TEXAS REVIEW
of
LAW & POLITICS

VOL. 19, NO. 1 FALL 2014 PAGES 25–62

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Charles R. Eskridge III

Reprinted from
Texas Review of Law & Politics
Volume 19, Number 1, Fall 2014

MODERN LESSONS FROM ORIGINAL STEPS TOWARDS THE AMERICAN BILL OF RIGHTS

BY CHARLES R. ESKRIDGE III*

* Partner, Quinn Emanuel Urquhart & Sullivan, LLP, Houston, Texas; Adjunct Professor of Law, University of Houston Law Center; Distinguished Visiting Practitioner of Law, Fall 2011, Pepperdine University School of Law.

This essay was adapted from a luncheon address given on May 23, 2014, in Austin, Texas, at the State Bar of Texas 8th Annual Bill of Rights Course on Litigating the Constitution. I thank Judge Thomas Reavley for his warm encouragement of an initial draft, Will Peterson for inviting me to prepare the address that turned into this paper, and the classroom discussions at the University of Houston Law Center and Pepperdine University School of Law that brought these ideas forward in my mind. Thanks also to Marcella Burke, Ryan Caughey, Stephen Cox, and Cliff Riley for helpful comments along the way.

When long ago serving as a law clerk to Justice Byron White, I quickly became aware of a gap in my law school education—a gap common to most lawyers. Law school was no advanced history class. A quote from a Federalist Paper cited in some brief or an extract from Blackstone's *Commentaries* in an earlier opinion would on its face address the legal question at hand, but I had no broad context for its place in the development of an issue. That always nagged at me a bit. And so, with apparently nothing better to do with my evenings, several years ago I organized and edited the material for a course I titled Origins of the Federal Constitution, which I now teach on a somewhat regular basis.[1]

What became evident then—and what I hope my students learn now—is that those letters and tracts and enactments are not some distant echo. The arguments were not hidden or subtle when made, but were instead written plainly and directly, to be understood by the people generally. True, the distance of time remains, but it is that very distance that allows us in hindsight to see the deliberate action and reaction that set the course of the law. These papers, then, continue to provide a frame of reference for issues with which we still wrestle.

I spend the second half of each semester considering in detail original documents that precede and explain the many rights and liberties found in our Constitution. I have selected for consideration ten steps on that path—steps that paint the broad movement towards our Bill of Rights, and from which we can draw modern lessons about how we should interact with our government, and with each other.

It is a conversation the people have been having for at least 800 years now.

I. MAGNA CARTA (1215)

On June 15 of this year, England will celebrate Magna Carta's 800th birthday.[2] That span is itself hard to grasp—800 years. On

1. The primary source of material for my course is original documents from THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987). This remarkable five-volume treatise contains curated and edited public-domain documents with citation to the underlying public source (which I omit from citations for this paper). The University of Chicago provides a valuable, ongoing public service by maintaining a freely available internet version at http://press-pubs.uchicago.edu/founders.

2. *Featured Documents: The Magna Carta*, NAT'L ARCHIVES & RECS. ADMIN., www.archives.gov/exhibits/featured_documents/magna_carta [perma.cc/GH7X-AKAY]

that day in 1215, on the field of Runnymede at the River Thames outside of London, it was not known that the beginning of English constitutional law was at hand, or that its child, American constitutional law, would emerge some 570 years later.[3]

Any historical consideration of the recognition of rights could begin much earlier, looking to Greek and Roman sources, or to a Biblical basis, in both the Old and New Testaments.[4] But the Dark Ages were dark for a reason. To the extent prior expression of rights existed, it had not yet taken root. And so in thirteenth century England, the Crown ruled by fiat—divine right, absolute prerogative.[5] If some monarchs were known for benevolent rule, many were not.[6] Among the worst offenders was an early one, John I, whose reign lasted from 1199 to 1216.[7]

John was a harsh and ruthless king, taxing heavily, quarreling with the church, and constantly engaging England in war.[8] When the nobles finally had enough and refused further allegiance, John turned his army on them, and ultimately lost all support among the people.[9] To resolve this crisis, the barons demanded—swords ready—that King John (with the Archbishop of Canterbury by his side) put his seal to a unique charter

(last visited Dec. 23, 2014).

