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## RIGHTS UNDER THE NINTH AMENDMENT: NOT HARD TO IDENTIFY AFTER ALL

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## INTRODUCTION

In 1789 when James Madison proposed a number of changes to the Constitution—what became the Bill of Rights—he made it clear that in selecting the proposals “nothing of a controvertible nature ought to be hazarded.”<sup>1</sup> The last thing he wanted was a protracted debate about amendments that was as likely to founder as it was to succeed.<sup>2</sup> Indeed, the Congressional Record confirms that the proposed provisions were not as

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1. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 5 THE WRITINGS OF JAMES MADISON 1787–90 at 406 (Gaillard Hunt ed., 1900).

2. Madison noted as much during the House debates. On August 15, 1789, he said that he had proposed amendments that gave “some security . . . for those great and essential rights which [many] had been taught to believe were in danger . . . But while I approve of these amendments, I should oppose the consideration at this time of such as are likely to change the principles of the Government, or that are of a doubtful nature; because I apprehend there is little prospect of obtaining the consent of two-thirds of both houses of Congress, and three-fourths of the state legislatures, to ratify propositions of this kind.” 1 ANNALS OF CONG. 775 (1789) (Joseph Gales ed., 1834).

heavily debated as some had feared.<sup>3</sup> The Ninth Amendment also was the focus of very little comment or debate.<sup>4</sup>

This is quite a contrast to the current debate about the Ninth Amendment, and how to identify the rights it was intended to protect. Scholars and judges in recent times have frequently disagreed over the proper method to identify Ninth Amendment rights.<sup>5</sup> Other scholars assert that the Ninth Amendment was intended as a mere restatement of states' rights, or as a limit on federal powers rather than as recognition of inherent rights.<sup>6</sup> As one scholar noted, many believe the Ninth Amendment "appears incapable of practical interpretation. No one has yet discovered a mechanism for empowering courts to identify the 'other [rights] retained by

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3. When Madison proposed the subject of amendments on June 8, 1789, Representative Smith said that "[i]f we go into the discussion of this subject, it will take us three weeks or a month; and during all this time, every other business must be suspended." Representative Jackson predicted that, "it will take a year to complete it!" Representative Vining said, "May it not be procrastinated into days, weeks, nay, months?" 1 ANNALS OF CONG., *supra* note 2, at 441–42, 446. However, their fears were unfounded. The house debates on amendments occurred over ten consecutive meeting days in August, from August 13 through 24. *Id.* at 703–85. However, the majority of the debate focused on more controversial amendments and proposals which were not ultimately adopted. Debate on the actual amendments which we know as the Bill of Rights occurred only between August 16 and 22, and consumed a mere fifteen pages of the record. Most of the amendments were adopted without significant discussion. *Id.* at 757–61; 778–85; 788–90; 795–97.

4. The need for the Ninth Amendment was described by Madison in his speech presenting amendments on June 8, 1789. *Id.* at 451. On the same day, Representative Jackson concurred that something like a Ninth Amendment was needed if any rights were enumerated. *Id.* at 442. He said, "There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government." The Ninth Amendment was only briefly debated on August 17, 1789. *Id.* at 749–56.

5. See, e.g., Calvin R. Massey, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS 14 (1995) ("Given that Ninth Amendment rights are, by definition, not spelled out in the Constitution, how do we divine their substance? This may be the toughest issue of all, for it forces us to articulate and defend a principled methodology of constitutional interpretation."); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 160 (1988) ("The fact that the [N]inth [A]mendment is no longer forgotten clearly does not establish that many of us know confidently what to do with it."); *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary United States S.*, 100th Congress 130, 249 (1987) ("Nobody has ever to my knowledge understood precisely what the Ninth Amendment did mean and what it was intended to do . . . I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it.")

6. McAfee is one proponent of the rights/powers view. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990). Kurt Lash is the main proponent of the state's rights view. See Kurt T. Lash, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009).

the people . . .”<sup>7</sup> Because of the difficulty judges and scholars have seemed to experience in understanding the Ninth Amendment, it has largely been ignored by the courts. Only in recent years has the amendment been referenced by Supreme Court Justices, and even then, usually only as support after an independent basis for the decision at hand has been found.<sup>8</sup>

Yet if Ninth Amendment rights are so difficult to identify, why wasn’t that very point raised against it in the congressional and state debates over ratification? More to the point, was it intended by the Founders that the Ninth Amendment would not be used, out of fear of its open-ended nature, or concern over the method or theory to be used in identifying rights? Were the Founders as uncertain of its meaning as succeeding generations have been?

This Article seeks to answer these questions. Specifically, it asserts that the Founders did not consider finding rights under the Ninth Amendment difficult at all. For us today to know what unenumerated rights were intended by the Ninth Amendment, we need only consult the natural law rights understanding of the founding generation.<sup>9</sup>

Part One will discuss the few comments by the Founders that have been misconstrued to suggest that it would be difficult to identify Ninth Amendment rights. However, it will be seen that even these references in fact do not support any supposed difficulty in finding rights. This part will also refute the rights/powers and states’ rights view of the Ninth Amendment asserted by some scholars. Finally, this part will discuss the original intent of the Founders and their belief that such original intent should be followed by succeeding generations, particularly regarding the identification of Ninth Amendment rights.

Part Two will discuss the rights understanding of the Founders and their views of natural law. Most importantly, this section will demonstrate with thirteen concrete examples that the Ninth Amendment and the natural law views of the Founders would have been a much better tool than the

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7. Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L. J. 759, 761 (1994). Sanders asserts that Ninth Amendment rights are identified by seeing if any claimed right causes tangible physical or economic harm to others.

8. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (mentioning the Ninth, but relying on the Due Process Clause of Fourteenth Amendment); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (mentioning the Ninth, but relying on the First Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (referring to the First, Third, Fourth, and Fifth Amendments before the Ninth).

9. Some other scholars have made a similar argument to that proposed in this Article. See, e.g., J.D. Drodny, *Originalist Justification and the Methodology of Unenumerated Rights* 1999 L. REV. MICH. ST. U. DET. C.L. 809 (1999); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

Fourteenth Amendment for the Supreme Court to use through the years to find “fundamental” rights. Hence, this part will demonstrate how a proper use of the natural law views of the Founders under the Ninth Amendment will eliminate most accusations of judicial activism today, and will put the substantive due process rights allegedly derived from the Fourteenth Amendment in their proper place.

#### PART ONE: THE FOUNDERS SAW NO DIFFICULTY IN IDENTIFYING NINTH AMENDMENT RIGHTS

As noted above, there is considerable disagreement among scholars about the purpose and meaning of the Ninth Amendment, and the best way to find the rights it was intended to protect.<sup>10</sup> Bennett B. Patterson, one of the first modern scholars to research the Ninth Amendment, has even maintained that “the unenumerated rights [in the Ninth Amendment] permit of no exact definition. To attempt to define these rights would be contrary to the obvious intent and meaning of the amendment.”<sup>11</sup>

The Founders would have been surprised to hear such notions. Indeed, if Ninth Amendment rights were supposedly so hard to identify, why wasn’t that very point raised against it by the Founders? After all, the members of Congress who debated the Ninth Amendment, and contemporary Founders who had the opportunity to comment on it, were extremely astute men, and certainly must have understood this problem if it indeed was considered to be a problem. Yet this alleged rights identification problem with the Ninth Amendment was actually not raised at all by any member of Congress!

#### *Comments in Congress on the Bill of Rights*

Indeed, the opposite notion is raised in a debate that took place in the House of Representatives on August 15, 1789 regarding the right to assemble. Representative Theodore Sedgwick asserted that listing the right to assemble in the First Amendment was inadvisable because it was “a self-evident, unalienable” part of free speech that did not need to be listed separately.<sup>12</sup> He went on to say that such “trifles” should not be included in a bill of rights. If they were, the result would be “a very lengthy enumeration of rights” such as, for example, a man’s “right to wear his hat if he pleased; [and] that he might get up when he pleased, and go to bed

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10. See *supra* notes 5–7 and accompanying text.

11. See, e.g., Bennett B. Patterson, *THE FORGOTTEN NINTH AMENDMENT* 44 (1955).

12. 1 *ANNALS OF CONG.*, *supra* note 2, at 759.

when he thought proper.”<sup>13</sup>

Representatives Tucker and Gerry both offered a response to Sedgwick’s concern. Tucker stated that he “hoped the words would not be struck out, for he considered them of importance,” while Gerry “was also against the words being struck out, because he conceived it to be an essential right.”<sup>14</sup> Obviously, what was being discussed was *not* any perceived difficulty in identifying rights, but what rights were fundamental and important enough to be enumerated as part of the proposed First Amendment. But as Representative Page then pointed out, even seemingly trivial matters such as wearing a hat “have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling” and “therefore it is well to guard against such stretches of authority.”<sup>15</sup>

In sum, the whole point of the debate was not about any difficulty in identification of rights, since none of those who spoke that day had any difficulty identifying rights. Rather, the debate was about which rights were so fundamental that they should be specifically listed in the First Amendment, rather than left to be covered by the Ninth. The very purpose for creation of the Ninth Amendment was to protect those rights that—as pointed out by Representative Page—might someday still be abridged by government, although they were not specifically enumerated. There was no other point in the congressional debate where ease or difficulty in identifying rights was raised.

#### *The Virginia Ratifying Convention and the Rights/Powers Issue*

In the state ratifying conventions, once again the alleged difficulty of identifying Ninth Amendment rights was not a major issue. Indeed, this point was only raised once, and even then not as a primary objection, but as a secondary matter.

The occasion was the ratification debates in the Virginia legislature. Edmund Randolph apparently objected to the word “retained” in the proposed Ninth Amendment, although his comments come to us

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13. *Id.* at 760. Randy Barnett sites this exchange to support the idea that any attempt at enumerating Ninth Amendment rights would be “dangerously incomplete.” Randy Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1, 30–33 (2006). Because of this incompleteness, it is sometimes assumed that identifying all such rights is impossible. Regardless of whether this is so, identifying specific rights in concrete cases based on the natural rights view of the founders is not at all difficult, as this Article explains.

14. 1 ANNALS OF CONG., *supra* note 2, at 760.

15. *Id.*

secondhand.<sup>16</sup> Randolph was said to have noted that “the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of,” and further that “there was no criterion by which it could be determined whither [sic] any other particular right was retained or not.”<sup>17</sup> But then Randolph betrayed his true concern, a concern that had nothing to do with any difficulty in identifying unenumerated rights, but that dealt instead with the powers of Congress. He expressed his opinion that it would be better to prevent an extension of “the powers of Congress by their own authority, [rather] than as a protection to rights reducable [sic] to no definitive certainty.”<sup>18</sup> After all, such a restriction on congressional power was the original proposal by the Virginia Constitutional Ratifying Convention, as expressed in that state’s proposed amendments.<sup>19</sup>

The reality that Randolph’s real objection was to clarify limits to Congress’ powers is expressed in the responses to Randolph by both state Representative Hardin Burnley and by James Madison. Neither bothered to discuss the alleged difficulty in identifying rights that Randolph seemed to have raised, but both spoke of the powers/rights issue. Burnley stated that “I see not the force of this distinction, for by preventing an extension of power in that body [Congress] from which danger is apprehended safety will be insured if its powers are not too extensive already, [and] so by protecting the rights of the people [and] of the States, an improper extension

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16. The account was given by representative Hardin Burnley in a letter to James Madison, who said that Randolph’s argument “if I understood it” was as given above. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 219 (Dep’t. of State Press Release 1905) [hereinafter Documentory History].

17. *Id.*

18. *Id.*

19. Randolph encouraged a return to Virginia’s seventeenth proposed amendment, which read as follows: “That those clauses which declare that Congress shall not exercise certain *powers* be not interpreted in any manner whatsoever to extend the *powers* of Congress. But that they may be construed either as making exceptions to the specified *powers* where this shall be the case, or otherwise as inserted merely for greater caution.” George Mason, Amendment Recommended “to the Consideration” of First Congress (1788), in 3 THE PAPERS OF GEORGE MASON 1119 (Robert A. Rutland, ed., 1970) (emphasis added). In his proposed amendments, Madison had altered this wording to refer to both rights and powers: “The exceptions here or elsewhere in the Constitution, made in favor of particular *rights*, shall not be so construed as to diminish the just importance of other *rights* retained by the people, or as to enlarge the *powers* delegated by the Constitution; but either as actual limitations of such *powers*, or as inserted merely for greater caution.” 1 ANNALS OF CONG., *supra* note 2, at 452 (emphasis added). As reflected in the final wording of the Ninth Amendment, Congress greatly altered this wording even further, deleting all reference to powers, and expressing the concept solely in terms of rights: “The enumeration in the Constitution, of certain *rights*, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX (emphasis added).

of power will be prevented.”<sup>20</sup> Madison stated that Randolph’s concern was

altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.<sup>21</sup>

Indeed, Randolph himself in a letter to George Washington indicated that his real concern with the Amendment was that “[C]ongress have endeavored to administer an opiate, by an alteration, which is merely plausible.”<sup>22</sup> The opiate was switching from a discussion of powers to rights. If he was really concerned about the difficulty of identifying unenumerated rights, he would certainly have said so in this letter. Hence, Randolph did not raise the question of what supposedly open-ended rights the Ninth Amendment was meant to cover (which has been so troubling to scholars in modern times) because he was concerned about the matter. He was concerned solely with limiting federal power.

In reviewing this objection by Randolph, and the responses to it by Burnley and Madison, one scholar asserts that the Ninth Amendment was primarily seen as a tool to limit the scope of federal power, and not as an open ended invitation to find modern rights.<sup>23</sup>

While this argument is basically on the right track and is especially commendable in condemning efforts by many scholars to use the Ninth Amendment to justify modern rights, it goes too far in assuming that rights were secondary to powers in the minds of the Framers forming the Ninth Amendment. Indeed, such an interpretation inverts the issue that the Founders found most important (natural rights) in favor of the view that powers (or their limitation) are the standard to be relied on in determining and identifying rights. As this Article demonstrates, constitutional grants of power were clearly seen by the Founders as secondary to natural rights retained by the people—rights that were understood by the Founders as being pre-political and above even the Constitution itself, with all of its powers. Since congressional power is subordinate to such rights, it is precisely the existence of these unenumerated rights that stands as the

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20. 5 DOCUMENTARY HISTORY *supra* note 16, at 219.

21. *Id.* at 222.

22. *Id.* at 223.

23. *See, e.g.,* McAfee, *supra* note 6, at 1290.

ultimate check on federal power. Accordingly, the need to identify these rights is just as great as ever. Simply put, there are certain realms in which the Federal Congress has no power to legislate: the realm of unenumerated rights. Indeed, if the Ninth Amendment was understood as being solely about limiting powers, there would have been no perceived need for a new constitutional amendment, proposed by Virginia in 1793 (but not adopted), to “restrict the general welfare clause to Congress’s enumerated powers.”<sup>24</sup>

*What was Debated and What was Not*

In respect to the Constitution, when one reads the notes pertaining to the original Constitutional Convention in 1787, and the state ratifying convention debates in 1787 and 1788, and then contrasts the views of the anti-federalists who hated the Constitution with the arguments in its favor by its defendants, the most striking feature of the debate is the focus on structure and federalism rather than on rights.<sup>25</sup> To be sure, detractors of the new Constitution cited lack of a bill of rights as a fatal flaw in the Constitution, along with a host of structural problems they also felt should be changed.<sup>26</sup> But it was the *existence* of a bill of rights, not the content or substance of such a bill of rights, that they were upset about. Perhaps the best example of this is found in the comments of George Mason at the end of the Constitutional Convention. One of the reasons he refused to sign the Constitution was its lack of a bill of rights. However, he did not think this lack would lead to extensive debates over rights, since he felt a bill of rights was so uncontroversial it could be drafted and inserted by the convention *in just a few hours*.<sup>27</sup>

Meanwhile, the most heated debates continued to rage over structural issues: the extent of Congress’ powers; the nature of the executive power; the reach (or lack of reach) of judicial review; and most of all, the degree to which the states could be said to be “swallowed up” by the new federal

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24. 14 THE PAPERS OF JAMES MADISON 470 (1983).

