

The Rights Question

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I. INTRODUCTION

God bless the Socratic Method. Ever since law schools embraced a teaching style that allows professors to answer questions with questions, all the while suggesting that we *know* the answer but would prefer that the student discover it themselves, we teachers of American Constitutional Law have had a place to hide our own confusion about a critical aspect of our constitutional jurisprudence. That confusion arises when we abandon our mother tongues and begin to use the language (let us call it “rights-speak”¹ for now) the United States Supreme Court uses when it tries to identify creatures called “fundamental rights” and describe the process by which they were located. From their undergraduate days and their general immersion in pop culture, our beloved students are certain that we can conjure up a list of the creatures for them and provide a “how-to” manual on finding others that are yet to be recognized. As law professors, we must surely be bilingual in “rights-speak.”

But then we try to explain it to them and pained looks appear on their faces. Even those of us whose tenure in this field now approaches the three decade mark find ourselves less able to feign the appearance that we *know* the answer to the “rights question” our Constitution poses. In the end, we have to acknowledge that not only is there no fixed list of

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1. With apologies to Professor Glendon and her excellent work of a similar name. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

rights and no analytical template to seek one, but that even a sensible starting point to fashion one eludes us. We are forced to admit that the road our current rights analysis has taken us down has turned into a thicket through circular reasoning and outcomes validated by arbitrarily selected “traditions” of the past masquerading as standards for “rights” in a dynamic present. We end up warning the students to steer clear of the area—pointing out that in 2009 the Supreme Court itself cautioned against expanding the rights protected by due process since “guideposts for responsible decision-making in this unchartered area are scarce and open-ended.”² As the Court is the guidepost maker, this was a sobering admission indeed.

Yet this is not just a problem involving some pedagogical difficulty in a law-school classroom. A thicket is a dangerous place to be when a sensible approach to the “rights question” is at issue—for reasons that go to the heart of the political world in which we all would like to reside.

“Rights,” whatever they are made of and however they operate, are measures of respect. Whether the government is required to respect our differences by applying laws under the principles of equal protection or whether it must simply respect a space in which we are to be left alone, rights and individuality are forever linked.

But as our economy, our culture, and our security become increasingly integrated with and systematically dependent upon others here and abroad, our worlds seem less and less our own. Central governments claim to be the only entities capable of managing that systematic integration but insist that to do so they need to respect us less. If the Supreme Court’s approach to the “rights question” remains confused, the thicket created will not just undermine the institution of the Court. It will make us all doubt that insisting on respect from the government is possible. So before we lose faith we cannot get back, we need a new approach to the “rights question.”

At the outset, I recognize the enormity of this undertaking. Kind souls who have read a draft of this Article have suggested that treating the issue in book length is needed, and I hope that will come. But, for now, treat what you are about to read as an initial expedition into the thicket. My goal is to give context to the problem we face, a sense of how we got here, and some inkling about how we may get out of it. If it leaves you interested enough to want more in any area or, better still, occasions you to offer comment and critique, I will be honored.

2. *Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

The paper asks three tough questions, the first of which is “where are we?” I will show that once the Supreme Court took on the mantle of resolving the “rights question” posed by the Constitution, its doctrines of “selective incorporation,” “substantive due process,” and Ninth Amendment “penumbral rights” have brought us to a dangerous jurisprudential thicket that threatens the very rights it seeks to uphold. The second question is “how did we get here?” This will require some brief history regarding the origins and purpose of the Amendments that pose the “rights question.” Finally, the question “where do we go from here?” requires that we recognize this simple truth: unless we call for a new constitutional convention, the American socio-political order in the twenty-first century will be predicated on a charter drafted in the later part of the eighteenth. This does not have to be the anomaly it seems at first blush as long as we determine that the old charter contains insight about human political nature that makes it continually relevant in our age. To see if it does, we need to understand those who framed it and the principles of the intellectual movement that so profoundly affected them. “They” were the Framers (primarily, James Madison) and the movement was the Scottish Enlightenment.

One final caution before we begin: I do not believe that the way to protect our ability to insist on respect from the government may be found merely by a survey of history or a philosophical meditation about issues that exist in a pure state only in the rarefied air of the academy. David Hume was right that “[t]he question is not concerning any fine imaginary republic, of which a man may form a plan in his closet,”³ or, for that matter, in his office at a university. The success of the very real republic we create by interpreting our Constitution will not be measured by the degree to which it approximates some theoretical construct or satisfies the intellectual elite. It will succeed only to the degree that it is embraced by the group Hume called ““that middling rank of men, who are the best and firmest basis of public liberty.””⁴ It is their most fundamental assent that any plan must seek.

The plan that will attain that assent will promise that our political world will be a sublime paradox: a government sufficiently *empowered*

3. GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST 13* (1981) (quoting 1 DAVID HUME, *Whether the British Government Inclines More to Absolute Monarchy, or to a Republic, in ESSAYS: MORAL, POLITICAL, AND LITERARY* 126 (T.H. Green & T.H. Gross eds., London, Longmans, Green, and Co. 1907) (1742) [hereinafter *ESSAYS*]). This theme was used by Madison in *The Federalist Nos. 37 and 56. Id.*

4. JAMES BUCHAN, *CROWDED WITH GENIUS, THE SCOTTISH ENLIGHTENMENT: EDINBURGH'S MOMENT OF THE MIND* 86 (HarperCollins Publishers 2003) (quoting DAVID HUME, *Of Refinement in the Arts, in POLITICAL ESSAYS* 112 (1752)).

to do the things only a collective entity can do in aid of the common good but sufficiently *restrained* so that individuals are free to pursue the spiritual, intellectual, and scientific growth that beings in evolution are bound to seek. Our concept of rights has a vital place in the effort to produce this paradox. By stepping out of the confines of the “rights-speak” language that has brought us into a dangerous thicket and stepping back to examine the origins of a charter in which we invest so much faith, we may find an approach to rights that gives them dignity, permanence, and, most of all, efficacy. But no matter what steps we ultimately take, there is one thing we must abandon. Hiding behind the Socratic Method is no longer an option.

II. ACCEPTING THE MANTLE AND THE SEARCH FOR SOURCES

While the Constitution is not a secret scroll that only the Supreme Court may decipher, John Marshall was right that the Supreme Court must bear the mantle for giving it authoritative interpretation. His famous passage states: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”⁵ This is not an assertion of the intellectual or political superiority of the Court to the other branches, the states, or the people. It is the simple recognition that courts decide cases. When an individual claims that a law conflicts with her Constitutional right, the Court cannot turn a blind eye to the claim. Unless the Court gets out of the business of deciding cases, the act of interpretation is inescapable and given the three critical respects in which the Constitution poses the rights question, it is inevitable.

First, there is the problem of how the Bill of Rights interfaces with the Fourteenth Amendment. As enacted, the Bill of Rights was directed only at limiting the power of the federal government vis-a-vis the individual. It was not until 1868 that the citizen acquired federal constitutional protection against a deprivation of his life, liberty, or property without “due process” of law by the states.⁶ But if by due process the Fourteenth Amendment meant all the protections of the first eight amendments, it could have, but does not, say that. And if it does

5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

6. U.S. CONST. amend. XIV.

not mean that, which, if any, of those original protections or rights constitute the process that is due?

Second, what are we to do with the Ninth Amendment, which warns that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”⁷ without a footnote indicating what those “others” might be, where they may be found, or who has the power to look for them?

Finally, both the Fifth and the Fourteenth Amendments tell us that along with “life” and “property,” “liberty” is protected by due process. But the Constitution comes with no glossary defining liberty. Beyond the obvious (freedom from imprisonment), the remainder of whatever constitutes the substance of due process rights to liberty is a matter someone must authoritatively interpret. Those who don judges’ robes have never been reluctant to do the interpreting as the common law tradition is part of a judge’s DNA. The common law process will, therefore, be applied to the rights question but whether it extends the thicket or extricates us from it depends on the sources the judge draws upon for interpretation.⁸ The use of legitimate sources will legitimize the interpretive process and validate its outcomes.

The foremost illegitimate source is the personal predilections of the individual justices. A Supreme Court that has assumed for itself the ultimate power of judicial review⁹ exercises that power legitimately only by not violating the great principle of governance given to us by the Enlightenment: the rule of law. If there were ever days when government was carried out on the whims of “divine right” rulers who claimed that the laws they propounded were the revealed word of God and thus beyond contestation, those days were gone once appeals to reason and the scientific method displaced revelation as the ultimate reference point for truth.¹⁰ While Hume and others in the Scottish Enlightenment had disagreements with John Locke on other matters,¹¹

7. U.S. CONST. amend. IX.

8. See THOMAS B. MCAFEE ET AL., *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 225–43 (Jack Stark ed., 2006) (discussing various interpretations of the Ninth Amendment); ROBERT S. PECK, *THE BILL OF RIGHTS AND THE POLITICS OF INTERPRETATION* 29–33 (1992) (discussing the development of the common law).

9. See Bruce A. Antkowiak, Essay, *Courts, Judicial Review and the Pursuit of Virtue*, 45 *DUQ. L. REV.* 467, 469–73 (2007) (describing the institutional, procedural, and political background of the Court).

10. STANLEY J. GRENZ, *A PRIMER ON POSTMODERNISM* 68–71 (1996).

11. Professor Samuel Fleischacker writes that Hume, Hutcheson, and Smith each begin with Locke, “if only to disagree with him.” Samuel Fleischacker, *The Impact on America: Scottish Philosophy and the American Founding*, in *THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT* 321–23 (Alexander Broadie ed., 2003) [hereinafter *THE CAMBRIDGE*

they joined with him on the need for laws to be grounded in human processes and expressed openly, with certainty, and with less capacity for arbitrary alteration.¹² As heirs to this view, we insist that interpretations of the words “due process,” “other [rights],” and “liberty” must relate to an accepted and credible source of law. Ah, but what source?

The debate over sources surfaced in 1798. In *Calder v. Bull*, the Court contemplated the ex post facto implications of a bill passed by the Connecticut legislature.¹³ Justice Chase felt that in deciding the matter, the Court was free to draw upon principles that transcended and predated the written words of the Constitution and expressed the “purposes for which men enter into society.”¹⁴ There are, he said,

certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative* power; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*; cannot be considered a *rightful exercise of legislative authority*.¹⁵

COMPANION].

12. In the *Second Treatise*, Locke observed that the state of nature left those interested in living in a civilized society “wanting,” first of all,

an *establish[ed]*, 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 not apt to allow of it as a Law binding to them in the application of it to their particular Cases.

JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 351 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689). Men join society, Locke said, so “that they may have the united strength of the whole Society to secure and defend their Properties, and may have *standing Rules* to bound it, by which every one may know what is his.” *Id.* at 359. Hume agreed that it was the intention of “republican and free” governments to establish constitutions that would not leave their success solely up to the “character and conduct” of the individuals who held the positions of authority in them. DAVID HUME, *That Politics May Be Reduced to a Science*, in *ESSAYS*, *supra* note 3, at 105. Legislators owed it to future constituencies as well as the present one to “provide a system of laws to regulate the administration of public affairs” and constitutions are “only so far good, as [they] provid[e] a remedy against mal-administration” *Id.* at 105, 108. Hume thought making the government announce laws in a reasonably certain manner was a key device to keep government from transgressing authority it otherwise should not enjoy. John M. Werner, *David Hume and America*, 33 *J. HIST. OF IDEAS* 439, 444 (1972).

13. 3 U.S. (4 Dall.) 386, 387 (1798).

14. *Id.* at 388.

15. *Id.*

Chase did not tell us how to find those “vital principles,” but he assumed that judges learned in the common law would know where to look.¹⁶

Justice Iredell condemned this as reliance on natural law and justice, a practice that assumed more power for the Court than the people intended it to have.¹⁷ Laws that transgress the terms of the Constitution should be struck down, Iredell argued, but otherwise judges should not don the robes of the philosopher king:

[Where] the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.¹⁸

Down through time, Justice Chase’s position won the debate, and various justices, while disdaining the idea that their view of a fundamental right is correct simply because they are “the ablest and the purest men,” have nonetheless drawn upon a variety of sources outside the Constitution to discuss the rights question. Justice Scalia, for example, in his 2008 analysis of the Second Amendment, argued that this Amendment did not *create* a right so much as it *codified* a right we inherited from our English ancestors.¹⁹ And in 2009, Justice Stevens broadly proclaimed that “[t]he liberty protected by the Due Process Clause is not a creation of the Bill of Rights” because “our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots.”²⁰ That root, he

16. His view was anticipated by Lord Coke, who ruled in 1610 that “the common law will [] controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . .” Bonham’s Case, (1610) 77 Eng. Rep. 646, 652 (K.B.). See also THOMAS B. MCAFFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDER’S UNDERSTANDING* 61–62 (2000).

17. *Calder*, 3 U.S. at 399 (Iredell, J., concurring).

18. *Id.*

19. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008). As we will see, over a hundred years earlier the Court had given little credence to the notion of rights inherited from our English forbears. See the discussion of *Hurtado v. California*, *infra* Part III.

