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Unenumerated Constitutional Rights and the Rule of Law

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SYMPOSIUM

FOREWORD: UNENUMERATED CONSTITUTIONAL RIGHTS AND THE RULE OF LAW

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> The great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting.
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> *First*, There wants an *establish'd*, settled, known *Law*, received and allowed by common consent to be the standard of Right and Wrong, and the common measure to decide all Controversies between them. For though the Law of Nature be plain and intelligible to all rational Creatures, yet Men, being biassed by their Interest, as well as ignorant for want of study of it, are apt not to allow of it as a Law binding to them in the application of it to their particular Cases.[1]

INTRODUCTION: THE RULE OF LAW REVIVAL

The rule of law has long been one of the mainstays of liberal thought. John Locke cited its absence—not the absence of rights, which Locke thought existed in the state of nature—as the first reason for forming a government.[2] Essentially, the rule of law says that the requirements of justice must take a form such that persons can know what justice requires of them before they act and can detect abuses by those charged with law enforcement. If the formal and procedural requirements of the rule of law are adhered to, those "good" persons who seek to

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1. J. LOCKE, TWO TREATISES OF GOVERNMENT 368-69 (P. Laslett 2d ed. 1967) (3d ed. 1698) (emphasis in original).

2. According to Locke, the other two shortcomings of the state of nature are the absence of impartial judges and the dangers faced by victims seeking to enforce their own rights when confronted by the violent resistance of the offender. *See id.* at 369-70.

act properly can know what proper actions are. With this knowledge they can order their actions with those of others, thereby achieving a peaceful society with a minimum of conflict. The order of actions provided by adherence to the rule of law not only avoids conflict, it permits individuals and associations to plan for the future and to take action in reliance on a predictable legal regime.

Moreover, the formal and procedural standards provided by the rule of law address two problems inherent to the administration of justice: the problems of enforcement error and enforcement abuse. Some of these standards—such as rules allocating burdens of proof—help avoid enforcement errors. Others—such as the requirement of generality or equal treatment—help observers of a system of justice to detect "bad" actions by persons vested with the responsibility for correcting injustice. The ability to detect enforcement abuse is a prerequisite for taking action against such persons.[3]

All this was challenged by the legal realists in the 1920s and 1930s, a period when the stable "order of actions" governed by the rule of law posed obstacles to the sort of radical progressivist reforms that were thought to be needed to combat the abuses of "unfettered" capitalism and eventually the Great Depression. The legal realists charged that adhering to the rule of law resulted in a "mechanical jurisprudence"—now widely called "formalism." According to this criticism, formal rules that are thought to be necessary for establishing a rule of law cannot be relied upon to reach just results. From the perspective of justice, rules are either redundant or pernicious. They are redundant when they reach the same result as substantive justice requires; they are pernicious when they yield a different result. The very generality of rules means that they often do injustice. As Jerome Frank contended:

> Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance, and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later

3. *See* Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 597, 602-09, 619-21 (1988).

> be brought into court. He then refuses to do justice in the case on trial because he fears that "hard cases make bad laws." And thus arises what may aptly be called "injustice according to law."
>
> Such injustice is particularly tragic because it is based on a hope doomed to futility, a hope of controlling the future. . . . For it is the nature of the future that it never arrives. . . .[4]

Moreover, some realists argued that rules of law are really indeterminate—that is, they are subject to unchecked manipulation and therefore fail to constrain judges and other legal decisionmakers. Furthermore, because people are widely ignorant of legal rules, they do not really rely on such rules to order their future. For all these reasons, realists believed that the objectives of the rule of law cannot be achieved by devising and adhering to formal rules; other means of predicting legal sanctions are required.

In place of the rule of law, some of the realists, like Jerome Frank, urged a more "particularist" mode of justice in which decisions are reached without much effort at identifying rules. According to this method, after all the relevant facts are developed, all these facts are reported together with the outcomes of cases so that future decisionmakers can predict how their factual circumstances might be decided. Equity, not the common law, was to be the model:

> *The judge, at his best, is an arbitrator*, a "sound man" who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely "find" or invent some generalized rule which he "applies" to the facts presented to him. He does "equity" in the sense in which Aristotle—when thinking most clearly—described it.[5]

Other realists, such as Karl Llewellyn, urged that decisions be reached by taking into account other bodies of knowledge, such as sociology or economics.[6]

Although the realists succeeded in undermining confidence in the efficacy of rules, they never succeeded in finding an adequate substitute for the formal requirements of the rule of law.

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4. J. FRANK, LAW AND THE MODERN MIND 165-66 (1963).

5. *Id.* at 168 (emphasis in original).

6. *See, e.g.*, Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). In this respect, while the critical legal studies movement has inherited the realist's particularism and antiformalism, the law and economics movement can be viewed as an outgrowth of this other more empirical strain of legal realism.

Although Jerome Frank assured us that "it is the nature of the future that it never arises,"[7] we are now living in the post-realist world in which the absence of rules often makes the outcome of lawsuits in many areas of law very difficult to predict.[8]

In the 1960s, three influential objections to this realist revolution appeared. In *The Concept of Law*, H.L.A. Hart challenged the radical indeterminacy thesis of the realists. According to Hart, a common-law system of judge-made rules was as good a source of comparatively determinate legal rules as any system of legislation:

> Any honest description of the use of precedent in English law must allow a place for the following pairs of contrasting facts. *First*, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. The head-note is usually correct enough. *Secondly*, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. *Thirdly*, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by courts which are bound by it of . . . creative or legislative activity. . . . Notwithstanding [this,] . . . the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule.[9]

In *The Judicial Decision*, Richard Wasserstrom challenged the wisdom of the realists' particularist view of justice. He argued that if judges did not base their decisions on general rules, such decisions would be based only on intuitions. An exclusive reliance on intuitions, however, provides an inadequate check on the exercise of judicial partiality. Intuitions of particular just decisions

> are essentially private affairs. They are difficult to obtain; they are even harder to repeat and thereby verify. The evidence for the correctness of the conclusion reached and advanced must consist in the testimony of the "intuitor" that he has had the proper intuition. Unless one has had a comparable intuition, the word of the "intuitor" must be taken

7. J. FRANK, *supra* note 4, at 166.
8. *See* P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).
9. H.L.A. HART, THE CONCEPT OF LAW 131-32 (1961) (emphasis in original).

