the Paris Peace Treaty, the state legislatures – contrary to espoused republican notions of virtue


and self-sacrifice for the greater good of the res publica – simply legislated in their own best interests rather for the benefit of the nation as a whole.

As troublesome as such self-interest was on the national level, it was even more serious on the state level. Emissions of paper money and bills of credit, and then passage of tender laws requiring creditors to accept inflated currency rather than specie in payment of debts, seriously undermined the property rights of creditors. James Madison, in particular, decried the states’ “general rage for paper money.” When Virginia voted down the issue in November of 1786, Madison smugly noted to his father that his colleagues in the legislature deemed paper money “unjust, impolitic, destructive of public [and] private confidence, and of that virtue which is the basis of [r]epublican [g]overnments.” So great was his disdain for such money, and the effect it had on creditor property, that Madison justified his proposed national veto of state legislation “in all cases whatsoever” not just on the necessity of securing authority for the national government, but also to restrain states from “oppressing the minority within themselves by paper money.” 97

Equally concerned as to the effect state legislation was having on the rights of property owners, John Adams wrote extensively about the need to protect creditors from overreaching majorities in the state legislatures. “The rich have as clear a right to their liberty and property as the poor: it is essential to liberty that the rights of the rich be secured.” Citizens cannot have liberty but, at the same time, pass laws which harm creditors. “Is it not an insult to common sense,” Adams asked rhetorically, “for a people with the same breath to cry liberty, and [call for] abolition of debts, and division of goods?” If that were the case, he answered, then there would be calls for similar abolition of debts and division of goods every few months and there would be anarchy. There will always be a struggle between rich and poor in every society where property exists, Adams wrote, but equal justice must be done to both sides and each must enjoy equal liberty.98 In short, having seen the ease with which majorities in democratic assemblies violated the rights of minority property owners, Federalists were determined to find a way both to check such abuses at the state level and to prevent them from ever arising at the national level.

B. The Problems with a National Government

As concerned as Federalists were of majority tyranny at the state level, Anti-Federalists were just as alarmed by the prospect of democratic tyranny from a distant national government. By and large, opponents of the proposed Constitution had more faith in elected assemblies but only those assemblies at the state or local level. Given the broad powers granted Congress, and to a lesser extent the President and federal judiciary, Anti-Federalists argued there was nothing to stop the national government from imposing its will directly onto the people and violating their rights and liberties. Elite, middling and plebian Anti-Federalists each had their own conceptions of good republican Constitutionalism and, thus, their own objections to the proposed national government.

As Saul Cornell has shown, Anti-Federalism was not a monolithic philosophy but, rather, a set of differing philosophies that varied widely depending on those who espoused them. Elite Anti-Federalists tended to be the well born and the well connected – men like Elbridge Gerry of Massachusetts and Richard Henry Lee of Virginia – and were perhaps most compatible with the “synthesized” republicanism of men like Madison. They remained true to orthodox republican ideals and believed that, while individual rights were important, the collective “people” also had great latitude to legislate for the benefit of the res publica and, where necessary, could restrain individual liberty. This allowed some elite Anti-Federalists to champion liberties like freedom of conscience but at the same time advocate the use of religious tests for public office because they insured virtuous office holders thus benefiting the public. Other elite Anti-Federalists were more libertarian and tried hard to reconcile classical republicanism with a need to protect at least some inalienable rights.99

Middling Anti-Federalists were comprised of wealthy farmers, merchants and craftsmen who were more willing to cede powers to state legislatures even if that power tended to violate individual liberties. This did not mean that middling Anti-Federalists disregarded fundamental rights altogether but, rather, they drew a distinction between inalienable rights (like religious conscience) and alienable rights (those political rights gained by man when he left a state of nature and entered political society) which occasionally must be sacrificed to secure the greater

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public liberty. As long as that sacrifice was deemed necessary by the people’s representatives, acting for the greater good of the \textit{res publica} rather than factious or parochial interests, then it was not incompatible with notions of liberty. The key here was that the decision must be made at the state level, in state legislatures, rather than at the national level.\textsuperscript{100}

On the far end of the Anti-Federalist spectrum were plebian populists, largely comprised of backcountry farmers, who were far less moderate than their elite or middling counterparts and tended to favor allocating power to the local level rather than the state level. Plebian populists favored militias and juries as a check on government tyranny and, insofar as representation was concerned, believed representatives were not only spokesmen for individual localities – the very sort of parochialism that disgusted Federalists – but that democratically elected representatives should resemble those localities as well. Even worse, they were not above the sort of mobocracy that most alarmed Federalists and brought down on Anti-Federalists such epithets as “Shaysites” and “levelers.” The Carlisle Riots are cited by Saul Cornell as an example of how plebian Anti-Federalists saw no problem in exercising a “heckler’s veto” over Federalists rights of assembly and speech.\textsuperscript{101}