20. *Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2334 (2009) (Stevens, J., dissenting).

argued, was the “unalienable Rights” language of the Declaration of Independence.²¹

Those justices have not, however, explained why they used certain sources or why there is no accord on what sources to use for interpretation of rights language. The result has been an uneven and unpredictable methodology that leaves the Court open to bitter criticism and the rights question clouded in doubt. This is the soil in which thickets grow, as a review of the three areas of rights interpretation will show.

III. RIGHTS INTERPRETATION

A. Selective Incorporation: Reasoning in the Round

In the 1833 case *Barron v. Mayor and City Council of Baltimore*, the Court recognized that, as enacted, the Fifth Amendment was “intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”²² When the Fourteenth Amendment declared that “due process” pursuant to the *federal* Constitution now stood in the way of a state depriving someone of life, liberty or property,²³ did it simply overrule *Barron* and

21. *Id.*

22. 32 U.S. (7 Pet.) 243, 250–51 (1833). Chief Justice Marshall did find the issue of “great importance, but not of much difficulty” and further explained:

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes.

Id. at 247.

23. U.S. CONST. amend. XIV, § 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

apply all of the protections in the first eight Amendments to the states? The Court said no in 1884 in *Hurtado v. California*.²⁴

Hurtado claimed that the Fourteenth Amendment gave him the right to have a grand jury consider the criminal charges against him before the state could prosecute.²⁵ He claimed this right as heir to Englishmen who brought it and all the protections of Magna Carta with them and who then explicitly placed it in the Fifth Amendment.²⁶

The Court held, however, that mere longevity is not enough to make a practice a due process right under the Fourteenth Amendment.²⁷ That “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.”²⁸ The institutions which once sought to preserve the core rights may become outdated abstractions and, thus,

it is better not to go too far back into antiquity for the best securities for our “ancient liberties.” It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.²⁹

Remember, the Court said, while English law traditions influenced our Constitution, the Constitution was really “made for an undefined and expanding future, and for a people . . . to be gathered, from many nations and of many tongues.”³⁰ Indeed, there

is nothing . . . which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.³¹

24. 110 U.S. 516, 535 (1884).

25. *Id.* at 519–20.

26. *Id.* at 521.

27. *Id.* at 531–32.

28. *Id.* at 529.

29. *Id.* at 530.

30. *Id.* at 530–31. This point was not repeated by Justice Scalia in *Heller*. See generally *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

31. *Hurtado*, 110 U.S. at 531. The Court’s willingness to embrace principles from other countries in construing the content of our own due process became a sticking point for the Court

The old provisions “must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”³² And what is that “substance”? It is “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,”³³ that is, “certain fundamental rights which [our] system of jurisprudence . . . has always recognized.”³⁴ The right to a grand jury, although long recognized and embodied in the basic document of our political institution, did not fit the bill.³⁵

By 1908, there was still no clue as to where any of these “fountains of justice” might be. In *Twining v. New Jersey*, the Court declined “to give a comprehensive definition of [due process],” preferring to allow its meaning to evolve as more inclusion or exclusion questions arose.³⁶ The Court did offer guidance by reference to “general principles, well settled . . . which narrow the field of discussion.”³⁷ There are three principles that are supposed to give guidance. First, “due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors,” but only usages “shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.”³⁸ Second, even if an old English process survived a New England winter we will not keep it for that reason alone lest we “straightjacket” American jurisprudence.³⁹ Third, we *will* keep “fundamental principles,” those “which . . . protect the citizen in his private right, and guard him against the arbitrary action of government.”⁴⁰ “[C]ertain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard . . . [are] fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”⁴¹ You have to admire this “test” if you either do your critical reasoning

about one hundred years later. See *infra* notes 132–34 and accompanying text.

32. *Hurtado*, 110 U.S. at 532.

33. *Id.* at 535.

34. *Id.* at 536 (quoting *Brown v. Bd. of Levee Comm'rs*, 50 Miss. 468 (1874)).

35. *Id.* at 534–38. The Court found that preliminary proceedings other than a grand jury were equally likely to produce fairness in criminal proceedings. *Id.* The right of grand jury indictment was not incorporated against the states, a ruling that stands through today.

36. 211 U.S. 78, 100 (1908), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

37. *Id.*

38. *Id.* This principle was actually drawn from an older case trying to define “due process” in Fifth Amendment terms. See *Den v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 276 (1855).

39. *Twining*, 211 U.S. at 101.

40. *Id.*

41. *Id.* at 102.

with a thesaurus or if you just have fond memories of a merry-go-round. Otherwise, they narrow nothing. The Supreme Court in *Twining* used this “test” to determine that the right against self-incrimination was not “fundamental”⁴² but reversed itself fifty-six years later⁴³ using the same test as, all the while, the thicket grew.

Matters got worse twenty-nine years after *Twining* in *Palko v. Connecticut*.⁴⁴ After bluntly rejecting the argument that the demands of due process in the federal system swept equally across a state criminal prosecution—finding “no such general rule”⁴⁵—the Court decided not to incorporate the double jeopardy protections of the Fifth Amendment against the states.⁴⁶ In doing so, the Court confidently announced that “a rationalizing principle which gives to discrete instances a proper order and coherence” to questions of this nature had emerged.⁴⁷ This “principle” held that some rights are “not of the very essence of a scheme of ordered liberty,” such that to “abolish them is not to violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁴⁸ But since being articulated in the Fifth Amendment was not enough to merit being rooted in that “tradition or conscience,” what else matters under this “rationalizing principle”?

The key component was simply the thickness of the skin of the majority of the justices. The “rationalizing principle” called for a subjective assessment of whether the process used seemed “fair” or if it imposed “a hardship so acute and shocking that our polity will not endure it”⁴⁹—that is, if it was generally unprecedented in the civilized world. How the Court would make that assessment was not clear. Without that clarification, the “rationalizing principle” was little more than a rationalization for the individual justice’s gut instinct.

42. *Id.* at 102–14. It was rejected primarily because older cases had not recognized it. *Id.* at 107–12. A “meager record of the early colonial time” did not support it as a procedural necessity. *Id.* at 108. Other countries did not recognize it as fundamental. *Id.* at 113. Overall, it just did not seem to be “an immutable principle of justice.” *Id.*

43. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

44. 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

45. *Id.* at 323.

46. *See id.* at 323–28. In *Palko*’s first trial the State failed to obtain the death penalty verdict they sought. *Id.* at 321. The state then appealed, claiming the judge had erred in several respects. *Id.* The Connecticut Supreme Court awarded the state a new trial and a second chance to get its capital verdict. *Id.* They succeeded, precipitating *Palko*’s claim. *Id.* at 321–22.

47. *Id.* at 325.

48. *Id.*

49. *Id.* at 328.

Later cases would provide little refinement. In *Adamson v. California*, the Court once again rejected the idea that those who enacted the Fourteenth Amendment “intended its due process clause to draw within its scope the earlier amendments to the Constitution.”⁵⁰ Justice Frankfurter noted in concurrence that in the seventy years after the passage of the Amendment, the justices were virtually *unanimous* in the belief that the Fourteenth Amendment was not a “shorthand summary of the first eight amendments.”⁵¹ While acknowledging that some at the time of ratification believed it had that “shorthand” effect, Frankfurter was persuaded that judges who witnessed the ratification process rejected this view.⁵² Respect for federalism accounted for this, he said, as justices were “mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War.”⁵³ The Fourteenth Amendment was not to engraft upon the states one exclusive set of “procedural arrangements,” but it was simply to insure that whatever arrangements the states did choose produced a generally fair system.⁵⁴ To construe the Fourteenth Amendment to require all the safeguards of the Bill of Rights would be “to confound the familiar with the necessary,”⁵⁵ and “tear up by the roots much of the fabric of law in the several States, [depriving them] of opportunity for reforms in legal process designed for extending the area of freedom.”⁵⁶

Frankfurter reluctantly accepted the “traditions and conscience” approach, adding only that the tradition had to be that of “English-speaking peoples.”⁵⁷ In the 1960s, the Court focused on traditions in “an

50. 332 U.S. 46, 54 (1947), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

51. *Id.* at 62 (Frankfurter, J., concurring).

52. *Id.* at 63–64. In his dissent in *Duncan v. Louisiana*, Justice Harlan exchanged the “shorthand” imagery for the “straitjacket”:

The overwhelming historical evidence marshalled . . . demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified [it] did not think they were “incorporating” the Bill of Rights and the very breadth and generality of the Amendment’s provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of “liberty” and “due process of law” but that the increasing experience and evolving conscience of the American people would add new “intermediate premises.” In short, neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.

391 U.S. 145, 174–76 (1968) (Harlan, J., dissenting) (footnote omitted).

53. *Adamson*, 332 U.S. at 62 (Frankfurter, J., concurring).

54. *Id.*

55. *Id.* at 63.

56. *Id.* at 67.

57. Justice Frankfurter’s frustration in being unable to come up with a better approach surfaces often in his opinion:

Anglo-American regime of ordered liberty,”⁵⁸ and suggested that surveying what states were already doing might supply the core of due process.⁵⁹ This made inertia a candidate to displace gut instinct as the “rationalizing principle” of constitutional interpretation.

Justice Black rejected this whole approach, attacking it historically and viscerally. In *Adamson*, he accused the Court of bad scholarship, insisting that the Fourteenth Amendment was intended to overrule *Barron* and make the Bill of Rights apply to the states.⁶⁰ Getting the

There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. . . . In the history of thought “natural law” has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. . . . We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field. . . . This guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost. As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is “a *constitution* we are expounding,” so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

. . . . The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain *whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses*. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

Id. at 65–68 (emphasis added).

58. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968). *See generally* *Griffin v. California*, 380 U.S. 609 (1965) (holding that the prosecutor’s comments on defendant’s failure to testify violated the Fourteenth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (discussing whether the concept of ordered liberty protects individuals from compulsory self-incrimination).

59. *Duncan*, 391 U.S. at 150 n.14.

60. *Adamson*, 332 U.S. at 71–72 (Black, J., dissenting). Black chastised the Court for relying on historical studies of the Amendment that did not give adequate credit to the views of Congressman John Bingham of Ohio, a man Black called the “Madison” of the first section of the Fourteenth Amendment. *Id.* at 74, 94–98. Black included an appendix to his opinion in *Adamson*

history wrong was dangerous, Black said, since it left the Court free to fill in the content of due process by reference to the same pernicious source that had alarmed Justice Iredell a century earlier: natural law.⁶¹ Using natural law to interpret the Constitution “degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise.”⁶² Natural law theory is “an incongruous excrescence on our Constitution. . . . [A] formula [that is] itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.”⁶³

If natural law existed, Black was convinced that his colleagues had no magical way to access it. Attempts to divine “due process” from a source other than the language of the Constitution made the Court an arbitrary authority “substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights.”⁶⁴ This was also unnecessary, he claimed, as the Bill of Rights was no eighteenth-century straitjacket unsuited to the wardrobe of modern times.⁶⁵ While its provisions “were designed to meet ancient evils . . . they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many.”⁶⁶

The arbitrariness and circularity of the reasoning used to guide incorporation analysis also occurred to Justice Harlan. In *Duncan v. Louisiana*, Harlan dissented from the “incorporation” of the Sixth Amendment’s jury trial protections against the states, but mostly he disdained the process that achieved it:

that quotes from Bingham

conclusively demonstrat[ing] that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.

Id. at 74–75. Bingham, who was originally from Pennsylvania, was a prominent figure in many of the enormous events occurring in and around the conclusion of the Civil War. See generally ERVING E. BEAUREGARD, BINGHAM OF THE HILLS: POLITICIAN AND DIPLOMAT EXTRAORDINARY (1989); Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881 (1988).

61. *Adamson*, 332 U.S. at 69–70 (Black, J., dissenting).

62. *Id.* at 70.

63. *Id.* at 75.

64. *Id.* at 89.

65. *Id.*

66. *Id.*

Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally “in” or totally “out,” I can find in the Court’s opinion no real reasons for concluding that it should be “in.” The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more “fundamental” than others, but it turns out to be using this word in a sense that . . . is of no help. The word does not mean “analytically critical to procedural fairness” for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean “old,” “much praised,” and “found in the Bill of Rights.” The definition of “fundamental” thus turns out to be circular.⁶⁷

Despite his appreciation of this circularity, Harlan’s solution was even less principled. The “rights,” or due process, question, he said, “is whether [a citizen] was denied any element of fundamental procedural fairness.”⁶⁸ By what standard, he did not say.

If this ride on the judicial merry-go-round produced consistent results, perhaps we could forget searching for a true rationalizing principle. But if consistency is the measure of success, selective incorporation has been a disaster. Numerous decisions on incorporation were reversed within a few decades using the same basic template for analysis.⁶⁹ The consequences of the imprecision of this analysis were sometimes quite severe. Thirty-two years after turning down Frank Palko’s appeal, the Supreme Court reversed itself and ruled that there is a fundamental right of double jeopardy against the state, again using the same test.⁷⁰ This change of heart came too late for Palko who was executed in Connecticut’s electric chair within days of losing his appeal.⁷¹

To be sure, the Framers made due process something of a mystery. They put it in the Fifth Amendment, but surrounded it there with other specific procedural protections, implying that due process means something *more*.⁷² Unraveling the mystery of what more merely by intoning the phrase “traditions and conscience of our people,” however,

67. *Duncan v. Louisiana*, 391 U.S. 145, 183 (1968) (Harlan, J., dissenting).

