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The Power of Nine:
Federalists, Antifederalists, and Natural Law Synthesis in the Ninth Amendment

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“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹

-Ninth Amendment to the United States Constitution, 1791

Introduction

In an 1807 letter, John Adams wrote to Mercy Otis Warren, stating, “I was always for a free republic, not a democracy, which is as arbitrary, tyrannical, bloody, cruel, and intolerable a government as that of Phalaris with his bull is represented to have been.”² Adams’s reference to Greek tyrant, Phalaris, and his brazen bull—which was used to roast people alive—is telling. Democracy may be held today as among the highest values of the American system of government, but the American founders looked upon democracy with suspicious eyes. Antidemocratic notions can be jarring and displeasing to modern sensibilities, but such reactions are commonly due to a lack of understanding regarding the framers and their devotion to Natural Law philosophy. Such an understanding can only be realized through an analysis of the theory of Natural Law.

Natural Law philosophy subscribes to the notion that individual rights are fundamental, inherent, inborn, and precede government. Unlike legal positivism, which asserts that rights are established and endowed by government, followers of Natural Law believe that rights are derived by nature, and nature’s God, and that the only legitimate form of government is one that protects individual inalienable rights. It is a view commonly rejected by those who believe in the administrative state and the virtuousness of institutions. Natural Law does not find a lot of supporters from those who seek to enlarge government or expand its powers, because the very

¹ “Ninth Amendment (ratified 1791),” U.S. Constitution, *The Federalist Papers*, edited by Clinton Rossiter (New York: Mentor, 1961), 523.

² John Adams, letter to Mercy Otis Warren, July 30, 1807, accessed November 27, 2016, <http://founders.archives.gov/documents/Adams/99-02-02-5199>.

notion of Natural Law philosophy limits governmental powers to that which protects individual rights of life, liberty, property, and conscience. There are important historic exceptions to this, however. For example, northern abolitionist and Secretary of State from 1861 to 1869, William Seward, asserted the supremacy of the “higher law”³ the nation was beholden to which superseded any supposed protections the U.S. Constitution held to retain slavery. Seward stated that “one who is equal to another cannot be the owner or property of that other... [slavery] is repugnant to the law of nature...”⁴ This example underscores Natural Law tradition in American philosophical thought. Thus, Natural Law sentiment, which flowered during the Civil War era and provided the moral and philosophical reasoning for slavery’s obliteration, had its seed planted in the founding era. This was the same ethical argumentation which had informed the political thinking of the framers. It provided the ideological foundations behind the debates over a new system of government during the late 1780s, and it underlies the synthesis of Federalist and Antifederalist thought enshrined in the Ninth Amendment. However out of vogue today, Natural Law informed the founders’ worldview.

Political scientist Michael P. Zuckert states, “Rights in their proper sense arise when human beings come to recognize a need for reciprocity in rights, when they recognize that to claim a right for oneself requires accepting the same right in others. That system of mutual recognition constitutes the system of natural duties correlative with natural rights.”⁵ Zuckert points to a paradox of the American political tradition of obsessing over the concept of rights. “Although the theme of rights obviously goes back to the founding era, those who are concerned

³ William Seward, “Higher Law Speech,” *The Works of William H. Seward*, George E. Baker, ed. (New York: Redfield, 1853), vol. I. Furman University Digital Archives. <http://eweb.furman.edu/~benson/docs/seward.htm>.

⁴ *Ibid.*

⁵ Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame: University of Notre Dame Press, 1996), 74.

with rights in the contemporary context hardly look to the founding period on the question, while those who study the founding have more or less abandoned the perspective of rights.”⁶ This is unfortunate. The challenging issues of the founding era, including slavery and the subservient role of women, have muted historical scholarship concerning the philosophy of rights during the American founding. The result has been a dearth of historians taking up the matter. Instead, the discussion has been dominated by political scientists and legal theorists, if the discussion has occurred at all. Historians have room to enter this territory, and the field would benefit from it greatly. An historical examination of how Natural Law philosophy informed the Constitution and the Bill of Rights—with particular focus on the Ninth Amendment—is long overdue.

The framers imbued the United States system of constitutional government with crucial Natural Law-based safeguards. These safeguards were championed both by supporters of the ratification of the U.S. Constitution, the Federalists, and those against ratification, the so-called Antifederalists. These protections included independence of the courts and the powers of the Senate, advocated by Federalists, and the protection of individual rights—freedom of speech, conscience, the press—by Antifederalists. A synthesis of Federalist and Antifederalist Natural Law philosophy can thus be found in the Bill of Rights generally and the Ninth Amendment specifically; this will be the locus of this work.

The governmental system of the United States has been successful because of the constant push and pull between democratic republicanism and liberal individualism. This tension is illustrated in modern political parties—Republicans and Democrats, Greens and Libertarians, etc. The same stress between democracy and liberalism, local control versus national power, and

⁶ Zuckert, *The Natural Rights Republic*, 10.

the inherent rights of the individual contrasted with the needs of the collective, played out in the earliest days of the republic. These opposing yet complimentary creeds were argued by Federalists and Antifederalists alike. They were not advocated across cleanly-divided lines. Indeed, while Federalists largely argued for concentration of centralized power in a new national government in the late 1780s, Antifederalists supported certain liberal/undemocratic—even antidemocratic—principles which would secure individual rights. Additionally, even as Antifederalists raised concerns about protecting rights of speech and the press, the Federalists inserted certain individual rights protections into the body of the Constitution, including the right of habeas corpus.⁷ It is important to note this, because Federalists and Antifederalists often argued upon similar principles. Both raised concerns about concentrated power in the wrong hands. It should thus be stated that democratic principles of the American system of government are essential to its strength and its agile ability to reform itself. Democracy, however, is merely half the story, and it was Federalists as well as Antifederalists who ensured undemocratic protections against abuses of power and the violation of individual rights.

This paper will offer an examination of the twin pillars of historiography concerning the motivations behind the drafting and ratification of the United States Constitution, Charles Beard’s economic thesis and Bernard Bailyn’s ideological thesis. It will further deliberate on the ratification debates which followed the drafting of the Constitution and survey how the debates informed the adding of additional amendments, which came to be known as the Bill of Rights. One of the most crucial characteristics of the American system will also be discussed: the

⁷ A writ of habeas corpus, Latin for “you have the body,” is a right derived from English common law. Cornell University Law School’s *Legal Information Institute* explains the writ of habeas corpus as a legal right “used to bring a prisoner or other detainee (e.g. institutionalized mental patient) before the court to determine if the person’s imprisonment or detention is lawful. A habeas petition proceeds as a civil action against the State agent (usually a warden) who holds the defendant in custody. It can also be used to examine any extradition processes used, amount of bail, and the jurisdiction of the court.” https://www.law.cornell.edu/wex/habeas_corpus.

independent judiciary, including its deliberately undemocratic nature at the level of the appellate courts. Finally, the Ninth Amendment will be scrutinized because of its unique status in law and American intellectual history. The Ninth Amendment, perhaps more than any other single sentence in the entire Constitution, reflects the Natural Law philosophy of the Federalists and Antifederalists.

A Century of Historiography

To properly approach a substantive discussion of how Natural Law informed Federalists and Antifederalists during ratification of the Constitution and Bill of Rights, some attention must first be given to the historiography over the past century regarding the motivation behind the Constitution. The first century of scholarship that followed ratification of the Constitution was of the classically Whig, nineteenth-century, approach: honoring the accomplishments of the framers without questioning too closely the motivations and self-interests of the participants. Conflicting interpretations then replaced this orthodox view in the twentieth century. Two separate and opposing viewpoints would vie for preeminence, and continue to do so in the twenty-first century. These opposing interpretations can be described as the Economic Thesis by Charles Beard, and the Ideological Thesis by Bernard Bailyn.