Despite these differences in philosophy, the one thing that united the Anti-Federalists was fear of a distant national government that threatened the rights of the citizenry. A Massachusetts Anti-Federalist wrote that “[a] bill of rights therefore, ought to set forth the purposes for which the compact is made, and serves to secure the minority against the usurpation and tyranny of the majority. * * * It is therefore as necessary to defend an individual against the majority in a republick [sic] as against the king in a monarchy.” In an address to the Virginia and New York

\begin{itemize}
\item Cornell, \textit{The Other Founders}, 8-9, 26, 54-61; Cornell, “The Ideology of Backcountry Anti-Federalism,” 1148-1149.
\item Cornell, \textit{The Other Founders}, 85-107.
\item Ibid., 107-120; Cornell, “The Ideology of BackCountry Anti-Federalism,” 1150-1156, 1159, 1167.
\end{itemize}

Although the proposed constitution was easily ratified in Pennsylvania, Carlisle was located in a section of the state that boasted a strong Anti-Federalist majority. When the Federalists minority staged a celebration on December 26, 1787, to mark that state’s ratification, Anti-Federalists showed up in force and demanded that they disband. When the Federalists refused, several days of rioting, demonstrations and counter-demonstrations ensued. On the tendency of Federalist’s to label their opponents as “Shaysites,” see Pennsylvania Gazette, 5 September 1787 and 10 October 1787 in \textit{The Documentary History of the Ratification of the Constitution}, 13:192, 584 (the squib from 10 October 1787, in particular repeating the suggestion that Anti-Federalists thereafter be distinguished “by the names Shaysites in every part of the United States.”)
ratification conventions, John Francis Mercer warned of the difficulties inherent in Madison’s extended republic. If local representatives were to pursue the “general interest” of the nation, then they must do so by sacrificing the interests, wishes and prejudices of those who put them in office. But, if representatives pursued the interests of those they represented, Mercer warned, the majority would throw the “[b]urthens [sic] of government upon that [m]inority.” In that sense, the “Majority must ruin the Minority.” In Essays by a Farmer, a Maryland Anti-Federalist warned that, in a democratic government, the “natural rights of an individual are opposed to the presumed interests or heated passions of a large majority.” In such government, “tyranny of the legislative is to be dreaded.”

Anti-Federalists were therefore every bit as concerned as Federalists about the tendency for democratic government to devolve into tyranny and oppress the rights of citizens. They were not opposed to democratic curtailment of liberty per se but believed that such decisions had to be made at the state (or local) level where elected representatives had a better feel for the needs of the res publica. What they did not trust were representatives from distant locales, with no idea of the local needs and conditions of their own states, making those kinds of decisions for them. Although Federalists won the day on ratification of the Constitution, Anti-Federalists were not completely shut out. As Herbert Storing has observed, the legacy of the Anti-Federalists was the Bill of Rights. The first nine amendments in that bill, together with the safeguards contained in the original Constitution, gave greater security to American rights and liberties than either side ever envisioned.

C. Constitutional Brakes on Democracy

The problems with paper money and debtor relief legislation were resolved with Article I, Section 10 of the new Constitution which expressly forbade states from coining money, emitting bills of credit, making anything but gold or silver tender for payment of debts and prohibiting passage of laws impairing the obligation of contract. In justifying these prohibitions, Madison wrote that “[t]he sober people of America are weary of the fluctuating policy which has directed

\footnotesize\[102\] Agrippa [pseud.], in The Complete Anti-Federalist, 4:109, 111; John Francis Mercer, Address to the Members of the Conventions of New York and Viriginia, ibid., 5:103-104; A Farmer [pseud.], Essays, ibid. 5:15

\footnotesize\[103\] Storing, “What the Anti-Federalists Were For,” in The Complete Anti-Federalist, 1:65-70.
the public councils. They have seen with regret and indignation that . . . legislative interferences, in cases affecting personal rights, become jobs in the hands” of scheming representatives. Thus, Article I, Section 10 was added as a “bulwark in favor of personal security and private rights” and would surely “give pleasure to every citizen, in proportion to his love of justice.”104

If impairment of property rights was the only Federalist concern, this probably would have sufficed. The dreaded “rage for paper money” was extinguished and, at least ostensibly, state legislatures could no longer enact laws that benefited debtors to the detriment of creditors. But the Confederation period had shown what unrestrained majorities could accomplish. While the ends to which those legislative majorities directed their attention in the 1780s were property rights, it stood to reason that unrestrained majorities could attack other natural rights and liberties as well. Accordingly, constitutional debates centered not just on the narrower issue of property rights, but on the broader issue of minority liberty infringed by tyrannous majorities.