68. *Id.*

69. Justice Brennan chronicles many of these reversals in *Malloy v. Hogan*, 378 U.S. 1, 4–7 (1964).

70. *Benton v. Maryland*, 395 U.S. 784, 787, 796 (1969).

71. OYEZ.org, *Palko v. Connecticut*, http://www.oyez.org/cases/1901-1939/1937/1937_135 (last visited Nov. 23, 2009).

72. See *Hurtado v. California*, 110 U.S. 516, 534–35 (1884).

makes rights seem the product of slight of hand and leaves the Court open to charges of using a smokescreen for the kind of arbitrary usurpation of authority judges love to publicly disdain. A sincere effort to base due process on an accurate perception of the conscience of the people seems like a good approach for a Court in a republic to take. But without articulating principles to accomplish that, all we get is a nasty thicket of dangerous uncertainty.

B. The Ninth Amendment: Blinded by a Penumbra

The relatively simple language of the Ninth Amendment⁷³ belies the complex issues of interpretation it has created. The Court could have simply interpreted it to mean that merely by listing rights in the first eight amendments, the Framers did not imply that the list was exhaustive.⁷⁴ That is, the Court could have found the Ninth to be only declaratory, a tautology stating the obvious point that the people would not be so foolish to limit their liberties by articulating a closed-end group of them.⁷⁵

73. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

74. Alexander Hamilton argued against a Bill of Rights for fear that it would be seen as a closed-end list. Bruce A. Antkowiak, *Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569, 579–80 (2007). Madison clearly wanted “an express declaration made that[] all rights not expressly given up[] are retained.” GAZZETTE U.S., June 10, 1789, reprinted in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 67 (Helen E. Veit et al. eds., 1991). A resolution he proposed on June 8, 1789, called for a “prefix” to the Constitution that “all power is originally invested in, and consequently derived from the people.” *Madison Resolution* (1789), reprinted in *CREATING THE BILL OF RIGHTS*, supra, at 11. And in one of his first drafts of the Amendment, he was more clearly building that hedge when he proposed that it read, in part, “[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.” *Id.* at 13.

75. Professor Amar writes that the Ninth Amendment, like the others, was first and foremost a declaratory document, stating the nature of human rights, not purporting to create them:

As modern day legal positivists, we tend to view the Bill as creating or conferring legal rights. But the congressional resolution accompanying the Bill explicitly described some of its provisions as “declaratory.” To a nineteenth-century believer in natural rights, the Bill was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed. Under this view, the First Amendment was not merely an interpretation of the positive law code of the original Constitution, declaring that Congress lacked Article I, Section 8 enumerated power to regulate religion or suppress speech; the Amendment was also a declaration that certain fundamental “rights” and “freedoms”—of assembly, petition, speech, press, and religious exercise—preexisted the Constitution. Why else, it might be asked, did the Amendment speak of “*the*” freedom of speech, implying a preexisting entitlement? The Ninth and Tenth Amendments did more than make explicit rules of

After 174 years, the Supreme Court rejected this option as one that did not give “real effect” to the language of the Amendment.⁷⁶ Instead, the Ninth Amendment was read as a grant of power to the Court to find the “other” rights without waiting for the democratic process to supply them by Amendments.

The search for “other” rights was launched in 1965 in *Griswold v. Connecticut* when the Court reversed the convictions of a doctor and his married-couple patients for violating a statute that criminalized prescribing or using artificial birth control.⁷⁷ Justice Douglas’s majority opinion made passing reference to the Ninth Amendment,⁷⁸ but it was in Justice Goldberg’s concurrence that the new jurisprudence of the Ninth was born.

Goldberg’s historical analysis of the Ninth Amendment led him to conclude that “[i]t was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.”⁷⁹ But those fears would rise again, he warned, if the Amendment was given “no effect whatsoever” by holding that “a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments.”⁸⁰

And speaking of fears, Goldberg assured everyone that this was not the beginning of a radical expansion of Supreme Court authority in a non-principled direction because, after all, clear limits and direction already existed in the process of selective incorporation.⁸¹ The “other” rights were already among those to be applied against the states under the Fourteenth,⁸² meaning that the Ninth simply “serves to support what this Court has been doing in protecting fundamental rights.”⁸³

construction for interpreting the Constitution as a positive law code; they also declared that certain “rights” and “powers” were retained by “the people” and “reserved” to them in contradistinction to “states.”

Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1206–07 (1992) (footnotes omitted).

76. *Griswold v. Connecticut*, 381 U.S. 479, 490–91 (1965).

77. *Id.* at 482.

78. *Id.* at 482–86.

79. *Id.* at 488–89 (Goldberg, J., concurring) (footnote omitted).

80. *Id.* at 491. Indeed, he proclaimed that this sort of interpretation would violate the Ninth Amendment. *Id.*

81. *Id.* at 491–92.

82. *Id.* at 486–87, 491–92.

83. *Id.* at 493.

The method for finding the other rights was two-fold.⁸⁴ First, the Court could employ the same circular reasoning used in the selective incorporation cases.⁸⁵ By studying “traditions” and the “conscience” of the people, a right “rooted” there would be seen as “fundamental” because without it, we would deny a principle of our institutions that was, well, “fundamental.”⁸⁶

But other rights could also be found by a new “penumbral” analysis that was espoused by the *Griswold* majority.⁸⁷ Justice Douglas found an other right of marital privacy stemming from the penumbra of the rights already listed in the Bill of Rights.⁸⁸ This process was superficially benign as it was one of mere inference.⁸⁹ It was legitimate (principled) because it was closely tied to the text of the Constitution. It was necessary, we were told, because otherwise “the specific rights would be less secure.”⁹⁰

But it put no check on the process of inference. A right to read may be inferred from the right of free speech, but in finding a right of marital privacy in the penumbras of various Amendments that allegedly created “zones of privacy”⁹¹ and harbored “a right of privacy older than the Bill

84. *Id.*

85. *Id.*

86. *Id.* The circular “test” in *Griswold* is rendered thusly:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] . . . as to be ranked as fundamental.” The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”

Id. at 493 (citation omitted). The “how” of this process is never discussed, but it was used later to find an “other” Ninth Amendment right of parents regarding the care and custody of their children. See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

87. *Griswold*, 381 U.S. at 484–86.

88. *Id.*

89. Various First Amendment rights were used as an example:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

. . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.

Id. at 482 (citations omitted).

90. *Id.* at 483.

91. The Court mentioned the First, Third, Fourth, Fifth, and Ninth Amendments, each of which

of Rights—older than our political parties, older than our school system,”⁹² the Court had once again unmoored its analysis from the text of the Constitution and set it adrift into an uncharted venue. This was no longer simple inference like branches flowing from the main trunk of a tree. The penumbral process invited the kind of unrestrained and unpredictable growth typical of most nasty thickets.

And the growth was robust. Although it was not clear how it helped preserve her right against unreasonable searches or to avoid having soldiers quartered in her home, the right of a woman to choose to terminate a pregnancy of a non-viable fetus was found in the shadowy contours of penumbras.⁹³ Penumbras soon went in a myriad of directions,⁹⁴ ostensibly to resolve the concerns of the Framers (Madison in particular) over a restrictive reading of the Bill of Rights.⁹⁵

But whether Madison would agree that the new jurisprudence of the Ninth Amendment was sufficiently principled to avoid the criticism that “a judge’s responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion,”⁹⁶ Justice Black certainly did not.⁹⁷ He ridiculed the Court’s attempt to give substance to the test under the Ninth Amendment, arguing that all such “formulas based on ‘natural justice,’ or others which mean the same thing . . . require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a

has “penumbras, formed by emanations from [the Bill of Rights] guarantees.” *Id.* at 483–84.

92. *Id.* at 486. Justice Goldberg heartily agreed that such a right could be found in the emanation from our entire constitutional system. *Id.* at 493–94 (Goldberg, J., concurring).

93. *Roe v. Wade*, 410 U.S. 113, 129, 152–53 (1973). *But see* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 839 (1992) (stating that the “all-encompassing ‘right to privacy,’” as claimed in *Roe*, was too far of a reach from *Griswold*).

94. In *Richmond Newspapers, Inc., v. Virginia*, the Court held “that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’” 448 U.S. 555, 580 (1980) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)) (footnote omitted). Justice Douglas also invoked the Ninth Amendment in bemoaning the loss of privacy in the government’s use of sophisticated surveillance techniques in criminal investigations. *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting). Douglas further argued that when a city closed its swimming pools rather than integrate them, their acts violated a right to be free from racial discrimination, a right tracing its origin to the Ninth and other Amendments. *Palmer v. Thompson*, 403 U.S. 217, 233–34, 237 (1971) (Douglas, J., dissenting). He also believed that the penumbra of the free speech right of the First Amendment could protect a public-school student from discipline over the length of his hair. *Freeman v. Flake*, 405 U.S. 1032, 1032 (1972) (Douglas, J., dissenting in denial of certiorari).

95. *Richmond Newspapers*, 448 U.S. at 579–80.

96. *Griswold*, 381 U.S. at 494 n.7 (Goldberg, J., concurring).

97. *Id.* at 510 (Black, J., dissenting).

legislative body.”⁹⁸ All that the members of the Court can rely upon in this area is “their personal and private notions,” he said, as the Court “certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the ‘[collective] conscience of our people.’”⁹⁹

The very notion that the Ninth was a grant of power to the Court was “a shocking doctrine,” Justice Black said, since the Ninth was meant to specifically *limit* the power of government, not to enrich it by placing the power to identify fundamental constitutional rights into the hands of its judicial branch on the federal level.¹⁰⁰ Since the Framers never intended to give such power to the Court, the Court simply usurped it from the people it claims it was protecting.¹⁰¹ This process threatened the structural protections of separation of powers and federalism,¹⁰² as the Court was not the agency of change for the Constitution; the process of amendment was.¹⁰³ Justice Black warned that the Court, through “broad, unbounded judicial authority,” had rendered itself “a day-to-day constitutional convention.”¹⁰⁴

98. *Id.* at 511–12 (footnote omitted). Indeed, he collects in a footnote all of the “catchwords and catch phrases” used to supply substance to the limit the Court believes is imposed upon a judge discerning what rights are protected as fundamental under either the Ninth Amendment or due process. An edited version of this summary is as follows:

Thus it has been said that this Court can forbid state action which “shocks the conscience,” sufficiently to “shock itself into the protective arms of the Constitution.” It has been urged that States may not run counter to the “decencies of civilized conduct,” or “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or to “those canons of decency and fairness which express the notions of justice of English-speaking peoples,” or to “the community’s sense of fair play and decency.” It has been said that we must decide whether a state law is “fair, reasonable and appropriate,” or is rather “an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts.” States, under this philosophy, cannot act in conflict with “deeply rooted feelings of the community,” or with “fundamental notions of fairness and justice.” Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can “not tolerate.”

Id. at 513 n.4 (citations omitted).

99. *Id.* at 519 (footnote omitted).

100. *Id.* at 519–20.

101. *Id.* at 520.

102. *Id.* at 520–21.

103. *Id.* at 526–27. Justice Black agreed with Judge Learned Hand in the observation that, “[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.” *Id.*

104. *Id.* at 520.

Justice Stewart agreed with Justice Black¹⁰⁵ and, years later, Justice Scalia did as well. While Justice Scalia believed that one of the other rights in the Ninth Amendment was the right of parents to direct their child's upbringing, he stated that he did "not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right."¹⁰⁶ Here, as in selective incorporation, the "traditions" and "penumbra" tests are indeed so lacking in any stated, principled methodology that denying that personal discretion is at their root seems entirely hypocritical. But while Justice Black's view may be the antidote to that hypocrisy, there is reason to hesitate before we embrace it.

The Ninth says that there *are* rights other than those listed in the eight amendments that precede it, not just that those specific rights should be read broadly. So what should the Court do when it confronts a situation in which the text of the Bill of Rights could not logically be stretched to protect a citizen, but what is at stake seems at least as important as not having soldiers quartered in your home? Justice Black would rule that there is no right a Court could enforce and tell the citizen to write to their legislator and get the amendment process churning.

But that would require holding either that, (1) there are no rights other than what is contained in the language of the first eight amendments (something the Ninth Amendment specifically says is not true) or, (2) that the Framers believed that there are rights as real and vital as the ones written down but which are not enforceable because, and only because, they are not inscribed on parchment. This latter reading makes the Ninth Amendment not just a declaratory text but one that actively *prohibits* a Court from protecting one of the other rights that the Ninth Amendment says really exists. And while allowing enforcement of such an other right would increase the power of the Court, making it unenforceable would vastly increase the power of legislatures whose laws are most often the alleged infringer of the right the citizen asserts.