In 1913, Charles Beard ushered in a Marxist-influenced school of thought, often referred to today as the Progressive school, which examined the economic motivations of the framers. Beard's *An Economic Interpretation of the Constitution* (1913) argues that economic self-interest largely defined and explained the desire for a stronger central government on the part of the Federalists. Beard contends that the "overwhelming majority of members, at least five-sixths, were immediately, directly, and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the

Constitution.”⁸ The economic thesis soon overtook the historical field of the early American republic and dominated the conversation for the next several decades. Beard’s thesis perfectly fit into the Progressive school method, which became the prevailing view and approach to history in the first half of the twentieth century. More than merely fitting into a certain psychological matrix at a convenient moment in time, however, Beard’s economic thesis offered a new and credible critique of the framers’ motivations. Many of his arguments were convincing and shed new light upon the founding era. Beard asserted that support for the U.S. Constitution was carried principally by interests connected to “money, public securities, manufactures, and trade and shipping.”⁹ At the heart of Beard’s economic thesis is his assertion that the U.S. Constitution was “essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.”¹⁰

Among the many supporters of the economic thesis of the Constitution was Jackson T. Main. In the 1950s and 1960s, Main offered more primary data than Beard had done to argue the thesis of economic self-interest and that support and rejection over ratification fell along class lines. “Main was close to Beard in his emphasis on class conflict—and he had the evidence of contemporary testimony to prove it.”¹¹ Main was arguably the most loyal champion of Beard and the economic thesis in the middle of the twentieth century. Rather than focusing too much on the limitations of Beard’s work, which Beard himself had admitted was “frankly fragmentary,”

⁸ Charles Beard, “An Economic Interpretation of the Constitution,” *Essays On The Making Of The Constitution*, ed. Leonard W. Levy, (New York: Oxford University Press, 1969), 6.

⁹ *Ibid.*, 31.

¹⁰ *Ibid.*

¹¹ Leonard W. Levy, *Essays On The Making Of The Constitution*, ed. Leonard W. Levy, (New York: Oxford University Press, 1969), 144.

designed to open new fields for research rather than to present a completed study,”¹² Main sought to flesh out the economic thesis and bring forth a more comprehensive analysis. Doing so, Main became more resolute regarding the economic thesis by affirming that the “fact is that... more than half of those who signed the constitution, were rich, and others were well to do... [The Federalists comprised] precisely what Beard said they were: a ‘consolidated group.’”¹³

Supporters of the economic thesis in the twenty-first century have attempted to utilize still more hard data to prove their case. Economist Robert A. McGuire, in his 2004 book, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution*, introduced a series of statistics and analyzed the occupations of the Federalists—more so than any of his predecessors—to analyze their economic motivations. In the opening of *To Form a More Perfect Union*, McGuire states, rather practically, “Constitutions are the products of those who frame and adopt them.”¹⁴ McGuire also utilized, to great effect, the arguments of the framers themselves, stating that “whether real or imagined, economic and other problems were used to justify the Philadelphia convention.”¹⁵

A crucial difference exists, however, in the original economic thesis of Charles Beard and the more recent economic thesis of Robert A. McGuire. Beard utilized a form of economic determinism to assert that economic self-interest was *the* motivator for creating a stronger central government on the part of the Federalists. McGuire’s newer thesis is more nuanced and does not entirely discount ideology. Nor does McGuire question why these men of social and economic

¹² Robert E. Brown, *Charles Beard and the Constitution*, (Princeton: Princeton University Press, 1956), 4.

¹³ Jackson T. Main, “The Beard Thesis Defended,” *Essays On The Making Of The Constitution*, ed. Leonard W. Levy, (New York: Oxford University Press, 1969), 152.

¹⁴ Robert A. McGuire, *To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution*, (New York: Oxford University Press, 2004), 8.

¹⁵ *Ibid.*, 50.

prominence would be the ones to participate in this restructuring. “[I]t is difficult to imagine any society that would choose individuals with no rank and no distinction, or influence, to participate in constitutional reform.”¹⁶

By the mid-1950s, the economic thesis of the Constitution began to be seriously questioned and critiqued by historians. One of the most vocal and effective of these critics was Cecelia M. Kenyon. Her critique of Beard’s thesis includes attacks upon his ultimate conclusions. Kenyon argues, in “Men of Little Faith: The Anti-Federalists on the Nature of Representative Government” that Beard had completely ignored, or unfairly dismissed, philosophical and ideological motivations. She reasons that the ideological context of the Constitution “was as important in determining its form as were the economic interests and motivations of its framers... the failure of Beard and his followers to examine this context has rendered their interpretation of the Constitution and its origin necessarily partial and unrealistic.”¹⁷ Kenyon further adds that Beard’s thesis concerning motivation behind the creation of the Constitution was “unrealistic and unhistorical.”¹⁸

One of Kenyon’s most pointed criticisms of Beard’s thesis, which is ultimately relevant to the thesis provided in this work, was Beard’s fundamental misunderstanding of certain undemocratic values the Antifederalists actually shared with the Federalists. Kenyon stated, in her 1963 article, “‘An Economic Interpretation of the Constitution’ After Fifty Years,” that it was true the “Founding Fathers had some doubts that the will of the majority would always be wise, or right, or just. But it is also true that those who opposed the Constitution had these same

¹⁶ McGuire, *To Form a More Perfect Union*, 54.

¹⁷ Cecelia M. Kenyon, “Men of Little Faith: The Anti-Federalists on the Nature of Representative Government,” *William and Mary Quarterly* 12, no. 1 (Jan. 1955): 5. <http://www.jstor.org/stable/1923094>.

¹⁸ *Ibid.*, 43.

doubts... Beard did not report these Antifederalist ideas, and apparently either did not notice them, or did not see the significance they had for his theory.”¹⁹ This is a crucial oversight by Beard. His assumption that Federalists were antidemocratic hoarders of wealth and power while Antifederalists were modest farmers who championed democracy was just what Kenyon said it was: unhistorical. Kenyon’s claim that the Constitution was ideologically motivated found support from many scholars, including Bernard Bailyn.

Bernard Bailyn first approached the ideological impulses of the framers by examining surviving pamphlets of the pre-revolutionary and revolutionary eras. By doing so, he became convinced that both the American Revolution and the subsequent drafting of the Constitution carried significant philosophical underpinnings. Bailyn’s *The Ideological Origins of the American Revolution* (1967) maintains that the Constitution “is the final and climactic expression of ideology of the American Revolution.”²⁰ Bailyn describes the writing and ratification debates of the Constitution as being the third and final phase of the ideological origins of the American Revolution. Bailyn asserts that the first phase was the pre-revolution arguments of liberty, the second phase was the military reality of revolution itself, leading to the end of the war and the third phase: the realization of the ideology of the revolution—brought into practice under the Constitution.²¹

Bailyn’s ideological thesis was arguably as impactful and paradigm-shifting in the second half of the twentieth century as Beard’s economic thesis had been in the first. Nonetheless, his

¹⁹ Cecelia Kenyon, “‘An Economic Interpretation of the Constitution’ After Fifty Years (1963),” reprinted in *Men of Little Faith: Selected Writings of Cecelia Kenyon* (Amherst and Boston: University of Massachusetts Press, 2002), 166.

²⁰ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), 321.

²¹ *Ibid.*, 323.

interpretation was criticized by the emerging social history movement of the 1970s, which was motivated by the exploration of the historically ignored histories of women, minorities, and the poor: the politically and economically disenfranchised. The social history movement generally supported Beard's thesis. Nevertheless, Bernard Bailyn's ideological thesis not only shifted the scholarship of the history of the American founding for a generation, but students of Bailyn have championed his interpretation ever since.

One of Bailyn's most prominent students is Gordon S. Wood. His works include *The Creation of the American Republic: 1776 – 1787* (1969), *The Radicalism of the American Revolution* (1991), and *Empire of Liberty: A History of the Early Republic, 1789 – 1815* (2009). In addition to promoting the ideological thesis in his work, Wood criticized Beard's characterization of the economic circumstances of the 1783 – 1787 era. He charges that Beard downplayed the economic realities of the 1780s, implying treachery on the part of the Federalists which Wood utterly rejects. "Historians [such as Beard] who have minimized the criticalness of conditions in the 1780s have naturally tended to see the movement for the Constitution as something in the nature of a conspiracy by a few without widespread justification in the social and economic realities of the period."²² Thus, Wood is among historians who do not reject the economic thesis entirely, but have found Beard's analysis to be too deterministic.

Herbert J. Storing added to the criticism of Beard in the 1970s, although he too agreed economics played a role in the motivations of the Federalists and Antifederalists. Storing nevertheless found Beard's thesis ultimately too simplistic. Echoing Cecelia Kenyon's critiques, Storing noted that Beard's thesis "tends to see simple democratic agrarians among the

²² Gordon S. Wood, *The Creation of the American Republic, 1776 – 1787* (Chapel Hill: University of North Carolina Press, 1969), 394.