> both for the fact that he has had the vision and for the fact that he has interpreted its commands faithfully. The course of human history has revealed the desirability of imposing far more stringent requirements than this in other areas of consequence; it seems strange, therefore, to argue that an institution so vital as the legal system ought to settle for so little.[10]

Finally, a crucial development occurred when Ronald Dworkin, in "The Model of Rules,"[11] criticized the realists' (and Hart's) exclusive identification of law with rules in favor of a more realistic view of law as a mixture of both rules and general principles. Dworkin accepted Hart's view that rules could effectively guide (and thereby order) human conduct, but challenged Hart's thesis that when the guidance provided by legal rules is exhausted, we are left with nothing but discretion unguided by general and predictable standards. "[W]hen lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute," Dworkin argued, "they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards."[12] When operating in the "open texture" of rules, Dworkin insisted that lawyers could still reach determinate "right answers" by taking into account background principles:

> Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them. But they seem most energetically at work, carrying most weight, in difficult lawsuits. . . . [In such cases] principles play an essential part in arguments supporting judgments about particular legal rights and obligations. After the case is decided, we may say that the case stands for a particular rule. . . . But the rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule. . . .
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> An analysis of the concept of legal obligation must therefore account for the important role of principles in reaching

10. R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 95-96 (1961).

11. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

12. *Id.* at 22. In his later writings, Dworkin distinguishes between principles and policies and eschews the judicial pursuit of the latter. *See* R. DWORKIN, LAW'S EMPIRE 244 (1986) ("Judges must make their common-law decisions on grounds of principle, not policy.").

particular decisions of law.[13]

This Symposium on "Rules and the Rule of Law" can be seen as the culmination of the emerging post-realist consensus concerning the rule of law. According to this consensus, the conception of the rule of law that, together with the conception of justice, is so important to liberalism should not be identified exclusively with legal rules. Though legal rules are surely important, other legal precepts, such as general principles, are also needed to achieve a rule of law and to avoid a "rule of men." The writings of Frederick Schauer that are the focus of this Symposium have done much to develop this insight, at a time when the critical legal studies movement was reacting to the revival of the rule of law with a renewed adherence to the radical indeterminacy thesis of the realists.[14]

In the balance of this Foreword, I wish to use this refined vision of the rule of law to address a controversy in constitutional theory: the protection of unenumerated constitutional rights. As I explain, constitutional theorists who resist recognizing and protecting unenumerated rights on the ground that the judicial protection of these rights violates the rule of law fail to grasp the new, refined conception of the rule of law based on both rules and principles. In particular, they fail to recognize the importance of presumptions—a type of legal precept also stressed by Fred Schauer[15]—in reconciling the rule of law with the pursuit of justice.

The Rule of Law and the Problem of Unenumerated Rights

The Ninth Amendment to the United States Constitution reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[16] In a like vein, the Privileges or Immunities Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or

13. Dworkin, *supra* note 11, at 29.

14. *Compare* Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985) *with* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983).

15. *See* Schauer, *Rules and the Rule of Law*, 14 Harv. J.L. & Pub. Pol'y 645, 674-77 (1991).

16. U.S. Const. amend. IX.

immunities of citizens of the United States . . . ."[17] The meanings of both of these provisions are highly controverted. Everyone agrees that each provision refers to rights that are not enumerated in the text of the Constitution. The controversy instead surrounds (a) the source and content of these rights, and (b) their judicial enforceability.[18] I will not rehearse these controversies in this Foreword. Instead, I will consider whether a commitment to the formal values represented by the rule of law is somehow incompatable with judges protecting the unenumerated rights encompassed by these provisions.

The very concept of *unenumerated* rights presents obvious rule of law problems. The rule of law dictates that the requirements of justice take an articulate and understandable form. Quite obviously, the unenumerated rights referred to by the Ninth and Fourteenth Amendments have no form at all—they are unwritten. Without some authoritative way to give them a sufficiently determinate content, judicial enforcement of these rights would seem to violate the rule of law. This becomes especially important when the separation of powers is considered. According to the theory of separation of powers, courts are only authorized to enforce the Constitution and the rights it protects, not to legislate. When faced with textual provisions as completely open-ended as these, any judicial interpretation of unenumerated rights hardly seems an *interpretation* at all, for there is simply nothing to interpret. Enforcing unenumerated rights in the absence of a text would seem instead to be a purely legislative act. To put the problem in H.L.A. Hart's terms, every case or controversy arising under the Ninth Amendment and the Privileges or Immunities Clause lies in the "open texture"[19] of these provisions; therefore, neither provision facilitates rule-bound decisions. When confronted with a case lying within the open texture of language, the only option

17. U.S. CONST. amend. XIV, § 1.

18. For the debate on the Ninth Amendment, see THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed. 1989) [hereinafter R. BARNETT]; and *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988). For a concise summary of the Ninth Amendment debate, see Alexander, Book Review, 7 CONST. COMMENTARY 396 (1990). For the debate on the Privileges or Immunities Clause, compare R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) with M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

19. *See* H.L.A. HART, *supra* note 9, at 120-32.

is to exercise judicial discretion, and this sort of discretion conflicts with the rule of law.

The apparent conflict between these clauses and the rule of law has most likely been one reason for their judicial neglect ever since their enactment. Recently, however, this rule of law difficulty with unenumerated rights has received special attention in the writings of Robert Bork. As Bork has explained:

> In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.[20]

Adhering to this philosophy, says Bork, is "essential if courts are to govern according to the rule of law rather than whims of politics and personal preference."[21] To illustrate this, Bork offers an analogy:

> [S]uppose that the United States, like the United Kingdom, had no written constitution, and, therefore, no law to apply to strike down acts of the legislature. The U.S. judge, like the U.K. judge, could never properly invalidate a statute or an official action as unconstitutional. The very concept of unconstitutionality would be meaningless. The absence of a constitutional provision means the absence of a power of judicial review. But when a U.S. judge is given a set of constitutional provisions, then, as to anything not covered by those provisions, he is in the same position as the U.K. judge. *He has no law to apply* and is, quite properly, powerless. *In the absence of law*, a judge is a functionary without a function.[22]

As Bork repeatedly argues, "[d]emocratic choice must be accepted by the judge where the Constitution is silent."[23]

For one who takes this view of the judiciary and the rule of law, the Ninth Amendment and the Privileges or Immunities Clause pose a dilemma. On the one hand, the Constitution is not exactly silent; it certainly includes these passages. On the

20. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 318 (1990).
21. *Id.*
22. *Id.* at 147 (emphasis added).
23. *Id.* at 150.

other hand, because these passages are so open-textured, their framers failed to provide judges with "their" morality; thus, these provisions appear to provide "no law" to the judge. In the absence of such authoritative guidance, judges would be free to allow their own desires free rein. The Ninth Amendment (and the Privileges or Immunities Clause) would thus provide "a bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion, a possibility that the Founders would have rejected out of hand."[24] Consequently, unless we can somehow discover the framers' original intent—that is, what specific rights they had in mind when drafting these provisions—the rule of law seems to require that judges ignore these enacted passages of the Constitution.