To prepare for those debates, James Madison drafted for himself a memorandum on what he saw as the major Vices of the Political System of the United States. While many of those vices related to weakness in the confederation, he also cited problems with state legislation including multiplicity, mutability and injustice of state laws. Of the three, Madison thought injustice was the more alarming because it called “into question the fundamental principle of republican [g]overnment, that the majority who rule in such [g]overnments, are the safest [g]uardians both of public [g]ood and of private rights.” Place three individuals in a situation where the interests of each depend on the voice of the others and give two of them an interest opposed to the rights of the third. Madison asked, “[w]ill the latter be secure” in his interest? Madison thought not and conceded that “[t]he prudence of every man would shun the danger.” But, if that sphere were enlarged, beyond the three individuals and beyond the population of towns or even states, the multiplicity of interests and passions might be such that it would prevent a majority from coalescing to oppress the rights of the minority.105

Madison’s conceptualization of an enlarged public sphere as the best means of protecting liberty found its most famous expression in Federalist 10 where he laid out his theory of an

extended republic. Faction, by which Madison meant a group of citizens – be they a majority or minority – united by common impulse, passion or interest, was a byproduct of liberty and could never be eliminated without getting rid of liberty as well. But, its effects could be controlled. If a faction was a minority, then relief could be provided through principles of republicanism and the majority would simply defeat it through the voting process. The more difficult problem arose when the faction was a majority faction and had the power (votes) to sacrifice “both the public good and the rights of other citizens.” The solution to the problem was a republic so vast that the majority, “by their number and location situation, [was] unable to concert and carry into effect schemes of oppression.” In conceiving an extended republic in this fashion, Madison turned on its ear millennia of political theory which held republics could not exist but in small city states.\textsuperscript{106}

Although Madison clearly addressed his arguments to factions who had a “rage for paper money,” abolition of debts or unequal wealth, there is no doubt that he also meant majorities that would push for “any other improper or wicked project.” Factions could form not just on issues of property, Madison warned, but also religion, differing opinions on government and “many other points as well.” So strong was man’s propensity to fall into mutual animosity that factions could even be directed at “persons of other descriptions whose fortunes have been interesting to the human passions.” Madison noted that political decisions in the states had, up to that time been made, not with regard to “the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” He told a fellow Virginian, that there was no maxim of democracy more liable to be misapplied than that which states “the interest of the majority is the political standard of right and wrong.” After all, Madison noted, “it would be the interest of the majority in every community to despoil [and] enslave the minority of individuals.” Republican virtue required something more; at the very minimum, a greater

\textsuperscript{106} Madison, “Federalist 10,” in \textit{The Federalist}, 53-61. Not surprisingly, Anti-Federalists rejected Madison’s revolutionary idea of an extended republic. Consistent with classical republican theory, Anti-Federalists believed that the essential elements of effective republican government included a voluntary attachment of the people to that government (so as to obey its laws) and a genuine responsibility of the government to the people being governed. These elements could only be achieved in small republics where the people were both familiar with their representatives and representatives felt a linkage to the people. See Storing, “What the Anti-Federalists Were For,” 15-23.
respect for the rights of fellow citizens.\textsuperscript{107}

Although John Adams was serving as American ambassador to the Court of St. James while these debates were taking place, he nevertheless played an important role in the political discourse through his three volume work \textit{Defence of the Constitutions of Government of the United States of America}.\textsuperscript{108} Adams joined Madison in excoriating the problems of democracy and the threat majority faction posed to liberty. He noted that people by nature “are factious, inconstant and ungrateful” which is why he perceived that a simple democracy would not work. Whatever dispute arises in such government must be decided by the majority and, if their decision is unjust, then there is no remedy. Even if the majority did not oppress the minority, Adams pointed out, they could still pass unjust laws which would “confine personal liberty of all equally . . . without reasonable motives, use, or benefit.”\textsuperscript{109}

While Adams agreed with Madison as to the danger of faction, he had his own ideas as to what would be a proper solution. Rather than rely on an extended republic to dilute common interests and provide a filtering mechanism for representation, Adams put his faith in a divided government. The three branches of government – legislative, executive and judicial – “have an unalterable foundation in nature” and maintenance of liberty depended “entirely on a separation of them in the new polity. Adams warned that, from New Hampshire to Georgia, states would