Antifederalists as it tends to see self-seeking commercial oligarchs among Federalists. There is some basis for this view, but the picture is thin and distorted.”²³

Primary source evidence supports the point that economics certainly were a concern across many of the colonies. This can be seen, for example, in an engraving by Amos Doolittle in 1787 during the ratification debate era. Doolittle lived in Connecticut and recognized the importance of strengthening the economy by means championed by the Federalists, including the implementation of uniform currency and the elimination of paper money. In Doolittle’s piece of political folk art, Connecticut is symbolized as a wagon loaded with debts and paper money. The weight of the debt has caused the wagon to sink into mud. The driver of the wagon warns, “Gentlemen this Machine is deep in the mire and you are divided as to its releaf.”²⁴

It should be noted that just as supporters of Beard have sought to clarify or add to his initial thesis—or point to elements of its limitations—some scholars who have been largely supportive of Bailyn’s ideological thesis have similarly highlighted certain weaknesses. This includes anarcho-capitalist economist, Murray Rothbard. In his article, “Modern Historians Confront the American Constitution,” Rothbard argues, “One problem with the generally correct Bailyn thesis is its exclusive emphasis on ideology, as it affected the minds and hearts of the Americans.”²⁵ Just as Beard could have benefited from giving some attention to ideology, Bailyn could have given at least a modicum of consideration to economic motivators.

²³ Herbert J. Storing, *What the Anti-Federalists Were FOR: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981), 4.

²⁴ Amos Doolittle. “The looking glass for 1787. A house divided against itself cannot stand. Mat. chap. 13th verse 26.” 1 print : engraving and rocker work, with watercolor on laid paper ; 28.7 x 36.7 cm. (image). New Haven, 1787. Library of Congress. <https://www.loc.gov/pictures/item/2008661778/>.

²⁵ Murray Rothbard, “Modern Historians Confront the American Revolution,” *Literature of Liberty: A Review of Liberal Thought* 1, no. 1 (January/March, 1978): mises.org/library/modern-historians-confront-american-revolution

The twenty-first century has seen more supporters of Bailyn's ideological thesis, including academics outside of the field of history. Randy Barnett, Professor of Law and Legal Theory at Georgetown University Law Center, in *Restoring the Lost Constitution* (2004), contends unwaveringly that the Natural Law principles of the framers were at the forefront of their motivations. Barnett maintains that the Constitution must be viewed in its proper ideological context, and that the Supreme Court has, throughout the nation's history, made a series of mistakes for not abiding by a "presumption of liberty"²⁶ precept. Barnett also examines the role of the Ninth Amendment in understanding the philosophy and motivations of the framers, which will be explored further in a later section of this work.

The dispute between the economic school and the ideological school has raged for the better part of a century, and there is no reason to believe it won't persist. This can be seen even in the reaction to an absence of debate. Pauline Maier, a student of Bernard Bailyn and author of *Ratification: The People Debate the Constitution, 1787 – 1788* (2010), gave no reference to Charles Beard in her index. As Tom Cutterham, postdoctoral researcher at University of Oxford, stated, this could have been taken that scholars no longer need to address Beard's enormous legacy. However, author Seth Cotlar of *Tom Paine's America: The Rise and Fall of Transatlantic Radicalism in the Early Republic* and Professor of History at Willamette University, called out Maier in a *William and Mary Quarterly* forum in 2013, and criticized her for the "absence of any direct engagement" with Beard's economic thesis. Thus, the debate rages on.²⁷

²⁶ Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004), 5.

²⁷ Tom Cutterham, "Charles Beard, Economic Interpretation, and History," *The Junto*, earlyamericanist.com/2013/02/12/Charles-beard-economic-interpretation-and-history.

The scope of this work will focus on aspects of constitutional history which neither Beard nor Bailyn reckoned with: the ratification debates and the Ninth Amendment. The aim is to explore the Natural Law tendencies of both Federalists and Antifederalists. Because of this, Bailyn, Wood, Maier, Barnett, and other views from an intellectual history perspective will be most represented. Nevertheless, while this writer sees problems with Beard's economic thesis, it is not to be construed as an avowal that it is wholly without merit. Indeed, an economic analysis of any historical era brings with it great value. However, as the scope of this work is to focus quite closely as to how Natural Law philosophy informed the creation of the Constitution and the Bill of Rights—and the Ninth Amendment most of all—it is understandable that any economic perspective, in and of itself, will be lacking. Though this is due to practical constraints, it is also due to a very real deficit the economic thesis carries, which is perhaps the largest criticism this writer can apply to Beard: the economic thesis of the Constitution separates economic motivation from Natural Law ideology. Simply put, economic motivators such as the protection of private property and the freedom to profit in an open marketplace are so intrinsically tied to Natural Law—just as individual rights of free speech, freedom of conscience, etc.—one cannot be so easily detached from the other. This is one of the dilemmas with the interpretation of economic determinism. It is inclined to cast economic interests in a vacuum; separate from political or philosophical beliefs. Human beings simply do not behave in such a way.

Economic motivators are very real, and should not be discounted or dismissed out of hand. However, proceeding as though economic impetus is not connected to broader beliefs in personal liberty, livelihood, individual happiness, and other elements of Natural Law philosophy is to ignore how deeply Natural Law theory influenced the lives of the framers. This work intends to show how that ideology informed the role of the Federalists in the making of the U.S.

Constitution, the establishment of a Bill of Rights by Antifederalists, and the ratification of the Ninth Amendment which was designed to appease both factions.

Natural Law

Defining terms is crucial when discussing intellectual history, and the history of American political thought is no exception. Thus, an exploration and explanation of Natural Law, as the framers understood it, is of utmost importance. To do so is, fortunately, somewhat simple. It can be seen clearly and powerfully in the words of the founding document of the United States: the Declaration of Independence. Thomas Jefferson stated emphatically the principles of Natural Law when he argued that “We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness.”²⁸ Thus, rights precede government. The words of Jefferson in the Declaration, modified slightly by others—including Benjamin Franklin and John Adams—asserts the essence of Natural Law. Rather than the legal positivist view that rights are established by statute, and therefore by government, Natural Law maintains that legitimate government neither creates, nor takes away, certain inherent rights.

The *Second Treatise on Government* by John Locke predates the Declaration of Independence by almost a century. The level of Locke’s influence upon the American founding has been debated by historians for decades, but his *Second Treatise* nonetheless states that all men are naturally in “a state of perfect freedom to order their actions, and to dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking

²⁸ Thomas Jefferson, *Declaration of Independence. For the Record: A Documentary History of America*, David E. Shi and Holly A Mayer, ed. (New York: Norton, 2013), 119.

leave or depending upon the will of any other man.”²⁹ However some may want to argue that Jefferson and others were not as influenced by Locke, as has been claimed, similar arguments for Natural Law can nevertheless be found in the writings of both men.

The reason why it is important to note the Natural Law influence upon the framers is precisely because the protection of individual rights can be put at risk through democratic means. Randy Barnett argues that “The Declaration stipulates that those who govern the people are supposed ‘to secure’ their preexisting rights, not impose the will of a majority of the people upon the minority...”³⁰ This stance was not unique to Jefferson. Quite the contrary. Only two months prior to the Declaration of Independence, George Mason wrote the Virginia Declaration of Rights in May of 1776. In it, Mason asserts that “all men are by nature equally free and independent, and have certain inherent rights.”³¹ Thus, Jefferson was not inventing a concept out of whole cloth. He was instead calling back to the principles of the Enlightenment, forwarded by Europeans like John Locke, and avowing the political zeitgeist of late eighteenth century North America by borrowing the language of contemporaries like George Mason. Alexander Hamilton asserted Natural Law in 1775, when he argued that the “Sacred Rights of mankind 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 Divinity itself, and can never be erased or obscured by mortal power.”³² Jefferson, Mason, and Hamilton were recognizing rights not as the acquiescence of monarchy or even representative parliament, but as a product of nature. Rights

²⁹ John Locke. *The Second Treatise on Civil Government. For the Record: A Documentary History of America*. David E. Shi and Holly A Mayer, ed. (New York: Norton, 2013), 84.

³⁰ Randy Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We The People*, (New York: Broadside Books/Harper Collins, 2016), 42.

³¹ George Mason, *Virginia Declaration of Rights*. May, 1776. Library of Congress. loc.gov/tr/program/bib/ourdocs/mason.html.

³² Alexander Hamilton, *The Papers of Alexander Hamilton*, Edited by Harold C. Syrett (New York and London: Columbia University Press, 1961—79), <http://press-pubs.uchicago.edu/founders/documents/v1ch3s5.html>.

are preexisting as they are innumerable and they cannot be justifiably surrendered. Just as the Virginia Declaration of Rights made explicit, “inalienable rights cannot be surrendered by compact.”³³ This worldview is essential to understanding the philosophical bedrock of the American founding.