This is precisely Bork's conclusion. In his Senate confirmation hearings, Bork was asked about the Ninth Amendment and gave the following, now famous, reply:

> I do not think that 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 ink blot 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 ink blot.[25]

In his book, *The Tempting of America*, Bork shifts this analogy to the Privileges or Immunities Clause:

> The judge who cannot make out the meaning of a provision is in exactly the same circumstance as judge who has *no Constitution to work with*. There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the grounds that there must be something under it. So it has been with the clause of the fourteenth amendment prohibiting any state from denying citizens the privileges and immunities of citizens of the United States. The clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter.[26]

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24. Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 2 (1980).

25. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 249 (1987) [hereinafter *Nomination Hearings*] (testimony of Robert Bork).

26. R. BORK, *supra* note 20, at 166 (emphasis added).

In this manner, Bork uses the rule of law to justify ignoring the unenumerated rights that are the subject of these two textual provisions.

Notice that Bork equates a judge intepreting a passage with no clear meaning with a judge having no constitution (like the U.K. judge described above). Where the text of the Constitution is insufficiently rule-like, Bork concludes that there is simply no *law* to apply, and consequently the Constitution is deemed to be "silent," notwithstanding what it says. As Bork concludes: "If the meaning of the Constitution is unknowable, if, so far as we can tell, it is written in undecipherable hieroglyphics . . . judges must stand aside and let democratic majorities rule, because there is no law superior to theirs."[27]

The Presumption of Liberty and the Rule of Law

The post-realist rule of law provides a way to escape the conundrum of ignoring those parts of the Constitution that fail to meet the criterion of ruleness. The rule of law is not a commitment to rules *simpliciter*; it is not the law of rules, though some talk as though it is.[28] It is a commitment to a particular set of values—in particular, the value of enabling persons to discern the requirements of justice *in advance of action* (and in advance of subsequent litigation). Individuals and associations must know what justice requires before acting, if they are to coordinate their actions with those of others. Moreover, only by somehow discerning the requirements of justice apart from the outcome of a lawsuit can we detect the existence of partiality in judicial decisionmaking that contributes to the problem of enforcement abuse.

Given this function of the rule of law, we can see that its informational requirements can be satisfied by means other than general rules—for instance, by general principles. Fred Schauer's emphasis on the use of "justificatory presumptions" in legal reasoning is particularly valuable in this regard:

> [A] justificatory presumption . . . in constitutional law, operates in a decisionmaking framework in which reasons vary in

27. *Id.* at 167.

28. *See, e.g.*, Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). While Justice Scalia's choice of titles reflects this view of the rule of law, throughout his article he repeatedly refers not only to rules, but also to "general" principles, "governing" principles, "firm, clear" principles, or "precise, principled content," as opposed to rules.

> strength. Even absent epistemic uncertainty, there may be reasons for taking some action that are simply stronger or more pressing than others. This loose observation, strong enough for present purposes, explains the difference between a reason that is compelling and one that is simply rational, between a justification that is reasonable and one that is important. The constitutional import of all these distinctions is that, time and again, reasons that are sufficient for some purposes are insufficient for others. For instance, the existence of a quite good reason for restricting speech or taking race into account may still turn out to be insufficient because of the overwhelming justificatory burden that such a reason must meet.[29]

Let us now return to the basic problem posed by unenumerated rights to see how the device of justificatory presumptions can be of assistance.

The problem posed by unenumerated rights for the rule of law is that they are unenumerated. For this reason, the text does not provide judges with specific guidance to inform their decisions so that they are both predictable and impartial. One alternative to ignoring such clauses is to determine the framers' original intentions with respect to specific unenumerated rights.[30] When pressed on the matter of judicial protection of unenumerated rights during his confirmation hearings, Bork replied, "Senator, if anybody shows me historical evidence about what . . . [the framers] meant, I would be delighted to do it. I simply do not know."[31] Assuming that the original intent of the framers with respect to specific rights can be determined, then, the rule of law problem created by the Ninth Amendment and the Privileges or Immunities Clause can be solved. These provisions should be taken to refer to the specific rights that the framers or ratifiers intended them to include.[32]

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29. Schauer, *supra* note 15, at 675.

30. *See* Barnett, *Reconceiving the Ninth Amendment*, 71 CORNELL L. REV. 1, 30-32 (1988) (describing the "originalist method" for determining unenumerated rights). This interpretive approach is distinct from one that seeks the original intention as to whether unenumerated rights—whose content is ascertained, perhaps, by some other interpretive method—should be protected. For a recent effort to enumerate the rights that the framers believed to be natural, see Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1074-81 (1991).

31. *Nomination Hearings*, *supra* note 25, at 249.

32. *Cf.* Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 81 NW. U.L. REV. 226, 264 (1988) (citations omitted):

> The existence of broad terms in the Constitution does seem to be good evidence of an abstract original intention or one which directs us to values outside the Constitution. But it is mere evidence. It must be reconciled with

The strength of using the originalist method to determine unenumerated rights is that it would extend enforcement to specific rights that the framers had in mind but did not enumerate. The weakness is that it would *only* enforce such specific rights and, thus, would fail to address the serious difficulty that motivated the framers to enact the passages in question in the first place. The problem is that a complete enumeration of such rights is simply impossible. As James Wilson noted:

> [T]here are very few who understand the whole of these rights. All the political writers, from *Grotius* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens. . . .
>
> . . . Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing.[33]

Because Wilson was an ardent natural-rights theorist,[34] we know that his remarks do not reflect a modern rights-skepticism based on the inherently contestable character of natural rights claims. But given his commitment to natural rights, what possible conception of "the rights appertaining to the people as men and as citizens" could account for the fact that they are unenumerable?