25. This can be seen by contrasting “The Federalist” penned by Hamilton, Madison, and Jay with one of the chief anti-Federalist publications, “Letters from the Federal Farmer” penned by Richard Henry Lee. Almost all of the disputed issues relate to structural matters. Yet Lee and Madison *agreed* on the need for the Ninth Amendment, as seen by this statement from Lee that closely parallels Madison’s thoughts regarding the need for the Ninth Amendment: “[A]s individual rights are numerous, and not easy to be enumerated in a bill of rights, and from articles, or stipulations, securing some of them, it may be inferred, that others not mentioned are surrendered.” Richard Henry Lee, LETTERS FROM THE FEDERAL FARMER 105 (1978).

26. Lee, *supra* note 25, at 105–12; 3 THE PAPERS OF GEORGE MASON, *supra* note 19, at 991.

27. Journal of the Constitutional Convention, 4 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 442.

goliath.<sup>28</sup> Notably lacking in this intensity of emotion and argument is any meaningful debate over the content and substance of individual rights to be protected.

Indeed, for most of the Founders, individual rights were not debatable—they were fundamental. Individual rights were derived from the law of nature, which predated the social compact, and inhered in the very being of each man and woman. In light of this, it is not surprising that George Mason thought the Constitutional Convention could write up an acceptable bill of rights within a matter of hours, or that Congress devoted little time to debating the Bill of Rights when it was presented to them. As another scholar noted, “[C]olonials believed that ‘the laws of nature are those which are expressive of the will of God, the true nature of man, the constitution of the universe. And they doubted not their ability to discover those laws.’”<sup>29</sup>

Only one state among those that ratified the Bill of Rights seemed to struggle with it, and everyone knew why. It was the State of Virginia, whose senate was, in the words of Jefferson, “7/8 antifederalists.”<sup>30</sup> Disappointed at Madison’s genius in proposing amendments based on natural law that dealt only with undisputed individual rights, they tried to shoot down the whole amendment effort in the hope of creating the need for a new constitutional convention that would focus on the structural and state/federal issues that they were really concerned about.

Closely related to the rights/powers issue in respect to the Ninth Amendment is the extent to which it was intended to act jointly with the Tenth Amendment to protect states’ rights. In his book, Kurt Lash has amassed an impressive array of historical support for this proposition.<sup>31</sup> However, Madison’s presentation of proposed amendments to Congress indicates his understanding that the two amendments were very different. The two amendments were stated separately in different parts of the speech, with an indication that each amendment was to be inserted directly into a different clause of the Constitution.<sup>32</sup> Furthermore, in his presentation to

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28. These and other structural issues are dealt with admirably in the writings of Richard Henry Lee and George Mason. *See supra* note 25, and accompanying text.

29. Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, in 1 *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 162 (Randy Barnett ed. 1989).

30. Letter from Thomas Jefferson to William Short (Dec. 14, 1789), in 5 *DOCUMENTARY HISTORY* 224, *supra* note 16.

31. Lash, *supra* note 6.

32. 1 *ANNALS OF CONG.*, *supra* note 2 at 456. Madison’s proposal of inserting the amendments directly into the Constitution was later replaced with the suggestion of Roger Sherman—agreed to by vote of the House on August 19, 1789—that the amendments be added to

Congress, Madison listed a number of reasons that had been asserted against adopting a bill of rights, answering each one in turn. The *only one* of the reasons that Madison expressed concern about was the problem remedied by the Ninth Amendment—how to overcome the presumption that creating a list of rights impliedly granted Congress the power to legislate on everything not in the list. Nor was Madison the only one to have this concern. Representative Jackson expressed it quite well in a comment he offered immediately after Madison had presented the proposed Bill of Rights on June 8th:

There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.<sup>33</sup>

Regarding this concern, Madison stated that, “[T]his is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights.”<sup>34</sup> Contrast this with Madison’s apology, later in his speech, for proposing the Tenth Amendment—an apology that seemed to border on near embarrassment. He stated:

I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several States. Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary: but there can be no harm in making such a declaration.<sup>35</sup>

In sum, Madison’s very presentation and statements, along with statements by other Founders, indicate a clear understanding of the different functions of the Ninth and Tenth Amendments. The Ninth Amendment was a crucial statement, necessary to preserve natural rights from legislative encroachment. The Tenth Amendment was a mere acknowledgment that

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the Constitution “by way of supplement.” *Id.* at 795.

33. 1 ANNALS OF CONG., *supra* note 2, at 460.

34. *Id.* at 456.

35. *Id.* at 458–59.

the new nation had created a unique system of federalism, in which different governments had different responsibilities. These are very distinct concepts.

### *Original Intent*

An essential assumption in this Article is that the original intent of the Founders regarding natural rights should continue to be followed today. Interestingly, one of the arguments used by some who oppose interpreting the Constitution based on original intent is the Ninth Amendment. They argue that the extra-textual reference to unenumerated rights in the Ninth Amendment makes interpreting the Constitution according to the textual original intent impossible as well, since the Ninth Amendment renders the text incomplete.<sup>36</sup>

The proponents of this argument are correct in asserting that there is no logical consistency in applying original intent to all of the Constitution except the Ninth Amendment. But it is wrong to assume that Ninth Amendment unenumerated rights are impossible or even difficult to identify, and therefore the Ninth Amendment undermines the concept of original intent. The Founders did not consider identifying such rights to be difficult. Indeed, rather than being the supposed best evidence against original intent, the Ninth Amendment is in fact the best evidence in its favor.

This conclusion is unavoidable when the Ninth Amendment is considered according to standard principles of interpretation. As any contract attorney will attest, because the wording of the Ninth Amendment is both open-ended and referential, it is essentially an incorporation by reference clause. This open-ended reference was intentional, but was not meant to refer to a void or a black hole that was endless or undiscoverable. It had to refer to something. Yet, it would be error to just blandly assume (as most Ninth Amendment scholars have strangely done) that the rights it referred to could consist of whatever future generations wanted to include. As brilliant as they were, would the Founders have intentionally left open a door for future generations to justify any right they felt inclined to name, based on the whims of the times? Would they have inserted a clause

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36. See Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 CALIF. L. REV. 2129 (2010); Sotirios A. Barber & James E. Fleming, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 69 (2007); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 193–94 (2003).

whereby “rights” could be found that might harm the people? Simply put, would the Founders have logically placed an opening in the Constitution that could serve to undermine its very purpose?

Hardly. Again, as any contract attorney knows, an incorporation by reference clause *must* include something already in existence. It cannot include future provisions, for this would be nothing more than an unenforceable agreement to agree, that would undermine the entirety of the contract. Thus, the Ninth Amendment was intended to be an anchor to secure the ship of state to solid, foundational principles commonly accepted in the founding age. The Founders would have been appalled at any attempt to use the Ninth Amendment to justify removing both anchor and rudder, leaving the ship of state to drift aimlessly wherever the popular currents and ever-changing fads might take it. Indeed, that would be the opposite of their intention in creating the Ninth Amendment.

The Founders very firmly intended that the Ninth Amendment would include fundamental, morally-based rights from their generation that should continue to be followed by succeeding generations. In short, they contemplated that their original intent regarding rights would be adhered to by succeeding generations. As James Madison said, “The [governmental] improvements made by the dead form a debt against the living, who take the benefit of them. This debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements.”<sup>37</sup> Madison made it clear that the “improvements” he was talking about were the governmental structure and rights set in place by the founding generation. He further noted that:

There seems, then, to be some foundation in the nature of things; in the relation one generation bears to another, for the descent of obligations from one to another. Equity may require it. Mutual good may be promoted by it. And all that seems indispensable in stating the account between the dead and the living, is to see that the debts against the latter do not exceed the advances made by the former.<sup>38</sup>

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37. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 439.

38. *Id.* This quote clearly indicates Madison’s belief that the values and rights of the founding generation—which were for the most part *not* debated in the Constitutional Convention anyway (since mostly structure was debated there)—should continue to be followed by succeeding generations. Yet this seems to be diametrically opposed to the oft-cited statements by Madison regarding his reluctance to reveal his notes regarding the Federal Convention, and that such notes should not be followed in constitutional interpretation. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARVARD L. REV. 885, 935–942 (1985). However, there is no inconsistency. Rather than the Constitutional Convention, Madison

In short, while the obligation of the living was not to exceed what the Founders put in place, it was nonetheless firmly rooted in what they created. This includes the Ninth Amendment and the natural law rights it included as understood by the founding generation.

This quote has frequently been overlooked by proponents of original intent possibly because it was a response by Madison to the suggestion of Jefferson—another Founder—that “no society can make a perpetual constitution, or even a perpetual law . . . every constitution . . . and every law, naturally expires at the end of 19 years.”<sup>39</sup> Jefferson grounded this assertion on a rather complicated analysis—based on then existing mortality rates—that nineteen years was the point of turnover (i.e., death) of more than half of any country’s population, and the dead should not control the living. While these statements by Jefferson seem to suggest he did not favor an original intent analysis, in fact the opposite is true. Jefferson based this entire nineteen year argument on the idea that the laws of nature *controlled* each succeeding generation—that each generation “have the same rights over the soil on which they were produced, as the preceding generations had. They derive these rights not from their predecessors, but from nature.”<sup>40</sup> The Declaration of Independence, which Jefferson penned, embodies the morally-based “laws of nature and of nature’s God”<sup>41</sup> that he believed must bind each generation. Hence, Jefferson favored the idea that the unchangeable laws of nature—such as those embodied in the Ninth Amendment—controlled each generation, even if the constitution each generation formed had expired. Accordingly, Jefferson reaffirmed the Founders’ belief that even constitutions are inferior to the laws of nature, and while men may not owe allegiance to the constitution that a prior generation of men had created, they still owed allegiance to the same laws of nature.

Madison did not disagree with that concept, but in his response noted

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encouraged use of ratifying conventions to discover original intent, and was only reluctant to use the Convention notes because he did not think it adequately represented the intent of the people as a whole. 9 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 421 (stating that rather than rely on the Convention notes to interpret constitutional provisions, “let us look for that in which they must have been understood by the conventions, or rather by the people, who thro’ [sic] their conventions, accepted and ratified it.”) As this Article demonstrates, there was hardly any dispute on natural law rights among members of the people of the founding generation, and therefore their original intent in respect to such rights is easy to ascertain.

39. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 121 (Paul Leicester Ford, ed., 1892–99).

40. *Id.* at 119.

41. The Declaration of Independence para. 1 (U.S. 1776).

that Jefferson's conclusions would turn property conveyancing on its head, and also wreak havoc with ongoing constitutional interpretation.<sup>42</sup> Hence, for Madison, not only the laws of nature, but also the original intent of the constitutional laws of men would bind future generations. Jefferson apparently came to accept this view himself. In 1823, he stated in respect to constitutional interpretation:

On every question of construction, [let us] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.<sup>43</sup>

Madison and Jefferson were not alone in their understanding that future generations were to be bound by the original intent of the Founders based on natural rights. This concept permeated the thinking of their entire generation. This idea is expressed in Article 15 of the 1776 Virginia Declaration of Rights, which stated that “no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, *and by frequent recurrence to fundamental principles.*”<sup>44</sup> Similar provisions are found in the Revolutionary Era Declaration of Rights in Pennsylvania, Massachusetts, Vermont, North Carolina, and New Hampshire.<sup>45</sup> Indeed, as this Article makes clear, the Founders viewed natural law rights as fundamental, pre-dating the Constitution. As John Adams stated, we have “rights antecedent to all earthly government—rights, that cannot be repealed or restrained by human laws;—rights, derived from the Great Legislator of the Universe.”<sup>46</sup> The Founders clearly contemplated that these basic principles would continue to be followed by succeeding generations.

However, such an idea is not popular among scholars or jurists today.

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42. Speeches in the First Congress, 2d Session (Feb. 1790), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 437–41.

43. Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 39, at 231.

44. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES 3814 (Francis Thorpe ed., 1993) (1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (emphasis added).

45. See Pennsylvania, 5 *id.* at 3083; Massachusetts, 3 *id.* at 1892; Vermont, 6 *id.* at 3741; North Carolina, 5 *id.* at 2788; New Hampshire, 4 *id.* at 2457.

46. John Adams, Dissertation on the Canon and Feudal Law, in 3 THE WORKS OF JOHN ADAMS 449 (Charles Francis Adams ed., 1851).

They generally prefer a more open-ended way to identify rights, freed from the moral and religious sentiment of the Founding Era. For example, one scholar has asserted that “it would be wrong to attempt to reconstruct what natural law meant in the eighteenth century and pretend that that version of natural law is enshrined in the [N]inth [A]mendment.”<sup>47</sup> His reason? Rather amazingly it is that “while natural law is immutable [i.e., unchangeable], people’s understanding of it can improve.”<sup>48</sup> Just how does one “improve” the unchangeable? Such a statement assumes that the Founders were dense when it came to natural rights, but we somehow understand them better. Anyone who has studied the writings of the founding generation about natural rights, and compared them to the natural rights writings of people today (to the extent any attention is even paid to natural rights today) will perceive that it is the other way around.

Another scholar recognized this reality, then turned around and denied it. He stated that “the documentary sources of the Bill of Rights reveal that conceptions of natural rights were much more determinate two hundred years ago than both commentators and courts suppose today.”<sup>49</sup> Yet he then asserts that each succeeding generation has the power to “add to or subtract from the list of its predecessors.”<sup>50</sup> This is a clear defiance of an incorporation by reference clause, and tends to undermine the entirety of the compact. Simply put, an adherence to the natural rights understandings of the founding generation is discounted by most scholars today because it disallows the free-wheeling creation of modern “rights” that has become so popular. The Founders never would have agreed with such a practice.

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47. Morris S. Arnold, *Doing More Than Remembering the Ninth Amendment*, 64 CHI. KENT L. REV. 265, 267 (1988).

48. *Id.*

49. Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1078 (1991).

50. *Id.* at 1082. Rosen purports to derive this conclusion from a statement of James Wilson, in which he said that “the law of nature, though immutable in its principles, will be progressive in its operations and effects.” James Wilson, *Lectures on Law*, in 1 THE WORKS OF THE HONOURABLE JAMES WILSON 143 (Wilson, ed., 1804). However, the omitted portions of the quote clarify Wilson’s meaning. He stated: “Our progress in virtue should certainly bear a just proportion to our progress in knowledge. Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence, we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. Indeed, the same immutable principles will direct this progression.” *Id.* Hence, we see that Wilson had no intention that this simple statement be turned into an open-ended finding of “rights” wherever people want to find them—especially rights that would be contrary to virtue such as the modern “right of privacy.” Wilson was simply noting that natural law, derived from God, is unchangeable, but that as time passes and new circumstances arise, the old, natural laws will be progressively applied to the new circumstances. As Wilson noted, the principles of natural law, being immutable, can *never* change, no matter what new circumstances come along.

The Ninth Amendment is steeped in natural rights and social compact theory. Interestingly, most scholars who discuss the Ninth Amendment agree that it was meant to secure natural rights as understood by the founding generation.<sup>51</sup> The Founders turned to natural law in the 1770s precisely because it was the only legitimate way they could justify overt lawless rebellion against the sovereign. In short, natural law *was the* justification for the Revolution, and subsequent establishment of the American nation. As stated by Madison as one of his proposed amendments, “[T]he people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.”<sup>52</sup> Jefferson stated the same concept in his opening paragraph of the Declaration of Independence, in which he noted that it was “pursuant to the laws of nature and nature’s God” that allowed the colonists “to dissolve the political bands which have connected them with another.”<sup>53</sup> These natural rights, as Hamilton stated, “are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself.”<sup>54</sup> Accordingly, these rights were considered by the Founders to have been planted in the human heart and soul by God himself. As such they were unchangeable, and based on concepts of morality and godly behavior. Any attempt to change, modify, or add to these moral standards was direct effrontery to God himself.

The Founders well understood—and frequently expressed their concern—that if such morally-based rights were ignored, or attempts were made to alter or modify them, the very liberty of the people would be threatened. As John Adams stated, “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>55</sup> George Washington probably said it best when, in speaking of the new Constitution, he stated,

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51. See, e.g., Patterson, *supra* note 11, at 19 (“The Ninth Amendment to the Constitution is a basic statement of the inherent natural rights of the individual”); DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE ‘SILENT’ NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 8 (2007) (“[N]atural law was not a dead letter for the Founding Fathers; it was hard, enforceable law.”); Barnett, *supra* note 13, at 2 (“The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before”).

52. 1 ANNALS OF CONG., *supra* note 2, at 451.