It might be assumed then that the push for a new Constitution, to replace the Articles of Confederation, was perhaps a means of further democratizing the nation; distancing the proposed government from the country’s Natural Law tendencies at the time of the Revolution. Such an assumption would be a mistake. It was, after all, James Madison, the chief promoter of ratification—often referred to as the *father of the Constitution*—who wrote in 1787 that the nation may be growing too democratic. He put his concern about the ill impacts of too much democracy into an easy to understand analogy:

Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third. Will the latter be secure? The prudence of every man would shun the danger. The rules and forms of justice suppose and guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand?³⁴

Just as Natural Law continued to be championed by Federalists like Madison in 1787, Antifederalists similarly emphasized undemocratic principles in their own arguments against ratification. Mercy Otis Warren argued in 1788 that “All writers on government agree... that man is born free and possessed of certain unalienable rights.”³⁵ She also noted that the new

³³ George Mason, *Virginia Declaration of Rights*. May, 1776. Library of Congress. loc.gov/rr/program/bib/ourdocs/mason.html.

³⁴ James Madison, *Vices of the Political System of the United States*, April, 1787. National Archives. *Founders Online*. founders.archives.gov/documents/Madison/01-09-02-0187.

³⁵ Mercy Otis Warren, “Observations on the New Constitution, and on the Federal and State Conventions by a Columbian Patriot” (Pamphlet, 1788), *Pamphlets on the Constitution of the United States, Published during Its Discussion by the People 1787–1788*. ed. Paul Leicester Ford. Brooklyn: Paul Leicester Ford, 1888. <http://oll.libertyfund.org/titles/ford-pamphlets-on-the-constitution-of-the-united-states-1787-1788>.

Constitution provided no protections for persons regarding “rights of conscience or the liberty of the press.”³⁶ Thus, her arguments were not merely for the rights of a vocal majority, but the protection of natural rights of individuals.

This was not unique among Mercy Otis Warren’s arguments. For example, she also argued for a decidedly undemocratic policy: term limits. Term limits permeate political debate in the United States to the present day. Modern arguments against term limits have included their inherently undemocratic nature. It is precisely the “stop me before I vote again” nature of term limits that is often denounced by supporters of democratic processes.³⁷ Mercy Otis Warren, on the other hand, supported term limits and criticized the new Constitution for not including them.

There is no provision for a rotation, nor anything to prevent the perpetuity of office in the same hands for life; which by a little well timed bribery, will probably be done, to the exclusion of men of the best abilities from their share in the offices of government. By this neglect we lose the advantages of that check to the overbearing insolence of office, which by rendering him ineligible at certain periods, keeps the mind of man in equilibrio, and teaches him the feelings of the governed, and better qualifies him to govern in his turn.³⁸

Warren underscores the position that democratic limitations can, in fact, bolster and strengthen democracy. This paradoxical, yet functional assertion resides at the heart of Natural Law.

John Adams, as early as 1765, emphasized Natural Law when he maintained that rights are “antecedent to all earthly governments: rights cannot be repealed or restrained by human

³⁶ Warren, “Observations on the New Constitution, and on the Federal and State Conventions by a Columbian Patriot” (Pamphlet, 1788).

³⁷ This is precisely the argument made by Victor Kamber in his book, *Giving Up on Democracy: Why Term Limits are Bad for America* (Washington, D.C.: Regenery Publishing, 1995).

³⁸ Warren, “Observations on the New Constitution,” (Pamphlet, 1788).

laws; rights [are] derived from the great legislator of the universe.”³⁹ This demonstrates that Adams, himself an advocate for a new Constitution in the 1780s, subscribed to Natural Law ideology. Thus, both pro-ratification and anti-ratification factions expressed their arguments through a shared Natural Law worldview.

The Ratification Debates and Rational Fear of Democracy

The ratification of the U.S. Constitution was a second American revolution. Its existence is today taken for granted as though its success was inevitable, even though it endured serious and crucial challenges during the Civil War of the 1860s. Because of this common oversight, the bitter debates over the Constitution’s ratification have been largely forgotten.⁴⁰ The ratification debates are seldom discussed in public high school history courses, or college courses for that matter, and the Constitutional Convention is itself given short shrift much of the time. This is unfortunate, because this second American revolution—the ratification of the Constitution—was, as much if not more so than the first, a revolution of political philosophy. It was a conversation over local control versus national control, liberty versus security, and parity versus individualism. It was also, in a number of ways, the realization of the Natural Law tenets declared by Mason and Jefferson in 1776. In this regard, it was a revolution which, somewhat ironically, simply emphasized the Natural Law arguments already asserted in the Declaration of Independence, even as it sought to create a stronger national government.

³⁹ John Adams, “A Dissertation on the Canon and Feudal Law,” August 12, 1775, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Adams/06-01-02-0052-0004>.

⁴⁰ The ratification process of the proposed Constitution required state conventions to assemble, deliberate, and vote on the Constitution *as is*. Any alterations promised by Federalists had to be trusted in good faith that amendments would be added later. This included concerns over a lack of a Bill of Rights. Nine state conventions had to approve ratification of the Constitution for the creation of the new Federal Government to become legally legitimate. Any state which voted against ratification would not be a member state of the new Constitutional government. Eventually, all thirteen states voted in favor of ratification.

The Natural Law view that emerged during the revolution was influenced by the Enlightenment and informed by the Glorious Revolution of England in 1688. England's revolution in the late seventeenth century established the primacy of parliament over that of its king. Modern interpreters may have trouble seeing the Glorious Revolution as a victory for democracy, as the House of Lords and House of Commons were made up of the most privileged, land-holding nobles and men of wealth. Nevertheless, it was an historic step forward in establishing a foothold for democratic structures in the form of representative government.

A distinction, however, between the English idea of *the people* and the American concept developed in the new United States in the 1770s and 1780s. Arguably informed by the bitter distrust of government which contributed to American independence, a different idea of *the people* came into being: the people and their government—i.e., their representatives, were not one and the same. Whereas English Parliament was largely immune from limits on power, Americans saw the same threat of abuse of authority in representatives as they did any king. Gordon Wood has noted, “The English Bill of Rights was designed to protect the subjects not from the power of Parliament but from the power of the king... Parliament was the highest court in the land and was therefore the bulwark and guardian of the people's rights and liberties; there was no point in limiting it.”⁴¹ Americans had begun to shed this view during the revolutionary and post-revolutionary eras. A long history of self-government in the American colonies had also instilled a healthy distrust of power.

This misgiving of authority is important to note, because it was a symptom of a largely new American creed: suspicion of too much political power from any source—including the

⁴¹ Gordon S. Wood, “The Origins of Vested Rights in the Early Republic,” *Virginia Law Review* 8, no. 7 (October 1999): 1425, <http://www.jstor.org/stable/1073871>.

people themselves. This can be a difficult position for some to comprehend, because it is counter to modern prevailing thought which enshrines popular will as the legitimate source of authority. Many founders, however—both Federalist and Antifederalist—held suspicion of mob rule to be as critical as suspicion of monarchy or oligarchy. American Natural Law was a decisive philosophical break from English representative democracy, which held popular will as the source of governmental legitimacy—albeit couched in a landed aristocracy. Wood acknowledges, “It is important to note that American rights are not merely the rights of the people against the power of government; they are the rights of individuals against the power of the people themselves.”⁴² This suspicion of representatives and of popular will informed much of the arguments between Federalists and Antifederalists during the ratification debates of 1788. Patrick Henry, master rhetorician and one of the major icons of the American Revolution, stated “the tyranny of Philadelphia [the federal Convention] may be like the tyranny of George III.”⁴³ To some, power—no matter the source—was a threat to individual rights.

The Antifederalists, by opposing ratification, claimed to be holding true to the essence of the patriot cause. They saw themselves as advocates of the principles of American independence and viewed the agenda of Alexander Hamilton, James Madison, and other supporters of the Constitution as betrayers of that cause. “[I]n the context of the great mass of ratification documents, the antifederalists emerge as the ones who kept the faith—the ancient faith so fundamental a part of the ideological origins of the Revolution, from which, they argued, the Constitution departed.”⁴⁴

⁴² Gordon S. Wood, “The Origins of Vested Rights in the Early Republic,” 1422.

⁴³ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), 338.

⁴⁴ *Ibid.*, 331.