The puzzle is resolved by viewing rights not as *welfare rights* entitling persons to claim a specified portion of the resources of others, but as *liberty rights* entitling persons to the freedom to use what is theirs as they choose.[35] Liberty rights define a boundary within which individuals and associations are free to do as they wish. Because the ways by which this liberty can be exercised are unlimited, it is impossible to enumerate all the specific rights that people possess. A complete list would in-

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contrary evidence, including the commitment to a government limited by preexisting law. The constitution-makers may have used broad language to express narrow, concrete intentions. What appears to us to be general terms may, in fact, have been used as specific terms of art, or they may just have been inapt words chosen carelessly.

33. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 454 (J. Elliot reprint ed. 1987) (2d ed. 1836) (remarks of James Wilson).

34. Wilson lectured extensively on the content of natural rights while a law professor. *See* Wilson, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 296 (J.D. Andrews ed. 1896).

35. *See* L. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 84 (1987) (distinguishing between welfare rights and liberty rights).

clude the right to type on a computer, to sip a Diet Coke, to scratch one's nose, and so forth.

To see this conception of rights in operation, consider the following exchange that occurred in the first United States House of Representatives during the debate over the language proposed by the House Select Committee charged with drafting the Bill of Rights for what eventually would become the First Amendment. Representative Theodore Sedgwick criticized the committee's inclusion of the right of assembly on the grounds that "it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae. . . ."[36] Representative Egbert Benson replied: "The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government."[37] Sedgwick then responded that

> if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper. . . .[38]

Sedgwick's point was not that these rights are unimportant. Indeed, he equated the inherent right to wear a hat with the "self-evident, unalienable right" of assembly.[39] Rather,

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36. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 731 (Gales ed. 1834) [hereinafter ANNALS OF CONG.] (statement of Rep. Sedgwick).

37. *Id.* at 731-32 (statement of Rep. Benson). "Inherent rights" was commonly used synonymously with natural rights.

38. *Id.* at 732 (statement of Rep. Sedgwick).

39. Even if Sedgwick believed both the right of assembly and the right to wear one's hat to be unimportant, others in Congress did not share his view. Representative John Page's reply to Sedgwick's example also reveals that the importance of what appear to be trifling rights depends crucially upon the context, and cannot always be anticipated:

> [L]et me observe to him that such rights 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 together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.

Id. at 732 (statement of Rep. Page). Of course, the right to wear a hat did not make it into the Bill of Rights. Should the government require head-baring in the presence of authority, the justificatory "presumption of liberty" discussed below would require that this infringement on the liberty of the people be justified as a legitimate exercise of governmental power, notwithstanding that the Constitution is "silent" with respect to hats. *See infra* notes 49-84 and accompanying text.

Sedgwick's point was that the Constitution should not be cluttered with a potentially endless list of rights that "would never be called in[to] question"[40] and were not "intended to be infringed."[41] Sedgwick's argument implicitly assumes that the "self-evident, unalienable," and inherent liberty rights retained by the people are unenumerable because the human imagination is limitless. In light of this difficulty, James Wilson and others argued that it would be dangerous to list just some rights, because others would necessarily be excluded and thereby put in jeopardy of being ceded to government:

> In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, 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 government; and the rights of the people would be rendered incomplete.[42]

James Madison's solution to this serious problem was the Ninth Amendment. As he explained when introducing his proposed constitutional amendments to the House:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentleman may see by turning to . . . [the precursor of the Ninth Amendment].[43]

Ironically, it is Robert Bork's interpretation of the Constitution *sans* Ninth Amendment that fulfills Madison's greatest fears concerning the Bill of Rights. For Bork contends that "[t]he elected legislator or executive may act *where not forbidden*; his

40. *Id.* at 731 (statement of Rep. Sedgwick).

41. *Id.* at 732 (statement of Rep. Sedgwick).

42. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (M. Jensen ed. 1976) (statement of James Wilson to the Pennsylvania Ratifying Convention, Nov. 28, 1787). For a different interpretation of Wilson's statement, see McAffee, 90 COLUM. L. REV. 1215, 1249-59 (1990). For a brief discussion of McAffee's interpretation of the Ninth Amendment, see *infra* notes 85-92 and accompanying text.

43. 1 ANNALS OF CONG., *supra* note 36, at 439 (statement of Rep. Madison).

delegation of power from the people through an election is his authority."[44]

There still remains the problem of protecting these unenumerated and unenumerable liberty rights in a manner that is consistent with the rule of law. Other than the originalist method, how can this be done? Bork presumes the power of legislatures to act unless rightfully restrained by the Constitution, but by ignoring the Ninth Amendment and the Privileges or Immunities Clause, he picks up in the middle of a story that begins with the rights of the people. This is not surprising in light of his view that "the ratifiers' creation of one set of rights is simultaneously a failure or refusal to create more. There is no basis for extrapolating from the rights they did create to produce rights they did not."[45]

Of course, although the framers undoubtedly thought bills of rights consisted of an amalgam of different sorts of rights, they certainly did not believe that they were "creating" the rights "*retained* by the people." The Constitution presupposes natural rights that preexisted its enactment.[46] As Madison stated: "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the *pre-existent* rights of nature."[47] Representative Roger Sherman, who served with Madison on the House Select Committee to draft the Bill of Rights, reaffirmed this basic assumption in the second article of his proposed version:

> The people have certain *natural rights* which are *retained by them* when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and

44. R. BORK, *supra* note 20, at 150 (emphasis added). The perversity of this claim for legislative and executive power is manifest when one considers the Tenth Amendment's dictate that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. According to the Tenth Amendment, the delegation of legislative and executive powers is not "through an election," as Bork asserts, but "by the Constitution."

45. R. BORK, *supra* note 20, at 198.

46. *See* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1166, 1177 (1987).

47. 1 ANNALS OF CONG., *supra* note 36, at 437 (emphasis added).

> publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.[48]

These natural or inherent rights protect the people's liberty to act as they see fit unless justly restrained by the government. Protecting these rights does not require specifying every instance of protected liberty in advance. Instead, we may adopt a justificatory *presumption of liberty* that puts the burden on government to show that any interference with the exercise of the rights retained by the people is justified. In contrast, courts today employ a "presumption of constitutionality" that can be rebutted by the citizen identifying a "fundamental" right that has been infringed.[49] With the exception of the right to privacy, in recent years only enumerated rights have been deemed to be fundamental. Certainly, no general right to liberty has been so characterized.