3. MAGNA CARTA (June 15, 1215), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 11, 11–22 (Richard L. Perry & John C. Cooper eds., rev. ed. 1978). For concise consideration of the events leading to Magna Carta, please see Louis Ottenberg, *Magna Charta Documents: The Story Behind the Great Charter*, 43 A.B.A. J. 495 (1957), and Robert Aitken & Marilyn Aitken, *Magna Carta*, A.B.A. J. OF LITIG. Spring 2009, at 59.

4. *See, e.g.*, Arthur Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. & POL. 303, 310–11 (2014).

5. 22 THE ENCYCLOPAEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 280 (Hugh Chisholm ed., Encyclopaedia Britannica 11th ed. 1911) (entry for "prerogative").

6. The rebellion of 1215 sprang, in part, if not in whole, from recollection of an even more distant past where sovereigns had recognized limits on their rule—or at least rules with respect to how their power would be exercised. *See* ANNE PALLISTER, MAGNA CARTA: THE HERITAGE OF LIBERTY 2 (1971) ("[The barons] looked back to an idealized past in which men enjoyed all their rights and liberties and where government was according to law, and they demanded a return to this good and ancient practice."); DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 257–58 (Hodder & Stoughton 2003) (discussing coronation of Henry I in 1100, who listed in his coronation charter the unpopular practices of his predecessor, which he promised to abolish).

7. *John Lackland (r. 1199–1216)*, THE OFFICIAL WEBSITE OF THE BRIT. MONARCHY, www.royal.gov.uk/historyofthemonarchy/kingsandqueensofengland/theangevins/Johnlackland.aspx [perma.cc/C7HP-GTZJ] (last visited Dec. 24, 2014).

8. SOURCES OF OUR LIBERTIES, *supra* note 3, at 1–3.

9. DANZIGER & GILLINGHAM, *supra* note 6, at 258–60.

carving out a limited array of sixty-three guarantees from the Crown.[10] The very idea was so inflammatory that when word reached Pope Innocent III in Rome, he decreed Magna Carta void and a subject of excommunication.[11]

Most of Magna Carta's clauses are rather technical when listing items necessary to survive and maintain life in feudal England—rules respecting fisheries, forestry, inheritance, dower, wine measurements, and the like.[12] Others have clear echoes into our time, even if not revealed in any detail:

> In the first place, we have granted to God, and by this our present charter confirmed, for us and for our heirs forever, that the English church shall be free, and shall hold its rights entire and its liberties uninjured . . . .
>
> . . . .
>
> And the city of London shall have all its ancient liberties and free customs, as well by land as by water. Moreover, we will and grant that all other cities and boroughs and villages and ports shall have all their liberties and free customs.[13]

But despite the swords, Magna Carta was phrased not as something claimed by right, or even royal duty, but instead as a generous gift on the part of John.[14] And so, he parted not with

10. SOURCES OF OUR LIBERTIES, *supra* note 3, at 2–3, 9; *see also* PALLISTER, *supra* note 6, at 2.

11. SOURCES OF OUR LIBERTIES, *supra* note 3, at 3–4; *see also* DANZIGER & GILLINGHAM, *supra* note 6, at 263.

12. MAGNA CARTA, *supra* note 3, at 11–22; *see also* GEORGE BURTON ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 210 (Fred B. Rothman & Co. 1986) (1912). Professor Adams categorizes the feudal traits of nearly all of Magna Carta's clauses as executed in 1215, and concludes:

> That Magna Carta is essentially a document of feudal law, resting for its justification upon feudal principles, giving expression to feudal ideas, and pledging the king to a feudal interpretation of his rights of action in so far as they affected the interests of the barons, must, I think, be clear from this analysis, or from any careful study of its provisions.

Id; see also SOURCES OF OUR LIBERTIES, *supra* note 3, at 9.

13. MAGNA CARTA, *supra* note 3, at 11 cl. 1, 14 cl. 13. As to Clause 1, *see* ADAMS, *supra* note 12, at 211 ("Clause 1 is a concession to the church of its rights and liberties . . . . To the church the concession meant escape from those consequences of feudalism which were most serious to itself."). As to Clause 13, and related Clauses 12 and 14, see *id.* at 217–29 (providing basis "to affirm and secure the right of consent to taxation," and providing protection to London and smaller villages).