Antifederalists concerns over the proposed new federal government, were not uniform. Some merely wanted to see a Bill of Rights which ensured individual rights and the security of certain state powers, while others were vehemently opposed to ratification under any circumstances. Their motivations were as varied as their objections, and while many would make similar arguments, there was a chasm between those who aimed to see inclusion of a Bill of Rights and those who wanted no part of the Constitution whatsoever. As Pauline Maier has stated, “the critics of the Constitution were no one thing.”⁴⁵

Among the most prominent of the Antifederalists was George Clinton, governor of New York. Clinton’s reasons for objecting to the new Constitution may have been the least ideological. Clinton was a powerful and successful governor. He wielded enormous executive power and made his success without the help of the federal government since the end of the Revolutionary War. Maier observes, “New York’s economy pulled out of the depression of the mid-1780s and began to prosper—with no help from Congress... That the governor would resist giving Congress a right to tax imports, which was at the time an exclusive right of New York, was not hard to imagine.”⁴⁶ The struggle for control between two prominent New Yorkers, Antifederalist George Clinton and champion of the proposed Constitution Alexander Hamilton, illustrates that the debates over ratification had enormous political, as well as, economic ramifications. It is here, when examining the economic and political motivations of those opposed to ratification, that the Beardian thesis becomes most credible. Maier maintains that “Hamilton and his allies wanted to create a stronger national government in part to counter the power of states like Clinton’s New York.”⁴⁷ In this regard, one can see the concerns Federalists

⁴⁵ Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon and Schuster, 2010), 93.

⁴⁶Maier, *Ratification*, 324.

⁴⁷*Ibid.*, 325.

like Hamilton and Madison held toward state officials in much the same way Antifederalists harbored suspicion toward a too-powerful national government. Additionally, James Madison had proposed during the Convention at Philadelphia that the new national government should have the power to veto state laws. This was interpreted as overreach and roundly rejected. Most at the convention regarded the proposal as an attempt to encroach upon the legitimate powers of the individual state governments.

Perhaps the most ardent Antifederalist was Mercy Otis Warren. Warren is a particularly important figure in the history of the American Revolution. As the wife of James Warren and sister of James Otis, Mercy Otis Warren found herself in the middle of patriotic rebellion in Massachusetts in the 1760s and 1770s. Her home was an important station of communication, helping to facilitate the Committees of Correspondence—the precursor to the Continental Congress—during the beginnings of the Revolution. Her specific contribution was also unique. She was a gifted playwright and essayist who wrote plays critical of monarchy. Her writings are among the first and most influential in overlapping the patriot cause with sympathetic artistic sentiment. Her work influenced support for independence. In her later life, she wrote the first multi-volume history of the American Revolution.

Warren viewed the proposed Constitution as antithetical to the values of the Revolution. She was not unique in this matter, as Antifederalists often saw themselves as guardians of the cause. Bernard Bailyn observes, “The identity between antifederalist thought and that of the most fervent ideologists of ’76 is at times astonishing.”⁴⁸ Warren did not see the Constitution as something to be fixed or improved upon. Writing under the pseudonym, “A Columbian

⁴⁸ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), 331.

Patriot,”⁴⁹ Mercy Otis Warren railed against the aims of the Federalists. “[L]et the sublime characters, the philosophic lovers of freedom who have wept over [freedom’s] exit, retire to the calm shades of contemplation there... [to] look with pity on the inconsistency of human nature, the revolutions of states, the rise of kingdoms, and the fall of empires.’ Warren’s tract stands as an impassioned plea that Americans reject the proposed federal government.”⁵⁰ If a change of government at the federal level were to transpire, Warren wanted it rebuilt from the foundation up. She saw no hope in the proposed Constitution, nor improving upon it. “[I]n short, she wanted the convention to start over from scratch, not, like Richard Henry Lee and many [other Antifederalists], to repair the Constitution’s most egregious shortcomings.”⁵¹

Antifederalists stood on a spectrum of opposition, from political differences to apprehensions regarding the erosion of state/local sovereignty. These concerns were similar, but not always the same. Warren’s concerns were principled and rooted in civic virtue. Cheryl Z. Oreovicz observes, “... the vision [Warren] articulates encompasses what historians refer to as ‘the republican synthesis,’ the commitment of citizens to both public and private virtue in their own lives so that the commonwealth may flourish.”⁵² Civic virtue, and its call for private integrity and public duty, informed much of the republicanism of the era. In contrast, George Clinton’s incentives were arguably self-serving and motivated by a need to hoard control at the state government level—and were not necessarily republican or virtuous in any meaningful

⁴⁹ The writings of “A Columbian Patriot” were long thought to be the work of Elbridge Gerry. It was only upon the discovery of original drafts in the twentieth century that Mercy Otis Warren became known as the legitimate author.

⁵⁰ Cheryl Z. Oreovicz, “Mercy Otis Warren (1728-1814),” *Legacy* 13, no. 1 (1996): 60, <http://www.jstor.org/stable/25679185>.

⁵¹ Maier, *Ratification*, 335.

⁵² Oreovicz, “Mercy Otis Warren (1728-1814),” 55.

sense. It is crucial to consider these distinctions between various Antifederalist arguments and motivations for the ratification debates to be properly understood.

George Mason may well best represent the combination between the civic principles of Warren and Clinton's wishes to retain state power. As previously noted, George Mason had already been influential upon the republic with his writing of the *Virginia Declaration of Rights* in 1776. He was a Virginia delegate to the Constitutional Convention and refused to sign the document due to its lack of a Bill of Rights. Mason feared the supremacy of the proposed Constitution over the laws of the states, combined with its lack of enumerated guaranteed rights of citizens, would circumvent both state power and individual rights. Further, "Mason feared that Congress would abuse the 'necessary and proper' clause... to extend its authority so far as to threaten the powers retained by the states and rights retained by the people."⁵³ A number of individual state constitutions included a Bill of Rights, or some assertion of rights of the people. Mason understandably argued that without a federal Bill of Rights, both the Necessary and Proper clause and the Supremacy Clause of the Constitution could undermine individual state protections of such rights. He argued that "the laws of the general Government being paramount to the laws and Constitution of the several States, the Declaration of Rights in the separate States are no Security."⁵⁴ Considering these factors, he felt obliged to reject the new model of government. Pauline Maier affirms, "Without the prospect of a second convention, [Mason] declared, he would neither sign the document nor support it in Virginia."⁵⁵ Mason's determined argument for the necessity of a Bill of Rights was perhaps the most emblematic of Antifederalist

⁵³ Maier, *Ratification*, 46.

⁵⁴ George Mason, "Objections to the Constitution of Government Formed by the Convention." ca. September 17, 1787. Manuscript document. *George Washington Papers*, Manuscript Division, Library of Congress. <http://edu.lva.virginia.gov/docs/MasonsObjections.pdf>.

⁵⁵ Maier, *Ratification*, 49.

sentiment. He was willing to accept the new federal government, but not without a guaranteed protection of rights, and his concern was with preserving the principle of Natural Law.

Among the most prominent of the Antifederalists were the writings of “Centinel,” “Cato,” and “Brutus;” anonymous writers who fervently argued against ratification. The identity of these figures has been debated for centuries. Centinel is generally thought to have been Samuel Bryan of Pennsylvania, or perhaps his father George. Most historians believe Cato to be the aforementioned George Clinton. Brutus is generally thought to have been Robert Yates, who had been a delegate from New York to the Constitutional Convention. Yates left in disgust prematurely because the Convention had strayed so far from its allegedly intended agenda: to create improvements to the Articles of Confederation. Once Yates saw that the aims of Alexander Hamilton and James Madison were to throw the Articles out and start anew, he left.

Some of the pseudonymed Antifederalists might have been more than a single person, much like “Publius” in *The Federalist* had been three different writers: Alexander Hamilton, James Madison, and John Jay. Although there were numerous Antifederalist writings, including the aforementioned writings of “A Columbian Patriot”/Mercy Otis Warren, a need to limit the focus of these is necessary for the practical purposes of this work. It should not, therefore, be taken that these writings—or these authors—are exhaustive.

Antifederalist arguments brought the need for enumerated, protected rights to the forefront. Centinel, in his second essay, argued for the protection of a free press. “As long as the liberty of the press continues unviolated, and the people have the right of expressing and publishing their sentiments upon every public measure, it is next to impossible to enslave a free

nation.”⁵⁶ A free press, able to publish even the most unpopular and antiauthoritarian views, secures liberty for all and keeps the people’s representatives in check. It is both a means of protecting democratic sentiment, but also a protection for those who hold unpopular opinions. Centinel also defended the right to worship according to one’s individual conscience. The protection of such right, it was stated, required a specified guarantee at the federal level. “[T]here is no declaration [in the Constitution], that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding...”⁵⁷ These concerns sustained the right of individual speech and individual worship against the prerogatives of the state. Centinel similarly stated the concerns of George Mason, “[T]he security of the personal rights of the people by the state constitutions is superseded and destroyed, hence results the necessity of such security being provided for by a bill of rights to be inserted in the plan of federal government.”⁵⁸

Cato also stated objections similar to those of George Mason. Mason stated that “there never was a government over a very extensive country without destroying the liberties of the people...”⁵⁹ Cato, like Mason, summoned the arguments of French Enlightenment philosopher Montesquieu. “Montesquieu observes, that ‘the course of government is attended with an insensible descent to evil, and there is no reascending to good without very great efforts.’ The plain inference from this doctrine is, that rulers in all governments will erect an interest separate from the ruled, which will have a tendency to enslave them.”⁶⁰ Again, a distrust of government—

⁵⁶ George Bryan, “Centinel II,” Online Text. Retrieved from the Library of Congress, <https://www.loc.gov/item/90898133/>.