So perhaps it is too late for the Court to get out of the other rights business altogether. But how it is doing so now will neither clear the

105. *Id.* at 529 (Stewart, J., dissenting). Stewart accused the majority of turning "somersaults with history" in how it read the Ninth Amendment. The Amendment was declaratory only, Stewart said, a truism "to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States." *Id.* at 529-30.

106. *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

thicket nor stunt its growth. Once again, finding a more principled and transparent methodology just might help.

C. Substantive Due Process: The “Traditions” Approach to “Liberty” and the Jurisprudence of Easy Answers

The Court has given us a warning about its effort to define the concept of “liberty” set forth in the due process clauses of the Fifth and Fourteenth Amendments:

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the *Bill of Rights*. . . . [T]here is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels¹⁰⁷ caution and restraint. But it does not counsel abandonment

The Court has not abandoned the effort, but the field remains quite treacherous.

“Caution and restraint” have evidently dictated that the Court find its poetic side in this part of the rights question. The “freedom to marry . . . [is] essential to the orderly pursuit of happiness by free men.”¹⁰⁸ Furthermore, the Court has extolled marriage and procreation as “fundamental to the very existence and survival of the race.”¹⁰⁹ Abortion rights are among those “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy [that] are central to the liberty protected by the *Fourteenth Amendment*.”¹¹⁰ And, of course, there is what Justice Scalia now derisively calls the “sweet-mystery-of-life”¹¹¹ passage: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed

107. *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (footnote omitted).

108. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

109. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

110. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

111. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

under compulsion of the State.”¹¹² This is not the normal language of the law. It all may be entirely true, but we are not told *why* it is true. It may as well be written in iambic pentameter or haiku.

The substance of “liberty” turns out to be the product of the “traditions” analysis we have seen before. Liberty becomes an arbitrary subset of things done in the past, defined cryptically as things that “[t]he American people have always regarded . . . as matters of supreme importance.”¹¹³ Using this sort of sound-bite jurisprudence, the Court found that a mother, her son and her two grandsons had a right protecting them from eviction by a housing authority, reasoning that family life is basic, historical, cherished and, well, traditional:

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful “respect for the teachings of history (and), solid recognition of the basic values that underlie our society”. Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.¹¹⁴

The problem is, though, that our past is littered with practices, some of which we may be proud to call traditions and others we would just as soon forget. Racism, sexism, intolerance to non-Christian beliefs, and imperialistic, expansionist ideals all may be said to be rooted in our Nation’s history.¹¹⁵ So how do we know what page of the family album of American history contains the portraits of honored traditions?

Justice Brennan believed that there was no principled way to do this. He saw the Court engaging in a failed search for limits in this area and feared that it would be criticized for defining liberty solely in terms of the whims of the individual justices:

[The Court] finds this limitation in “tradition.” Apparently oblivious to the fact that this concept can be as malleable and as elusive as “liberty” itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for “tradition” involves nothing more idiosyncratic or complicated than poring through dusty volumes

112. *Casey*, 505 U.S. at 851.

113. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

114. *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (citations omitted).

115. Such practices were often defended, in their time, by the invocation of “natural law.” See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 293 (1996) (The “abolition of slavery would violate the natural law of property.”).

on American history. Yet . . . “[w]hat the deeply rooted traditions of the country are is arguable.” . . . Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of “liberty,” the plurality has not found the objective boundary that it seeks.¹¹⁶

Indeed, the traditions approach hardly gives the kind of limit to the Court’s discretion the Court seems to think it does. Picking the timing, scope, and content of a given practice to see if it qualifies as a tradition is a discretionary act of the first order.¹¹⁷

On the right length of time for a practice to be a tradition, the Court is as subjective as Red Riding Hood selecting porridge; it has “to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer”¹¹⁸ with no objective basis for this calculation. Moreover, the longevity of a tradition is not necessarily related to its present value. People can do dumb things for years while wisdom lately acquired is wisdom nonetheless.

Picking the “scope” of the “honored tradition” is also wholly arbitrary. While the Court has continually found the “liberty interest . . . of parents in the care, custody, and control of their children” to be “perhaps the oldest of the fundamental liberty interests recognized by this Court,”¹¹⁹ in *Michael H. v. Gerald D.*, that interest was superseded.¹²⁰ A child’s biological father was found to have an insufficient liberty interest to obtain a visitation order where a state statute presumed that the child’s father was the man to whom the mother was married when the biological father impregnated her.¹²¹ The *relevant* tradition in the case, Justice Scalia wrote, was not the liberty of a father in the care, custody, and control of his child, but the tradition of the law condemning adulterers.¹²² The formula to find the relevant tradition was this:

We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.

116. *Michael H. v. Gerald D.*, 491 U.S. 110, 137 (1989) (Brennan, J., dissenting).

117. *Id.* at 138–41 (discussing the plurality’s approach to determining tradition).

118. *Id.* at 138.

119. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Court used that interest to overturn a state law that gave grandparents visitation rights over the objection of the child’s mother. *Id.* at 65–72.

120. 491 U.S. at 125–27.

121. *Id.*

122. *Id.* at 129–30.

If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.¹²³

Note that finding the “most specific level” for a relevant tradition is not scientific. The judge is not issued a judicial microscope turned up to the highest magnification to find what she seeks. As in all cases of traditions analysis, the judge *selects* what traditions are *relevant* to the case by making a discretionary judgment unguided by principles that would respect the basic institution of the rule of law. Selecting the scope of the tradition is thus quite subjective and arbitrary.¹²⁴

In *Lawrence v. Texas*,¹²⁵ the subjective nature of the timing *and* content of the “relevant” tradition was shown. *Lawrence* overruled the 1986 decision in *Bowers v. Hardwick*¹²⁶ that upheld laws criminalizing private, consensual, adult homosexual conduct on the basis that sodomy had never been recognized as a fundamental right.¹²⁷ Seventeen years later, the *Lawrence* Court considered matters of private, intimate conduct protected by the liberty provisions of the Fourteenth Amendment.¹²⁸ To accomplish this reversal, the *Lawrence* Court demonstrated what a wonderfully compliant formula the traditions analysis really is. While Justice Kennedy, writing for the *Lawrence* plurality, claimed that *Bowers* had misread history and attributed an “anti-gay” origin to a variety of statutes that were directed at other considerations,¹²⁹ he had to admit that Chief Justice Burger’s concurrence in *Bowers* accurately collected a number of laws passed throughout the Nation’s history that plainly *did* announce and enforce a tradition of anti-gay bias.¹³⁰ But despite what

123. *Id.* at 127–28 n.6.

124. Justice Scalia’s own opinion in *District of Columbia v. Heller* illustrates this. In deciding that the Second Amendment comprehends an individual right to carry firearms, he sought out the understanding of the terms not only from the eighteenth century but also from the English Bill of Rights of the seventeenth century. 128 S. Ct. 2783, 2791–94, 2798–99 (2008). However, when confronted with the argument that such an analysis should yield the conclusion that any individual right recognized in those eras should apply *only to weaponry of that same period* (a very specific level of tradition) he dismissed such talk by the curt rejection “[w]e do not interpret constitutional rights that way.” *Id.* at 2791.

125. 539 U.S. 558 (2003).

126. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

127. *Lawrence*, 539 U.S. at 567–68, 577–78 (plurality opinion).

128. *See id.* at 578–79.

129. *Id.* at 568–71.

130. *Id.* at 571–72.

had existed for decades or more before *Bowers*, Justice Kennedy reasoned the “traditions” analysis must come with an expiration date:

In all events we think that our laws and traditions in the *past half century* are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.¹³¹

And it was not just “our” traditions and laws that are relevant, Justice Kennedy said, but what other segments of the Western world have done during this period as well.¹³² Earning the wrath of Justice Scalia for doing so,¹³³ Justice Kennedy cited reforms of anti-gay laws by the British Parliament and the European Court of Human Rights as evidence of the content of the truly relevant tradition.¹³⁴

Why was the last fifty years made the relevant time period here? Why look to the United Kingdom, and the European Union and not the Pacific Rim, Africa, or anywhere else outside the jurisdiction of our Constitution? The answer is not clear. It is, we may suppose, as arbitrary a selection as anything else in this area. Analysis by traditions is, at the end of the day, a friend to all and an enemy of principled analysis. By picking the time period you want, the scope of what you wish to include in it and the breadth of the relevant pool of practices you wish to draw upon, a traditions analysis can work for all sides of any issue. Its ubiquitous nature is, however, reason enough not to use it if we wish to have the Court act like an institution within a constitutional framework and desire that the rights question be answered within a politically transparent context.

The traditions approach is, as we have seen, at the heart of all three areas of “rights” interpretation and in all three areas its gossamer quality has failed to shield the Court from criticism that they are just making

131. *Id.* (emphasis added). In the post-*Bowers* era, Kennedy noted, a number of state courts rejected *Bowers* and found protection for such conduct within their own state constitutions. *Id.* at 573.

132. *See id.* at 572–73.

133. *Id.* at 598 (Scalia, J., dissenting). Scalia wrote:

The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”

Id. (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)). Over 100 years earlier, of course, the Court had embraced this multi-national approach. *See generally* *Hurtado v. California*, 110 U.S. 516 (1884).

134. *Lawrence*, 539 U.S. at 572–73 (plurality opinion).

things up as they go along. The whole tradition approach is flawed from the outset and no amount of specifying it, confining it to a relevant number of decades, or expanding it to include the past or current practices of some segment of the community of nations will fix it. It does not work because it is lazy. It finds a familiar practice and stops, instead of trying to understand why we practiced it in the first place.

Understanding why we should keep traditions is the key. Families have traditions just as nations do. If each year at Christmas the entire family travels to Uncle Henry's for dinner, a wonderful tradition may well be established. But when Uncle Henry dies, or if he and the rest of the family have a bitter falling out over a matter of inheritance, showing up at his doorstep on Christmas day hardly seems like a practice worth maintaining. The essence of that tradition, however, can most certainly be preserved. If the children who ate dinner at Uncle Henry's now create the same warm sense of family at holiday dinners of their own, then the thing that mattered in the past is preserved regardless of where we are when we have our turkey on December 25th, or that, instead of turkey, we now eat a salmon soufflé.

When the Court seeks to rely upon traditions it has to remember that it is not the curator of the Museum of Americana where historical preservation for historical preservation's sake is the goal. The past is filled with truth, liberty, and great insight into human nature, along with ignorance, biases, and bigotries that grew up with them. The great task is to discern the core of traditions and bring forward those aspects of the past which will secure for us today the measure of respect from government we believe a free and honorable people must have. Martin Heidegger advised us to be "ruthless" in seeking the tradition that lies within the past.¹³⁵ The use our current jurisprudence makes of tradition does not honor the wisdom of the past so much as it simply enshrines the boxes it was packaged in. Not making a concerted effort to find the truth inside those boxes will, sooner or later, lead us to believe they were empty in the first place. In answering the rights question, that is a cynicism we cannot afford. Our failure to assert a meaningful conception of rights will mean that a void will be created—and voids in

135. Heidegger stated:

Ruthlessness toward the tradition is reverence before the past—and it is authentic only in the appropriation of this—the past—out of the destruction of that—the tradition. From here out must each actual historical work, which is something fully other than history in the usual sense, insinuate itself in the discipline of philosophy.

ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* xx (2005) (quoting MARTIN HEIDEGGER, *PLATO'S SOPHIST* 178 (1954)).

any political universe do not stay empty as long as a government stands ready to fill them.

We have surrounded rights in a thicket of pretentious verbiage. We seem unwilling or unable to substitute for that verbiage an analytical process that we can accept as legitimate. Such a process, human in origin, will never be infallible, but at least it could allow justices to argue within it without having to use as their ultimate source of authority the plea, “trust me.” Step one in finding that process requires recognizing that we did not *originally* plan to ask the modern rights question at all.

IV. HOW WE GOT HERE: AN ABRIDGED HISTORY OF THE RIGHTS AMENDMENTS

In the summer of 1787, Americans faced the task of revising a system of government that, under the Articles of Confederation, had brought the young Republic face to face with an enemy more dangerous than the British Empire it had defeated a decade earlier. The threat was the prospect of internal collapse from a central government too weak to address problems so national in scope that attempts to deal with them from the parochial viewpoints of states only made them worse.¹³⁶ But while more central authority was needed, excessive central authority was precisely what had spawned the Revolution in the first place. Madison called this the “great difficulty” of creating the sublime paradox of a central government sufficiently enabled to serve the proper ends for which a national government was established while tolerably controlling it so that it would not suppress the personal liberties of citizens.¹³⁷

As of 1787, however, little or no thought was given to accomplishing this by writing a Bill of Rights. The Articles of Confederation had none,¹³⁸ and no delegate who came to the Convention had a Bill of Rights as their top priority. A suggestion for one was only raised a few

136. There are many excellent historical accounts of the circumstances leading to the call for a constitutional convention. See, e.g., FARBER & SHERRY, *supra* note 115, at 18–31, 257–60; ALLAN NEVIS & HENRY STEELE COMMAGER, *A POCKET HISTORY OF THE UNITED STATES* 106–30 (Washington Square Press 1960) (1942); *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* (Michael Kammen ed., 1986) [hereinafter *ORIGINS*]; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); DANIEL N. ROBINSON, *AMERICAN IDEALS: FOUNDING A “REPUBLIC OF VIRTUE”* 98–147 (2004); Paul Finkleman, *The Paradox of Rights Rhetoric*, in *TO SECURE THE BLESSINGS OF LIBERTY: RIGHTS IN AMERICAN HISTORY* 84–86 (Josephine F. Pacheco ed., 1993) [hereinafter *BLESSINGS OF LIBERTY*].