Of course, liberty does not mean license to do whatever one wishes.[50] Justice, which is to say rights, defines the boundaries within which one may do as one wishes. One cannot permissi-

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48. Sherman, *Roger Sherman's Draft of the Bill of Rights, reprinted in* R. BARNETT, *supra* note 18, at 351 (emphasis added). This recently discovered draft, and Madison's use of the Ninth Amendment in his argument against the constitutionality of a national bank, *see infra* notes 71-84 and accompanying text, do much to undercut Russell Caplan's thesis that the rights "retained by the people" mentioned in the Ninth Amendment refer *exclusively* to state constitutional rights (that can be altered by a state's amendment process) or to statutory and common-law rights (that can be altered by simple state legislation), and not also to natural or inherent rights. *See* Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227-28 (1983). Having shifted his inkblot analogy to the Privileges or Immunities Clause, Bork now tepidly endorses Caplan's theory of the Ninth Amendment. *See* R. BORK, *supra* note 20, at 184-85. For a provocative discussion of how state constitutional rights can serve as one source of rights protected by the Ninth Amendment, see Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229.

49. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . ."). The Court also suggested that the presumption may be rebutted by showing that discrete and insular minorities are adversely affected or that the political process is being impeded. *See id.*

50. As Locke put the matter:

> But though this be a *State of Liberty*, yet it is *not a State of License*. . . . The *State of Nature* has a Law of Nature to govern it, which obliges everyone: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

J. LOCKE, *supra* note 1, at 288-89.

bly infringe upon the rightful domains of others.[51] The common law of property, contracts, and torts defines the extent and nature of these boundaries.[52] Tortious conduct is not a "rightful" exercise of one's liberty; likewise, one has no constitutional right to commit trespass upon the land of another. Provided that one is acting rightfully in this sense, however, government must justify any interference with such conduct.

Bork himself once flirted with the idea that the Constitution supports a "general principle of individual autonomy underlying the particular guarantees of the Bill of Rights."[53] Ultimately, he came to reject the idea of an "independent right of freedom, which is to say a general constitutional right to be free of legal coercion,"[54] on the grounds that such a right is "a manifest impossibility in any imaginable society."[55] If, however, this general right to liberty is considered not as absolute but rather as a justificatory presumption that shifts the burden to the government to show that interference with liberty is "necessary" and its motives "proper," then there is nothing remotely impossible about protecting such a right. Indeed, the allocation of such burdens of proof is a traditional function of the rule of law.

In *The Tempting of America*, Bork considers and rejects a similar proposal advanced by Bernard Siegan.[56] His first objection

51. According to Locke, in the state of nature, "all Men may be restrained from invading others' Rights, and from doing hurt to one another." *Id.* at 288.

52. The common-law process was not seen as the source of these rights—which are natural—but as the means of giving these otherwise abstract rights a conventionally established, specific content. *See, e.g., id.* at 368-69. While it is true that state legislation could systematize and even alter judge-made common-law rights, this was considered in large part to be an extraordinary corrective to the very strict common-law doctrine of precedent. Even so, most state and federal legislation does not even purport to be performing this corrective function. Moreover, the rules established by both common-law decisions and legislation can be critically scrutinized to determine whether they are inconsistent with abstract natural rights.

53. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) [hereinafter Bork, *Neutral Principles*]. *See also* Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 138, 174 ("[I recommend] great lateral expansion of the area of individual rights. The new concept of rights becomes, indeed, something roughly describable as a presumption in favor of human autonomy.").

54. Bork, *Neutral Principles*, *supra* note 53, at 9.

55. *Id.*

56. *See* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). Siegan proposes the following standard of review:

> [T]he government would have the burden of persuading a court utilizing an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives, that is, . . . the fit

is the familiar one that the many liberties protected by such a presumption are "not mentioned in constitutional materials."[57] As he puts it: "There being nothing in the Constitution about maximum hours laws, minimum wage laws, contraception, or abortion, the Court should have said simply that and left the legislative decision where it was."[58] We have already seen, however, that Bork's argument for ignoring unenumerated rights depends upon the claim that the framers' failure to enumerate specific rights makes the judicial enforcement of rights not enumerated violative of the rule of law. If, however, there is a way of giving these provisions content that is consistent with the rule of law, then this objection must fail.

Second, and more interestingly, Bork considers the presumptive nature of the right to liberty. Although he again rejects the concept on the grounds of feasibility, he no longer argues, as he once did, that such a right is an "impossibility in any imaginable society."[59] Siegan cites Aaron Director's claim that "[l]aissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error."[60] Bork replies that the "next question, however, is who is to apply the presumption of error, players in the political process or judges. My answer is the former; Siegan's is the latter."[61]

Bork defends his preference on the ground that the task facing a judiciary seeking to evaluate the necessity and propriety of governmental conduct would be "stupendous":[62]

> The court could not carry out the task assigned unless it had worked out a complete and coherent philosophy of the proper and improper ends of government with respect to all human activities and relationships. This philosophy must give answers to all questions social, economic, sexual, familial, political, moral, etc. It must be so detailed and well articulated, with all major and minor premises constructed and put in place, that it enables judges to decide infinite numbers

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between means and ends must be close; and third, that a similar result cannot be obtained by less drastic means.

Id. at 324.

57. R. BORK, *supra* note 20, at 225.

58. *Id.*

59. Bork, *Neutral Principles*, *supra* note 53, at 9.

60. B. SIEGAN, *supra* note 56, at 154 (citing Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 2 (1964)).

61. R. BORK, *supra* note 20, at 225.

62. *Id.* at 226.

> of concrete disputes. . . . No theory of the legitimate and important objectives of government that possesses all of these characteristics is even conceivable. No single philosopher has accomplished it, and nine Justices could not work it out and agree on it. Yet, upon the premise that a judge may not override democratic choice without an authority other than his own will, each of these qualities is essential.[63]

The problem with Bork's reply is revealed in his last sentence, in which he assumes what a presumption of liberty calls into question—namely, that the legitimacy of democratic choice places the burden on the court to justify any interference with legislative will when protecting unenumerated rights. He repeatedly asks how the court is "to demonstrate"[64] or "to prove"[65] that it is right and the legislature is wrong. However, we are speaking now of adjudication with parties on both sides of a case or controversy. In this context, placing the burden on "the court" is no different than placing the burden on the citizen to justify his or her exercise of liberty.

Although this position is entirely consistent with Bork's view that the "elected legislator or executive may act where not forbidden," it does no more than reassert the presumption of constitutionality, rather than defend it. The presumption of liberty places the burden on the government to justify its interference with the liberties of the people. Therefore, the burden falls to the legislature or executive, not the court, to develop the theories to justify its actions. One need not be too cynical to suspect that, when the justificatory shoe is placed on the other foot, this burden will no longer remain so insurmountable.