53. The Declaration of Independence para. 1 (U.S. 1776).

54. Alexander Hamilton, *The Farmer Refuted* (1775), in 2 THE WORKS OF ALEXANDER HAMILTON 80 (John C. Hamilton, ed., 1850).

55. Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 THE WORKS OF JOHN ADAMS, *supra* note 46, at 229.

I would not be understood my dear Marquis to speak of consequences which may be produced, in the revolution of ages, by corruption of morals, profligacy of manners, and listlessness for the preservation of the natural and unalienable rights of mankind . . . as these are contingencies against which no human prudence can effectually provide.<sup>56</sup>

Again, these are points that are not very popular today. It is more fashionable to try and change the Ninth Amendment to fit with the times, turning the Founders' clear meaning into something more socially acceptable in a world where moral values have become secondary. But it does not need to be that way, and that is not how the Founders intended it to be. They desired that the morally based principles of their generation would continue to be followed by their descendents. Nor did they think it would be hard to ascertain what these principles were. As will be described in the following section, natural rights as understood by the Founders are in fact relatively easy to find and identify—their writings are full of them. Interestingly, the Supreme Court itself has occasionally made reference to them. It is a pity they haven't done so more often.

#### PART TWO: EXAMPLES OF RIGHTS THAT SHOULD HAVE BEEN FOUND UNDER THE NINTH AMENDMENT, PURSUANT TO THE FOUNDERS' VIEWS OF NATURAL LAW

Some specific examples will demonstrate how Ninth Amendment natural law rights as understood by the Founders could have (and should have) been used to identify unenumerated rights that have been claimed since the founding. Thirteen such examples will be discussed, based on rights identified by Walter F. Murphy, James E. Fleming & Sotirios A. Barber in their book *American Constitutional Interpretation*.<sup>57</sup> Of course, this list is not exhaustive, and other sources may provide a slightly different list of rights.<sup>58</sup> Yet the list provided by Murphy, Fleming, and Barber

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56. Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), in 9 THE WRITINGS OF GEORGE WASHINGTON 318 (Jared Sparks, ed., 1835)

57. WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* 1239–40 (2d ed. 1995).

58. For example, Daniel A. Farber lists the following rights he feels have been found by the Supreme Court: (1) a right to sexual privacy; (2) a right of reproductive autonomy, or, in other words, to contraceptives and abortions; (3) a right for everyone to have a basic education; (4) a right to travel; (5) protection by government from private, domestic violence; (6) a right to refuse

generally incorporates most of the rights on all such lists. This list provides as good a starting place as any to demonstrate how an understanding of the natural rights views of the Founders can successfully and safely answer *any* rights question that may arise, including those that we may think are too “modern” for the Founders to have ever contemplated.

As noted above, the bedrock foundation for the Founders’ interpretation of natural law rights is a moral sense derived from the laws of God. When this moral sense is applied to even modern conundrums that the Founders never had to face (of which there are surprisingly few), identification of rights is nevertheless as plain and easily discerned as ever. Nor is it necessary to dig endlessly to find the Founders’ views on rights. Their works are permeated to such a large extent with statements on nearly every subject that we need only familiarize ourselves with some of their basic writings to find what we are looking for.

Accordingly, each of the thirteen claimed rights discussed below will include identification of natural law statements by the founding generation in support of or opposition to the claimed right. Hence, it will be seen that the natural rights understanding of the Ninth Amendment by the founding generation could have resolved all questions about the existence of these claimed rights, without resort to any “penumbra” of rights derived vaguely from other amendments.<sup>59</sup>

Regarding the nature of these rights, it should be noted at the outset that the rights discussed here—like the rights in the first eight amendments—include some which are purely natural rights, and others that are akin to natural rights, but which only arise in the context of the social compact, and would not necessarily exist in a pure state of nature. Madison described this distinction by noting that in some cases his proposed amendments “specify those rights which are retained when particular powers are given up to be exercised by the legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact.”<sup>60</sup> Madison then gave a specific example of a positive right: the trial by jury, which he considered being as fundamental as a natural right. “Trial by jury cannot be considered as a natural right, but a right resulting

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unwanted medical treatment. See Farber, *supra* note 51, at 14. A number of rights are identified in 16A Am. Jur. 2d *Constitutional Law* (2009). For example, section 589 says there is a right to privacy in one’s political associations and beliefs. Section 606 discusses the right to run for public office. Section 619 covers the right of personal appearance and grooming. Section 608 even reviews the freedom to loiter for innocent purposes.

59. The reference to a “penumbra” in respect to the Amendments comes from a statement of Justice Douglas in *Griswold*, in which he said that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life.” 381 U.S. at 484 (1965).

60. 1 ANNALS OF CONG., *supra* note 2, at 454.

from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent laws of nature."<sup>61</sup>

Indeed, the first eight amendments themselves contained both purely natural rights and positive rights. The same is true of the additional rights discussed below. Both have their basis in natural rights, and both can be found by carefully reviewing the statements of the founding generation.<sup>62</sup>

The thirteen rights presented by Fleming and Barber will now be discussed in turn.

*1 The right to retain American citizenship, despite even criminal activities, until explicitly and voluntarily renouncing it.*

The modern Supreme Court case cited by Murphy, Fleming, and Barber as finding this right was the 1967 case of *Afroyim v. Rusk*,<sup>63</sup> in which the citizenship of a naturalized American was questioned after he voted in another country's elections while living temporarily abroad.<sup>64</sup> There is *no* mention of the Ninth Amendment anywhere in that case. While

61. *Id.*

62. A categorization (in the view of this author) of whether rights are natural or positive in both the Bill of Rights and the additional examples of rights discussed in this paper is as follows:

From the first eight amendments (the amendment number given in parentheses): free exercise of religion (1) (natural); free speech (1) (natural); free press (1) (natural); freedom to assemble (1) (natural); right to petition government for a redress of grievances (1) (positive); right to bear arms (2) (natural); freedom from quartering of soldiers (3) (positive); freedom from search and seizure (4) (both natural and positive); warrants only allowed with probable cause (4) (positive); cannot be jailed without an indictment (5) (positive); against double jeopardy (5) (positive); cannot be forced to be a witness against self (5) (positive); due process (5) (positive); takings (5) (positive); speedy trial by impartial jury (6) (positive); accused is informed of accusations against him (6) (positive); right to witnesses and counsel in defense (6) (positive); trial by jury (7) (positive); against excessive bail or fines (8) (positive); against cruel and unusual punishment (8) (positive).

From the thirteen examples of rights taken from Murphy, Fleming and Barber (the right number given in parentheses): to maintain citizenship unless specifically renounced (1) (positive); equal protection from both state and federal government (2) (positive); right to vote (3) (positive); presumption of innocence (4) (positive); criminal proof beyond a reasonable doubt (4) (positive); use of federal courts and agencies to redress wrongs (5) (positive); right to associate (6) (natural); right to sexual privacy (7) (nonexistent for abortion; for contraception, natural); right to travel (8) (natural); right to marry (9) (natural); right to educate one's children (10) (natural); right to choose and follow a profession (11) (natural); right to attend and report on criminal trials (12) (positive); right to refuse unwanted medical treatment (13) (natural).

Summary: 34 total rights on both lists, 12 of which are natural, 21 of which are positive, 1 of which is both (search and seizure) and part of one (sexual privacy—abortion) is neither. Broken down separately: 20 total rights in the first eight amendments, 5 of which are natural, 14 of which are positive, and 1 of which is both. 14 total rights on the list of Murphy, Fleming, and Barber, 7 of which are natural, 7 of which are positive, and part of one (sexual privacy—abortion) is neither.

63. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

64. Murphy, et al., *supra* note 57.

the term “natural right” was rarely mentioned,<sup>65</sup> the majority opinion commendably based much of its holding on the views of those in the founding era. It cited congressional discussions about naturalization in 1794, 1797, and 1818, and also quoted Justice John Marshall in support of this right, based on his views in the 1824 case of *Osborn v. Bank of the United States*.<sup>66</sup> Justice Harlan in his dissent (joined by Clark, Stewart, and White) attempted to distinguish the Founding Era sources cited by the majority by asserting that most of the comments relied on by the majority were dicta.<sup>67</sup>

A resort to the natural rights understanding of the Founders under the Ninth Amendment would have greatly aided the majority in supporting their opinion, and would have left the dissent with little to base their position upon. Although the majority’s sources were good and their effort to ascertain the thinking of the Founders commendable, there were even better sources based on the natural rights beliefs of the Founders that could have and should have been used.

The best expression is found in a plain statement by Jefferson in 1793: “[T]he laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen.”<sup>68</sup> Jefferson noted that citizens are free to revoke their citizenship “by immigration, [and] other acts manifesting their intention, [and] may then become the subjects of another power.”<sup>69</sup> Indeed, Jefferson noted that if mere commission of a crime could terminate citizenship, this would render the crime of treason “innocent by giving it the force of a dissolution of the obligation of the criminal to his country.”<sup>70</sup>

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65. One of the references is particularly significant. At issue was an “expatriation” law debated by Congress in 1868, which would have terminated citizenship not by voluntary renunciation, but by the happening of certain actions by a citizen. Representative Nathaniel Banks of Maryland commented: “It is a subject which, in our opinion, ought not to be legislated upon . . . This comes within the scope and character of natural rights which no Government has the right to control and which no Government can confer . . . Congress shall have no power whatever to legislate upon these matters. *Id.* at 266 n.20 (citing Cong. Globe, 40th Cong., 2d Sess. 2316 (1868)) It is heartening to see that, at least in 1868, a natural rights perspective still existed with some in Congress.

66. *Osborn v Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827 (1824). Marshall stated that a naturalized citizen “becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.” *Id.*

67. *Afroyim*, 387 U.S. at 268–93 (Harlan, J., dissenting).

68. Letter to the United States Minister to France (Aug. 16, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 39, at 381.

69. *Id.*

70. *Id.*

Another expression of the principle was given by James Wilson, who followed a lengthy discussion of natural rights and citizenship with this quote from Cicero—a quote that would have directly answered the question raised in *Afroyim*:

[T]hat no one, contrary to his inclination, should be deprived of his right of citizenship; and that no one, contrary to his inclinations, should be obliged to continue in that relation. The power of retaining and of renouncing our rights of citizenship, is the most stable foundation of our liberties.<sup>71</sup>

Another good example is found in a discussion of citizenship and the state of nature in the very first Congress in May 1789. An objection was raised as to whether William Smith, representative from South Carolina, had the right to retain his seat, since it was alleged that he had not been a citizen for seven years prior to his election as required by Article 1, section 2, paragraph 2 of the Constitution.<sup>72</sup> Smith explained that he was studying in Europe during the entirety of the Revolutionary War, and did not return to America until late in 1783, five and a half years before the election. He affirmed that he had never sided with the British, even when living in England.<sup>73</sup>

Two opposing points of view were expressed in the debate that followed. One was by Madison, who asserted that the Revolution did not create a total governmental void and consequent resort by the entire populace to a state of nature. Rather, what occurred was merely a renunciation of British rule by the established states or “societies” in America. As such, the social compact of government in America continued unbroken, although under a different head (the states). Accordingly, Smith—who was originally born in South Carolina—remained a citizen of that state and consequently of the United States during his time in Europe, and therefore the seven year requirement was satisfied. Madison acknowledged that this line of reasoning also meant that *all* opponents of the Revolution could also be considered citizens. Indeed, Madison noted

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71. James Wilson, *Of Man, as a Member of Society*, reprinted in 1 THE WORKS OF JAMES WILSON 245 (Robert G. McCloskey ed., 1967) (citing Cicero’s writings found at Pro.Balb. c. 13).

72. This provision states: “No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.” U.S. CONST. art. 1, § 2, cl. 2.

73. 1 ANNALS OF CONG., *supra* note 2, at 413–18.

(similar to Jefferson above) that even an act of treason such as fighting against the United States—which is far more egregious than *Afroyim's* casting a vote in a foreign election 178 years later—would *not* result in loss of citizenship. Rather, it would subject traitors to potential punishment pursuant to laws regarding treason, but would do so on the basis that the offender was still a citizen of the United States. In this regard, Madison said, “The number, I admit, is large who might be acknowledged citizens on my principles; but there will very few be found daring enough to face the laws of the country they have violated, and against which they have committed high treason.”<sup>74</sup>

A very different view was espoused by James Jackson of Georgia. He asserted that the people in America *did* find themselves in a total state of nature upon renouncing British rule, since he asserted that there was no continuity of government when the break with England occurred. Accordingly, in his view the Revolution constituted a complete break and resort to the laws of nature, and subsequent creation of a new social compact in new state and federal governments. Therefore Smith’s being born in South Carolina would not help him since his birth occurred during the era of British rule, making Smith a British citizen. Rather, he needed to have been in America for seven years prior to the election to satisfy the requirements of the Constitution.<sup>75</sup>

Madison’s views prevailed. By the overwhelming vote of 36 to 1, the members of the House concluded that Smith had been a continuous citizen for seven years and voted to seat him. Jackson did not cast the sole dissenting vote; rather, he simply abstained from voting.<sup>76</sup> A clearer demonstration of the Founders’ belief in the right of ongoing citizenship, such as was discussed in *Afroyim*, could hardly be found.

Citizenship was debated again in the House of Representatives later that year when the first naturalization law was discussed. During the debate, Representative Boudinot asserted that “after a person was admitted to the rights of citizenship, he ought to have them full and complete, and not be divested of any part.”<sup>77</sup> However, Representative White interjected that perhaps “a clause ought to be added, depriving persons of the privileges of citizenship, who left the country and staid [sic] abroad for a given length of time.”<sup>78</sup> Representative Lawrence immediately countered that this was going too far, since “[C]ongress had nothing more to do than point out the

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74. *Id.* at 422.

75. *Id.* at 423–24.

76. *Id.* at 425. Jonathan Grout of Massachusetts cast the only contrary vote. Naturally, William Smith himself did not vote on the issue.

77. 1 ANNALS OF CONG., *supra* note 2, at 1147–53.

78. *Id.*

mode by which foreigners might become citizens.” White later agreed with this point,<sup>79</sup> which was repeated by John Marshall in the *Osborn* case, as noted by the majority in *Afroyim*.<sup>80</sup> Madison also opposed the addition of such a clause, noting that the best way to verify the sincerity of those desiring citizenship would be a defined residency requirement before citizenship would be granted. This would require a demonstration of loyalty that should discourage aliens who “might acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America, enjoying at the same time all the advantages of citizens and aliens.”<sup>81</sup> Again, this is the very thing that occurred in *Afroyim*, and the context of Madison’s statement again shows his understanding that citizenship in such a case would not be lost.

In sum, the majority in *Afroyim* were correct that the Founders favored the citizenship rule they espoused in that opinion. However, it would have been better if they had founded their opinion on the natural rights views of the Founders under the Ninth Amendment.

2 *The right to receive equal protection not only from the states but also from the federal government.*

Murphy, Fleming and Barber cite the entirety of chapters 14 and 15 in their book in support of this right, which chapters contain numerous cases.<sup>82</sup> By “equal protection,” the authors clearly mean the protection of minority groups from discrimination, which is provided under the Fourteenth Amendment. The protected classifications usually identified today are race and ethnic origin, gender, age, and disability; however, any discrimination against a particular group of people could come under the equal protection right. Obviously, this is a very broad “right” indeed.

Of course, the most obvious example of violation of equal protection is racial discrimination. The original Constitution seemed to sanction the most egregious form of discrimination by recognizing slavery. Indeed, slavery was the one and only acknowledged deviation of the Founders in the Constitution from natural rights. Before discussing slavery and the

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79. *Id.* at 1149, 1152. White stated, “[T]he power vested by the Constitution in Congress, respecting the subject now before the House, extend to nothing more than making a uniform rule of naturalization. After a person has once become a citizen, the power of Congress ceases to operate upon him.” *Id.* at 1152.

80. *Osborn*, 22 U.S. (9 Wheat) 738; *Afroyim*, 387 U.S. 253; *see supra* text accompanying note 66.

81. 1 ANNALS OF CONG., *supra* note 2, at 1150.

82. Murphy, et al., *supra* note 57.

reason for this deviation however, it is essential to note that the Constitution itself contains an equal protection clause. Equal protection is too fundamental a principle to have been left out of the original Constitution.