137. See Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 *WIDENER L.J.* 11, 27–28 (2003) (quoting *THE FEDERALIST* NO. 51 at 349 (James Madison) (Clinton Rossiter ed., 1961)).

138. MCAFFEE ET AL., *supra* note 8, at 29.

days before adjournment and generated no interest.¹³⁹ The original approach of the Framers was to use the language of *process*, creating a governmental *structure* that would, by its natural operation, limit government and, consequently, create for individuals a space in which they would be left alone.

In prior articles, I have detailed the intriguing structural approach the Framers concocted to seek the sublime paradox.¹⁴⁰ The concoction was premised on an insight about human nature that while virtue was a treasured attribute of political leaders, not all who sought political power would be virtuous. The safer assumption was that they all would be ambitious and the best way to counteract ambition was with the counterweight of ambition for the same limited quantum of power.¹⁴¹

This slightly sardonic view of human nature, and the teachings of David Hume and Adam Smith,¹⁴² led the Framers to make a “unique contribution” to “political science and political theory” by acting on the insight that “freedom was enhanced by the creation of two governments, not one.”¹⁴³ They “split the atom of sovereignty,”¹⁴⁴ dividing that portion

139. FARBER & SHERRY, *supra* note 115, at 316–17; RAKOVE, *supra* note 136, at 288–89.

140. See Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599, 609–21 (2005) [hereinafter Antkowiak, *Contemplating Brazilian Federalism*] (stating that the “federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society”); Antkowiak, *supra* note 9, at 468–74 (stating that “[r]eason may have displaced an older, theological mandate as the philosophical force behind political society but it hardly stripped that society of its moral component: limited government did not mean an amoral one”); Bruce A. Antkowiak, *Judicial Nullification*, 38 CREIGHTON L. REV. 545, 572–74 (2005) (stating that “[w]ithin the spheres of authority properly demarcated for government action, such action enjoyed the full and proper range of human judgment including, of course, the ethical dimension”); Antkowiak, *supra* note 74, at 578–82 (stating that the “Fourth Amendment protects a right to be let alone, a right . . . that reflects most particularly the government’s structural charge to perform tasks the Constitution delegates to it and, otherwise, to leave us alone”). Scottish Enlightenment scholars have noted that great economic growth and the possibility of increasing numbers of people acquiring it were factors the Scots believed had profound effects on moral philosophy. Knud Haakonssen, *Natural Jurisprudence and the Theory of Justice*, in THE CAMBRIDGE COMPANION, *supra* note 11, at 217; Fania Oz-Salzberger, *The Political Theory of the Scottish Enlightenment*, in THE CAMBRIDGE COMPANION, *supra* note 11, at 164–69. Certainly, George Washington saw an American Empire coming. JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 87–89 (2007).

141. THE FEDERALIST NO. 51 (James Madison).

142. As Professor Wills and others have pointed out, it sometimes seemed as if Madison wrote his most celebrated works, including *The Federalist No. 10*, while he had the works of Hume opened beside him. DOUGLAS ADAIR, “That Politics may be Reduced to a Science” *David Hume, James Madison, and the Tenth Federalist, as reprinted in FAME AND THE FOUNDING FATHERS* 98–104 (Trevor Colbourn ed., 1974); WILLS, *supra* note 3, at 20–22.

143. *United States v. Lopez*, 514 U.S. 549, 575–76 (1995) (Kennedy, J., concurring). To the extent that federalism in particular was meant to deal with the question of factions, Justice Kennedy’s observation should probably have acknowledged the contribution made by Hume and Smith whose influence on the writing of *The Federalist No. 10* is plain. See ELLIS, *supra* note 140,

of the socio-political universe to be ruled over by government into two spheres of authority, federal and state. With ambitious people in both of those spheres, conflict was inevitable and anticipated. Even more conflict was anticipated *within* the federal sphere where three co-equal branches would be in a constant state of dispute over the use of the power the federal government had been given. Creating the most efficient government was not the ultimate goal—the sublime paradox was. The part of that paradox that involved protecting individual liberty was addressed by a *process* that enumerated powers to be wielded by the central government and enforced that enumeration by the structures of federalism and separation of powers. These would be the “double security” to the rights of the people.¹⁴⁵ No meaningful effort was made to define or identify rights as stand alone quantities within the text of the Constitution itself.¹⁴⁶

In large measure, what our Framers initially envisioned was that rights would happen as the byproduct of a system of government of enumerated powers and be protected by the two great structural pillars,¹⁴⁷

at 105–06 (“The ‘literary cargo’ of books Jefferson had sent [Madison] from Paris included the histories of David Hume, which contained an embryonic version of the idea that Madison might have picked up.”); Fleischacker, *supra* note 11, at 327–28 (stating that “like Smith, [Madison] sees the liberty that . . . gives rein to ‘interest’ as compatible with a republic concerned” with fostering virtue).

144. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

145. THE FEDERALIST NO. 51 (James Madison).

146. As Professor Rakove points out, the body of the Constitution does contain certain specific “rights” guarantees (such as habeas corpus, jury trial in criminal cases, the privileges and immunities protections of Article IV, the contracts clause, and the ban against religious tests for public office) but they were “piecemeal in composition and partial in coverage.” RAKOVE, *supra* note 136, at 317–18. They were hardly the “natural rights” of the Declaration. *See id.* (stating that “[n]one of these provisions invoked the natural rights and first principles that Americans expected a declaration of rights to contain”). Indeed, a quick scan of the rights will show that they were all mostly useful in service of the structural protections the rest of the Constitution afforded. For example, habeas corpus afforded the judiciary the authority to inquire into and check the executive’s assertion of the power to hold someone, and jury trial is the quintessential structural protection of liberty. Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 462–64 (2008); Shannon C. Stimson, *A Jury of the Country: Common Sense Philosophy and the Jurisprudence of James Wilson, in SCOTLAND AND AMERICA IN THE AGE OF THE ENLIGHTENMENT* 193, 198–204 (Richard B. Sher & Jeffrey R. Smitten 1990) [hereinafter SCOTLAND AND AMERICA]. The privileges and immunities clause preserved basic guarantees of federalism against the corrosive force of state isolationism; the contracts clause limited state power generally; and, while the religious test ban comes closest to a stand alone “right” it did not guarantee freedom of religious practice as much as seek to remind all governments of the secular authority from which they originated. *See RAKOVE, supra* note 136, at 311–12 (stating that “at the heart of [Jefferson’s and Madison’s] support for disestablishment and free exercise lay the radical conviction that . . . religious practice could be safely deregulated, placed beyond the cognizance of the state, and thus defused as both a source of political strife and a danger to individual rights”).

147. *See Antkowiak, Contemplating Brazilian Federalism, supra* note 140, at 605–09 (stating that “each of [the] dual sovereigns must maintain political credibility since it is ‘in the tension

implemented by a judiciary with a broad and vigorous mandate. In *Federalist No. 78*,¹⁴⁸ Hamilton argued that the judiciary must be independent “to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men . . . sometimes disseminate among the people themselves . . . [resulting in] serious oppressions of the minor party in the community.”¹⁴⁹ It was the duty of judges to act “as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community,”¹⁵⁰ and they were to accomplish this by using “reason and law.”¹⁵¹ Rights did not need to be specified as they were simply what was left outside of those powers we specifically bestowed upon the central government.¹⁵² Rights were part of a process in which we enjoyed freedom from arbitrary, tyrannical power.¹⁵³ Had we kept with the Framers’ original design, and had a Constitution without a Bill of Rights, answering the rights question would be a vastly different enterprise.

Of course, we never let that original design get off the ground. As brilliant as this plan of government may have been, it was politically unpalatable in the America of the late eighteenth century. Like any radical new notion, it was viewed with a jaundiced eye. A number of states appended calls for various amendments to their ratification

between federal and state power’ that ‘lies the promise of liberty’”).

148. James Wilson was an equally strong advocate for expansive judicial power, largely as an outgrowth of his admiration for the common sense philosophy of Thomas Reid. Stimson, *supra* note 146, at 199–204.

149. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

150. *Id.* at 470.

151. *Id.* at 468. Two excellent discussions of Hamilton’s treatment are contained in PECK, *supra* note 8, 65–67, and in WILLS, *supra* note 3, at 151.

152. See *infra* notes 156–58 and accompanying text for a discussion of Hamilton’s and Wilson’s opposition to a Bill of Rights.

153. This epitomized the concept of freedom defined by Philip Pettit in *Freedom as Antipower*:

I am free to the degree that no human being has the power to interfere with me: to the extent that no one else is my master, even if I lack the will or the wisdom required for achieving self-mastery. The account is negative in leaving my own achievements out of the picture and focusing on eliminating a danger from others.

And he considered the best way to achieve it to be to

consider the introduction of protective, regulatory, and empowering institutions. I do not say that every institution will necessarily increase antipower, of course; some may have indirect, counter productive effects, and empirical work will be required to determine which mix of institutions does best. I say only that protective, regulatory, and empowering institutions represent the sorts of options that we ought to be considering if we are interested in the promotion of antipower in a society.

Antkowiak, *supra* note 74, at 580–81 (quoting Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 578, 590 (1996)).

resolutions,¹⁵⁴ and Anti-Federalist thought, defeated in its general opposition to the Constitution, won out on the need for a listing of rights.¹⁵⁵

Hamilton and others argued stridently against including such a listing, warning that it could serve only as an instrument to *limit* political liberty by making it appear that the government could control all conduct outside such an enumeration.¹⁵⁶ James Wilson feared that including a Bill of Rights would undercut the notion that “the Constitution was a bold statement that ‘we reserve the right to do as we please’ when specific authority for government action does not exist.”¹⁵⁷ But in the *realpolitick* of the 1790s, Madison knew that to forestall a move for a second Constitutional Convention, he had to propose a Bill of Rights to the first Congress.¹⁵⁸

In advancing the Bill of Rights, though, Madison would do nothing that meant scraping the careful contours of the Constitution he had just helped author. He became satisfied that enacting a Bill of Rights risked little insofar as the integrity of his governmental system was concerned. And on the plus side, a Bill could help educate and galvanize the

154. These are very nicely collected for viewing at the website of the Avalon Project at the Yale Law School. The Avalon Project, <http://avalon.law.yale.edu> (last visited Nov. 1, 2009).

155. *Selected Anti-Federalist Writings 1787–1788*, reprinted in ORIGINS, *supra* note 136, at 291–94, 315–19, 369–71, 376–79; *see also* FARBER & SHERRY, *supra* note 115, at 321–23; ROBERT GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 58–59 (1997); PECK, *supra* note 8, at 60–67; *see generally* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2006).

156. Professor Rakove quotes Benjamin Rush as observing that, “Our rights are not yet all known . . . how could they be properly enumerated?” and Noah Webster as lampooning the whole idea that a Bill of Rights could ever be effective. RAKOVE, *supra* note 136, at 327–30. *See also* MCAFFEE, *supra* note 16, at 140–42; PECK, *supra* note 8, 63–64. Elsewhere, I have written:

When the product of the Philadelphia Convention was assailed for failing to include a list of rights, Hamilton called a listing “unnecessary” because under our constitution, unlike the English system, “in strictness, the people surrender nothing.” A listing was “dangerous” because it could leave future generations to wonder if the list was by way of limitation of rights when, in fact, the Constitution itself was itself a bill of rights, reserving to the individual all that had not been specifically delegated away.

Bruce A. Antkowiak, *The Irresistible Force*, 18 TEMP. POL. & CIV. RTS. L. REV. 1, 33 (2008) (footnote omitted).

157. *See id.* at 33 n.266 (quoting *The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution* (1787)). As the discussion on the Ninth Amendment indicates, there is a considerable body of scholarly thought that Madison included the provision not to invite broad Court intervention into the rights business but as a structural guarantee against the interpretation Hamilton, Wilson and others feared. *See* AKHIL AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 327–29 (2005); MCAFFEE, *supra* note 16, at 2–3, 84, 147, 170–73; MCAFFEE ET AL., *supra* note 8, at 226–37. *See generally* KURT I. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 13–38 (Oxford Press 2009).