In his response to Siegan, Bork not only misses the basic thrust of the presumption of liberty, he also misses the point of the theory of delegated powers that underlies the entire Constitution and that is explicitly acknowledged in the Tenth Amendment. If the government cannot articulate a coherent and legitimate justification for its actions, if it cannot show how its actions are substantially related to these objectives and that it cannot achieve its objectives by means that do not infringe upon liberty,[66] then it deserves to lose, and the citizen deserves

63. *Id.*

64. *Id.* at 227.

65. *Id.*

66. The text paraphrases the type of scrutiny recommended by Bernard Siegan. *See supra* note 56.

to win. According to the presumption of liberty, it is the legislature's burden to justify its conduct, not the citizen's or the court's.[67]

Moreover, what Bork claims is an impossible function for judges is precisely how the First Amendment protection of speech is interpreted. Indeed, it is how Bork himself protected the freedom of speech as a federal appeals court judge.[68] Courts have not interpreted the First Amendment to mean that government actions may never in any manner affect speech, but that when they do, the government is under a heavy burden to justify its conduct. This is a burden that the Executive and Legislative Branches have sometimes met and sometimes failed to meet. The presumption of liberty simply extends the protection afforded to the enumerated right of free speech, and other enumerated rights, to the unenumerated freedoms retained by the people.

One source of Bork's difficulty here is his acceptance of Herbert Wechsler's view of legislation: "No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that . . . is intrinsic to judicial action. . . ."[69] In Bork's words, "no legislation rests on a principle that is capable of being applied generally."[70] But a presumption of liberty contests this interpretive assumption—an assumption that is, by the way, both extra-textual and questionable on originalist grounds. While the legislature may be under no general obligation to state a principled basis for its legislative acts, *when these acts infringe upon the rightful liberties of the people and are challenged*, they must be defended in a princi-

67. Although the delegated powers provisions of the Constitution do not define the limits of state governmental powers, neither do state governments have plenary powers to do anything they will. Rather, when their actions infringe upon the unenumerated rights protected by the Fourteenth Amendment, state government officials must show that they are properly exercising their so-called police powers. Any such justification requires a theory of this extra-textual doctrine of state powers that is not inconsistent with the textual protections afforded by the Ninth and Fourteenth Amendments. For one such theory, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

68. *See* Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893 (D.C. Cir. 1984). As Bork himself has argued: "We are . . . forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials for building." Bork, *Neutral Principles*, *supra* note 53, at 22-23.

69. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959).

70. R. BORK, *supra* note 20, at 80.

pled manner or be nullified as un*law*ful. It is not enough for a legislature to say, "We just wanted to do this." The legislature, no less than a court, must act lawfully.

To see how a presumption of liberty might operate, consider Congress's power under Article I, Section Eight to "establish post offices." Having exercised this power of establishment, Congress is free under the Necessary and Proper Clause to regulate the operation of its post offices in any manner it sees fit. But when Congress, allegedly pursuant to its postal powers, goes beyond its power to administer its own offices and claims the further power to establish a postal monopoly, as it has, then it must be prepared to articulate a compelling reason why such action is both necessary and proper, for presumptively it is not. In establishing the Constitution, the people retained the right to establish their own private post offices.

Madison used the Ninth Amendment in a strikingly similar fashion during his speech to the House opposing the national bank bill. In challenging the constitutionality of the act, Madison examined the Constitution at length to see if the power to create such a bank could be found among any of those delegated to the government, and he concluded that "it was not possible to discover in [the Constitution] the power to incorporate a Bank."[71] He then considered whether the proposed bank might be justified under the Necessary and Proper Clause[72] as a means of executing the Borrowing Power.[73] "Whatever meaning this clause may have," he began, "none can be admitted, that would give unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers."[74]

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71. 2 ANNALS OF CONG., *supra* note 36, at 1896 (statement of Rep. Madison).

72. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . . .").

73. *See id.* ("The Congress shall have Power . . . To borrow Money on the credit of the United States . . . .").

74. 2 ANNALS OF CONG., *supra* note 36, at 1898. Madison's argument here reflects one of the reasons he offered for adopting a bill of rights:

> It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, . . . because in the Constitution of the United States, there is a clause granting to Congress the power to make all

In evaluating the legitimacy of the lawmaking power, Madison contrasted the requirement of necessity with that of mere convenience or expediency. In so doing, he employed a type of scrutiny that is quite like the third step of the analysis urged by Bernard Siegan:[75]

> But the proposed bank could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenues.[76]

Notice that Madison was not simply making what would now be called a "policy" choice.[77] Rather, he was advancing the constitutional argument that these other means of accomplishing an enumerated objective or end are to be preferred in principle precisely because they do not entail the violation of the rights retained by the people. In particular, these measures do not involve the grant of a monopoly, which, according to Madison, "affects the equal rights of every citizen."[78] There is a difference in principle between these alternative means, just as there is a difference in principle, not merely in policy, between drafting citizens and paying volunteers as the means of exercising the congressional power to "raise and support Armies . . . ."[79]

Madison offered another reason against the theory that the

> laws which shall be necessary and proper for carrying into execution the powers vested in the Government of the United States, or in any department thereof.

1 ANNALS OF CONG., *supra* note 36, at 438 (statement of Rep. Madison). Madison contended that a bill of rights was one way to police abuses of this discretion.

75. *See supra* note 56.

76. 2 ANNALS OF CONG., *supra* note 36, at 1901 (statement of Rep. Madison).

77. In his address to the House, Madison did address the policy issues raised by the proposal when he "began with a general review of the advantages and disadvantages of Banks." *Id.* at 1894. However, "[i]n making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it." *Id.* at 1896.

78. *Id.* at 1900. In this claim, Madison was in no way idiosyncratic. The eighth article of Roger Sherman's draft of the Bill of Rights stated: "Congress Shall not have power to grant any monopoly or exclusive advantages of commerce to any person or Company; nor to restrain the liberty of the Press." Sherman, *supra* note 48, at 352. Of the eight states that accompanied their ratification of the Constitution with proposed amendments, five (Massachusetts, New Hampshire, New York, North Carolina, and Rhode Island) offered similar language. *See* R. BARNETT, *supra* note 18, at 353-85.