#### The Equal Protection Clause in the Original Constitution

Equal protection was provided by way of the ban on bills of attainder found in Article 1, Sections Nine and Ten. A bill of attainder is a legislative act that targets an individual or group, taking from them their life, liberties, or property.<sup>83</sup> Significantly, the Constitution gave the federal government the power to nullify such bills of attainder not only by the federal government itself (as seen in Article One, Section Nine), but also constitutionally banned all bills of attainder enacted by the individual states (as seen in Article One, Section Ten). Hence, unlike the original Bill of Rights which only applied to federal acts,<sup>84</sup> the Constitution's Equal Protection Clause—the ban on bills of attainder—was intended from the beginning to apply directly to state acts.

The ban on bills of attainder was the result of a compromise of the delegates in respect to James Madison's proposal at the beginning of the Constitutional Convention respecting a "negative" on state laws, or legislative veto, under which the Federal Congress would have the power to nullify ANY state law.<sup>85</sup> Madison viewed such a protection as absolutely essential, not only as a vehicle for the national government to keep the states under proper control, but also to protect the people from violations of their rights by the states. Hence, it is error to assume that the Founders at the Constitutional Convention did not address rights until the end of the convention. The legislative veto was understood by them as a rights protection.<sup>86</sup>

However, many felt that the power to nullify all state laws was too

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83. BLACK'S LAW DICTIONARY 176 (8th ed. 2004).

84. This was confirmed in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

85. Journal of the Constitutional Convention, in 3 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 19. This was the sixth resolution of the Virginia Plan presented to the Convention by Edmund Randolph.

86. Madison stated in a letter to Jefferson after the Convention that a "constitutional negative on the laws of the states seems equally necessary to secure individuals against encroachments on their rights." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 27. During the Convention, Madison noted on June 8, 1787 that one of the reasons for the legislative veto was because the states might "oppress the weaker party within their respective jurisdictions." 3 *Id.* at 121. James Wilson concurred, noting that the legislative veto would serve both to keep the states in line and to protect individual liberties: "Abuses of the power over the individual person may happen as well as over the individual states. Federal liberty is to the states what civil liberty is to private individuals." 3 *Id.* at 124.

broad, and might be too overwhelming a task for Congress.<sup>87</sup> The delegates accordingly replaced Madison's legislative veto with a judicial one. They inserted a list in Article One, Section Ten, in respect to things that states could *not* do, leaving the federal courts to be called upon to protect those rights.<sup>88</sup> A similar list restricting the federal government was inserted in Article One, Section Nine. As stated by Gouverneur Morris at the Convention, "A law that ought to be negatived will be set aside in the Judiciary departm[ent] and if that security should fail; may be repealed by a Nation[al] law."<sup>89</sup>

The broadest and most comprehensive of the protections in Article One, Section Ten was the ban on bills of attainder, protecting as it did all governmental actions designed to target groups for discriminatory treatment. So sweeping were the protections in Article One, Section Ten—and particularly the ban on bills of attainder—that Chief Justice John Marshall stated in 1810 that Article One, Section Ten "may be deemed a bill of rights for the people of each state."<sup>90</sup>

The Founders understood the ban on bills of attainder as a protection against discrimination against any group targeted by government, not just racial/ethnic groups. One of the best expressions of this was from James Madison in 1794. At that time, certain "self-created societies" were said to have been the motivating force behind the recent "whiskey rebellion."<sup>91</sup> It

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87. Mr. Bedford of Delaware and Mr. Butler of South Carolina expressed this view. The Journal of the Constitutional Convention (1787), in 3 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 126–27. At a later date, Mr. Lansing also opposed the measure for the same reasons. *Id.* at 229.

88. The list of rights to be protected was debated on Aug. 28, 1787, along with a discussion of the habeas corpus protection. Journal of the Constitutional Convention (1787), in 4 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 316–21. When discussing whether impairment of contacts should be added to the list, Madison once again asserted "that a negative on the State laws could alone secure" such a protection. "Evasions might and would be devised by the ingenuity of the legislatures." *Id.* at 319. Madison repeated his dissatisfaction with the judicial veto as a replacement for the legislative veto on Sept. 12: "The jurisdiction of the Supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was that this was sufficient. A negative on the State laws alone could meet all the shapes these [rights violations by the states] could assume. But this had been overruled." *Id.* at 443–44.

89. Journal of the Constitutional Convention, in 3 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 440.

90. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810). Justice Marshall stated as follows: "[T]he [C]onstitution of the United States contains what may be deemed a bill of rights for the people of each state. No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained." *Id.*

91. This was a rebellion by radicals against a federal excise tax on whiskey. Washington sent troops to put down the rebellion in Pennsylvania. Many of the rebels were members of the

was well known that many of these societies were composed largely of members of the new “democratic-republicans,” the party of Jefferson and Madison.<sup>92</sup> Even President Washington had condemned such societies in a State of the Union address.<sup>93</sup> When Congress debated whether to issue its own statement against these societies Madison objected, stating in respect to such legislation that “if it falls on classes or individuals, it will be a severe punishment . . . Is not this proposition, if voted, a vote of attainder?”<sup>94</sup>

During the Antebellum Period, the ban on bills of attainder continued to be understood as a unique protection of individuals against unequal treatment by state or federal governments.<sup>95</sup> With the coming of the Fourteenth Amendment after the Civil War however, this perception faded into disuse. The ban on bills of attainder as an equal protection clause is all but forgotten today, since the Fourteenth Amendment has taken over this function.

#### The Equal Protection Views of the Founders

Even if we set aside the equal protection/discrimination safeguard in Article One, Sections Nine and Ten of the Constitution, equal protection against discrimination was also one of the principles of natural law that was firmly believed in by the Founders. For example, the 1776 Virginia Declaration of Rights, penned by George Mason, declared that “all men are by nature equally free and independent and have certain inherent rights.”<sup>96</sup> Similar statements can be found in the bills of rights of other states.<sup>97</sup> In 1785, James Madison stated that equality “ought to be the basis of every law,” after which he expounded on the meaning of the Virginia Declaration of Rights and its declaration of equality: “If ‘all men are by nature equally free and independent,’ all men are to be considered as entering into society

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secret societies at issue. For a discussion of the Whiskey rebellion, see FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876*, 36–38 (Wilson Carey McWilliams & Lance Banning eds., 2000).

92. *Id.* at 37.

93. Speech to Both Houses of Congress (Nov. 19, 1794), in 12 *THE WRITINGS OF GEORGE WASHINGTON* 44–45, *supra* note 56.

94. Letter from James Madison to James Monroe (Dec. 4, 1794), in 6 *THE WRITINGS OF JAMES MADISON*, *supra* note 1, at 222 n.1.

95. For a general discussion of bans on bills of attainder during the Antebellum Era, see Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42(2) *UNIV. OF TOL. L. REV.* 395 (2011).

96. 7 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 44, at 3813.

97. See Pennsylvania, 5 *id.* at 3082–83; Massachusetts, 3 *id.* at 1892; Vermont, 6 *id.* at 3739; New Hampshire, 4 *id.* at 2454.

on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights.”<sup>98</sup>

James Wilson noted that “the law of nature, having its foundation in the constitution and state of man, has an essential fitness for all mankind, and binds them without distinction.”<sup>99</sup> He also noted that “the original equality of mankind consists in an equality of their duties and rights.”<sup>100</sup> John Witherspoon stated that “men are originally and by nature equal, and consequently free.”<sup>101</sup> An anonymous pamphlet author writing in 1783 about the laws of nature noted that the “public good” does not justify the government from taking individual rights from any group—“the civil law should, with eyes of a mother, regard every individual as the whole community.”<sup>102</sup> Many other sources could be cited, including of course the verbiage of the Declaration of Independence penned by Thomas Jefferson that “[w]e hold these truths to be self-evident, that all men are created equal.”<sup>103</sup>

Such statements may seem hypocritical or insincere in light of the constitutional protection of slavery. But the Founders likewise recognized that slavery was directly contrary to the laws of nature. For example, James Wilson stated that slavery “is repugnant to the principles of natural law, that such a state should subsist in any social system.”<sup>104</sup> James Otis said, “The colonists are by the law of nature freeborn, as indeed all men are, white and black,” after which he then affirmed that slavery was “a shocking violation of the law of nature.”<sup>105</sup>

Many slaveholding Founders also voiced their dissatisfaction with slavery, and expressed the hope that it could be abolished. Thomas Jefferson noted that:

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98. Memorial and Remonstrance Against Religious Assessments (1785), in 2 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 186. This reference was made against a proposed law that sought to establish a state-wide tax to support teachers of Christian religion. Madison saw this as an attempt by the state to abridge fundamental rights regarding religious freedom.

99. Of the Law of Nations (1791), in 1 THE WORKS OF JAMES WILSON, *supra* note 71, at 145.

100. 2 *Id.*, at 595.

101. John Witherspoon, Lectures on Moral Philosophy, in THE SELECTED WRITINGS OF JOHN WITHERSPOON 191 (Thomas Miller ed., 1990).

102. Anonymous, Rudiments of Law and Government Deduced from the Laws of Nature (1783), reprinted in AMERICAN POLITICAL WRITINGS DURING THE FOUNDING ERA 1760–1785, 567 (Charles S. Hyneman & Donald S. Lutz, eds., 1983).

103. The Declaration of Independence para. 1 (U.S. 1776)

104. Of the Natural Rights of Individuals (1791), in 2 THE WORKS OF JAMES WILSON, *supra* note 70, at 605.

105. THE PHILOSOPHY OF FREEDOM: IDEOLOGICAL ORIGINS OF THE BILL OF RIGHTS 131 (Samuel B. Rudolph ed., 1993).

The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other . . . [However] the spirit of the master is abating, that of the slave is rising from the dust, his condition mollifying, the way I hope preparing, under the auspices of heaven, for a total emancipation.<sup>106</sup>

Indeed, Jefferson had introduced a proposal to the Continental Congress in 1784 to abolish slavery in new states that might enter the union.<sup>107</sup> Washington noted regarding slavery that “there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of it.”<sup>108</sup> And James Madison stated that he “thought it wrong to admit in the Constitution the idea that there could be property in men.”<sup>109</sup>

Why then was slavery allowed? Simply in order to permit federation at all, as a distasteful compromise heartily disliked by many of the Founders. In the course of the debates, southern states such as Georgia and North and South Carolina made it clear that they would not join the Union unless slavery was allowed by the Constitution.<sup>110</sup> Distasteful and despised by many of the Founders as slavery was, they feared disunion more than maintaining the infernal practice. Hence, it was reluctantly allowed, so that union could be achieved. But this did not change the compromise on slavery from being what it really was—a blatant deviation from correct principles of natural law. Several Founders expressed concern that God would seek vengeance on the nation for having allowed it to continue<sup>111</sup>—a prophecy fulfilled in the Civil War.

The reluctant allowance of slavery highlights an important feature of

106. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 240, 242 (1801).

107. See William G. Merkel, *Jefferson's Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism*, 38(2) SETON HALL L. REV. 555 (2008) (describing Jefferson's effort).

108. Letter from George Washington to Robert Morris (Apr. 12, 1786), in 28 THE WRITINGS OF GEORGE WASHINGTON 408 (John C. Fitzpatrick ed., 1938).

109. Journal of the Constitutional Convention (1787), in 4 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 305–06.

110. For a concise summary of much of the debate, see WILLIAM PETERS, A MORE PERFECT UNION 164–69 (1987).

111. In speaking of slavery and how he expected God to someday address the issue, Jefferson said, “I tremble for my country when I reflect that God is just: that his justice cannot sleep forever.” Query XVIII (1801), in 3 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 39, at 267. George Mason noted in the Constitutional Convention that slavery will “bring the judgment of heaven on a Country. As nations cannot be rewarded or punished in the next world they must be in this . . . providence punishes national sins by national calamities.” Journal of the Constitutional Convention (1787), in 4 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 266–67.

constitutional rights. If the people, speaking en masse or through their representatives, collectively decide to defy the laws of nature by way of constitutional amendment, they may certainly do so. In the minds of many Founders, such a position is taken at extreme risk, in light of what God may do to a nation thus defying His laws. Hence, speaking of abortion or gay marriage as examples, a constitutional amendment legitimizing such things would be as valid as any other part of the Constitution. However, when five men on the Supreme Court decide to create such rights, in defiance of the natural rights understanding of the Founders, which they are duty-bound to uphold, and without a supporting constitutional statement or amendment, a violation of the most egregious kind is committed against the Constitution. This will be discussed more fully in respect to right number seven below.

3 *The right to vote, subject only to reasonable restrictions to prevent fraud, and to cast a ballot equal in weight to those of other citizens.*

Murphy, Fleming, and Barber cite the entirety of chapter 13 in their book in support of the right to vote, which chapter contains numerous voting cases.

Once again, this right was well known to the Founders. Indeed, as every student of the Revolution knows, it was largely due to the Colonists' inability to vote on taxes enacted by Parliament that they revolted against Great Britain. Alexander Hamilton, writing immediately before the Revolution, noted that it was the "unalienable birth-right" of every Colonist to vote, a clear reference to unalienable natural rights. He then stated that:

But, as many inconveniences would result from the exercise of this right, in person, it is appointed by the [British] constitution, that he shall delegate it to another. Hence he is to give his vote in the election of some person he chuses [sic] to confide in as his representative. This right no power on earth can divest him of. It was enjoyed by his ancestors time immemorial.<sup>112</sup>

James Wilson expressed the concept succinctly by stating that "[t]he right of citizenship consists in these two things: 1. A right to elect. 2. A

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112. Alexander Hamilton, *The Farmer Refuted*, in 1 THE PAPERS OF ALEXANDER HAMILTON 92 (Harold C. Syrett & Jacob Cooke eds., 1961).

right to be elected.”<sup>113</sup> The right of every man to “have the right of suffrage” was listed as a basic right in the 1776 Virginia Declaration of Rights.<sup>114</sup> Similar provisions regarding the right of suffrage or to vote are found in the bills of rights or constitutions of many other states.<sup>115</sup> And James Madison, writing in 1785 about the basic rights that should be included in the new Constitution and Declaration of Rights of Kentucky, inserted “the right of suffrage” as coequal with the habeas corpus, a free press, and free religious exercise.<sup>116</sup> He again noted the importance of the right to vote in his 1785 “Memorial and Remonstrance”<sup>117</sup> against a proposed Act of the Virginia legislature which would have implemented a tax to pay Christian ministers of religion. Speaking in terms that demonstrate the right to vote as essential and sacred, Madison stated that if the legislature had the power to meddle with religion, they also could “controll [sic] the freedom of the press, may abolish the trial by jury, may swallow up the executive and judiciary powers of the state; nay that they may despoil us of our very right of suffrage.”<sup>118</sup>

Some may question the use of the Ninth Amendment and the natural rights views of the Founders regarding the right to vote, on the presumption that the Founders were opposed to women’s right to vote. Such opposition would not be well founded for two reasons. First, many Founders did in fact favor women’s right to vote, or at least were not opposed to it if individual states provided for it. Hence, New Jersey allowed women to vote between 1776 and 1807.<sup>119</sup>

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113. A charge delivered to the grand jury in the circuit court of the United States for the district of Virginia, in May, 1791, in 2 THE WORKS OF JAMES WILSON, *supra* note 71, at 796.

114. 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 44, at 3813.

115. See Pennsylvania, 5 *id.* at 3083; Massachusetts, 3 *id.* at 1891; Vermont, 6 *id.* at 3740; New Hampshire, 4 *id.* 2455; Maryland, 3 *id.* at 1687; New Jersey, 5 *id.* at 2595; New York, 5 *id.* at 2630.

116. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 2 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 168. Madison referred to the rights that should be listed as “the essential exceptions” to legislative power. He then listed them as follows: “The constitution may expressly restrain them from meddling with religion—from abolishing juries—from taking away the habeas corpus—from forcing a citizen to give evidence against himself—from controuling [sic] the press—from enacting retrospective laws at least in criminal cases, from abridging the right of suffrage, from taking private property for public use without paying its full value, from licensing the importation of slaves, from infringing the confederation, &c &c.” *Id.*

117. See *supra*, note 98.

118. Letter from James Madison to George Washington (Nov. 11, 1785), in 2 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 191.