158. He made that proposal the day before another House Member was going to present a resolution for a new constitutional convention. GOLDWIN, *supra* note 155, at 76–80.

populace over certain principles and prevent the gradual expansion of government by enabling courts to see themselves as, according to Madison, “an impenetrable bulwark against” usurpations of power by the executive or legislature.¹⁵⁹ All in all, he said, we have “something to gain, and, if we proceed with caution, nothing to lose.”¹⁶⁰

Madison did not, however, see the Bill of Rights as doing much to abate the real danger to individual liberty that loomed. The *structure* of the republic he devised—with wise advice from Hume and Smith—would deal on the federal level with the greatest threat of oppression that he believed existed, oppression from a majority.¹⁶¹ A republic in a large geographic area was best suited to deal with the pernicious tendency of factions to coalesce as majorities and suppress minority rights and viewpoints.¹⁶² But, in pockets of that geographic expanse that was the states, such oppression was highly probable.¹⁶³

Madison’s initial solution to this problem was to use Congress, not the judiciary, as the oversight mechanism. At the Philadelphia Convention, he proposed that Congress have the power to veto *any* state law, but all he could achieve was the Supremacy Clause.¹⁶⁴ It was not until the passage of the Fourteenth Amendment forty-four years after his death that some direct federal oversight of a state’s potential to oppress a minority point of view became possible.¹⁶⁵

159. RAKOVE, *supra* note 136, at 332–35; *see also* GOLDWIN, *supra* note 155 at 76–80, 92; PECK, *supra* note 8, at 4–5.

160. *See* GOLDWIN, *supra* note 155, at 80.

161. ELLIS, *supra* note 140, at 105–07; FARBER & SHERRY, *supra* note 115, at 191–92; GOLDWIN, *supra* note 155, at 63–68; RAKOVE, *supra* note 136, at 313–16 (arguing that Madison’s greatest fear was that states would attack property rights); Finkleman, *supra* note 136, at 99–100.

162. ADAIR, *supra* note 142, at 98–106; ELLIS, *supra* note 140, at 105–06; GOLDWIN, *supra* note 155, at 63; RAKOVE, *supra* note 136, at 332. A detailed explanation of this influence is set forth by Professor Branson. *See* Roy Branson, *James Madison and the Scottish Enlightenment*, 40 J. HIST. OF IDEAS 235, 246–50 (1979).

163. State constitutional rights provisions were seen as useless to prevent such oppression. At times, they read like mere exhortations or statements of broad principles, using the word “ought” instead of language setting clear boundaries of authority; at all times, they were the products of state legislatures that were free to change them by a mere legislative act. MCAFFEE, *supra* note 16, at 19–26; RAKOVE, *supra* note 136, at 306. Moreover, state governments were viewed as having general police power for the health, safety and welfare of the community, a power to be checked by popular sovereignty more than by state courts which could not find in any of their constitutions an explicit power of judicial review. MCAFFEE, *supra* note 16, at 26.

164. ELLIS, *supra* note 140, at 112, 118; GOLDWIN, *supra* note 155, at 59; MCAFFEE, *supra* note 16, at 49.

165. Some historians have seen the Fourteenth Amendment as the last chapter in Madison’s legacy. GOLDWIN, *supra* note 155, at 59; RAKOVE, *supra* note 136, at 338.

Exactly how much and what sort of oversight the drafters of that Amendment foresaw is a matter of considerable debate.¹⁶⁶ What may be gleaned from a brief review of the Fourteenth Amendment's history is that there was no definitive understanding by those who framed and ratified it about how it would treat the rights question under the Constitution.¹⁶⁷ It focused on the concept of equality before the law and did not intend to radically upset notions of local self-rule and federalism.¹⁶⁸ Federalism was still considered a "bulwark of liberty" and whether the Amendment—as first proposed—would simply grant power to Congress to enforce equality through legislation,¹⁶⁹ or—as it was passed—allow for the Court to enforce it as well, there appears to be little evidence that it was understood to be a broad mandate for the identification of new rights not theretofore in the vocabulary of the law.¹⁷⁰

The simplest explanation [of the Amendment], which was repeated continually during the congressional and state ratification debates, was that the amendment did not protect specific fundamental rights or give Congress and the federal courts power to interfere with state lawmaking that either created or denied rights. The only effect of the amendment was to prevent the states from discriminating arbitrarily between different classes of citizens. As long as the state treated its citizens equally . . . the state would remain immune from federal intervention pursuant to the Fourteenth Amendment.¹⁷¹

Through the latter part of the nineteenth century and into the early decades of the twentieth, the consensus was that states were to determine

166. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 1–4 (1988) (discussing the various scholarly interpretations of the Fourteenth Amendment).

167. See *id.* at 60–61, 114–22, 123–24, 146. As noted earlier, there was debate from the outset about whether it would operate to incorporate all of the first eight amendments against the states. See *id.* at 155–96 (expanding on the debate over incorporation).

168. *Id.* at 8–9.

169. See *id.* at 49–55 (discussing the Fourteenth Amendment's implications for congressional powers). The change to permit the Supreme Court to enforce it seems to have occurred when the Republicans who supported the Amendment realized that they may be voted out of office at some point, leaving enforcement to their rivals whose vigor to enforce equality was tempered, to say the least. *Id.* at 111–13.

170. See *id.* at 115 (explaining that the purported effect was to prevent arbitrary discrimination).

171. *Id.* at 115. Professor Nelson argues that the "liberty" to be protected by the Amendment was a function of three components: a "higher law" which all parties to any debate could invoke with equal apparent force, rendering resorting to "higher law" a nullity; the liberty that flowed from the fact that we lived under a republic, this being one of the first principles of the social compact idea of Justice Chase; and, the liberty we enjoyed as the result of federalism and the structural protections it provided. *Id.* at 21–31. The last two of these are clearly structural concepts in the tradition of the original plan of the Constitution. *Id.*

the rights of their citizens and that the Amendment only required that they confer them equally, that is, in a reasonable way.¹⁷² That view not only finds voice in *Hurtado*, but in more recent cases in which the Court defeated claims of liberty interests essentially in the name of federalism.¹⁷³

This history raises a significant question. Assume that Madison's expectations for the Bill of Rights were modest,¹⁷⁴ and that the Fourteenth Amendment was only projected to seek equality in application of rights and not the definition of the rights themselves.¹⁷⁵

172. See *id.* at 151–64, 175–76, 180–81.

173. See *DeShaney v. Winnebago County*, 489 U.S. 189 (1989). In *DeShaney*, a little boy who was neglected by state child-welfare agents while he was under their jurisdiction resulted in him being beaten viciously by his abusive father; the Court rejected the assertion that such neglect amounted to a denial of his liberty interest in personal security. *Id.* at 195. The Constitution does not put upon states an affirmative obligation to ensure life, liberty or property, the Court said, only to protect against intrusions of these by the state itself. *Id.* at 196. Any argument that the state would have liability by voluntarily undertaking to protect the boy would have to be addressed to the state courts or legislators in the context of tort law, the Court concluded, but for constitutional purposes, the State owed the child nothing. *Id.* at 201–02.

In *Town of Castlerock v. Gonzales*, the police failed to enforce a restraining order even though they had probable cause to believe a violent father had violated it by snatching his children from a playground. 545 U.S. 748, 753–54 (2005). He shot the children before dying in a shoot out with the police when he drove to the police station. *Id.* at 754. The plaintiff this time asserted a “property” interest in having the Court order properly enforced but, after reference to state law principles, the United States Supreme Court found no sustainable property right to be enforced. *Id.* at 756–57. And, even if there was some reasonable expectation that an order would be enforced, the Supreme Court found that expectation not like a “traditional conception of property” cognizable under the Fourteenth Amendment. *Id.* at 766.

Most recently, the Supreme Court rejected a claim by an Alaskan prisoner that due process required the State to give him access to a critical piece of evidence used to convict him so that he could conduct DNA tests on it using techniques not available at his trial that could prove his long-asserted innocence. *Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2316 (2009). “The dilemma [of] how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice” is, according to the Court, a “task [that] belongs primarily to the legislature.” *Id.* at 2317. That the Alaska legislature had not gotten around to that matter, however, was of little importance as the Court believed its only task was to determine whether the somewhat uncertain post-conviction remedies the defendant did have offended “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* at 2320 (quoting *Medina v. California*, 505 U.S. 437, 446 (1993)). Finding that the remedies were adequate, the Court then declined to hold that there was a substantive due process “right” to have a DNA analysis even when it could exonerate an innocent person because, evidently, the Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.” *Id.* at 2322 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Indeed, given that DNA testing is so recent, there hardly can be a “tradition” of it to elevate and elevating it would serve to pre-empt state legislative actions that should be given deference. *Id.* at 2323.

174. See GOLDWIN, *supra* note 155, at 71–80 (explaining how Madison persuaded himself to support the Bill of Rights); RAKOVE, *supra* note 136, at 332 (explaining Madison’s doubts about the Bill of Rights).

175. NELSON, *supra* note 166, at 115–23.

Add that these limited expectations were initially realized, as there were relatively few cases litigating these Amendments well into the twentieth century.¹⁷⁶ As Justice Scalia remarked, many provisions of the Bill of Rights “remained unilluminated” for long periods of time as sometimes questions about them simply did not present themselves.¹⁷⁷ So why all the presentation in the last half century? What explains the prominence and high expectations we now hold for these Amendments? Perhaps part of coming to a sensible answer to the rights question involves understanding why we have felt the need to illuminate rights in this era of our history.

As we are engaged in a preliminary expedition of these critical matters, let me set forth a working hypothesis. America underwent fundamental, perhaps cataclysmic, changes beginning after the Civil War. Those changes profoundly challenged one of the great assumptions Madison and others made about the efficacy of structure in protecting that which we call “rights.” Consider the sequence of events occurring after 1865: the Industrial Revolution and the massive immigration and the shifting of population centers to major cities it begat, the First World War, the Great Depression, the Second World War, the Cold War, the explosion of technology that increasingly links world cultures and economies (globalization), and international terrorism. Each of these standing alone was an event that seemed to compel a massive expansion of governmental power generally and, as the scope of each problem far exceeded the boundary of any state, invited the jurisdiction of the federal government to grow in geometric terms. When seen collectively, these events created a rising tide of federal authority that seriously called into question whether federalism remains a viable structural instrument to limit the power of government generally. While we do love our federalism and we always have,¹⁷⁸ can it possibly be expected to stand as a pillar of limited government against this relentless march of time?

If these dynamic forces of history have made us doubt the efficacy of federalism, or made us believe that the United States must exercise

176. Professor Belz identifies only nine Supreme Court cases dealing with the first eight amendments through the nineteenth century. Herman Belz, *Written or Unwritten: Is the Bill of Rights Adequate? Historical Reflection and Constitutional Criticism*, in BLESSINGS OF LIBERTY, *supra* note 136, at 145, 151. A search on Westlaw for Supreme Court cases mentioning the first eight amendments will garner approximately 812 cases before 1945, while the same search from 1945 onwards results in approximately 3,342 cases.

177. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008).

178. See Antkowiak, *Contemplating Brazilian Federalism*, *supra* note 140, at 602 (“We see federalism as arising as part of the core act of genius of the Constitutional scheme.”); Branson, *supra* note 162, at 250 (arguing that Madison’s *The Federalist No. 51* is his ode to structure as the true bulwark for freedom).

general police power to deal effectively as a member of an integrated community of nations, might the Supreme Court have subtly decided that only by exerting a more vigorous role in interpreting the rights question could it fulfill its role per Hamilton's *Federalist No. 78* or meet the threat Madison feared the most: the oppression of the majority?

Whether this hypothesis will withstand further scrutiny or be adjudged a fatal oversimplification, it is clear that the Court will forge ahead to answer the rights question. Hopefully, in so doing, it will carve out some measure of respect for individuals consistent within the ever-elusive sublime paradox. But as of now, the confused state of its efforts threaten to be counter-productive. They do not need to be. James Wilson said "that of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles."¹⁷⁹ If we believe that our government is still one of the best, then drawing back to our first principles is the logical way to ease the confusion.

V. GOING ON FROM HERE: HINTS AT A WAY OUT OF THE THICKET

A. *Hint #1: Know Thyself*

A good place to start is to recognize that "we," the vanguard of that search, are lawyers. While theologians and philosophers relish languages like "rights-speak," we lawyers do not. The "mother tongue" of lawyers is not English. It is the language of justice by *process*.

All jokes about us to one side, we are a humble group who do not pretend that we see "justice" as a stand-alone commodity in the heavens to be brought to earth by some transcendent act of our rhetorical reasoning. Justice happens not because we divine the just outcome intuitively, but because we have fashioned a *process* we trust that will likely bring it about. We set elements of crimes, fashion rules of evidence and procedure to structure our trials, and define a degree of certainty necessary to validate the final outcome of the litigation. But when we have done all of that and have conducted our "fair" trial, we walk away telling a group of non-lawyers to go into a room, take what our process has given them, and come out with justice. Just as we do not presume to define justice apart from the process that leads to it, we are uncomfortable speaking of rights as free-standing nouns in the political universe, preferring instead to use them as verbs to animate parts of our

179. Stimson, *supra* note 146, at 193.

process. We validate that process simply by the ongoing, deep-seated consensus of the people who live with it.

But when the lawyers on the Supreme Court face the “rights question,” they lapse into “rights-speak,” and “rights” become nouns. They speak of them as stand alone, transcendent “things” existing apart from our “process.” They deem themselves capable of divining absolute sources from which the “things” came and validate their act of divination by invoking equally absolute paradigms. In doing so, the Court forgets that its very authority to act at all derives not from the cosmos, but from a document that is the first product of an earth-bound democracy and begins with “we the people.” The Court forgets that the Constitutional Convention was in Philadelphia, not on Olympus.