⁵⁷ Bryan, “Centinel II.”

⁵⁸ *Ibid.*

⁵⁹ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), 349.

⁶⁰ Cato, “Essay VII (1788),” *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York: Signet Classics, 1986), 344.

including representative government, is at issue. While some today may want to see such apprehension as paranoiac, it was a reasonable suspicion by those who had only recently thrown off the shackles of monarchy.⁶¹

The figure who most artfully and directly combated the ratification of the Constitution and the arguments for its support by the Federalists was Brutus. Named after one of the prime conspirators who assassinated Caesar to save the Roman republic, the Antifederalist Brutus was an impressive intellectual force to friend and foe alike. Pauline Maier observes, “Both ‘Cato’ and ‘Centinel’ expressed admiration for [Brutus’s] ‘masterly’ arguments. Even *The Federalist*... recognized ‘Brutus’ as a formidable opponent by answering him, though without acknowledging him by name.”⁶²

It is indeed the writings of Brutus which may ring most similar to that of classical liberals and libertarians today. His predictions appear outright prophetic when he writes, in essay number XII, that the Constitution’s preamble would “authorise the Congress to do any thing which in their judgment will tend to provide for the general welfare, and this amounts to the same thing as general and unlimited powers of legislation in all cases.”⁶³ Brutus’s misgivings here appear to hinge upon the potential of unfettered federal power—regardless of any possible popular sentiment.

Supporters of the Constitution similarly made many of their arguments by employing antidemocratic positions. Many of the essays known as *The Federalist*, written by Alexander

⁶¹ Cato was, like Brutus, a reference to an historical adversary of Julius Caesar. It was also, however, a reference to *Cato’s Letters*, a series of essays by British writers John Trenchard and Thomas Gordon, published in the 1720s. The essays’ warnings against tyranny were influential upon American political thought in the eighteenth century.

⁶² Maier, *Ratification*, 83.

⁶³ Brutus, “Essay XII (1788),” *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham, (New York: Signet Classics, 1986), 319.

Hamilton, James Madison, and John Jay, were explicitly critical of democracy. Federalist no. 10, written by Madison, states that “democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”⁶⁴

Similarly, *The Federalist* asserts the need for liberal republican government precisely to ward off those who may take office and attempt to bend power to themselves for their own selfish aims. “Enlightened statesmen will not always be at the helm.”⁶⁵ Madison’s defense of longer terms for Senators and the political dominance they would hold, versus that of the House of Representatives, in their advise and consent role and ratification of treaties was thus, “assemblies yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions... a body which is to correct this infirmity ought itself to be free from it...”⁶⁶ The impulse of sudden passions from the electorate or from leadership could improperly sway the direction of Congress, and Federalists wanted to assure such fleeting passions were kept in check. This was also why the Senate was to be one step removed from the election of the people and were to be instead representatives of the individual states. Professor of Law, Frank B. Cross, acknowledges, “By being less immediately majoritarian, the Senate would foster stability in government.”⁶⁷ This check the Senate was designed to have against the impulse of sudden and violent passions was ostensibly removed with the Seventeenth Amendment in 1913 through the direct election of Senators.

⁶⁴ Publius, “Federalist No. 10 (1788),” *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 49.

⁶⁵ *Ibid.*, 48.

⁶⁶ Publius, “Federalist No. 62 (1788),” *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 347.

⁶⁷ Frank B. Cross, “Institutions and Enforcement of the Bill of Rights,” *Cornell Law Review* 85, no. 6 (September 2000): 1560. <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2821&context=clr>.

Safeguard Against Democracy: Independent Courts

Perhaps the most crucial undemocratic function of the U.S. government is the independence of the courts. The independence of the judiciary was not new when the Constitution was proposed. As with much of the qualities of the proposed federal government, an independent judiciary was a key element of state governments, and had been championed by figures such as John Adams from the earliest days of the American Revolution. The undemocratic, indeed antidemocratic nature of an independent judiciary—especially at the level of the Supreme Court—was another check against the momentary appetites and legislative whims of the people and their representatives.

Brutus, in essay XI, shared the same fear of the Supreme Court as he did of the national legislature. “They will give the sense of every article of the constitution... in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.”⁶⁸ It is worth noting that Brutus condemns the new constitution for the potential power of its democratically elected body, the Congress, as well as its undemocratic body, the judiciary. However, history has proven Brutus to some degree correct when he asserts in essay XI that “the judicial power of the United States, will lean strongly in favour of the general government...”⁶⁹

Nevertheless, the alternative would be for courts to be beholden to public opinion and/or legislative rule. This has been referred to in the modern era as *judicial deference* or *judicial restraint*. The opposite of which, so-called *judicial activism*, is seen in the present age as

⁶⁸ Brutus, “Essay XI (1788),” *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham, (New York: Signet Classics, 1986), 311-312.

⁶⁹ Brutus, “Essay XI (1788),” *The Anti-Federalist Papers*, 312.

verboten. The irony of Brutus's criticism of the independent judiciary, of course, is that it is the very independence of the courts which secure the liberties Brutus and other Antifederalists were concerned about. When John Marshall firmly established the federal precedent of judicial review in the *Marbury v. Madison* decision in 1803, he was properly asserting the co-equal power of the Supreme Court to judge the constitutionality of federal statutes.⁷⁰ Regardless of the protests by figures like Thomas Jefferson that Marshall read into the Constitution a power the Supreme Court was never explicitly given—without such power, the Court would neither be co-equal, nor independent. In the twentieth century, Justice Robert H. Jackson commented on this principle in *West Virginia State Board of Education v. Barnette* (1943). “Justice Jackson provided a classic explication of the minoritarian argument for judicial review... ‘the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials...’”⁷¹

It is indeed the brilliance of judicial independence at the highest level of the federal government, an inherently undemocratic system, which helps to preserve individual liberties. Francis Edward Devine observes, “Judicial review, in itself, is postulated on the possibility of overriding democratically elected legislatures in the interest of indefeasible rights.”⁷² Such assertions have grown unpopular in academic circles in recent decades. Whether this is due to prevailing political ideology in academe or an assumed elitism implied in undemocratic methods,

⁷⁰ The Supreme Court's power of judicial review is not explicitly granted in the Constitution. Thus, it has been criticized by scholars and politicians across the political spectrum. Yet, it remains that individual rights may have been endangered further had federal judicial review never been asserted by Chief Justice John Marshall in the *Marbury* case. Furthermore, while not spelled out in the Constitution, a tradition of judicial review certainly existed in the young nation prior to 1803. Judicial review has proven to be a powerful check against legislative and executive overreach, despite the controversy over its legitimacy.

⁷¹ Frank B. Cross, “Institutions and Enforcement of the Bill of Rights,” *Cornell Law Review* 85, no. 6 (September 2000): 1551. <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2821&context=clr>.

⁷² Francis Edward Devine, “Absolute Democracy or Indefeasible Right: Hobbes Versus Locke,” *The Journal of Politics* 37, no. 3 (1975): 737, <http://www.jstor.org/stable/2129323>.

is not entirely clear. What is clear, however, is that while the democratic elements of the United States system of government have been applauded; indeed, celebrated—its undemocratic safeguards have been ignored or deliberately avoided. This is despite the civil liberties which have been protected and even expanded due to their presence. This is the irony of the American republican system: undemocratic safeguards have strengthened American democracy. By empowering individual rights, the rights of all are reinforced. The alternative, pure democracy—something occasionally advocated for in the modern age, would instead be indebted to the shifting biases of a sizable tyranny. As Devine acknowledges, “If the majority were to rule, rights viewed as fundamental in the American tradition would be, at least at times, abolished.”⁷³

The Bill of Rights and the Ninth Amendment

In the late 1780s, arguments against a Bill of Rights were properly reasoned in Natural Law just as arguments for a Bill of Rights had been. An exploration of this will be discussed below. What must first be understood beforehand, however, is that—to some reasonable degree—the Bill of Rights is, by design, a list—in part—of undemocratic principles set out to protect individuals. “The supremacy of the people does not secure the rights of individuals and minorities against the majority... a bill of rights in a republican form is to serve as a check against majority faction.”⁷⁴ Why then, some may ask, would anyone argue against a Bill of Rights?