119. SUSAN E. KLEPP, REVOLUTIONARY CONCEPTIONS: WOMEN, FERTILITY AND FAMILY LIMITATION IN AMERICA 1760–1820, 7 (2009). It also has been asserted that Lydia Taft was the first woman to vote in America, primarily because she was the recent widow of a wealthy landowner. This vote was said to have occurred in Massachusetts, in 1756. However, this assertion comes from a speech by Henry Chapin over 100 years later in 1864. See HENRY CHAPIN, ADDRESS DELIVERED AT THE UNITARIAN CHURCH IN UXBRIDGE 172 (1864).

Second, and more fundamentally, the issue of the Founders' natural rights views regarding women and the vote is rendered moot by the Nineteenth Amendment, which grants that right. As noted above, Article V of the Constitution gives Americans the right to amend the Constitution at will, regardless of whether such amendments are contrary to natural rights or the intent of the Founders. Once such an amendment is made, it is as much a part of the Constitution as the original text. Accordingly, if the majority of Americans want a right of abortion or gay marriage, they can have one by constitutional amendment. Again however, as described in this article, it is improper for the Supreme Court to create such a right on its own. It is contrary to the Court's authority to create new rights (especially controversial ones) which have no basis in the natural and positive rights as understood by the Founders. Such policy matters should be left to the people, as expressed by their legislatures and the amendment process.

4 *The right to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of crime.*

Several cases from the 1970s are cited by Murphy, Fleming, and Barber for this right.<sup>120</sup> None of them make any reference to the Ninth Amendment or natural rights, but several of them do mention as the source of their authority the 1895 case of *Coffin v. United States*<sup>121</sup> In that case, Justice White, writing for the majority, discoursed at length on historical sources of the rule that a person is innocent until proven guilty.

While the maxim could therefore be found based on the assumption that the Founders were familiar with the law referred to by Justice White, there is more direct support of the natural law views of the Founders on this point. One of the very best sources is found among the bills of rights of the states. The Rhode Island Declaration of Rights of 1798, which expressed "the inherent and unquestionable rights of the people"<sup>122</sup> specifically stated in section ten that "Every man being presumed to be innocent, until he is

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120. See, e.g., *Jackson v. Virginia*, 443 U.S. 307 (1979); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970). A common refrain in many of the cases was that it was better to let the guilty go free than to convict the innocent.

121. *Coffin v. United States*, 156 U.S. 432 (1895).

122. Patrick T. Conley, *Rhode Island: Laboratory for the "Lively Experiment"*, in *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 123, 155 (Patrick T. Conley & John P. Kaminski, eds., 1992) (from "An Act Declaratory of Certain Rights of the People of this State," Rhode Island's first bill of rights (1798)).

pronounced guilty by the law.”<sup>123</sup> Scholar Francois Quintard-Morenas provides a number of examples in both England and Colonial America between 1750 and 1800 where the maxim regarding the presumption of innocence is found.<sup>124</sup> For example, in a charge to the jury in a case in Boston in 1765, the court noted that “Every Man in the Eye of the Law is presumed innocent till proved guilty.”<sup>125</sup> A similar expression was given in a case in New York in 1800.<sup>126</sup>

As for the right that proof must be beyond a reasonable doubt, once again this right can be found in an instruction to the jury, this time in the famous Boston Massacre case in 1770. Both Justice Trowbridge and Justice Oliver in that case made references to the law of nature, after which Justice Oliver concluded by instructing the jury that “if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent.”<sup>127</sup> A similar jury instruction was given in the 1800 slander case of *United States v. Haswell*<sup>128</sup> and the 1814 homicide case of *United States v. Travers*,<sup>129</sup> as well as the judgment of the court in the 1816 case of *Spurr v. Pearson*.<sup>130</sup>

5 *The right to use the federal courts and other governmental institutions and to urge others to use these processes to protect their interests.*

Two cases are cited for this right: *The Slaughter-House Cases*,<sup>131</sup> and *NAACP v. Button*.<sup>132</sup> The Ninth Amendment is not mentioned in either case, and there are scant and largely inconsequential mentions of natural law rights in *the Slaughter House Cases*, and not at all in *NAACP v. Button*.<sup>133</sup>

This right also could have—and should have—been based on the

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123. *Id.*

124. Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AMER. J. COMPAR. L. 107 (2010).

125. *Id.* at 129 n.205 (citing JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, 111–12 (1865)).

126. *Id.* at 129–130 n.204, and accompanying text.

127. John Adams, Wemms Trial, in 3 THE LEGAL PAPERS OF JOHN ADAMS 309 (L. K. Wroth & Hiller B. Zobel eds., 1965).

128. *United States v. Haswell*, 26 F. Cas. 218, 219 (1800).

129. *United States v. Travers*, 28 F. Cas. 204, 213 (1814).

130. *Spurr v. Pearson*, 22 F. Cas. 1011, 1015 (1816).

131. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

132. *NAACP v. Button*, 371 U.S. 415 (1963).

133. In the *Slaughter-House Cases*, Justice Field noted several pages into his opinion that the Fourteenth Amendment protected the “natural and inalienable rights which belong to all citizens.” 83 U.S. 36, 110. The other reference to natural rights was in a footnote by Justice Field, referring to a 1776 French edict. *Id.* at 136 n.39. *Button*, 371 U.S. 415.

natural rights understanding of the Founders, since they intended for federal courts to be accessible by individuals in order to safeguard their rights. One of the best expressions of this is found in the comments by Edmund Randolph in the 1793 case of *Chisholm v. Georgia*.<sup>134</sup> Randolph had been a member of the Constitutional Convention, and at the time of *Chisholm* was Attorney General of the United States. However, in this case he undertook private representation of the Plaintiffs, who were the executors of an estate of a former resident of Georgia. The executors sued the State of Georgia for payment of a bond that the state had promised to pay to the decedent.

Randolph cited the prohibitions of state actions in Article I, Section Ten of the Constitution—including the ban on bills of attainder—then noted, “and thus is announced to the world the probability, but certainly the apprehension, that States may injure individuals in their property, their liberty, and their lives.”<sup>135</sup> He later asked, “What is to be done, if in consequence of a bill of attainder, or an ex post facto law, the estate of a citizen shall be confiscated, and deposited in the treasury of a State?”<sup>136</sup> The answer obviously was that individuals had a right to access the courts to secure their rights. Indeed, Randolph stated that:

It is not denied, that one State may be sued by another; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the State aggrieving. A distinction between the cases is supportable only on a supposed comparative inferiority of the Plaintiff. But, the framers of the Constitution could never have thought thus. They must have viewed human rights in their essence, not in their mere form.<sup>137</sup>

It is well known that *Chisholm v. Georgia* caused such controversy among the states that a new Eleventh Amendment was created, which limited suits by individuals against states. What is noteworthy about this amendment is that it was *not* intended as a blanket prohibition of suits by citizens against individual states, but only to disallow federal court jurisdiction of cases where a citizen of a state sued another state solely under state (not federal) law.<sup>138</sup>

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134. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

135. *Id.* at 422.

136. *Id.*

137. *Id.* at 422–23.

138. For a general discussion of this point, see Ostler, *supra* note 95, at 402–11.

*Chisholm* was a case in assumpsit to compel Georgia to fulfill the promised payment of a bond to the decedent. As such, it was a case arising solely under Georgia state law, not federal law. Georgia refused to appear in the case, considering itself to be immune from such a suit brought in federal court, as a sovereign entity. But as Randolph noted, the plain wording of Article III, Section Two of the Constitution allowed suits in federal court even by citizens against other states solely under state law, even where there was no federal question involved.<sup>139</sup> State governments were so incensed when the *Chisholm* Court ruled in favor of the Plaintiff they immediately hammered out a new constitutional amendment. In 1795, the Eleventh Amendment was added to the Constitution, which forbade suit against a state “by citizens of another state, or by citizens of subjects or any foreign state.” By its own plain wording, the Amendment was intended to modify only two of the nine bases for jurisdiction given in Article III, Section Two of the Constitution, and was not intended to alter or undermine subject matter jurisdiction under federal law (such as Article I, Section Ten).<sup>140</sup> This was because the plain wording in Article III, Section Two allowed a citizen of another state to bring suit against a state regardless of the source (state or federal) of his claim. Obviously therefore, this amendment was not intended to have any impact on a citizen bringing suit under a federal question.<sup>141</sup>

Unfortunately, approximately 100 years later, this plain understanding of the Eleventh Amendment was lost in the 1890 case of *Hans v.*

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139. Before the Eleventh Amendment, Article III, Section 2 gave an unjustified benefit to out-of-state claimants bringing suit under state law in federal court. U.S. CONST. art. III, § 2.

140. This article states as follows, with numbers of the basis for jurisdiction added: “The judicial power shall extend to all Cases, in Law and Equity, [1] arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [2] to all Cases affecting Ambassadors, other public Ministers and Consuls; [3] to all Cases of admiralty and maritime Jurisdiction; [4] to Controversies to which the United States shall be a Party; [5] to Controversies between two or more States; [6] between a State and Citizens of another State; [7] between Citizens of different States; [8] between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. CONST. art. III, § 2.

141. It should be noted that the First Judiciary Act of 1789 did not allow even a federal question suit to be brought directly to federal court by an individual, as can be done today. *See* First Judiciary Act of 1789, ch. 20, § 25, 1 stat. 73, 85. Rather, such a suit had to first be brought in state court, and then appealed to the U.S. Supreme Court if one of the parties was unhappy with the outcome. This procedure was created out of respect to the states. Hence, the reason for Madison’s reference in such a suit to “an appeal against a State to the supreme judiciary” (*see infra*, text accompanying note 143). As Justice Brennan explained in 1985, the First Judiciary Act “did not provide the federal courts with original federal-question jurisdiction, although it did in § 25 provide the Supreme Court with considerable jurisdiction over appeals in federal-question cases from state courts.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 280 (1985) (Brennan, J., dissenting).

*Louisiana*.<sup>142</sup> In this case, the Supreme Court ruled that the Eleventh Amendment meant that states could not be sued by individuals, regardless of whether the suing individual was a citizen of that state or of another state, and regardless of the nature of his claim. In support of this surprising decision, the *Hans* Court cited a statement by James Madison that “[i]t is not in the power of individuals to call any state into court.”<sup>143</sup> However, this was a statement out of context, as Madison also noted as part of the same quote that suits by individuals against states could occur “if a state should condescend to be a party” under federal question jurisdiction.<sup>144</sup> All of the states had condescended to be parties to the Federal Constitution, and particularly to the subject-matter bases of jurisdiction in Article I, Section Ten, including the ban on bills of attainder (discussed above). In addition, at approximately the same time that Madison made the statement relied on by the *Hans* Court, he also lamented the loss of the legislative veto in correspondence to Jefferson, and expressed his concern that an individual may find it difficult to finance a lawsuit against a state for violation of his rights. He stated:

It may be said that the judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will particularly be the case, where the laws aggrieves individuals, who may be unable to support an appeal against a State to the supreme judiciary.<sup>145</sup>

Hence, we see that Madison also contemplated access to federal courts of persons with claims against the government. Indeed, his concern was not whether such claimants would be able to bring such suits, but whether they would be able to support—or in other words to afford—such a suit.

Finally, the bills of rights of several states also contained a provision indicating that the people have a fundamental right of access to the courts for wrongs they experience. Typical wording is from the Massachusetts Bill of Rights of 1780, which states,

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142. *Hans v. Louisiana*, 134 U.S. 1 (1890).

143. *Id.* at 14 (quoting 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathon Elliot ed., 2d ed. 1891) (1866)).

144. *Id.*

145. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 218–19.

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.<sup>146</sup>

Similar provisions are found in other state bills of rights as well.<sup>147</sup>

6 *The right to associate with others.*

Two cases are cited for this right, *De Jonge v. Oregon*<sup>148</sup> and *NAACP v. Alabama*.<sup>149</sup> Neither case makes any reference to the Ninth Amendment, natural rights, or the laws of nature.

Again, such a right was contemplated by the Founders, and commented about by them. For example, among a list of natural rights given by John Witherspoon is “a right to associate, if he so incline, with any person or persons whom he can persuade.”<sup>150</sup>

More fundamentally, the right to associate relates directly to the entire concept of the social compact, which was seen by the Founders as *the* reason men joined together to form government. James Wilson articulates the concept well:

This union may rationally be supposed to be formed in the following manner: if a number of people, who had hitherto lived independent of each other, wished to form a civil society, it would be necessary to enter into an engagement to associate together in one body, and to regulate, with one common consent, whatever regards their preservation, their security, their improvement, their happiness. In the social compact, each individual engages with the whole collectively, and the whole collectively engage with each individual.<sup>151</sup>

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146. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 44, at 1891.

147. See New Hampshire, 4 *id.* at 2455; Maryland, 3 *id.* at 1688.

148. *DeJonge v. Oregon*, 299 U.S. 353.

149. *NAACP v. Alabama*, 357 U.S. 449.

150. THE SELECTED WRITINGS OF JOHN WITHERSPOON, *supra* note 101, at 189.

151. Of Man, as a Member of Society, in 1 THE WORKS OF JAMES WILSON, *supra* note 71, at 239.

Additionally, the words of Representative Sedgwick from the debate on the First Amendment (described in detail above) pertain to the right to associate as well. The point at issue was whether to include the right of the people to assemble. Sedgwick indicated that such assembling was essentially the equivalent of associating with others. For him, the right to engage in such associations was inherent in the exercise of free speech, since “if people freely converse together, they must assemble for that purpose; it is a self-evident, inalienable right which the people possess.”<sup>152</sup>

7 *The right to enjoy a zone of privacy.*

The only case cited by Murphy, Fleming, and Barber in support of this right is *Griswold v. Connecticut*, a case about contraception.<sup>153</sup> The right “to make one’s own choice about having children” (which includes abortion) is joined by Murphy, Fleming, and Barber with the right to marry, as the Ninth right on their list.<sup>154</sup> However, in a prior edition of their book they listed the right of choice about having children as a separate right.<sup>155</sup> Indeed, since the Supreme Court indicated in *Roe v. Wade* that the “right” of abortion is derived from the “right of privacy,”<sup>156</sup> it will accordingly be discussed here. Murphy, Fleming, and Barber list five cases in support of the right of choice regarding children, all of which relate to contraception or abortion, and all of which are based on the right to privacy.<sup>157</sup>

The right of privacy as that term has come to be understood is not so much about privacy as about sex. As such, it would probably be better worded as “rights related to sex and its consequences,” since it is invoked almost exclusively in respect to sexual matters such as contraception, abortion, and gay rights. As we shall see, the Founders supported a right of contraception, but not of abortion rights or gay rights.

While comments by the Founders on these topics are sparse, there is more than enough evidence to show how they felt about these matters, and

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152. 1 ANNALS OF CONG., *supra* note 2, at 759.

153. *Id.* Murphy, Fleming, and Barber note however that in *Palmer v. Hudson* 1984 this “right” was denied to prisoners in their cells. Murphy et al., *supra* note 57, at 1240, n.19.

154. *Id.*

155. WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION 1083–84 (1st ed. 1986).

156. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

157. *Griswold*, 381 U.S. 479 (contraception use by married couple); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception used by unmarried partners); *Carey v. Population Servs.*, 431 U.S. 678 (1977) (contraception use by minors); *Roe*, 410 U.S. 113 (abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion).

what the natural law on these topics was. Comments are sparse because it simply was not proper in that era to speak as openly about these issues as it is today. As one scholar noted, “eighteenth-century social conventions . . . banned the reference to intimate topics, especially those involving sexuality. The mention of pregnancy was considered off bounds.”<sup>158</sup> Hence, when Abigail Adams was pregnant in 1777, the private letters between her and John Adams (who was away at Congress) never mentioned more than her “condition.”<sup>159</sup>

### Abortion

How the Founders felt about these matters becomes more clear by dealing with abortion first, followed by a discussion of contraception. While the Founders themselves rarely commented on these matters directly, the natural law writers they relied on most certainly did. The Founders frequently identified which natural law writers they had studied and which they followed. For example, in responding to British-supporter Samuel Seabury in 1775, Alexander Hamilton urged him to “[a]pply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui.”<sup>160</sup> John Adams noted that James Otis, in 1775, when speaking of natural law would cite among others Pufendorf, Grotius, Barbeyrac, and Burlamaqui.<sup>161</sup> James Wilson in his lecture on “The Natural Rights of Individuals” cited these same classical writers, citing Burlamaqui more than any other.<sup>162</sup>

So what do Burlamaqui, Grotius, and Pufendorf have to say about abortion? Quite a bit. Burlamaqui stated as follows:

[T]he right which requires that nobody should injure or offend us, belongs as well to children, and even to infants that are still in their mother’s wombs, as to adult persons. This is the foundation of that equitable rule of the Roman law, which declares, [t]hat infants who are as yet in their mothers wombs, are considered as already brought into the world, whenever the question relates to anything that may

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158. EDITH B. GELLES, *ABIGAIL AND JOHN: PORTRAIT OF A MARRIAGE*, 100–01 (2009).