Like anyone who tries to speak a language they have not mastered, the Court ends up spewing gibberish. However, there is no reason to despair. The Constitution was more the work of able lawyers than platonic guardians, and we all are more than capable of answering the rights question it poses.¹⁸⁰ However, we must consider taking advice from those who taught the able lawyers who put the question there initially. We might even find that they spoke a language we can readily understand.

B. Hint #2: Listen to the Men Who Framed the Framers

To understand Madison’s Bill of Rights, and indeed, his whole Constitution, we must do as he did and become students of the Scottish Enlightenment. The influence of David Hume, Adam Smith and others on the writing of the American Constitution is well documented.¹⁸¹ Leading scholars have called the Scottish Enlightenment Scotland’s chief export to the United States and have called our Founders better readers of Scottish writers than any of their contemporaries in Europe.¹⁸² Scotland was the center of “eighteenth-century social science research and

180. Historian Douglas Adair quotes fellow historian Vernon Paddington as arguing that the Constitution was the work of “able lawyers,” not political philosophers. ADAIR, *supra* note 142, at 127.

181. See MICHAEL FRY, *HOW THE SCOTS MADE AMERICA* (2005); ALEXANDER LESLIE KLIEFORTH & ROBERT JOHN MUNRO, *THE SCOTTISH INVENTION OF AMERICA, DEMOCRACY AND HUMAN RIGHTS: THE HISTORY OF LIBERTY AND FREEDOM FROM THE ANCIENT CELTS TO THE NEW MILLENNIUM 269–71* (2004); ROBINSON, *supra* note 136, at 125–27; GARY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 207–17* (1978); WILLS, *supra* note 3, at 13–23; Fleischacker, *supra* note 11, at 317–20.

182. Alexander Broadie, *Introduction* to *THE CAMBRIDGE COMPANION*, *supra* note 11, at 6; Oz-Salzberger, *supra* note 140.

publication in all the world”¹⁸³ and Madison was “[t]he most creative and philosophical disciple of the Scottish school of science and politics.”¹⁸⁴ Madison’s formal exposure to Hume and others began at Princeton where he studied under the great Scottish teacher, John Witherspoon.¹⁸⁵ In the summer before the Convention, Madison absorbed the writings of Hume and Smith in a collection Jefferson shipped to him from Paris.¹⁸⁶ These studies resulted in the profound influence Hume had on Madison in the grand concept of a large republic’s capacity to deal with factions, embodied in *Federalist No. 10*.¹⁸⁷

While we have no body of writings like the Federalist Papers to guide us through the philosophical foundation of the Bill of Rights—or, for that matter, the Fourteenth Amendment that extended it¹⁸⁸—it is unlikely that Madison and others disregarded all they learned from the Scots when they put the language of the rights question into the Constitution. But tracing those influences just to find a curious thread of intellectual history is secondary to the search for a better way to interpret critical passages of a constitution not entwined in a dangerous thicket of interpretation. By appreciating the intellectual foundation of the men who posed the rights question, we may be inspired to find a clearer path to answering it.

Before going further, though, I need to remind the reader of my initial admonition that this paper is the scouting party of a larger expedition into an area that requires more room for explication than any law review can provide. The Scottish Enlightenment was not just Hume and Smith—its “common sense” school of Thomas Reid, Francis Hutcheson and others attracted the allegiance of many influential Framers¹⁸⁹—and no attempt at anything like a comprehensive synthesis

183. ADAIR, *supra* note 142, at 95.

184. *Id.* at 97.

185. Witherspoon’s presence in America was yet another contribution made to the nation by Benjamin Rush who recruited Witherspoon to the post at Princeton from Edinburgh. Witherspoon puts all other teachers to shame in terms of the accomplishments of his students. He instructed a President, a Vice President, twenty-one Senators, twenty-nine House Members, twelve governors, fifty-six state legislators, thirty-three judges (three of whom ascended to the Supreme Court), and various founders of other colleges, ministers and authors. WILLS, *supra* note 3, at 18. Once Madison arrived in Philadelphia in 1787 he was joined by eight other Witherspoon-Princeton alumni. *Id.* at 6–7, 15. For additional reference to Hume’s influence on other Founders, see Werner, *supra* note 12, at 453–54.

186. ELLIS, *supra* note 140, at 101–05.

187. Adair masterfully documents Hume’s tremendous impact on this critical Federalist Paper. ADAIR, *supra* note 142, at 98–106.

188. NELSON, *supra* note 166, at 60–61, 123–24.

189. Madison was taken by Hume and Smith, James Wilson by Reid, and Jefferson, at least in his moral philosophy, paid homage to Hutcheson. Fleischacker, *supra* note 11, at 317–20; *see also*

of either school is possible here. My purpose now is only to suggest that even a cursory review of the key points of the Scot's teachings suggest why they appealed to those who first placed rights into an American context and why we must study the Scots further today.

First, the Scots were children of Isaac Newton. The science Newton uncovered made the world knowable by an empirical, analytic approach in which all people, not just those who claimed some special revelation, could access an ever unfolding cascade of truth.¹⁹⁰ Hume was profoundly affected by this, realizing at an early age that he was not the kind of man disposed to submit to any authority and that he needed a "new medium to establish truth."¹⁹¹ He found it in Newton and Francis Bacon, and the science of thought using empirical analysis.¹⁹² In politics, Hume concluded that absolutes did not exist and that with the use of a proper *process*, the science of politics would allow the gradual, evolutionary unfolding of knowledge.¹⁹³

The Scots also agreed "on the sociability of human nature, on the importance of history to moral philosophy and social science, [and] on the dignity and intelligence of ordinary people . . ."¹⁹⁴ The emphasis on man's sociability did not detract from the fact that the individual's happiness remained the final mark of a well-functioning society.¹⁹⁵ While Hume disagreed with Locke on states of nature and social contracts,¹⁹⁶ he and other Scots agreed with Locke that government's primary function was to "protect certain conditions for individual liberty" rather than to lead the populace to some higher plane of "religious or moral virtue."¹⁹⁷

But as our Framers carefully studied the Scots for advice on how to protect those "certain conditions," they would have found little that

KLIEFORTH & MUNRO, *supra* note 181, at 269–71. The influence of Thomas Reid on fellow Scot James Wilson pervaded Wilson's advocacy of bicameralism, wide powers for juries, and a Supreme Court empowered to carry out the broad principles of the common sense philosophy. Stimson, *supra* note 146, at 200–06. Wilson quoted Reid in *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419, 453 (1798), and Chief Justice John Marshall echoed Wilson's ideals. *Id.* at 205–06. Overall, an outstanding compilation of Scottish thought may be found in Alexander Broadie, *A HISTORY OF SCOTTISH PHILOSOPHY* (2009).

190. GRENZ, *supra* note 10, at 66–71; Alexander Broadie, *The human mind and its powers*, in *THE CAMBRIDGE COMPANION*, *supra* note 11, at 60, 60–62; Broadie, *supra* note 182, at 1.

191. BUCHAN, *supra* note 4, at 77.

192. *Id.* at 79.

193. Oz-Salzberger, *supra* note 140, at 160–62; Werner, *supra* note 12, at 440.

194. Fleischacker, *supra* note 11, at 333.

195. *Id.* at 323.

196. HUME, *Of the Original Contract*, in *ESSAYS*, *supra* note 3, at 443, 443–44.

197. Fleischacker, *supra* note 11, at 321–23. Politics was thus to have a liberal, not "Christian or civic republican" orientation. *Id.*

motivated them to write a Bill of Rights. This was because *none of the Scots made rights central to their major lines of argument*.¹⁹⁸ What mattered more was justice—what Madison may have learned from Hume and Smith on that issue may help explain how Madison likely viewed the rights question we still face.

For Hume, justice was not a transcendent entity. It was an “artificial virtue” to be discovered by a critical analysis of how life operated well in practice.¹⁹⁹

Humanity by luck, chance and necessity falls upon certain forms of behaviour, such as trusting strangers with one’s goods. As such behaviour ‘works’—i.e. serves the self-interest of most members of the group in question and thus the ‘public interest’ of the group as a whole—it becomes an observable pattern of behaviour. This will tend to be seen as a rule which can be the object of *common* sentiments of regard, moral sentiments.²⁰⁰

Hume’s justice was a process that originated “solely in social convention” and is validated entirely by “utility.”²⁰¹ The “rules” we enforce are ones a broad-based consensus deem necessary to preserve conduct conducive to the life of the species.²⁰² A constitution under Hume’s vision embodies that same, ongoing consensus:

Hume did not conceive of the constitution as a timeless substance. For Hume, the human world is an order of evolving conventions. Such conventions are not the result of a contract or of any conscious planning. Like a natural language, they evolve spontaneously over time to satisfy human needs. The moral and legal rules of a political constitution are like the rules of English grammar: a formal expression of what has evolved unreflectively over time and is open to still further evolution.²⁰³

Because the skeptical Hume rejected a “moralistic [or] legalistic” view of the world,²⁰⁴ he saw rights in a whole other perspective. They were simply “formal expressions of social utilities in evolving conventions”

198. Haakonssen, *supra* note 140, at 214–15.

199. *Id.* at 211.

200. *Id.*

201. John W. Cairns, *Legal Theory*, in THE CAMBRIDGE COMPANION, *supra* note 11, at 222, 231–32.

202. *See id.* (“Hume thought that rules for the allocation of the scarce resources necessary for life developed out of customary practices on the basis of expediency and necessity.”)

203. Donald W. Livingston, *Hume, English Barbarism and American Independence*, in SCOTLAND AND AMERICA, *supra* note 146, at 133, 137.

204. *Id.* at 138.

and by viewing them in this way, he focused on and understood more about how constitutions actually worked—that is, their process.²⁰⁵

Hume would have taught Madison that rights were not a static phenomenon, fixed in time and immune from fundamental changes in society occurring around them.²⁰⁶ To hunters and gatherers, for example, property rights were meaningless, but to a new commercial and professional class, they were of real importance.²⁰⁷ Hume would never embrace a rights analysis that ignored the dynamic forces of history and sought to conjure up immutable truths from a mythical social contract.²⁰⁸ Hume's justice was based on social conventions that evolve just as the people whose consensus creates those conventions evolve; after all, no proper political system could be fashioned "by a people, who know not how to make a spinning-wheel, or to employ a loom to advantage."²⁰⁹ When those people discard the superstitions of "ignorant ages . . . which throws the government off its bias, and disturbs men in the pursuit of their interest and happiness,"²¹⁰ government must be ready to effect that change of view.

In studying Adam Smith, Madison would have again learned that justice was without transcendent origin. He also would have received a glimpse of how the underlying consensus upon which justice, and rights, could be recognized. Smith's justice did not come about from a process that relied on some innate moral sense or reason. The process of justice is a reflective one that starts with our perceiving the interaction of others. In so doing, we assess whether one was wronged by another and if they should have some recourse to right that wrong.²¹¹ From this assessment, we begin to contemplate principles by which we may judge our own conduct.²¹² However, because self-interest will tend to allow us to excuse our own conduct when we might be the one to be condemned or exaggerate the wrong if we were the victim, we find that validating these principles requires us to "invoke the judgment not of conscience—such as might operate on a desert island—but of society itself. Aware of what our society thinks, we become spectators of our own appearance and behavior, and make our judgments of both."²¹³

205. *Id.*

206. See Haakonssen, *supra* note 140, at 217 ("rights were temporal and historical phenomena").

207. *Id.*

208. See Oz-Salzberger, *supra* note 140, at 164–69.

209. HUME, *supra* note 3, at 303.

210. *Id.*

211. Cairns, *supra* note 201, at 233.

212. BUCHAN, *supra* note 4, at 136–37.

213. *Id.* at 137.

But Smith recognized that society itself may, in the passions of a given moment, be as imprecise a guide for conduct as we are ourselves. Something even more objective, although no less earth-bound, was needed as a guide to the rules we would write. Ultimately, he thought, we must

submit not only to the actual judgment of our peers but also to a higher instance, “the supposed impartial and well-informed spectator, to that of a man within the breast.” This “man within,” a collection of general rules about what is to be done and what avoided, is a balance to worldly misjudgment and our own self-delusion.²¹⁴

The “impartial spectator” looks upon the interaction of others from a “third standpoint of absolute neutrality” but he is not a man, or even a noun, at all. The spectator is a process whereby we continually refine an ongoing, deeply held societal consensus that proceeds by asking how a truly neutral person would judge a situation, giving due consideration to the particular circumstances of each of the people involved. The process becomes a “continual weeding out of behavior which is incompatible with social life.”²¹⁵

Smith advised that the power to determine the view of the impartial spectator should be vested in courts, who he thought were best able to discern the underlying principles of this consensus on a case-by-case basis.²¹⁶ They could best recognize that justice is a “negative virtue,”²¹⁷ that is, the virtue of the omission of injury,²¹⁸ and, importantly, they could see how the notion of “rights” flowed naturally from it:

The negative virtue of avoiding harm or injury was justice, which was the foundation of law and the subject of jurisprudence. The personal attributes and actions that are protected in each person when others show them justice, i.e. abstain from injuring them, are their rights. A right is a sphere of freedom to *be* or *do* or *have* something that the individual can maintain against all others because the spectatorial

214. *Id.* at 137–38 (footnote omitted).