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\item \textsuperscript{107} Madison, “Federalist 10,” in \textit{The Federalist}, 53-61; Madison to James Monroe, 5 October 1786, in \textit{The Papers of James Madison}, 9:14-141.
\item \textsuperscript{108} Adams has been criticized by Gordon Wood for missing the very point of the republican revolution in the 1780s. Although Adams argued for a balanced constitution, where one branch of government could check the other, his argument was based on a British model of constitutionalism pitting the people against the propertied elites with an executive to balance them out. Wood charges that Adams’ \textit{Defence of the Constitutions} is “anomalous” because he did not grasp the changing political theory that sovereignty in a republic lay with the people rather than a parliament which balanced the interests of king, lords and commons against each other. Wood, \textit{Creation of the American Republic}, 567-592. Joyce Appleby, on the other hand, seeks to rehabilitate Adams’ work and argues it must be considered within the context of the debate in which Adams found himself; namely, that between Baron Anne Robert Turgot who argued that national power should be vested in a single law-making body and the so-called \textit{Anglomanes} who championed the British system of king, lords and commons. Of particular influence to Adams’ work, Appleby argues, was Jean Louis DeLolme’s, \textit{The Constitution of England}, which posited that the balancing of differing estates in the British Constitution had produced a stable system which enjoyed the rule of law and provided for the protection of individual rights. See Joyce Appleby, “The New Republican Synthesis and the Changing Political Ideas of John Adams,” \textit{American Quarterly} 25 (1973): 578-595.
\item \textsuperscript{109} Adams, \textit{A Defence of the Constitutions of the United States}, 1:123, 3:452, 483; Elliot, \textit{Debates}, 2:198.
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divide themselves into “two parties, one generally at the head of the gentlemen, the other of the simplemen [sic]” and “tear one another to pieces” with a “ferocious animosity” and “unremitting rancour [sic]” unless restrained by an independent legislative, executive and judicial branch. Not only was it important for these three branches of government to be separate and distinct, it was also necessary for them to be able to check each other. Each branch should have an “equal negative, in all the separate governments.” An executive veto, in particular, was necessary to hold the balance between rich and poor and decide when they could not agree on a common course of action that would benefit both.110

Connecticut Governor Samuel Huntington repeated arguments similar to those espoused by his fellow New Englander. Liberty “is not so well secured as it ought to be” when power is vested in one body of representatives. “There ought to be two branches of the legislature, that one may be a check on the other.”111 In the New York Ratification Convention, Alexander Hamilton extolled the virtues of a divided government as a check against tyranny and a means to preserve liberty:

What, then, is the structure of this Constitution? One branch of the legislature is to be elected by the people – by the same people who choose your state representatives. Its members are to hold their offices two years, and then return to their constituents. Here, sir, the people govern; here they act by their immediate representatives. You also have a Senate, constituted by your state legislatures, by men in whom you place the highest confidence, and forming another representative branch. Then, again, you have an executive magistrate, created by a form of election which merits universal admiration. In the form of this government, and in the mode of legislation, you find all the checks which the greatest politicians and the best writers have ever conceived. What more can reasonable men desire? Is there any one branch in which the whole legislative and executive powers are lodged? No. The legislative authority is lodged in three distinct branches, properly balanced; the executive is divided between two branches; and the judicial is still reserved for an independent body, who hold their office during good behavior. This organization is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success.112

These were the Federalist solutions to the problems of excessive democracy and majority tyranny – a large extended republic, separation of power, checks and balances, an executive veto

112 Ibid., 2:348.
and, as discussed more fully below, a federal judiciary to vindicate rights. What Anti-Federalists brought to the table was an ongoing debate during ratification about the need to expressly set out certain rights over which a distant national government could not tread. For the most part, these included the civil or political rights which made up the amendments proposed by several states as part of the ratification process. Virginia, for example, recommended amendments specifying guarantees for freedom of speech and “publishing” as well as the “ancient” right to trial by jury and various criminal rights like the right to be confronted by accusers and to call witnesses in one’s favor. Massachusetts also recommended specific guarantees for jury trial as well as the right to be free from criminal prosecution except upon indictment by a grand jury. Maryland proposed there be an express guarantee of religious liberty and that freedom of press should be “inviolably preserved.”

These great bulwarks of liberty were easily delineated. What was more problematic was how to deal with the myriad of other rights that many thought worthy of protection but could not be so easily stated let alone catalogued. When a few Anti-Federalists in Pennsylvania proposed recommending amendments granting “liberty to fowl and hunt in seasonable times” and to “fish in all navigable waters,” Federalists howled with laughter. Noah Webster could not resist poking fun at his colleagues and proposed an amendment that would also prevent Congress from passing any law that restrained Americans from eating or drinking at “seasonable times” or “prevent his lying on his left side in a long winter’s night, or even on his back, when he is fatigued by lying on his right.” This anecdote, though amusing, highlights a serious theoretical problem which faced Congressmen in 1791. As Jack Rakove notes, once a partial set of rights received textual recognition as the supreme law of the land, those rights which were not so textually recognized automatically assumed some “lesser” constitutional status.