159. *Id.*

160. The Farmer Refuted, in *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 112, at 86.

161. JOHN ADAMS & JONATHAN SEWELL, *NOVANGLUS AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS, PUBLISHED IN THE YEARS 1774 AND 1775*, 230 (1968).

162. The Natural Rights of Individuals (1791), in 2 *THE WORKS OF JAMES WILSON*, *supra* note 71, at 592.

turn to their advantage.<sup>163</sup>

Grotius was in agreement. He noted that “children yet unborn are considered as already born, whenever their advantage is in question.”<sup>164</sup> The concept is simple: if there is a doubt or question about abortion, do that which errs on the side of protection. Indeed, what could be more natural and to the “advantage” or “favor” of an unborn—at any stage of pregnancy—than to have its life preserved? A similar point was made recently by a scholar who noted that the reference in the Constitution’s Preamble to “secure the blessings of liberty to ourselves and our posterity . . .” creates an “honest doubt” as to whether “posterity” was intended to protect unborn fetuses—a doubt that should be resolved in favor of protecting the unborn.<sup>165</sup>

Returning to the natural law writers, Pufendorf was quite specific and clear on the matter of protecting the unborn child, using similar language to that which has been asserted by anti-abortionists in modern times. He stated:

For the life of the babe was guarded not only by the mother instinct but by law; and the mother should have recognized before the event that her infamy was of less consequence than the death of one whose existence was due to an act to which she herself had consented. Wherefore, if the care for her reputation meant more to her than the pleasure of copulation or the love of her own offspring, she ought to have been thinking about the matter before she took the man to herself. *After the act*, the child does not merit death, in order that the sin of the parent may go unobserved.<sup>166</sup>

Hence, Pufendorf was explicit in identifying protection of the unborn from the moment of conception. He repeated this point with tremendous clarity on another occasion. In talking of those who have no rights because

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163. JEAN-JACQUES BURLEMAQUI, *THE PRINCIPLES OF NATURAL AND POLITICAL LAW* 84–85 (Petter Korkman, ed. 2006) (1747) (Thomas Nugent, trans.).

164. HUGO GROTIUS, *INTRODUCTION TO DUTCH JURISPRUDENCE*, Ch. III, sec. 4, XVI.

165. Raymond B. Marcin, *God’s Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe*, 25 J. CONTEMP. HEALTH L. & POL’Y 38, 66–71 (2008).

166. SAMUEL PUFENDORF, *6 DE JURE NATURAE ET GENIUM LIBRI OCTO [ON THE LAWS OF NATURE AND NATION IN EIGHT BOOKS]* 841 (C.H. Oldfather & W.A. Oldfather, trans. 1934) (1688) (emphasis added).

they are not yet “a part of the world,” he says “[n]ow by him who is not yet a part of the world we understand one who has not yet been conceived, not one who is still in the womb.”<sup>167</sup> And on still another occasion, he stated,

Obligation has also been enjoined upon parents by the law of nature, that not merely shall they not destroy by abortion the offspring conceived within their flesh, nor expose it, nor put it to death after it has been brought into the light of day; but also that they shall supply it with nourishment (one or both of them, just as they have agreed in the marriage pact), until it can conveniently support itself.<sup>168</sup>

Hence, natural law writers Burlamaqui, Grotius, and Pufendorf—who were heavily relied on by the Founders—were in agreement that abortion at *any* stage of pregnancy was contrary to the law of nature, and that the unborn should be protected from the moment of conception.

A statement by John Adams praising the Greek political reformer Lycurgus likewise indicated his distaste for abortion. Adams described how Lycurgus was about to succeed to the throne at the death of his brother Polydectes, “but being told his brother’s widow was with child, he declared himself protector only, and resigned the crown.”<sup>169</sup> Then his brother’s widow offered to have an abortion to “remove out of his way the only competitor” to the throne. Lycurgus then “deceived her by counterfeited tenderness; and diverted her from the thoughts of an abortion, by promising to take the disposition of the child upon himself when it should be born.”<sup>170</sup> Adams was clearly impressed by the magnanimity of Lycurgus, and his refusal to consent to the abortion.

Adams was not alone among the Founders in speaking negatively about abortion. Jefferson described abortion as one of the practices of some native American Indians of his day, who he characterized as uncivilized savages. He then noted that “the same Indian women, when married to white traders, who feed them and their children plentifully and regularly, who exempt them from excessive drudgery, who keep them stationary and unexposed to accident, produce and raise as many children as the white women.”<sup>171</sup> Other Founders did not refer to abortion *per se*, but used the

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167. 4 *Id.* at 657.

168. SAMUEL PUFENDORF, 2 *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS* [THE ELEMENTS OF UNIVERSAL JURISPRUDENCE] 283 (William A. Oldfather, trans., 1931) (1660).

169. Lachdaemon, in 4 THE WORKS OF JOHN ADAMS, *supra* note 46, at 549.

170. *Id.*

171. Notes on Virginia, in 3 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 39, at 442.

term in a negative sense to describe self-destructive actions.<sup>172</sup>

Some may argue that the natural law position described above would be untenable with the Founders because the common law at that time stated that abortion was no crime prior to the “quickening” of the child—the time (approximately sixteen to eighteen weeks) at which the mother could feel the unborn child move in the womb. Indeed, in an effort to support its position by a resort to history, the court in *Roe v. Wade* cited the common law for this very proposition.<sup>173</sup> However, the Founders saw a clear distinction between the common law and natural law. While none of the Founders had any problem with natural law, which they saw as divine, many of them disagreed quite strongly with many common law standards. For example, Madison described the common law as being full of “incongruities, barbarisms, and bloody maxims,” concluding that “the common law never was, nor by any fair construction ever can be, deemed a law for the American people.”<sup>174</sup> Madison was particularly harsh against any assertion that the Supreme Court could interpret the common law as support for a constitutional right—exactly as happened in *Roe v. Wade*. He stated:

[W]hether the common law be admitted as of legal or of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power . . . [they would] decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States. A discretion of this sort has always been lamented as incongruous and dangerous . . . the power of the judges over the law would, in fact, erect them into legislators, and . . . it would be impossible for the citizens to conjecture, either what was or would be law.<sup>175</sup>

Indeed, the contrast between the law of nature and the common law is

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172. Madison used the term in referring to the unwise combining of the question of where to locate the national capital with other issues, which could end in “an abortion of both.” Speech in the First Congress, in 6 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 14. Hamilton used the term to describe the unsuccessful British attempt to tax tea imported to the American colonies, which resulted in the Boston Tea Party. Estimates, in 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 93.

173. *Roe*, 410 U.S. at 141.

174. Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), in 6 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 380–81.

175. *Id.* at 378, 380–81.

made even clearer when we consider how each relates to legislation and constitutions. It is generally understood that the common law is considered binding *as long as the legislature or the courts do not replace it*. As such, the common law is inferior to legislation and the courts, and can be changed at will by either.<sup>176</sup> It is essentially the lowest level of law, and is the last resort where there is no other avenue of law to turn to. Natural law on the other hand, as we have already seen above, was seen by the Founders as superior to legislation and to constitutions. It is the highest level of law. As James Wilson said, “Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”<sup>177</sup>

Hence, for the Founders if there was a conflict between a man-made law and the laws of nature, the latter should prevail. Simply put, whatever the common law had to say about abortion is significantly subordinate to natural law. To say that the common law should prevail in respect to abortion is to elevate the trivial over the essential.

But this is not all. When we closely examine the common law rule regarding abortion and the reason behind it, we readily see that the common law was actually also against abortion from the moment of conception in light of today’s medical technology. To understand why this is so, we must examine the evidentiary nature of the common law rule.

James Wilson observed in respect to the common law rule regarding abortions that

human life, from its commencement to its close, is protected by the common law. *In the contemplation of law*, life begins when the infant is first able to stir in the womb. (1 William Blackstone[] Commentaries 129). By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.<sup>178</sup>

The italicized portion indicates the evidentiary nature of the common law rule—that in the contemplation of the common law (as given in

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176. 15A Am.Jur. 2d *Common Law* § 15 (2000).

177. Of the Natural Rights of Individuals (1791), in 2 THE WORKS OF JAMES WILSON, *supra* note 71, at 592.

178. *Id.* at 597 (emphasis added) (citation in original). An interesting variation of the rule is given in a contemporary British treatise, J. Johnson, THE LAWS RESPECTING WOMEN 348 (London, 1777). The rule states: “As soon as an infant is able to stir in its mother’s womb, it becomes an object of protection in the eye of the law . . .”

Blackstone's Commentaries), proof sufficient for a criminal conviction due to abortion quite obviously required evidence that the child was alive. In those days of limited medical technology, this was necessarily at the point of quickening. Any act to abort the child from that time forward—which consequently stopped the movement of the unborn child—would be criminal. Any abortive act prior to quickening would not necessarily “in the contemplation of law” result in a conviction, since it would be impossible to prove whether the child was alive when the prior abortive act occurred. In short, due process and fairness required such a rule, particularly since stillborns were common in those days.<sup>179</sup> An early English example of this concept is found in 1348 in *The Abortionist's Case*, when it was decided that an indictment against a person for killing an unborn child was unacceptable because “it is difficult to know whether he killed the child or not.”<sup>180</sup> A similar result was reached in *Sim's Case* in 1601. One scholar notes that “[t]he judges for the case expressed concern about abortions and how difficult they are to prove.”<sup>181</sup> Probably that is why most of the few abortion cases in early England resulted in acquittal, although there was one case in 1320 or 1321 in which “a person who caused an abortion was found guilty and hanged.”<sup>182</sup>

Naturally, such an evidentiary problem would simply not exist today, with modern medical technology. Remember that under the common law, the essential proof element is stirring, or movement of the fetus. Just as a laser speed gun is used by police today to show evidence of speeding, the ultrasound and other modern medical techniques can be used from the earliest stages of pregnancy after conception to provide the evidence that an

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179. Horan and Balch noted that “[t]he primitive nature of biological knowledge and abortion technology made it next to impossible to prove that the child was alive before the supposed abortion and that the abortion was the cause of death.” Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Basis in Law, Logic, or History*, in *THE ABORTION CONTROVERSY: A READER* 94 (Louis P. Pojman & Francis J. Beckwith eds., 1994).

180. Year Book Mich., 22 Edw. 3, in Fitzherbert, 2 LE GRAUNDE ABRIDGEMENT, fol. 217, no. 263. The case is discussed and quoted in JOHN M. RIDDLE, *EVE'S HERBS: A HISTORY OF CONTRACEPTION AND ABORTION IN THE WEST* 96 (1997).

181. RIDDLE, *supra* note 180, at 130.

182. *Id.* at 99. Riddle notes however that the person hanged was also charged with other, unspecified crimes. Riddle also referred to seven other cases that resulted in acquittal. *Id.* It is most likely this evidentiary difficulty of proof of causation that led Coke to articulate the “born alive” rule regarding abortion: “If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder.” 3 COKE, INSTITUTES \*50 (1648). Hence, aborting a quick child was criminal, but not murder, unless the child was born then died—the surest proof of all. Blackstone reiterated the rule from Coke with very similar wording. 1 WILLIAM BLACKSTONE, COMMENTARIES \*129, \*139.

unborn is moving—which was all the proof needed under the common law to show that the child was alive and merited protection.

The words of Benjamin Rush offer further support for this view. Rush was both a physician and a signer of the Declaration of Independence. He pulled no punches on the commencement of life from the moment of conception when viewed from a non-evidentiary standpoint when he stated that life's "first motion is produced by the stimulus of the male seed upon the female ovum. . . . No sooner is the female ovum thus set in motion, and the foetus formed, than its capacity of life is supported . . ." <sup>183</sup> Rush was aware that there was constant movement by the unborn from the moment of conception, regardless of when that movement could be established for evidentiary purposes. He further noted that this constant state of motion of the foetus was supported in the first trimester by the heat it received from its mother and its own blood circulation (another form of movement or stirring verifiable with modern technology), and then later "[b]y its constant motion in the womb after the third month of pregnancy. The absence of this motion for a few days is always a sign of the indisposition or death of a foetus." <sup>184</sup> Hence, Rush saw clearly that the life of the unborn commenced from conception, but could only be clearly proven after it started to move in the womb after the first trimester. If an abortive act was taken after movement had been felt, causing the movement to stop, then proof was established for the crime.

But this is not all. The common law itself contemplated life and protection from the moment of conception in respect to inheritance. That is, an unborn child had the right at common law to inherit from the moment of conception. <sup>185</sup> In the law of inheritance, there was no evidentiary proof required other than being born alive. Interestingly, the *Roe* Court partially acknowledged this startling ambiguity of the common law (but without noting that the protection was from the moment of conception)—and then promptly ignored it. <sup>186</sup> There is tremendous inconsistency in protecting an unborn's property more assiduously than his life. Indeed, one jurist of 100 years ago noted this inconsistency by observing that under the two rules, "one must respect the rights of ownership, and, so far as a civil remedy is concerned, disregard the safety of the owner. In such argument there is not

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183. Benjamin Rush, *Lectures on Animal Life* (1799), in *THE SELECTED WRITINGS OF BENJAMIN RUSH*, 151–52 (Dagover D. Runes, ed. 1947).

184. *Id.* at 152

185. "An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy . . . [i]t may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*126.

186. *Roe*, 410 U.S. at 162.

true sense of proportion in the protection of rights. The greater is denied.”<sup>187</sup>

Again, the evidentiary rule of the common law in no way negated the reality that under the law of nature the unborn were entitled to protection from the moment of conception, regardless of whether the child’s mother or another person could be criminally convicted for an abortion in the first trimester. Indeed, to assume that early abortions were “acceptable” in the Founding Era just because there was no evidentiary way to convict prior to quickening at sixteen weeks flies directly in the face of the moral-based aspect of the natural law believed in by the Founders. It is to say that anything goes as long as you can get away with it, due to a lack of evidence to convict you. That simply is not the way the Founders thought. They treasured morality and virtue, and clearly saw natural law as the higher, God-given law that binds all men. If a sense of morality was not retained by the people, government was largely meaningless. As Madison firmly stated: “Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea.”<sup>188</sup> George Washington concurred, noting in his farewell address that “religion and morality are indispensable supports . . . [and the] great Pillars of human happiness.”<sup>189</sup> John Adams expounded, in his usual blunt way, that “we have no government armed with power capable of contending with human passions unbridled by morality and religion.”<sup>190</sup>

The Supreme Court in *Roe v. Wade* attempted to make its defiance of natural law more palatable by citing early Roman law in support of its holding, in addition to the common law. The reason for this effort was obvious—if history supported its holding, it would be harder to criticize. However, the Court got its history wrong. In respect to Roman law, it obviously overlooked (or purposely ignored) the Roman law cited by Burlamaqui that the unborn should be recognized as human beings when it is in their favor.<sup>191</sup> As for the common law reference, as noted above, the

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187. *Nugent v. Brooklyn Heights R.R. Co.*, 139 N.Y.S. 367, 371 (1913). The case was for negligent harm to an unborn by a railroad. The court ruled that under the rules of negligence, the Railroad did not have a duty to scrutinize passengers, looking for unborns to whom it would owe a duty if they were injured.

188. Speeches in the Virginia Convention (Jun. 5–24, 1788), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 223.

189. 6 ANNALS OF CONG., *supra* note 2, at 2876.

190. Letter from John Adams to the Officers of the First Brigade of the Third Division of Massachusetts (Oct. 11, 1798), in 9 THE WORKS OF JOHN ADAMS, *supra* note 46, at 229.