Federalist 84 states, “bills of rights... are not only unnecessary in the proposed Constitution, but would be dangerous... For why declare that things shall not be done [by

⁷³ Devine, "Absolute Democracy or Indefeasible Right: Hobbes Versus Locke," 738.

⁷⁴ Storing, *What the Anti-Federalists Were FOR*, 68.

Congress] which there is no power to do?”⁷⁵ Federalist James Wilson made the same argument at the Pennsylvania Ratifying Convention on November 28th, 1787. “If we attempt an enumeration [of rights], everything that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.”⁷⁶ This is, at the very least, sound argumentation, and certainly underscores a belief in Natural Law theory. It is an understandable and reasonable claim that the listing of rights could set a negative precedent.

James Madison soon enough proposed a list of enumerated rights to be added to the Constitution during the earliest days of the new federal government. Madison, himself, had not seen a need for a bill of rights, but his friend Thomas Jefferson argued in a letter to Madison in late 1787 that “a bill of rights is what the people are entitled to against every government on earth, general or particular and what no just government should refuse, or rest on inference.”⁷⁷ Jefferson’s reasoning resonated and convinced Madison to champion a bill of rights during the first session of the newly-established House of Representatives in 1789. Against the protests of other Federalists, Madison sought the addition of a Bill of Rights to appease the concerns Antifederalists had made during debates over ratification. During his floor speech, Madison stated:

It has been objected... that, by enumerating particular exceptions to the grant of [federal] power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure.

⁷⁵ Publius, “Federalist No. 84,” 1788, *The Federalist Papers*, edited by Clinton Rossiter. 478-488 (New York: Mentor, 1961), 476.

⁷⁶ James Wilson, “Pennsylvania Ratifying Convention Speech, 28, November 1787,” *Founders Documents*. University of Chicago. press-pubs.uchicago.edu/founders/documents/v1ch14s27.html.

⁷⁷ Thomas Jefferson, Letter to James Madison from Thomas Jefferson, December 20, 1787, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-10-02-0210>.

This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.⁷⁸

As a result, among the amendments Madison proposed was the prototype which would, with some separation and modification, become the Ninth and Tenth Amendments of the United States Constitution. The proposal tied together the issue of retained rights and the powers left to the states and the people. Eventually, the matter of rights retained by the people and powers reserved to the states were unglued and made into two separate amendments. In this regard, the Ninth and Tenth Amendments are unique, as they are the only ones that were the result of the ratification debates specifically. Unlike the first eight amendments that assert explicit individual rights, the Ninth and Tenth Amendments were informed by the concerns espoused by Federalists as well as Antifederalists. The Ninth Amendment, however, is exceptional because it addresses the Natural Law assertion of unenumerated rights specifically. The Ninth Amendment states that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁷⁹ Ratified in 1791 as part of the first ten amendments, known as the Bill of Rights, it makes clear the Natural Law premise of the framers.

Ninth Amendment Scholarship and Legal Precedent

Adding to the Ninth Amendment’s unique nature and legacy is the long state of dormancy in which it rested for well over a century and a half. Though the amendment was ratified in 1791, it would not receive much study by legal theorists, political scientists, or historians until the twentieth century. In the 1920s, political scientist and Princeton professor,

⁷⁸ James Madison, “Amendments to the Constitution,” June 8, 1789, *Founders Online*, National Archives, <http://founders.archives.gov/documents/Madison/01-12-02-0126>.

⁷⁹ “Ninth Amendment (ratified 1791),” U.S. Constitution, *The Federalist Papers*, edited by Clinton Rossiter (New York: Mentor, 1961), 523.

Edward S. Corwin, discussed the Ninth Amendment and its relation to Natural Law in some of his work. Corwin deconstructed the nature of the nation's devotion to the Constitution and found the legitimacy of it not in the legal positivism emerging in twentieth century political thought, but in the Natural Law enlightenment values underpinning the nation's founding. Corwin stated that "the legality of the Constitution, its supremacy, and its claim to be worshipped, alike find common standing ground on the belief in a law superior to the will of human governors."⁸⁰

Despite Corwin's scholarship, no monograph dedicated to the exclusive study of the Ninth Amendment was published until 1955, by Bennet B. Patterson. The title of Patterson's book alone was quite revealing: *The Forgotten Ninth Amendment*. In it, Patterson asserted the amendment's relationship to individual rights against the federal government as well as the states. He argued that a "careful analysis of the Ninth Amendment will reveal that the Ninth Amendment cannot be classified as a restrictive clause at all, because it is on the contrary a great declaration of the rights of natural endowment."⁸¹ This view is alternately challenged and championed by scholars in the twenty-first century, as is discussed below. Patterson, however, made clear his view that any interpretation that the Ninth Amendment merely left rights retained to the separate states, and not individuals, was wholly misguided. Such misunderstanding undermines the Natural Law tenet the amendment was designed to secure.

We have a choice of the theory of liberty and rights by natural endowment as announced in the Declaration of Independence, and again in the Ninth Amendment, and in the other liberty documents, or we have the choice of the theory that all of our inherent and

⁸⁰ Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," originally published in 1928, reprinted in *The Rights Retained by the People* Vol. 1, Randy Barnett, ed. (Fairfax: George Mason University Press, 1989), 71.

⁸¹ Bennet B. Patterson, *The Forgotten Ninth Amendment*, originally published in 1955, reprinted excerpt from *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* Vol. 1 (Fairfax: George Mason University Press, 1989), 110.

fundamental rights were surrendered to State governments and that the governments of the States are the creators of our rights and liberties.⁸²

Patterson articulates that any presumption that the Ninth Amendment's reference to retained rights somehow alludes to state powers is disingenuous. Such a claim undermines the Natural Law concerns shared by Federalists and Antifederalists of the 1780s. This flawed claim, further discussed below, is also absurd because the Ninth Amendment addresses rights retained by the people while the Tenth Amendment addresses powers reserved to the states. The *rights retained connects to state powers* thesis is thus not worthy of any serious consideration. This, however, has not stopped some scholars in the twenty-first century from reclaiming and re-asserting new versions of the argument, as will be discussed momentarily. Patterson, however, in 1955, was a voice in the wilderness regarding Ninth Amendment scholarship, and similar scholarship would not achieve substantial significance for several more years.

The Ninth Amendment was similarly avoided in the world of American jurisprudence until the second half of the twentieth century. Suddenly, however, in the Supreme Court case of *Griswold v. Connecticut* (1965), which concerned the use of birth control among married couples, the court's majority ruled that a right of privacy emanated from certain constitutional protections. More explicitly, in a concurring opinion, Justice Arnold Goldberg cited the Ninth Amendment in his support of the court's ruling.⁸³ One hundred and seventy-four years after it was ratified, the Ninth Amendment and its assertion of Natural Law was proclaimed by the Supreme Court. The ramifications were enormous on subsequent cases. For example, a turning point was made in *Griswold* which set the precedence for federal abortion rights in the *Roe v.*

⁸² Patterson, *The Forgotten Ninth Amendment*, 114.

⁸³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Wade (1973) decision, as well as free speech/free press issues in *Richmond Newspapers, Inc. v. Virginia* (1980).

The Ninth Amendment became a matter of discussion again in the 1980s during the confirmation hearings of Robert Bork, who was nominated to the Supreme Court by President Ronald Reagan in 1987. During the hearings, Bork was asked for his views concerning the Ninth Amendment. His negative view toward the Ninth Amendment providing legal protection for unenumerated rights was among the factors which sunk his nomination. Bork answered, “I do not think you can use the Ninth Amendment unless you know something of what it means... if you had an amendment that says ‘congress shall make no’ and then there is an ink blot and you cannot read the rest of it... I do not think the court can make up what might be under the ink blot if you cannot read it.”⁸⁴ Bork’s nomination was an utter failure, and his dismissiveness toward the Ninth Amendment—and thus, toward Natural Law—played no small part in his undoing. As Stephen Macedo stated just a year later, in 1988, “Judge Bork’s unwillingness to regard the ninth amendment as anything more than an unintelligible aberration seriously hurt his case in the Senate Judiciary Committee.”⁸⁵ The Ninth Amendment thus had gone from something ignored in American jurisprudence for the better part of two centuries, to a litmus test for Supreme Court confirmation. This trend did not continue, however, and the vocal and overt reverence toward the Ninth Amendment seen in the Supreme Court in the 1960s and 1970s, and the Senate Judiciary Committee in 1987, soon disappeared from sight as quickly as it had emerged in 1965. Though

⁸⁴ Robert Bork, *Supreme Court Nomination Hearings Before the Senate Judiciary Committee*, September 18, 1987, excerpts reprinted in *Rights Retained by the People* Vol. 2, Randy Barnett, ed. (Fairfax: George Mason University Press, 1993), 1.