Madison was clearly aware of that problem but, in advocating his proposed amendments, was determined not to get bogged down in “rights minutia.” Though not dismissing the idea that man possessed political and natural rights that were not expressly included in his proposed bill of

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113 Rakove, Original Meanings, 288-338; Cornell, The Other Founders, 158-164; Elliot, Debates, 2:657-659 (Virginia’s proposed amendments); Ibid, 2:177-178 (Massachusetts’ proposed amendments); Ibid., 2: 549-556 (Maryland’s proposed amendments).

rights, he was determined to limit that bill to those “simple and acknowledged principles” with which everyone could agree so as to improve its chances of ratification. Thus, when debating if constituents should have an express right to instruct their representatives, Madison demurred on inserting such a right into the proposed bill not because he believed such a right did not exist but because it could raise other issues like how binding those instructions should be on congressional representatives or what would happen if a constituent instructed his representative to violate the Constitution. Madison wanted no such debate in the state conventions and, thus, was determined that the express rights set out in his amendments were those on which there was no confusion or debate – e.g. liberty of conscience, free press, right to trial by jury, etc. – so as to remove any impediment to their ratification.\footnote{Debates of the First Federal Congress, in Creating the Bill of Rights, 152, 155, 167.}

Nevertheless, the problem remained – how could the constitutional status of important, albeit non-textual, rights be preserved? One possible solution was suggested by the New York Convention which proposed an amendment “that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States . . . remains to the people of the several States[.]” Though Madison may not have followed New York directly, he clearly came to the same conclusion. In explaining his proposal for what ultimately became the Ninth Amendment, Madison stated that he sought to “guard against” the argument that those rights not singled out for express enumeration could be “assigned into the hands of the general government” and legislated away.\footnote{Debates of the First Federal Congress, in Creating the Bill of Rights, 152, 155, 167.}

C. The Role of the Federal Judiciary

An extended republic, divided government and executive vetoes were not the only means devised by the founders to brake popular democracy. The federal judiciary, provided for in Article III of the Constitution, was also to play a pivotal role. The concept of “judicial review” of legislative acts was an entirely new development in Anglo-American jurisprudence. British Constitutionalism placed Parliament, and thus acts of Parliament, on a par with the Constitution rather than subordinate thereto. Furthermore, bills of rights were thought to restrain kings rather than democratically elected assemblies. The experiences of the 1770s and 1780s, however,
altered the thinking of legal elites who came to see constitutions as embodying rights which served as restraints on legislatures and courts as the proper bodies to enforce those restraints.

Despite its innovativeness, the notion that a judiciary could strike down legislation that violated fundamental law was not created out of whole cloth in either Philadelphia or the First Congress. Rather, notions of judicial review had been percolating in legal circles for decades. In *Lechmere's Case* in 1761, James Otis argued that writs of assistance should be voided because “Acts of Parliament . . . against the Constitution [are] void.” Likewise, the *Declaration of Rights and Grievances* from the Stamp Act Congress in 1765 declared Britain’s imposition of stamp act duties violated “ancient limits” to Parliamentary power and Samuel Adams argued in *The Rights of the Colonists* that some fundamental natural law must “govern even the legislative power itself.”

These arguments survived the break from Great Britain and, eventually, began to creep into Confederation era jurisprudence. In *Commonwealth v. Caton*, the Virginia General Court ruled that a pardon for treason granted by that state’s House of Delegates, but not its Senate, was invalid under its Constitution. Judge Wyth, in a rare display of judicial bravado, declared that “if the whole legislature . . . should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal: and pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further.” A North Carolina court likewise held in *Bayard v. Singleton* that an act by that state’s General Assembly which attempted to quiet title to property and deny previous owners a right to jury trial, as promised in that state’s Constitution, stood as “abrogated and without any effect.” Though somewhat more circumspect than its colleagues in Virginia, the North Carolina Court noted that, if the legislature could take away the constitutional right to trial by jury in property cases, it could just as easily do so in capital cases or, for that matter, declare