191. See *supra* text accompanying note 163.

Court assumed away the evidentiary nature of the rule, instead stating that “The absence of a common-law crime for pre-quickening abortion appear to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins.”<sup>192</sup> The Court’s fixation on when life begins served to effectively mask the purely evidentiary nature of the common law rule, which focused on proof sufficient for conviction, not the moment of commencement of life. The Court’s most blatant misstatement—directly refuted by the sources cited above—was its conclusion that “at the time of the adoption of our Constitution . . . abortion was viewed with less disfavor than under most American statutes currently in effect.”<sup>193</sup> The Founders would never have agreed with such a statement.

But the *Roe* Court didn’t stop there. After discussing whether a “person” includes an unborn, the Court inexplicably abandoned the time of quickening or movement as the point at which the unborn can be fully protected. The Court substituted instead the point of viability, when the child “has the capability of meaningful life outside the mother’s womb.”<sup>194</sup> Perhaps the Court was aware that modern medical technology could identify an infant’s quickening and movement much sooner than was possible in the eighteenth century, and therefore wanted to forever put to rest the evidentiary nature of the common law rule by creating a new standard. If so, the court chose the least logical point of all—the point of viability. The evidentiary proof of life as demonstrated by stirring or movement was now replaced with independence of life, or in other words that the child was now able to survive on its own. By this standard, all unwanted children of any age who suddenly find themselves in need of life support should be denied it, and allowed to die. Indeed, even a healthy baby is helpless and will die without help and support from the adults around it. There simply is no basis for this new standard created by the Supreme Court, least of all in the natural rights protected by the Ninth Amendment.

### Contraception

Like abortion, the Founders spoke very little about contraception. But that does not mean they knew little or nothing about it. Condoms made of animal parts had been known for centuries in Europe,<sup>195</sup> and there is no question the knowledge of how to create such devices had migrated to the

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192. *Roe*, 410 U.S. at 132–33.

193. *Id.* at 140.

194. *Id.* at 163.

195. JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH CENTURY AMERICA 27 (1994).

Americas. Other methods of contraception also existed. For example, Congressman Sedgewick, who was referred to above in respect to congressional debates about rights, noted that his wife had breast-fed one of their children far longer than was necessary, apparently as a birth control method.<sup>196</sup> Abigail Adams at various times expressed concern over the large number of children various relatives were having, thereby suggesting that these relatives should have followed some method of control to prevent it.<sup>197</sup> Yet Abigail would hardly have been endorsing abortion as a method of birth control—she was nearly inconsolable at the stillborn birth of one of her daughters, and further noted that the death of the infant “was not owing to any injury which I had sustained, nor could any care of mine have prevented it.”<sup>198</sup> Furthermore, abortion methods were so primitive in those days that there was a serious risk of death if the attempt was made.<sup>199</sup>

Natural law writers were not silent about contraception either, although they had less to say about it than abortion. For example, Pufendorf noted that “he who becomes parent of few children satisfies the law of nature as well as he who becomes the parent of many.”<sup>200</sup> We have already seen Pufendorf’s comment above that favored abstinence in preference to trying to hide pregnancy through abortion.<sup>201</sup> Pufendorf also stated that “to force a man to beget children to no hope but that of hunger is inhuman, and to fill a state with a crowd of beggars is improvident.”<sup>202</sup>

One scholar researching views of contraception and abortion in the founding generation noted that in colonial America there were no laws against contraception at all, but there were laws against abortion.<sup>203</sup> This speaks volumes in itself. Susan Klepp’s research of fertility in the Founding Era indicates that birth rates dropped dramatically after 1750, and continued to drop throughout the entirety of the Founding Era.<sup>204</sup> Her study describes the increasing control exercised by Revolutionary Era women over the size of their families, through use of the contraceptive methods

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196. *Id.* at 46.

197. *Id.* at 41.

198. GELLES, *supra* note 158, at 105. John Adams was also very upset, “I feel a Grief and Mortification, that is heightened tho [sic] it is not wholly occasioned, by my sympathy with the mother.” *Id.* at 106.

199. One example was the case in Connecticut in the 1740s, in which John Hallowell was responsible for Sarah Grosvenor’s pregnancy, then convinced her to attempt an abortion. Grosvenor died a month after the abortion. See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 221–24 (2006).

200. PUFENDORF, *supra* note 166, at 841.

201. See *supra* text accompanying note 163.

202. PUFENDORF, *supra* note 166, at 851.

203. BRODIE, *supra* note 195, at 39.

204. KLEPP, *supra* note 119, at 26.

available to them. Indeed, Klepp linked this new way of thinking by women of the era to the very principles of liberty and natural rights that motivated the revolution itself.<sup>205</sup> As such, the revolutionary thinking and natural rights views of this era extended to more than mere political freedom. This trend can be specifically seen in the family sizes of the Founders themselves. Of the fifty-six signers of the Declaration of Independence, more than half had six or fewer children—still large families by today’s standards—but significantly reduced from the typical families that had twice that many children during the prior 100 years.<sup>206</sup>

There is tremendous consistency in the Founders’ view which supported contraception, but not abortion. Family size and whether to create life in the first instance are matters of choice. There is nothing unnatural in a couple taking reasonable steps to prevent conception. But once life had its start, from the moment of conception it was sacred and worthy of protection, even if it was not comfortable or convenient to do so. At that point it was not a question of what a woman could do with her body; it was her responsibility to care for the body of someone else.

#### 8 *The right to travel within the United States.*

Two cases are cited for this right by Fleming, Barber, and Murphy, namely *Crandall v. Nevada*,<sup>207</sup> and *Shapiro v. Thompson*.<sup>208</sup> Neither case mentioned the Ninth Amendment, and *Shapiro* contained only passing comments about natural rights.<sup>209</sup> Once again, this right could easily have been found under the Ninth Amendment, pursuant to the natural rights understanding of the Founders.

For example, James Wilson stated that “it is both inhuman and unjust to convert the state into a prison for its citizens, by preventing them from leaving it.”<sup>210</sup> He further noted that “the right of emigration is a right, advantageous to the citizen, and generally useful even to the state. It may, however, in the fundamental laws, be reduced to a certainty . . . By the constitution of Pennsylvania, it is declared ‘that emigration from the state shall not be prohibited.’”<sup>211</sup>

Indeed, the 1776 Declaration of Rights in the Pennsylvania Constitution identified the right to travel as a natural right, stating in Article

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205. *Id.* at 3–18.

206. *Id.* at 18.

207. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

208. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

209. *Id.* at 668–69.

210. Of man, as a Member of Society, in 1 THE WORKS OF JAMES WILSON, *supra* note 71, at 245.

211. *Id.* at 246.

fifteen “That all men have a natural inherent right to emigrate from one state to another that will receive them.”<sup>212</sup> The 1777 Vermont Declaration of Rights had nearly identical wording.<sup>213</sup> Article IV of the Articles of Confederation stated that all persons “shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State.”<sup>214</sup> While the Federal Constitution of 1787 did not retain the reference to travel, it was undoubtedly understood as inherent in the privileges and immunities clause that was retained in Article IV, Section Two.

But the right to travel has an even earlier and most auspicious history. Clause 42 of Magna Carta states that “It shall be lawful in future for any one . . . to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy—reserving always the allegiance due to us.”<sup>215</sup> Clearly, the right to travel had been a recognized, natural right for centuries by the time of the drafting of the Constitution.

9 *The right to marry or not to marry and to make one’s own choice about having children.*

Five cases are cited for this right, none of which relate to the right to get married at all, but all of which relate to contraception or abortion, which was fully discussed above.<sup>216</sup>

Not surprisingly, the Founders’ understanding of natural rights included the right to marry. John Witherspoon noted that this natural right was part of the right to associate.<sup>217</sup> James Wilson concurred, noting that “to the institution of marriage the true origin of society must be traced.”<sup>218</sup> He then decried sexual relations outside of marriage, noting that the

212. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 44, at 3084.

213. The only difference was the substitution of the word “people” for “men.” Article Seventeen of the Vermont Declaration of Rights stated “that all people have a natural and inherent right to emigrate from one State to another that will receive them.” 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 44, at 3739, 3741.

214. Articles of Confederation, Article IV, *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 28 (Government Printing Office, 1927).

215. WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 407–08 (2d ed., 1914).

216. *Griswold*, 381 U.S. 479 (contraception use by married couple); *Eisenstadt*, 405 U.S. 438 (contraception use by unmarried partners); *Carey*, 431 U.S. 678 (contraception use by minors); *Roe*, 410 U.S. 113 (abortion); *Casey*, 505 U.S. 833 (abortion).

217. THE SELECTED WRITINGS OF JOHN WITHERSPOON, *supra* note 101, at 188–89, 195–97.

218. Of the Natural Rights of Individuals (1791), *in* 2 THE WORKS OF JAMES WILSON, *supra* note 71, at 598 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

Romans began to consider that cohabitation without marriage was acceptable, which resulted in “that detestable train of conjugal vice, infidelity, rage, rancor and revenge, with which so many volumes of the Roman story are crowded and disgraced.”<sup>219</sup>

An issue that would have appalled the Founders, but which has become a major point of discussion today, is so-called gay marriage. At the time of the writing of this article, no Supreme Court ruling has been made in respect to such an alleged right of marriage, but one is expected soon. As demonstrated by Wilson’s statement of disapproval of sexual relations outside marriage between a man and a woman, there is no question the Founders would have strongly opposed gay marriage.

Indeed, in a surprising deviation from its normal practice of ignoring the views of the Founders, the Supreme Court ruled against gay behavior in the case of *Bowers v. Hardwick*.<sup>220</sup> In that case the majority opinion properly relied on history to support its ruling that upheld a Georgia state law against sodomy. Justice White noted that sodomy was criminal in each of the original states in 1791.<sup>221</sup> In his concurring opinion, Justice Burger said that Blackstone “described ‘the infamous crime against nature’ as an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named.’”<sup>222</sup> Hence, in the days of the Founders, gay behavior was considered to be the ultimate crime against nature, and accordingly the ultimate defiance of natural law.

Unfortunately, *Bowers* was expressly overruled by the Supreme Court seventeen years later in *Lawrence v. Texas*.<sup>223</sup> The court in *Lawrence* did not mention the Ninth Amendment or natural rights. As demonstrated by Blackstone’s and James Wilson’s statements above, there is no doubt the Founders would strongly oppose gay behavior and gay marriage as contrary to the laws of nature. Accordingly, the decision about gay marriage is made easy by reference to the natural rights understanding of the Founders.

10 *The right to educate one’s children as long as one meets certain minimum standards set by the state.*

One case is cited in support of this right, *Pierce v. Society of Sisters*,<sup>224</sup> which overruled an Oregon law that required all minor students to attend public schools. The Ninth Amendment is not mentioned in the case, nor

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219. *Id.* at 600.

220. *Bowers*, 478 U.S. 186.

221. *Id.* at 192 n.5.

222. *Id.* at 186 (Burger, J. concurring).

223. *Lawrence v. Texas*, 539 U.S. 558 (2003).

224. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

were natural rights discussed other than a passing reference by counsel for the Society of Sisters.<sup>225</sup>

Once more, the natural rights view of the Founders supports this right. James Wilson stated that it was the parents' duty "to educate them according to the suggestions of a judicious and zealous regard for their usefulness, their respectability and their happiness."<sup>226</sup> Speaking particularly of the father's duty to discipline and educate, he stated that "Part of his authority he may delegate to the person intrusted [sic] with his child's education: that person acts then in the place, and he ought to act with the disposition of a parent."<sup>227</sup> Hence, for Wilson, it was the parent, not the state, who had the duty of education—a duty he could never escape, but could delegate if he chose.

In speaking of the right and duty of a father to educate his children, natural law writer Burlemaqui noted that it would not be "lawful for a father to neglect the education of his children, though the prince [government] should order him to neglect it."<sup>228</sup> Hence, even if government for some reason required a parent to NOT educate his children, he would still have a natural right and duty to do so. Pufendorf stated, "Take away from the parents all care and concern for their children's education, and you make a social life an impossible and unintelligible notion."<sup>229</sup> Once again, the parental responsibility for education was paramount in the view of natural rights writers.

John Adams held firm beliefs about the need for parents to educate their children. He wrote the following to Abigail in 1755:

Education makes a greater difference between man and man than nature has made between man and brute . . . It should be your care, therefore, and mine to elevate the minds of our children and exalt their courage; to accelerate and animate their industry and activity . . . and an ambition to excel in every capacity, faculty and virtue. If we suffer their minds to grovel and creep in infancy, they will grovel all their lives.<sup>230</sup>

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225. *Id.* at 518.

226. Of the Natural Rights of Individuals (1791), in 2 THE WORKS OF JAMES WILSON, *supra* note 71, at 607.

227. *Id.* Wilson cites to Blackstone's Commentaries, vol. 1, pg 453 regarding the principle of delegation.

228. BURLEMAQUI, *supra* note 163, at 411.

229. PUFENDORF, *supra* note 166, at 915.

230. Letter from John Adams to Abigail Adams (Oct. 29, 1755), in 1 LETTERS OF JOHN

Clearly then, the Founders viewed education of children as first and foremost a parental duty, rather than a duty of the state. Indeed, Benjamin Franklin and Thomas Jefferson both sought throughout their lives to create opportunities for public education for those of the populace who desired it, since educational opportunities were very limited in those days.<sup>231</sup> In modern times however, public schools have become so institutionalized that the idea of education as primarily a parental duty—rather than a duty of the schools—seems foreign. Yet that was the educational concept of the Founders, based on natural law. Public schools are at best an option parents can use to fulfill their personal responsibility to educate their children.

### *11 The right to choose and follow a profession.*

Three cases are cited for this right by Murphy, Fleming, and Barber: *Allgeyer v. Louisiana*,<sup>232</sup> *Meyer v. Nebraska*,<sup>233</sup> and *Gibson v. Berryhill*.<sup>234</sup> None of these cases discussed the Ninth Amendment or specifically mentioned natural rights, although the court in *Allgeyer* did partially base its finding of this right on the “pursuit of happiness” clause in the Declaration of Independence.<sup>235</sup>

Once again, the Founders’ understanding of natural rights included this right. John Witherspoon lists as one of the fundamental rights of all men “a right to employ his faculties and industry for his own use.”<sup>236</sup> James Wilson quoted Coke as stating that “no man can be prohibited from exercising his industry in any lawful occupation.”<sup>237</sup>

The right to pursue a vocation was inextricably linked in the minds of the Founders to the right to acquire property. Accordingly, Samuel Adams said, “In the state of nature, every man hath an equal right by honest means to acquire property, and to enjoy it; in general, to pursue his own happiness,

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ADAMS ADDRESSED TO HIS WIFE 73 (Charles Francis Adams, ed., 1841).

231. In 1749, Benjamin Franklin published a pamphlet which encouraged the establishment of regular, public schools. See BENJAMIN FRANKLIN, PROPOSALS RELATING TO THE EDUCATION OF YOUTH IN PENSILVANIA (1749). In 1806, Thomas Jefferson in his State of the Union address requested a constitutional amendment allowing public funds to be used for public education. 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 39, at 494.

232. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). This case is frequently named as the first in the Lochner Era.

233. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

234. *Gibson v. Berryhill*, 411 U.S. 564 (1973).

235. *Allgeyer*, 165 U.S. at 589.

236. THE SELECTED WRITINGS OF JOHN WITHERSPOON, *supra* note 101, at 188–89.

237. Of the Natural Rights of Individuals (1791), in 2 THE WORKS OF JAMES WILSON, *supra* note 71, at 607.

and none can consistently control or interrupt him in the pursuit.”<sup>238</sup> In his great discourse on property, James Madison noted that men have property rights in a great many things not normally associated with property. Hence, a man “has an equal property in the free use of his faculties and free choice of the objects on which to employ them.”<sup>239</sup> As the *Allgeyer* Court noted, these views by Adams and Madison are consistent with Jefferson’s famous statement in the Declaration of Independence that men have the inalienable right to “life, liberty, and the pursuit of happiness.”<sup>240</sup>

Closely connected with the right to pursue a vocation is the right to contract, known in the Founders’ day as the right to the fulfillment of engagements. This, too, was understood as a natural right by the Founders. James Wilson noted that a man has a natural right to “be free from injury and to receive the fulfillment of the engagements which were made to him.”<sup>241</sup> Citing Barbeyrac, he also noted the “inviolable right of nature—every man is obliged to a religious observance of his promise.”<sup>242</sup> Jefferson concurred, noting that “I have but one system of ethics for men and for nations—to be grateful, to be faithful to all engagements and under all circumstances, to be open and generous.”<sup>243</sup>

However, the right to contract was not left unenumerated; it was embodied in the Contract Clause, in Article I, Section Ten. The Founders were greatly concerned with state laws during the Revolutionary Era that blithely eliminated contractual debts, in whole or in part, regardless of the debtor’s ability to pay. This in turn seriously hurt the reputation of the new nation abroad. As Madison stated, “It seems to be forgotten that the abuses committed within the individual states previous to the present constitution, by interested or misguided majorities, were among the prominent cause of its adoption, and particularly led to the provision contained in it which prohibits paper emissions and the violations of contract . . .”<sup>244</sup>

The Contract Clause follows immediately after the ban on bills of

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238. Letter from Samuel Adams to the Legislature of Massachusetts (Jan. 17, 1794), in 4 THE WRITINGS OF SAMUEL ADAMS 356 (Harry A. Cushing, ed. 1968).