79. U.S. CONST. art. I, § 8.

Necessary and Proper Clause justified the bank—the fact that the power claimed was highly remote from any enumerated power:

> Mark the reasoning on which the validity of the bill depends! To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishments, & c. implied as the means.
>
> If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.
>
> The *latitude of interpretation* required by the bill is condemned by the *rule* furnished by the Constitution itself.[80]

As authority for this "rule" of interpretation, Madison offered the Ninth Amendment. His reference to the Ninth Amendment is reported in the *Annals of Congress* as follows:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment], *the former, as guarding against a latitude of interpretation*; the latter, as excluding every source of power not within the Constitution itself.[81]

Thus, while Madison saw the Tenth Amendment as authority for the rule that the Congress could only exercise a delegated power, he saw the Ninth Amendment as authority for a rule against the loose construction of such powers—especially the Necessary and Proper Clause—when legislation affects the rights retained by the people.[82] In Madison's view, for legisla-

80. 2 ANNALS OF CONG., *supra* note 36, at 1899 (statement of Rep. Madison) (emphasis added).

81. *Id.* at 1901. The numbering of the amendments changed because the first two amendments proposed by Congress were not ratified by the states. At the time Madison spoke, this outcome was not yet known.

82. This is not the only time that Madison expressed his view that, though they may both share the objective of constraining the powers of government, the Ninth and Tenth Amendments do not operate identically. In his speech to the House explaining his proposed amendments, Madison referred to the precursor of the Tenth Amendment in the following way: "Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration. . . ." 1 ANNALS OF CONG., *supra* note 36, at 441 (statement of Rep. Madison). Contrast this tone with the seriousness with

tion to fall under a delegated power it must be a genuinely necessary and proper exercise of such a power. As he concluded: "In fine, if the power were in the Constitution, the immediate exercise of it cannot be essential; if not there, the exercise of it involves the guilt of usurpation. . . ."[83] Put another way, as I have argued elsewhere, constitutional rights—including unenumerated rights—operate both as "means-constraints" and "ends-constraints."[84]

Recently, Thomas McAffee has offered an insightful, detailed, and closely-reasoned analysis of the original meaning of the Ninth Amendment.[85] An adequate treatment of his theory would require a more extensive consideration than is possible or appropriate in this discussion of the rule of law. Nonetheless, it is worth noting how Madison's application of the Ninth Amendment in his argument against the national bank undercuts McAffee's interpretation.

McAffee denies that the rights retained by the people "are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution."[86] Instead, "the other rights retained by the people are *defined* residually from the powers granted to the national government."[87] He contends that the Ninth Amendment was originally intended *solely* to prevent later intepreters of the Constitution from exploiting the incompleteness of the enumeration of rights to expand federal powers beyond those delegated by the Constitution.[88] He denies that it was intended to *better* protect individual rights by justifying a more strict con-

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which he treated the precursor to Ninth Amendment. *See* text accompanying *supra* note 43.

83. 2 ANNALS OF CONG., *supra* note 36, at 1902 (statement of Rep. Madison).

84. *See* Barnett, *supra* note 30, at 11-16.

85. McAffee, *supra* note 42.

86. *Id.* at 1222.

87. *Id.* at 1221 (emphasis added).

88. As McAffee explains: "On the residual rights reading, the ninth amendment serves the unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power." *Id.* at 1306-07. So, for example:

> If the government contended in a particular case that it held a general power to regulate the press *as an appropriate inference from the first amendment restriction on that power*, or argued that it possessed a general police power *by virtue of the existence of the bill of rights*, the ninth amendment would provide a direct refutation.

Id. at 1307 (emphasis added). In sum, according to McAffee, the only function of the Ninth Amendment is to protect the scheme of delegated powers by arguing against this specific sort of inference.

struction of the enumerated powers than might be warranted under the delegated-powers provisions standing alone:

> The Ninth Amendment reads *entirely* as a "hold harmless" provision: it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates *only* that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights.[89]

Yet when Madison used the Ninth Amendment in his speech concerning the national bank, he was in no manner responding to an argument for expanded federal powers based on the incomplete enumeration of rights, but rather was arguing entirely outside the only context in which, according to McAffee, the Ninth Amendment was meant to be relevant. Moreover, in contrast to McAffee's thesis, Madison used the Ninth Amendment precisely and explicitly as authority for more strictly construing enumerated powers—in particular, the Necessary and Proper Clause. That is, Madison used the Ninth Amendment to restrict the means by which delegated powers can be exercised—the "means-constraints" construction of the Ninth Amendment that I have defended elsewhere.[90] Finally, contrary to what McAffee's theory would predict, Madison rested his argument against the claimed power to grant a monopoly charter in part on the fact that such a power violates the "equal rights of every citizen."

In sum, rather than looking exclusively to the delegation of powers to define as well as to protect the rights of the people, as McAffee would have it, Madison looked to the rights retained by the people in his effort to interpret and define the delegated-powers provisions.[91] In Madison's words, the bill

89. *Id.* at 1300 n.325 (emphasis added).

90. *See* Barnett, *supra* note 30, at 11-16. There I defend the "power-constraint" conception of constitutional rights in which rights constrain the exercise of constitutionally delegated powers. The alternative "rights-powers" conception views rights solely as what is left over after the powers have been delegated and thus "residual rights" (to employ McAffee's terminology) can and must be defined exclusively by reference to the enumerated powers.

91. Although he does not discuss this use by Madison of the Ninth Amendment, McAffee is nothing if not resourceful in interpreting unfriendly evidence—as exemplified by the lengths to which he goes to explain why Roger Sherman's reference to the "natural rights . . . retained by [the people]" in his draft bill of rights has no bearing on the proper construction of the Ninth Amendment. *See* McAffee, *supra* note 42, at 1303 n.333. I can imagine two responses that McAffee might make to my interpretation of Madison's speech concerning a national bank:

First, because Madison did not specify the rights of the people that would be vio-

"was condemned by the explanatory amendments proposed by the Congress themselves to the Constitution."[92]

CONCLUSION

We may summarize the analysis presented here as follows. If the unenumerated rights retained by the people deserve judicial protection, we require some means for protecting them that is consistent with the rule of law. The presumption of liberty is one such means: It protects rights by providing a "rule" or, more accurately, a justificatory presumption that places the burden of justification upon the government whenever its actions infringe the rightful exercise of liberty by a person or association. This presumption is at least as compatible with the

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lated, perhaps he was defining the infringement of these rights solely by the fact that the power claimed is beyond those delegated by the Constitution. According to this account, Madison was simply referring to the rights "reserved by" the delegation of powers and not to any "affirmative" rights retained by the people. But this response would have Madison engaged in a meaningless rhetorical flourish when making this part of his argument. Moreover, it does not explain Madison's consideration of the alternative means of exercising the borrowing powers. This construction would have Madison at this juncture making a policy argument in the guise of a constitutional claim, rather than, as I contend, to be making a principled distinction between means that violate the equal rights of the people, and those that do not. Nor does it explain Madison's use of the Ninth Amendment as authority for his conclusion that "if the power were in the Constitution, the immediate exercise of it cannot be essential." 2 ANNALS OF CONG., *supra* note 36, at 1902 (statement of Rep. Madison). According to my reading of the Ninth Amendment, one need not specify the rights retained by the people for these rights to do independent work in constraining the exercise of government powers. One need only shift the burden of justification to those advocating the legitimacy of the power.