215. KNUD HAAKONSSSEN, *THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH*, 58–59 (1981). The process is much like John Rawls’s act of negotiation behind the veil when people, coming together to form a society, negotiate rules for it not knowing who they will be once a “veil” is lifted and society begins. I have discussed Rawls extensively in Antkowiak, *supra* note 74, at 594–606.

216. BUCHAN, *supra* note 4, at 136; Cairns, *supra* note 201, at 233.

217. Haakonssen, *supra* note 140, at 215.

218. *Id.* at 215–16.

resentment of infringement of this sphere is so strong that it has been institutionalized in the form of the legal system.²¹⁹

While it might be assumed that people would always agree on a core group of rights “common to all social living,” all rights beyond that were “dependent upon the spectatorial recognition in social intercourse.”²²⁰ Rights would evolve, like the people whose deep, societal consensus animated and validated them.

If this brief sketch of Scottish Enlightenment thought is accurate, then it is not surprising that a Bill of Rights was not on the agenda in Philadelphia or that it came about as a political compromise necessary to ratify the main document. There is much to suggest that passing the Bill of Rights did not reflect a change in the fundamental view that “rights” were part of a constitutional *process* that sought “justice” in the present of every generation which embraced it. “Rights” were not stand-alone, transcendent entities that only Princeton graduates could recognize.

That the Framers from time to time spoke of “inalienable rights” did not mean that they deemed themselves beneficiaries of divine revelation. Indeed, reference to inalienable rights was made most commonly to refute the assertion that monarchs could wield power without popular assent based upon some divine, transcendently revealed authority. The foremost “natural” right, one that was *self-evident*, was that no one had the right to assume power over others by transcendent edict alone.²²¹

Indeed, the Framers did not seriously suggest that anything they specified in the Constitution or its first set of amendments was a right of supernatural origin.²²² Consider this simple point: neither the Constitution nor the Bill of Rights recognized any rights that the amendment process could not change or abolish if a consensus of the

219. *Id.* at 216.

220. *Id.*

221. See FARBER & SHERRY, *supra* note 115, at 219–21. Professor Kenyon traces the natural right theory to the Protestant Reformation, arguing that once theology espoused the idea that each person had to face God alone and without the necessity of an earth-bound intervener in the person of the Church, the notion that any earthly ruler could hold sway by the hand of God was soon to lose favor. See John P. Kenyon, *Rights: Where Did the Concept of Rights Come From?*, in BLESSINGS OF LIBERTY, *supra* note 136, at 21, 26–27.

222. See generally FARBER & SHERRY, *supra* note 115, at 219–45 (discussing the events leading to the inclusion of the Bill of Rights in the Constitution). Whether they were devout Christians, deists, or skeptical devotees of Hume, enacting a Constitution and Bill of Rights that overtly accepted the institution of slavery and was indifferent to the systematic marginalization of women and others in the political process would be an odd profession of faith. Indeed, Professor McAfee points out that the Virginia Declaration of Rights was carefully crafted to avoid giving such rights to slaves. MCAFFEE, *supra* note 16, at 18.

present generation sought to do so.²²³ Truly inalienable rights would be absolute and inviolable, but the Framers allowed each generation to accept or reject them based on the demands of the present. In Thomas Paine's words, the Framers would not engage in the "vanity and presumption of governing beyond the grave."²²⁴ Rights were creatures we created for reasons of governance; they were thought to neither "proceed from, nor have any warrant in, the Divine Will."²²⁵

Neither were the Framers to be slaves of history. Their physical separation from England freed the Framers from the "dead hand of the past" and traditions that were, while insightful, not controlling.²²⁶ In like manner, the Framers freed their heirs from the idea that their practices or observations about the Constitution were compulsory traditions or interpretive gospel.²²⁷ They recognized that they had achieved no consensus about how to interpret the Constitution²²⁸ and that they were about to consign it to a common-law system of interpretation that extracted principles from precedent, but made them applicable to evolving contemporary problems.²²⁹ The Constitution was to become a "child of fortune,"²³⁰ the principles of which courts would "liquidate"²³¹ over time using "reason and law."²³²

223. MCAFFEE, *supra* note 16, at 22–23, 124–25; *see also* RAKOVE, *supra* note 136, at 290–91 (stating that the distinction between inalienable and alienable rights "was more theoretical than practical" and that a state could essentially regulate any right, "if its actions met requirements of law"); Noah Webster, *On the Absurdity of a Bill of Rights*, AMERICAN MAGAZINE, Dec. 1787, reprinted in INTERPRETING PRIMARY DOCUMENTS: THE BILL OF RIGHTS 31, 33–35 (Tom Head ed., 2004) (arguing that having "a standing *Bill of Rights* is *absurd*" because, under a free government, no constitutions are unalterable).

224. THOMAS PAINE, RIGHTS OF MAN 41–42 (Penguin Books 1985) (1791). Jefferson also believed that all laws should expire every nineteen years so that each new generation could govern anew. Branson, *supra* note 162, at 238.

225. PECK, *supra* note 8, at 161 (quoting LEARNED HAND, THE BILL OF RIGHTS 2–3 (1958)).

226. ELLIS, *supra* note 140, at 16.

227. FARBER & SHERRY, *supra* note 115, at 377–79; PECK, *supra* note 8, at 168 (observing that the convention members did not advocate the publication of their journals until after the ratification votes and that Madison published his posthumously); *see also* RAKOVE, *supra* note 136, at 340–41 (noting that the prevailing interpretive norm in the late 1780s focused almost exclusively on "the explicit language of a legal text" and did not equate "intention with the subjective purposes of identifiable historical actors").

228. *See* FARBER & SHERRY, *supra* note 115, at 377–79.

229. *See* RAKOVE, *supra* note 136, at 341 (stating that early interpreters of the Constitution would have relied primarily on "rules and precedents of common-law adjudication").

230. ELLIS, *supra* note 140, at 111.

231. Both Madison and Hamilton were fond of this term, although they may owe its use to Hume. THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961); WILLS, *supra* note 3, at 53–54.

232. THE FEDERALIST NO. 78, at 468.

The teachings of the Scots on these matters appear to have resonated particularly in Madison who, in terms of constitutional interpretation, supported “a very adaptable and flexible instrument reflecting the needs of social man. This test of utility is what we might have expected from Madison’s close reading of Hume.”²³³ In the end, the Constitution “enshrined an argumentative process in which no such thing as a last word would ever be uttered”²³⁴ more than it ordained fixed, immutable traditions. That should be music to the ears of humble lawyers like ourselves.

C. Hint #3: Ask the Right People for Validation

But we are not listening, either to the Scots or to the Framers who learned from them. While the Court will sometimes express the process orientation of the Constitution’s treatment of rights,²³⁵ it continues to fear accepting that rights are not transcendent things that can be cast in the amber of tradition. To a degree, their fear is understandable, however, because the Court’s internal critics of this view have not provided a reasonable alternative approach to the one currently in use.

Justice Brennan, for example, has dissented from the traditions analysis in terms faithful to Hume and Smith. Using traditions, he says, makes the Constitution “not the living charter that I have taken [it to be],” but renders it “instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.”²³⁶ Justice Harlan was also inspired in *Poe v. Ullman* when he argued that liberty is

not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes

233. WILLS, *supra* note 3, at 54.

234. ELLIS, *supra* note 140, at 125.

235. See passages quoted in PECK, *supra* note 8, at 172–73. A good example of this expression is in *United States v. Classic*:

[I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.

319 U.S. 299, 316 (1941).

236. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

a freedom from all substantial arbitrary impositions and purposeless restraints²³⁷

But neither Justice could describe how to find the soul of that “living charter” or the content of that “continuum” without resort to the same, unprincipled process the majority ultimately used to subjectively pick a tradition or find a penumbra.²³⁸

Indeed, no one has suggested an effective alternative to date. This initial expedition into the problem, however, suggests that the Scots laid out two principles that should be the focus of further research into an answer. First, the Scots would advise that the ultimate arbiter of whether the Court is answering the rights question properly is not the Court itself, the word “Supreme” in its title notwithstanding. Justice Harlan sensed this in *Poe* when he said that the object of constitutional interpretation is “the balance which our Nation . . . has struck between . . . liberty and the demands of organized society,”²³⁹ a balance “this country” strikes by being mindful of “the traditions from which it developed as well as the traditions from which it broke.”²⁴⁰ But Justice Harlan suggests that the “country” that ultimately strikes this balance is, as the Scots knew, the deep-seated consensus of the citizenry itself. A “decision of this Court which radically departs from [that balance] could not long survive,” he warns, “while a decision which builds on what has survived is likely to be sound.”²⁴¹ Democracy at its most principled and considered level provides the final validation.²⁴²

A proper interpretation of the rights question thus depends on the Court’s ability to grasp this fundamental consensus of the people. Hamilton spoke of it in *Federalist No. 1*, where he said:

237. 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). I have discussed Harlan’s opinion extensively in my article *Saving Probable Cause*, wherein I also noted the extensive and thoughtful analysis of it given by my colleague, Professor Bruce Ledewitz. Antkowiak, *supra* note 74, at 601–06.

238. Harlan truly disappoints in this respect, for he ends up proposing little more than his own version of a traditions analysis as his guide. Rights are to be assessed “as they have been rationally perceived and historically developed.” *Poe*, 367 U.S. at 544. Whether a new claim passes muster “must depend on grounds which follow closely on well-accepted principles and criteria” and must arise from “considerations deeply rooted in reason and in the compelling traditions of the legal profession.” *Id.* at 544–45. Using this approach, Harlan opines that laws banning private, adult, consensual sex would probably continue to be constitutional. *Id.* at 552–53.

239. *Id.* at 542.

240. *Id.*

241. *Id.*

242. See generally Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL. 373 (2004) (explaining Justice Harlan’s idea of democracy as a way of self-correcting judicial decisions).

[I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.²⁴³

It is the essence of the rhetorical question of the Anti-Federalists: “What is the usefulness of a truth in theory . . . unless it exists constantly in the minds of the people, *and has their assent?*”²⁴⁴ It is Hume’s “evolving conventions” and it is the product of Smith’s spectatorial process. It is, perhaps, what the Court would find if it found an honorable way to appreciate the conscience of the people and know the practices that “our polity will not endure.”²⁴⁵

The Scots may help in finding that way as well. Once the Court recognizes where the ultimate validation of its efforts to answer the rights question lies, it will know that a new kind of judging is needed. The new judging will require the Court to abandon its failed efforts to speak of rights as transcendent things in terms no political institution can articulate with integrity. Once the Court begins to speak like lawyers again, and shifts its focus from parsing about what level of traditions is the valid measure of human rights, it can focus on understanding that deep consensus upon which a constitutional process that can assure a meaningful measure of respect for the people is based. To this end, the Scots would not advise that the Court just wait for the Congress to propose new Amendments. While the last, best hope for individual liberty will always lie with the body of the people themselves, on a day to day basis, the Court has an obligation to try to get it right.

The new judging may test if Smith was correct that courts not only could use the impartial spectator process to do justice but that they were the best venue for it.²⁴⁶ It may require contemplating if the processes John Rawls speaks of for rulemaking in a well-ordered society—processes that seem to incorporate Smith’s ideas—are viable, as I have suggested they are in another context.²⁴⁷ Whatever form it takes, the effort to grasp that consensus will respect the words of the Constitution and give the Court a foundation upon which to interpret them consistent

243. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

244. RAKOVE, *supra* note 136, at 323 (emphasis added).

245. Palko v. Connecticut, 302 U.S. 319, 328 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

246. See BUCHAN, *supra* note 4, at 136; Haakonssen, *supra* note 140, at 214–15.

247. See Antkowiak, *supra* note 74, at 596–99.

with the rule of law. It will allow our ancestors to vote²⁴⁸ by examining the efficacy of their efforts to achieve the same sublime paradox we seek, always cognizant, however, that we live in the dynamic context of a world very different from theirs.

This effort will require some profoundly inspirational voices. On a visit to Monticello, Hamilton once supposedly asked Jefferson to identify the men in the three portraits proudly displayed in the hall.²⁴⁹ They were, Jefferson replied, the three greatest men who ever lived: Francis Bacon, Isaac Newton and John Locke.²⁵⁰ Hamilton shrugged. The greatest man who ever lived, he said, was Julius Caesar.²⁵¹ It matters who inspires us. As the project of addressing the “rights question” continues, we all need to ask whose portraits hang on our walls. Perhaps they should be portraits of people who have a history of inspiring the American constitutional experiment. Perhaps they are people who just might lead us home today.

248. G.K. Chesterton said: “Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about.” GILBERT K. CHESTERTON, *ORTHODOXY* 85 (Greenwood Press 1974) (1908).

249. ADAIR, *supra* note 142, at 13.

250. *Id.*

251. *Id.*