239. Property (1792), in 6 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 101. Immediately following this was Madison’s famous statement, “In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.” *Id.*

240. *Allgeyer*, 165 U.S. at 589–90.

241. Of the Judicial Department, in 2 THE WORKS OF JAMES WILSON, *supra* note 71, at 466.

242. 1 *Id.* at 192.

243. Letter from Thomas Jefferson to Madame la Duchesse d’Auville (Apr. 2, 1796), in 5 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 39, at 153–54.

244. Letter from James Madison to — (1833), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 1, at 522.

attainder and the ban on ex post facto laws, since the sanctity of contracts, like equal protection (protected by the ban on bills of attainder), was too significant a right to be left out of the Constitution. These bans are preceded by a prohibition against the states making anything but gold or silver a valid way to pay debts. The states had frequently issued paper money, knowing of its tendency to become quickly devalued, as one way of assisting their citizens—even the wealthy ones—to avoid contractual debts. This is the source of Madison’s criticism in *The Federalist* Number Ten of the “rage for paper money, for an abolition of debts.”<sup>245</sup>

Comments at the Constitutional Convention about the Contract Clause are very enlightening, and help us understand it better. On August 28, 1787, Rufus King moved for the addition of “a prohibition on the States to interfere in private contracts.”<sup>246</sup> Madison agreed with the proposal, but felt that it was not the best cure since “[e]vasions might and would be devised by the ingenuity of the legislatures.”<sup>247</sup> He therefore once again urged his legislative veto as the best method of protection. Colonel Mason ignored the reference to the legislative veto, and simply objected that a ban on state interference with contracts “is carrying the restraint too far. Cases will happen that cannot be foreseen, where some kind of [government] interference [with a contract] will be proper and essential.”<sup>248</sup> Wilson’s prompt reply was that “retrospective interferences only are to be prohibited.”<sup>249</sup> When it was pointed out that the ban on ex post facto laws which had already been adopted could accomplish the same goal, the Convention reaffirmed this ban (although rewording it as a prohibition on retrospective laws), then moved on.

But the next day, Mr. Dickinson pointed out that he had reviewed Blackstone and the ban on ex post facto/retroactive laws applied in criminal cases only, and “would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite.”<sup>250</sup> The record is devoid of any other comment on his observation, as the Convention moved on to other business. But when the committee on style came back with a final version of the Constitution on September 12, 1787, Article 1, Section Ten contained *both* clauses.<sup>251</sup> No further comment was made about the Contract Clause at that

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245. *The Federalist* no. 10, 136 (James Madison).

246. *Journal of the Constitutional Convention* (Aug. 28, 1787), in 4 *THE WRITINGS OF JAMES MADISON*, *supra* note 1, at 319.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 325–26.

251. *Journal of the Constitutional Convention*, 4 *THE WRITINGS OF JAMES MADISON*,

time, but on September 14, Mr. Gerry proposed that a prohibition of federal interference with contracts be inserted similar to the one against the states. However, no one even bothered to second his motion.<sup>252</sup>

The debates are enlightening because they highlight the way the natural law right of contract embodied in the Contract Clause was understood by the Founders. It was to prevent retroactive alteration of some (but not all) existing contracts by the states, and not future contracts. The courts also had this view. As one scholar noted, the early Supreme Court “conceived the federal contract clause to prohibit impairment of contractual obligations created before the enactment of the challenged statute, but to extend no protection to contracts formed thereafter.”<sup>253</sup> Early cases demonstrate this. One example was the 1810 case of *Fletcher v. Peck*,<sup>254</sup> in which the Supreme Court invalidated an effort by the Georgia legislature to rescind the shady Yazoo land fraud enacted by a prior legislature. Fraudulent as the prior legislation was, the Court upheld it and denied the new legislative attempt at rescission, precisely because the prior legislation had created contractual vested rights which could not be abridged. Other cases of the era that confirmed this understanding were *Calder v. Bull*,<sup>255</sup> and *New Jersey v. Wilson*.<sup>256</sup> Indeed, in *Calder* Justice Chase shed some light on the rare circumstances in which contracts could be impaired by noting that this was justified only where it was “for the benefit of the whole community.”<sup>257</sup>

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*supra* note 1, at 429.

252. *Id.* at 458.

253. James L. Kainen, *Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 103 (1993). Kainen cites the case of *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) for this proposition.

254. *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810).

255. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). “The prohibitions not to make any thing but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law, was to secure the person of the subject from injury, or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected, or injured, by such laws, and the prohibition is sufficiently extensive for that object, the other restraints, I have enumerated, were unnecessary, and therefore improper; for both of them are retrospective.” *Id.* at 390.

256. *New Jersey v. Wilson*, 11 U.S. (7 Cranch.) 164 (1812). In this case, New Jersey purchased land from the Indians for them to reside on, with the proviso that the land would not thereafter be subject to taxes. When the tribe later moved the state and sold the land, the New Jersey legislature attempted to rescind the law regarding taxation. The Court said this was an improper impairment of contract because the vested right passed with the land.

257. *Calder*, 3 U.S. (3 Dall.) at 394. While such exceptions could include a great many things, the most frequent example was a taking, as Justice Chase noted. He noted that “The restraint against making any ex post facto laws was not considered by the framers of the [C]onstitution, as extending to prohibit the depriving a citizen even of a vested right to property;

In modern times, the right to contract has arisen in a very different context—as the tool used by an allegedly activist Court in the early part of the 20th century to invalidate social legislation. The so called *Lochner* Era, in which the right to contract was said to be sustained at the expense of the public welfare, is almost universally held up as an example of inappropriate judicial activism. Interestingly however, the cases identified under the heading of Lochnerism—including *Lochner v. New York* itself—did not rely on the natural rights view of contracts of the Founders as embodied in the Contract Clause, but rather on a more activist, implied right to contract in the Due Process Clause of the Fourteenth Amendment.<sup>258</sup> Some scholars postulate that this switch was precisely because of the retrospective focus of the Contract Clause. The Contract Clause with this limitation was not perceived as a sufficiently strong tool by conservatives to stop social legislation.<sup>259</sup> Hence, the judicial activism of the *Lochner* Era was contrary to the understanding of the Founders about natural contract rights.

Revisionist scholars such as David E. Bernstein and James W. Ely, Jr., have clarified that the alleged judicial activism of Lochnerism is mostly a modern creation, and activist cases were actually few in number.<sup>260</sup> But whether the activist cases were few or many, the most important point to remember about the *Lochner* Era and the founder’s views of the natural right to contract is that the two are not connected. As noted above, the Founders believed that retroactive interference with contracts in the civil

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or the provision, ‘that private property should not be taken for PUBLIC use, without just compensation,’ was unnecessary.” *Id.*

258. See *Lochner v. New York*, 198 U.S. 45, 53 (1905). The *Lochner* Court did not refer to the Contract Clause at all. Bernstein notes that, ironically, *Lochner* was a significant step in the development of judicial activism based on the Fourteenth Amendment since the 1960s, including *Griswold v. Connecticut* and *Roe v. Wade*. See David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1514–20 (2005).

259. James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 396–97 (2005); Bernard Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 SUP. CT. REV. 95, 99 (1979).

260. See Bernstein, *supra* note 258, at 1473–74; Ely, *supra* note 254, at 291–92. Bernstein noted that it was not until Lawrence Tribe’s 1978 treatise on constitutional law that the *Lochner* Era was even identified as a distinct time period, based on court cases between 1897 and 1937. Bernstein, *supra* note 258, at 1520. He further noted that most Supreme Court cases before and after *Lochner* upheld social legislation, and Congress even altered Supreme Court jurisdiction in 1914 to allow the Court to review state court judgments, since the state courts were not as progressive. However, he acknowledged that the most activist rulings in line with *Lochner* occurred in the 1920s. *Id.* at 1493, 1506–09. Ely noted that “it is not clear that the idea of a *Lochner* era has any chronological coherence.” Ely, *supra* note 254, at 391. Other revisionist scholars who have questioned traditional Lochnerism include: Gregory S. Alexander, *The Limits of Freedom of Contract in the age of Laissez-Faire Constitutionalism*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 108 (F.H. Buckley, ed., 1999); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC’Y 53.

context should usually be avoided, but could still be justified in limited circumstances, for the benefit of the community. For example, while they inserted the ban on state interference with contracts in Article I, Section Ten, to stop state efforts to help their wealthy citizens avoid creditors, they refused to extend the same limit to the federal government as Mr. Gerry had suggested.<sup>261</sup> Indeed, Article I, Section Eight of the Constitution expressly gave the federal government the power to regulate bankruptcy laws across the country—a clear impairment of pre-existing creditor/debtor contracts by the federal government!<sup>262</sup> In short, the Founders agreed that there were times that pre-existing contractual rights could be impaired, where to do so benefitted the whole community. Their view of the right to contract did not support the *Lochner* judicial activism of the 1920s.

In sum, the natural rights understanding of the Founders supported the right of individuals to pursue whatever legal vocation they might choose. The judicial activism of the *Lochner* Era was not in keeping with the views of the Founders about the natural right to contract.

## 12 *The right to attend and report on criminal trials.*

One case is offered in support of this right by Fleming, Barber and Murphy, the 1980 case of *Richmond Newspapers v. Virginia*.<sup>263</sup> This case departs significantly from most Supreme Court cases discussed above, since the Court did a superb job of reciting historical evidence at the founding in support of this right. For example, the Court quoted the words of Representative Sedgwick, cited above, about the right of the people to assemble together, thereby demonstrating the Constitution's protection of this inalienable, natural right.<sup>264</sup> The Court also quoted from an address directed to the inhabitants of Quebec by the Continental Congress in 1774 describing the "irrevocable rights" and "the natural and civil rights" of the colonists as supporting this right.<sup>265</sup> Additionally, the Court specifically acknowledged the Ninth Amendment as supportive of this right.<sup>266</sup>

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261. See Journal of the Constitutional Convention, in 4 THE WRITINGS OF JAMES MADISON, *supra*, note 1.

262. U.S. CONST., art. 1, § 8. As noted above, this was because the states blatantly created laws for their citizens to evade creditors even where the debtors had the ability to pay. The federal government on the other hand would presumably create federal bankruptcy laws that would apply only in cases where debtors truly could not pay their debts, and actually needed relief.

263. *Richmond Newspapers*, 448 U.S. 555.

264. *Id.* at 578, n.13.

265. *Id.* at 568. The address can be found at 1 JOURNALS OF THE CONTINENTAL CONGRESS 106–07, 113 (1774).

266. *Id.* at 579, n.15.

In short, the Court in this case for the most part did what this Article urges—it based its finding of this unenumerated right on the intent of the Founders, and their view of natural rights under the Ninth Amendment. Indeed, this case demonstrates that such an approach is not that hard to undertake after all.

*13 The right to refuse unwanted medical treatment, including artificial nutrition and hydration, even if doing so may result in one's death.*

One case is given in support of this right, the 1990 case of *Cruzan v. Director, Missouri Department of Health*.<sup>267</sup> The Ninth Amendment and natural law are not mentioned in the case, although natural death without life support is discussed at length.

Once again, statements by the Founders show that they would have agreed with this right. The most far-reaching is a statement by Thomas Jefferson that would go beyond mere withdrawal of life support. He commented that the herb *Datura Stramonium* which caused death “as quietly as sleep . . . seems far preferable to the Venesection of the Romans, the Hemlock of the Greeks, and the Opium of the Turks.”<sup>268</sup> He then referred to “self-administration” of this drug in extreme cases: “There are ills in life as desperate as intolerable, to which it would be the rational relief, e.g., the inveterate cancer.”<sup>269</sup>

Others of the founding era, while not going as far as Jefferson, would undoubtedly have agreed with a person's right to not have life prolonged, but to allow a natural death. For example, George Washington responded in 1798 (one year before he died) to concern and suggestions on how to sustain his health with these words:

I thank you for the trouble you have taken in delivering your thoughts on the means of preserving health. Having, through life, been blessed with a competent share of it, without using preventatives against sickness, and as little medicine as possible whensick; I can have no inducement now to change my practice.<sup>270</sup>

Other Founders acted on such beliefs, rather than just commenting on

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267. *Cruzan v. Dir. Missouri Dep't. of Health*, 497 U.S. 261 (1990).

268. Letter from Thomas Jefferson to Dr. Samuel Brown (July 14, 1813), in 6 *THE PAPERS OF THOMAS JEFFERSON* 293 (J. Jefferson Looney ed., 2009).

269. *Id.*

270. Letter from George Washington to Landon Carter (Oct. 5, 1798), in 36 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 108, at 484.

them. For example, the biography of Rufus King records that in 1827, since King had lost most of his memory and strength, “he no longer wished to live. He took to his bed in March and thereafter slept most of the time. Although not in pain, he lost his appetite and wasted away. On April 29, at the age of seventy-two, Rufus King died.”<sup>271</sup> Hence, King essentially withdrew his life support of food and exercise, allowing himself to die. Perhaps Jefferson did something similar. He refused the laudanum he had been taking the night before his death on July 4, 1826.<sup>272</sup>

Others expressed a wish that death come swiftly, rather than be lingering. Benjamin Franklin took opium to relieve his discomfort as the end approached, and when his daughter expressed the hope that he might recover and live many more years, he simply replied, “I hope not.”<sup>273</sup> John Adams in his old age wondered in a letter to Benjamin Rush if it wouldn’t be best for his horse to just stumble, resulting in a fatal fall one day.<sup>274</sup> And James Otis, famed orator of the Revolution, frequently expressed the desire that when God “shall take me out of time into eternity that it will be by a flash of lightning.”<sup>275</sup> In a fantastic display of thunderous power, that is exactly what happened—at age fifty-eight, Otis was killed by a lightning strike on May 23, 1783.<sup>276</sup>

## CONCLUSION

It was the intent of the Founders that any unenumerated rights found to be constitutional would be derived from the Ninth Amendment. These were rights that were based on the fundamental laws of nature, and were not considered as changing over time. The Founders may have disagreed about the best governmental structure, but when it came to natural, inherent and ongoing rights, they were unified in their views. Somehow, in the 200-plus years that have intervened, Americans have lost this simple, straightforward understanding of natural rights, and of the Ninth Amendment as the vehicle for such rights to be identified and preserved.

The Founders intended for natural rights as they understood them to continue to hold sway in the United States. Indeed, it was the natural rights view that was the foundation of the Revolution. The views of the Founders

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271. ROBERT ERNST & RUFUS KING, *AMERICAN FEDERALIST* 403 (1968).

272. SARAH N. RANDOLPH, *THE DOMESTIC LIFE OF THOMAS JEFFERSON* 428 (1978).

273. *The Life of Benjamin Franklin*, in 10 *THE WRITINGS OF BENJAMIN FRANKLIN* 490 (Albert H. Smyth ed., 1907).

274. Letter from John Adams to Benjamin Rush (Jan. 4, 1813), in *ALEXANDER BIDDLE, OLD FAMILY LETTERS* 333–34 (1892).

275. WILLIAM TUDOR, *THE LIFE OF JAMES OTIS* 485 (1823).

276. *Id.*

regarding natural rights that should be protected are easily ascertainable, and cover almost every contingency in which rights challenges arise—including the so-called modern rights that the Founders supposedly knew little or nothing about.

By returning to an acceptance and adoption of the natural rights views of the Founders under the Ninth Amendment, Americans can attain the stability in rights determinations that the Founders intended. They can also avoid the trap of declaring as “rights” certain practices that are not supported by the natural rights views of the Founders.