⁸⁵ Stephen Macedo, “Reasons, Rhetoric, and the Ninth Amendment,” reprinted in *The Rights Retained by the People* Vol. 2, Randy Barnett, ed. (Fairfax: George Mason University Press, 1993), 151.

the Ninth Amendment has flown under the radar in the decades since, it is not truly gone. Since *Griswold*, the Ninth Amendment has been asserted by the court over a thousand times.⁸⁶

The debate over the Ninth Amendment's meaning continued into the twenty-first century, with some scholars resurrecting the argument that the amendment doesn't protect individual unenumerated rights. Kurt T. Lash, for example, Professor of Law at University of Richmond, has proclaimed, "Instead of being read as a source of individual rights, courts developed the Ninth [Amendment] as a tool for preserving state autonomy."⁸⁷ There are some serious problems with this thesis, however, and Lash has trouble proving his claim. Furthermore, such an interpretation renders the Tenth Amendment moot, as it addresses precisely the issue Lash purports the Ninth does. The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁸⁸ Also, Lash misses entirely the historical context of the framers' devotion to Natural Law and suspicion of overtly democratic systems. Randy Barnett, a critic of Lash's collective-rights/state powers thesis, maintains that opposition "to majoritarianism, also derisively called 'democracy' in this [founding] period, in the form of legislative supremacy was repeatedly voiced at the Constitutional Convention."⁸⁹ Barnett adds that it is not at all surprising, considering the framers' fear of majoritarian power, legislative or otherwise, that the Bill of Rights took on "a decidedly individualist cast."⁹⁰ Barnett appears to understand the Natural Law

⁸⁶ Randy Barnett, *The Rights Retained by the People* Vol. 1 (Fairfax: George Mason University Press, 1989), vii.

⁸⁷ Kurt T. Lash, "The Lost Jurisprudence of the Ninth Amendment," *Texas Law Review* 83, no. 3 (February 2005): 5, http://constitution.org/9ll/schol/kurt_lash_juris_9th.pdf.

⁸⁸ "Tenth Amendment (ratified 1791)," U.S. Constitution, *The Federalist Papers*, edited by Clinton Rossiter (New York: Mentor, 1961), 524.

⁸⁹ Randy Barnett, "Kurt Lash's Majoritarian Difficulty: A Response to 'A Textual-Historical Theory of the Ninth Amendment.'" *Stanford Law Review* 60, no. 4 (February 2005): 943, <http://www.jstor.org/stable/40040404>.

⁹⁰ *Ibid.*, 944.

ideology the framers, both Federalist and Antifederalist, were appealing to when they designed the Ninth Amendment.

Thus, this is why it can be said that the Ninth Amendment best represents Natural Law synthesis between the Federalists and the Antifederalists. A presumption of preexisting rights on both sides of the ratification divide informed both the arguments for a Bill of Rights and for why such a listing of rights could be potentially hazardous. The Ninth Amendment addresses both concerns implicitly by nodding to the Natural Law creed of both factions. As stated previously, when James Madison wrote the Ninth Amendment, he himself had gone through a transformation. As a Federalist, he had himself argued against the inclusion of a Bill of Rights. However, he came to terms with the fact that the legitimacy of the Constitution and the new federal government could be at stake without a Bill of Rights. Madison also received much the same argument of the need for such protections by his mentor, Thomas Jefferson. Thus, the Natural Law argument for a Bill of Rights combined with the Natural Law argument against it, synthesizing in the Ninth Amendment of the U.S. Constitution. Barnett notes that the “Ninth Amendment was supposed to ensure that the eight [preceding] amendments protecting rights were not exclusive.”⁹¹ By folding the Ninth Amendment into the other protected rights enumerated, Madison not only satisfied Antifederalist concerns over a lack of a Bill of Rights, but he also addressed Federalist concerns about including one. This synthesis, through the Ninth Amendment, legitimized both the U.S. Constitution and the Bill of Rights on Natural Law grounds.

Conclusion

⁹¹ Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004), 172.

The ideological lesson of the American founding is seen in the writings of Federalists and Antifederalists alike. They never rejected democratic values outright or abandoned the principle that legitimate government derives from the consent of the governed. Yet, they were able to improve upon this notion by asserting that democracy is, in and of itself—and in its purest form, also a tyranny. Both those who created the Constitution and those who demanded a Bill of Rights did so by resolutely defending the rights of the individual. “Hence the Constitution and especially the Bill of Rights place [rights] beyond the reach of the majority.”⁹² Doing so, they established a more robust democracy by affirming Natural Law values.

Critics of the Natural Law thesis may be prone to criticize the founders for lacking modern sensibilities of racial and gender equality. Some of the framers, including Jefferson, Mason, and Madison, can be derided as ideological hypocrites for asserting the equality of all men while participating in the institution of slavery. Such criticisms are wholly acceptable and warranted. Criticisms, however, become self-defeating when they then attempt to attack Natural Law for this moral shortcoming. It is an illogical and absurd notion. For the fact is that such shortcomings show a failure in the consistent execution of Natural Law practice and does not invalidate Natural Law itself. It is a mistake to confuse the message with the messengers.

Natural Law informed the creation of the United States Constitution as well as the Bill of Rights, and the document’s most explicit expression of Natural Law theory is the Ninth Amendment. The Ninth Amendment’s unique place as an enumerated right which protects unenumerated rights is ironic as it is exceptional. The fact that the amendment was not utilized

⁹² Francis Edward Devine, "Absolute Democracy or Indefeasible Right: Hobbes Versus Locke," *The Journal of Politics* 37, no. 3 (1975): 737-738, <http://www.jstor.org/stable/2129323>.

explicitly in American law until the second half of the twentieth century further reveals its unique position in American constitutional law and academic scholarship.

To underscore the paradox of a strong democracy built upon the protection of individual liberty, the words of John Adams again become appropriate. John Adams was, after all, a strong supporter for the rule of law as well as independence of the courts. Yet, it was John Adams, the man who had likened democracy to the tyrannical roasting of people alive, who pointed to the essence of the intertwined nature of American liberal democracy; the individual and the collective. As Bernard Bailyn acknowledges, “For John Adams an essential point was that the commons, or the democracy, of society shared too in the execution of laws [with the elites] through the institution of trial by jury...”⁹³ Adams recognized, despite his histrionic rhetoric about democracy, that it was the democratic participation of citizens in the jury, as well as the independence of the courts, which strengthened society and established justice. It is the marriage of the two that makes the crucial difference. The jury process democratizes the justice system while the independence of the courts shield it, to some extent at least in its design, from political agendas; agendas fed by constituencies and voters which are then channeled through elected representatives. There is, then, a dichotomy that exists between the democratic process of the will of the people in trial courts and the protection of minority interests in appellate courts—most specifically the Supreme Court—which do not utilize juries. This shows again how the system of American government is a thoughtful balance of both democratic and undemocratic principles.

Democracy, at its best, represents the will of the people. At its worst, it oppresses minority factions. Constitutional protections of individual rights safeguard against such

⁹³ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), 74.

oppression. It was in the nineteenth and twentieth centuries that challenges to violations of Natural Law, including slavery, the suppression of free speech, and other fundamental individual rights arose and the brilliance of American liberalism was essentially realized. Many today, including religious groups, the LGBT community, Pro-Choice advocates, and free speech activists, owe a debt to the independence of the courts, the Natural Law tenet enshrined in the Ninth Amendment, and other undemocratic facets of the United States structure of government. It has protected freedoms, including freedoms which have not historically had the support of the majority. The protection of individual liberties, long held as libertarian values, have established protections for political progressives as well, and this should be remembered.

Whether it was Centinel's declaration of the right to worship as one's conscience required, Cato's warnings of government's tendency toward evil, or Publius's assertion that government should be impervious to the ephemeral whims of the electorate, their contributions are extraordinary. Both supporters and opponents of the United States Constitution understood the delicate balance between the will of the people and the rights of the individual. That understanding embodies the Ninth Amendment. The balance of these two values, with proper consideration to each, is essential to a lasting liberal democracy.

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