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The founders, many of whom were prominent lawyers themselves, were undoubtedly aware of these cases. Indeed, at Philadelphia and in state ratification debates, those who spoke on the concept of judicial review ranked among the elite of America’s emerging bench and bar. The best way to secure the peoples’ liberty, wrote John Adams, was to give them the power to defend it, not just in legislatures, but also “in the courts of justice.” The federal judiciary must be “constant to the laws” and “screen it from the resentment and encroachment” from the other branches of government. John Marshall, later Chief Justice of the United States Supreme Court, stated in the Virginia Convention that if Congress would try to legislate in an area beyond the enumerated powers given to them, “it would be considered by the judges as an infringement of the Constitution which they are to guard” and “[t]hey would declare it void.” Similarly, at the Connecticut ratification convention, Oliver Ellsworth, another future Chief Justice, assured his fellow delegates that if the legislature should at any time “overleap [its] limits,” the judiciary was there as a constitutional check. “If the United States [Congress] go[es] beyond their powers, if they make a law which the Constitution does not authorize, it is void” and the judiciary “will declare it to be void.” James Iredell, a prominent North Carolina Federalist and future Associate Justice of the Supreme Court, wrote that “an act inconsistent with the Constitution was void; and that the judges [consistent] with their duties, could not carry it into effect.” A constitution, wrote Iredell, “appears to me to be a fundamental law, limiting the powers of the Legislature” and “the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority” when determining if a law was enforceable. This is not to say that judges are the arbiters of legislative constitutionality but “when an act is necessarily brought in judgment before them, they must unavoidably, determine one way or another.”\footnote{\textit{Adams, A Defence of the Constitutions of the United States}, 3:327, 453; Elliot’s Debates, 3:553 (remarks of John Marshall); Ibid. 2:196 (remarks of Oliver Ellsworth); Iredell to Richard Spaight, 26 August 1787, in \textit{Life and Correspondence of James Iredell}, ed. Griffith J. McRee (New York: D. Appleton & Co. 1949) 172-173.}

The most eloquent statement for the role of the federal judiciary, though, was made by Alexander Hamilton in \textit{Federalist 78}. There could be no liberty, Hamilton extolled, unless the
judicial power was separate from the legislative and executive powers. Indeed, “courts were
designed to be an intermediate body between the people and the legislature” in order to, among
other things, “keep the latter within the limits assigned to their authority.” Because the federal
judiciary was the bulwark of “a limited Constitution against legislative encroachments,” judges
must be insulated from the legislature which required “permanent tenure” and independence.
These measures were required to “guard the Constitution and the rights of individuals” from the
efforts of designing men who give rise to “dangerous innovations in the government, and serious
oppressions of the minor party in the community.”

Hamilton went on to state that the Constitution “must be regarded by the judges as a
fundamental law” and that interpretation of the laws “is the proper and peculiar province of the
court.” He brushed aside any argument that the legislature itself should be the “constitutional
designers of their own powers” or that the opinions of Congress as to the Constitutionality of statute
were binding on the other branches of government. No such inference flowed from the text of
the Constitution and it was more rational to suppose that this was a job which fell to the courts.
Hamilton then emphasized that “[n]o legislative act . . . contrary to the Constitution, can be valid.
To deny this, would be to affirm that the deputy is greater than the principle; that the servant is
above his master; that the representatives of the people are superior to the people themselves.”
This did not mean that the judicial power was superior to the legislative, it only meant that the
power of the people was superior to both. “[W]here the will of the legislature, declared in its
statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought
to be governed by the latter rather than the former.”

The creation of a federal judiciary was one of the more significant brakes against “excess
democracy” inserted into the Constitution. Although the Virginia Plan proposal for a “negative”
on state legislation never came to fruition, there still emerged from Philadelphia a body capable

121 Ibid. Critics of judicial review also point to Hamilton’s remarks in Federalist 78, that the judiciary
was meant to be the “least dangerous branch of government,” as an indication that the Supreme Court was
never intended to have the power to strike down legislation. Such an argument takes Hamilton’s remarks
out of context. What he meant by the judiciary being the “least powerful” branch of government was not
that it should be restrained in its review of legislative enactments but merely that federal courts did not
possess the power of the purse (like Congress) or the power of the sword (like the President). The federal
of negating federal legislation – or at least federal legislation that violated protections set out in the Constitution.\textsuperscript{122} This “negative” on legislation, or “brake” on democracy, became even more important after adoption of a bill of rights. On the floor of the House of Representatives, James Madison described what he saw as the unique role of the federal judiciary in protecting the rights of the people:

> It has been said, that it is unnecessary to load the constitution with this provision [a bill of rights], because it was not found effectual in the constitution of the particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.\textsuperscript{123}

In conceiving of judicial review of legislative acts, and by empowering a federal court system to strike down laws which violated fundamental rights, American Constitutionalism thus diverged from its Anglican progenitor. British history had shown, and orthodox Whig political theory had held, that threats of tyranny came from unchecked royal prerogative and that the best guardians of the people’s liberty were their representatives in Parliament. It was inconceivable that constitutions or bills of rights could constrain Parliament because Parliament was a part of the Constitution and, in any event, was not a source of tyranny. The American experience had proven otherwise. As representative assemblies were given enormous power after separation from Britain, and as those assemblies used that power to pass laws which not only contravened notions of republican virtue, but also violated the natural rights of property owners, Americans came to see that democratic bodies could be every bit as tyrannous as kings. To check that tyranny, and prevent what had happened at the state level from repeating itself on the national 

courts could only adjudicate to protect the rights of the people but had no independent ability to exercise power over the people and oppress them.\textsuperscript{122} The Bill of Rights, as drafted, applied only to the federal government. It was not until Reconstruction where, most scholars agree that Radical Republicans intended to incorporate most of those rights into the Due Process Clause of the Fourteenth Amendment, was there any attempt to assert those rights against legislation passed by state governments. See Amar, \textit{The Bill of Rights}, 181-214; Eric Foner, \textit{Reconstruction: America’s Unfinished Revolution} (New York City: Harper & Row, 1988) 258, 533.