Second, McAffee may respond that Madison was not protecting "affirmative rights" at all but was simply using the Ninth Amendment to bolster the enumerated-powers scheme. Without question, the protection of the enumerated-powers structure of the Constitution was the main thrust of Madison's constitutional objection and was repeatedly mentioned by him. However, this answer would not save McAffee's thesis that a rights analysis is irrelevant to the construction of enumerated powers. According to McAffee, enumerated powers alone define rights; rights do not define powers. For this thesis to survive, it is not enough to argue that when the retained rights are being used to limit delegated powers, this is merely an expression of the limited-powers scheme. While preserving the form of McAffee's "reserved rights" thesis, this would reverse the interpretive methodology he favors. Instead of using the concept of delegated powers to define the concept of reserved rights, as he would have it, reserved rights would be used to help define the delegated powers. Thus, this response would support my view of the Ninth Amendment—one McAffee explicitly rejects, *see* McAffee, *supra* note 42, at 1291-92—that the concept of constitutional rights, including unenumerated ones, provides a *conceptual* means *in addition* to the concept of delegated powers by which the legitimacy of claimed government powers can be critically assessed. In his speech concerning a national bank, Madison appears to have used the Ninth Amendment in just this way.

92. 2 ANNALS OF CONG., *supra* note 36, at 1902 (statement of Rep. Madison).

rule of law as the prevailing presumption of constitutionality, and perhaps more so.

The presumption of constitutionality surrenders to the government the power to restrict any of the people's retained rights (unless prevented from doing so by the existence of an enumerated right). By providing no principled and effective procedural means to detect abuses in the exercise of government power, this presumption fails to perform one of the principal functions of the rule of law: the detection of enforcement abuse. After all, legislatures are but men and women, and if the "rule of men" is to be avoided, then legislative enactments must be scrutinized to determine whether they truly are "laws." In words that echo and apply to representative government the question John Locke asked of absolute monarchy,[93] Madison observed:

> No man is allowed to be the judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . Justice ought to hold the balance between them.[94]

The only agency available to put "justice" or rights between the claims of the executive or legislature and that of the citizen is a court.[95] By putting on those who infringe upon the liberties

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93. Here are Locke's words:

> I easily grant, that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case, since 'tis easily to be imagined, that he who was so unjust as to do his Brother an Injury, will scarce be so just as to condemn himself for it: But I shall desire those who make this Objection, to remember that *Absolute Monarchs* are but Men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure?

J. LOCKE, *supra* note 1, at 294 (emphasis in original).

94. THE FEDERALIST No. 10, at 79-80 (J. Madison) (C. Rossiter ed. 1961).

95. True, at the time he wrote this passage, Madison did not appear to contemplate that judicial review could help deal with this problem. After the passage quoted in the

of the people the onus of explaining why their enactments are lawful—in the sense that they are justified on general principles—the presumption of liberty serves the rule of law far better than the presumption of constitutionality. For we must never forget that the rule of law is meant to protect the people from the government, not to protect the government from the people.

Beneath this debate about unenumerated rights and the rule of law lies another that concerns the source of constitutional legitimacy. Is the Constitution binding solely because it is the product of the exercise of will—in this case, the will of the people who ratified it—as Robert Bork insists, or is it legitimate in whole or in part because it establishes a system of government that is substantively justified? The question of legitimacy is hardly a new one. As observed by Edward Corwin:

> The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents . . . a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of essential and unchanging justice . . . . The Ninth Amendment of the Constitution of the United States . . . illustrates this theory perfectly, except that the principles of transcendental justice have been here translated into terms of personal and private rights. . . . [These rights] owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete.
>
> Thus 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.[96]

Actually, it is the legitimacy of governmental action, rather than of the Constitution itself, that is directly at issue. The Constitution is binding, if at all, on the government and its offi-

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text accompanying *supra* note 94, he continued: "Yet the parties are, *and must be*, themselves the judges. . . ." *Id.* at 57 (emphasis added). After the ratification of the Constitution and under the influence of Jefferson, however, he came to change his view. *See* B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 118 (1977). In his speech introducing his proposed amendments to the House, he referred to "independent tribunals of justice [who] will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive. . . ." 1 ANNALS OF CONG., *supra* note 36, at 439 (statement of Rep. Madison).

96. Corwin, *supra* note 46, at 152-53 (emphasis in original).

cials. The question is whether actions of the government established by the Constitution are binding "in conscience" on individuals and associations.[97] Unless we have reason to think that legislative or executive actions are consistent with the rights retained by the people, there is no prima facie moral duty to obey their dictates.

When legislation is produced by constitutional processes that lack any impartial review to determine whether the legislation has this rights-respecting quality, then the people have no assurance of legitimacy. In the absence of such assurances, nothing but force or power exists to enlist obedience. As Bork acknowledges: "Power alone is not sufficient to produce legitimate authority."[98] What he fails to see is that, without the scrutiny provided by a presumption of liberty, the fact that legislation is enacted suggests little, if anything, about its substantive legitimacy. Citizens have no reason to think it represents anything other than an exercise of naked legislative power—whether in service of a majority or a minority faction.[99]

With the protection of the background rights retained by the people—both enumerated and unenumerated—providing the basis of constitutional legitimacy, the Borkian picture of the Constitution as "islands [of rights] surrounded by a sea of government powers"[100] is reversed. In its place is the original picture of the Constitution, "wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights."[101] Ultimately, it is for us to decide which picture is correct.

97. *See* Barnett, *The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988).

98. R. BORK, *supra* note 20, at 176.

99. *See* THE FEDERALIST No. 10, *supra* note 94, at 78 (emphasis added):

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens*, or to the permanent and aggregate interests of the community.

100. S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION 32 (rev. ed. 1987).

101. *Id.*