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level, the founders inserted various “brakes” on the democratic process directly into the body of the Constitution.

Federalists and Anti-Federalists alike feared the potential for democratic excess and the violation of minority rights at the hands of unrestrained majorities. Although Federalists located that danger at the state level, and Anti-Federalists located it at the national level, both sides could agree that something needed to be done to protect minority rights. Their solution, as mentioned above, was to “brake” the democratic process. To a large extent, this had already been done at the convention in Philadelphia. An extended republic, executive veto and separation of powers, among other things, provided for a republican form of government significantly more refined than a pure democracy.

One of the more important brakes to the system, however was a federal judiciary charged with guarding the rights of the people and watching over Congress to ensure it did not overstep its delegated powers. This may not have meant much in 1789, when the Constitution contained few guarantees of individual liberty, but it became significantly more important in 1791 after the Bill of Rights was ultimately ratified. The first eight amendments to the Constitution referenced what Madison characterized as “simple and acknowledged” rights. To be sure, there were other rights of constitutional dimension beyond those he proposed but Madison did not want a bill of rights to get bogged down in petty disputes when sent to the states for ratification. Thus, rather than clutter his bill with more complex and convoluted rights, he devised a method by which the federal courts could still reference other rights when policing legislative acts to ensure they did not violate minority rights – that method was the Ninth Amendment. By instructing courts that the enumeration of some rights in the Constitution should not be construed as disparaging the existence of others, Madison made clear that other rights not included in the Constitution or Bill of Rights would still receive judicial protection. Nobody could predict in 1776 that legislatures would be the locus of tyrannous and pass laws infringing on property rights. Likewise, nobody could predict what sorts of laws Congress might pass in the future that would violate other rights. The Ninth Amendment made it unnecessary to try and predict every exigency. Courts were now authorized to strike down legislation which violated any natural right of man, even those which were not specifically set out in the Bill of Rights. The “republican synthesis” was complete.

123 Debates of the First Federal Congress in Creating the Bill of Rights, 83.
Conclusion

“[W]hatever veneration might be entertained for the Body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people speaking through the several State Conventions.”

James Madison in the United States House of Representatives, 6 April 1796.124

The Constitution and Bill of Rights are fundamentally products of their time and they must be understood in the context of those times. When examined separately, either from each other or untethered from the moorings of the debates that spawned them, they appear as little more than a bare framework of government accompanied by a set of vaguely worded general principles. But, when read in conjunction with each other, and in the context of the political debates in Philadelphia, the state ratification conventions and the first federal Congress, these documents take on an altogether different appearance as brilliantly orchestrated compromises between differing parties with oftentimes conflicting viewpoints on many issues including the protection of individual rights and the nature of democracy in the new American polity.

There is no question that “rights rhetoric” permeated revolutionary and foundering era polemics. Although Federalists and Anti-Federalists generally agreed that man possessed certain inherent rights, they disagreed on how to protect those rights. Anti-Federalists viewed the states as the best protection for individual rights and feared encroachment by the national government. They argued the new Constitution was defective because, among other things, it did not provide a bill expressly stating the rights of the people that could not be infringed. Federalists, caught off guard after having not included a bill of rights in the draft of the original constitution, argued that such a bill would be dangerous because it was impossible to list all the rights of man. Concerned with operation of the legal maxim of expressio unius est exclusio alterius, Federalists feared that an incomplete list of rights in a bill of rights could lend support to future tyrants who might argue that, because a right was not set out in the bill, no such right existed.
As important as this discourse was to the emerging sense of Constitutionalism, it paled by comparison to the even larger debate over the role of democracy in the new republic. Popularly elected state governments were problematic from the outset of independence. The inability of state legislatures to requisition supplies for the war effort nearly founndered the continental army and their refusal to support the Confederation government, or cooperate in commerce and foreign affairs, rendered the “perpetual union” of the states little more than a chimera. As bad as these problems were, though, they were nothing compared to popular politics of 1780s. Founders like James Madison watched in disgust as state legislatures shrugged off any notion of “republican virtue” and passed law after law infringing on property rights. When it came time to re-structure the government, Federalists were determined to reign in this sort of “excess democracy” and to insert brakes into the system to protect individual rights. Even Anti-Federalists, who were by and large less convinced of the inviolability of individual rights in the face of public legislation, were still concerned that majorities in the new federal government could oppress minorities.

The Ninth Amendment resolved the concerns of both Federalists and Anti-Federalists on these two discourses. With respect to rights of men, Anti-Federalists demanded a bill specifying those rights which could not be infringed by the national government whereas Federalists feared an incomplete enumeration of rights could later be construed to deny the existence of any rights which were not expressly set out in that bill. A compromise was reached whereby the first eight amendments to the Constitution expressly spelled out certain rights and liberties that could not be infringed and the Ninth Amendment made clear that the expression of those rights was not to be misconstrued so as to deny the existence of others.

On the issue of democracy, the founders devised a number of brakes to populist politics and inserted them directly into the Constitution and its first ten amendments. These “brakes” included such devices as an extended republic, divided power and executive vetoes. One of the more important safeguards, however, was a federal judiciary to vindicate and protect the rights of citizens. The role of the judiciary was even more important after ratification of the Bill of Rights in 1791. The Constitution’s first eight amendments now specified a number of natural, civil and political rights over which factious majorities in Congress could not trammel. Furthermore, the Ninth Amendment made clear there were other rights – specifically, natural rights – which were

124 Farrand, Records of the Federal Convention, 3:374
not expressly set out in the Bill of Rights but also warranted Constitutional protection. The role of the federal courts was to ensure that the other two branches of government, particularly the legislature, never violated these rights.

There is little evidence in the historical record from which to glean an “original intent” either of Madison when he introduced what became the Ninth Amendment or the First Congress when it debated that proposal, altered it and eventually sent it to the states for ratification. There is also no record of what the states intended by ratifying it. Nevertheless, we can get a general idea of what the amendment probably meant by looking to the context in which it was proposed and ratified as well as the problems it was meant to address. The founders, Federalists and Anti-Federalists alike, feared oppressive majorities that would tyrannize and infringe the rights of minorities. Although Federalists feared this at the state level, and Anti-Federalists feared it at the national level, they came together and forged a compromise whereby natural rights were given protection from oppressive pluralism.

To be sure, the impetus for this so-called “republican remedy” arose out of a perceived violation of property rights. But, there is nothing to suggest that property rights were the only natural rights with which the founders were concerned.125 Men like James Otis and Alexander Hamilton spoke of the natural right of “liberty” long before a violation of property rights led to the “republican synthesis.” Given the amorphous nature of a natural right to “liberty,” it is no wonder Federalists shied away from any attempt to list all the rights that would be protected in a bill of rights or that the First Congress included an amendment directing future generations not to misconstrue an express enumeration of some rights in the Constitution as denying the existence of others. Anti-Federalists were equally concerned about protection of individual liberty. They cited the broad powers being delegated to the national government and warned such power could invade the sanctity of the home and reach into the most private spheres of live. The power of the government could, and no doubt would, “enter the house of every gentleman . . . attend him to

125 There is also nothing to indicate that the founders strictly limited their definition of property to how we understand the concept today. John Locke, who inspired much of the founders’ thinking on natural rights, wrote that “every man has a property in his own person.” Locke, The Second Treatise of Government, 128. Thus, the founders may well have had more on their mind when they spoke of protecting property rights than simply preservation of intangible debt obligations.
his bed-chamber . . . [and] haunt him in his family, and in his bed.”

Whatever their particular reasons, the founders – Federalists and Anti-Federalists alike – shared a fear of “excess democracy” and inserted brakes on the democratic process directly into the body of the Constitution. The Ninth Amendment is simply another such brake. Rather than provide for an executive veto, or separation of powers, this particular brake informs the federal judiciary that there are natural rights outside the text of the Constitution, which are as deserving of legal protection as those in the first eight amendments of the Bill of Rights, and instructs the bench to protect those rights from infringement by factious majorities in the future.

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126 Brutus [pseud.] in *The Documentary History of the Ratification of the Constitution*, 15:110, 114. This language, about preserving the sanctity of home against the reach of an intrusive government, raises some interesting questions about “privacy” as an unenumerated right addressed in the Ninth Amendment.

127 For a revealing look at the sort of harm that excess democracy is still capable of inflicting, see Barbara S. Gamble, “Putting Civil Rights to a Popular Vote,” *American Journal of Political Science* 41 (1997) 245-269, where the author surveys popular referenda and voter initiatives directed at restricting civil rights of various minorities and finds that more than seventy-five percent (75%) of such measures have passed in the last three decades. Clearly the founders’ concerns about “tyrannous majorities” are just as relevant today as they were two centuries ago.
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