14. *See* MAGNA CARTA, *supra* note 3, at 11. Magna Carta opens with a salutation: "John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, reeves, servants, and all bailiffs and his faithful people greeting." *Id.* The King then states that "for the good of our soul and those of all our predecessors and of our heirs, to the honor of God and the exaltation of holy church, and the improvement of our kingdom, [and] by the advice of our venerable fathers [including]

much, and remained absolute over all areas not, at least in some sense, given by him back to the people.[15] Unwittingly, however, King John gave sanction to that most venerable of institutions—the rule of law—while forever placing himself and his successors within its bounds.[16] For while one passage may read in an unfamiliar way, it is of signal import when we appreciate as lawyers the path it forged:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.
>
> [T]o no one will we sell, to no one will we deny, or delay right or justice.[17]

There shall be trials, and the King shall act not merely by decree, but only "by the law of the land."[18] So said Magna Carta in the 13th century, to which Winston Churchill observed in the 20th century that this was "reaffirmation of a supreme law," and that "here is a law which is above the King"—above the government—"and which even he must not break."[19] A century later, when Parliament set Magna Carta into statutory law in 1354, "by the law of the land" attained a phrasing that has now endured for more than 650 years: "That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement,

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Stephen, Archbishop of Canterbury," that "*we have granted* to God" certain liberties for the Church of England. *Id.* (emphasis added). Magna Carta then prefaces the balance of the individual grants with: "*We have granted moreover* to all free men of our kingdom for us and our heirs forever all the liberties written below, to be had and holden by themselves and their heirs *from us and our heirs*." *Id.* at 12 (emphasis added).

15. DANZIGER & GILLINGHAM, *supra* note 6, at 260–61.

16. *Id.*

17. MAGNA CARTA, *supra* note 3, at 17, cls. 39 & 40. While the likely intent of the barons was simply to secure procedures according to feudal tradition, "what was then demanded was a trial according to law and securing to them their legal rights," which "proved historically fortunate, because, as men's legal ideas changed and feudalism disappeared, [the terms] could be adapted to new conceptions of civil rights and seemed in the end to embody a universal principle of political liberty." ADAMS, *supra* note 12, at 243–44.

18. *See* MAGNA CARTA, *supra* note 3, at 17, 19–20.

19. WINSTON S. CHURCHILL, 1 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN 256 (1956) (emphasis added). Similarly, Professor Adams concluded:

> To repeat what has been already said, the controlling and moulding power of the Charter in English history is to be found in two things: First of all in the principle upon which it rests that there is a definite body of law by which the king's action is bound, and, second, that, if he insists upon violating it, he may be compelled by force to desist.

ADAMS, *supra* note 12, at 250.

nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer *by due Process of the Law.*"[20]

Could the nobles at Runnymede have imagined the force and scope that "due process of law" would attain from their demand that the King act only "by the law of the land"? Probably not.[21] But that is the momentum of rights once formally recognized: how far or how fast they will carry is not known on the first push.

A continuing lesson from Magna Carta is the idea of repetition. Rights must be acknowledged if they are to be honored and protected, and their repetition educates not just the people, but the government. King John was a devious man.[22] Having saved his own skin that day, he sought the upper hand in almost immediate clashes with the nobles.[23] But as fate (and a fatal bout of dysentery) would have it, he died a little over a year after Magna Carta, leaving his kingdom to his nine-year-old son, Henry III.[24] Henry's youth made it easy to have him accept an amended Magna Carta in 1217 and another amended version in 1225; these began to circulate widely with public recital throughout the lands.[25] With time, though, Henry's rule proved more tumultuous than his father's, and he was forced to swear oaths of recognition of Magna Carta six more times before his death in 1272.[26] In 1265, it was decreed that Magna Carta would be read twice annually, so that no person—citizen or monarch—could claim ignorance of its words.[27] By Sir Edward Coke's

20. Liberty of Subject, 1354, 28 Edw 3, c. 3 (Eng.), *available at* www.legislation.gov.uk/aep/Edw3/28/3 [perma.cc/NRK3-SJDY] (emphasis added).

21. "It is the unintended result which followed in course of time, which gives to the rebellion of 1215 its right to be regarded as the first step in the formation of the English Constitution." ADAMS, *supra* note 12, at 250.

22. *See* DANZIGER & GILLINGHAM, *supra* note 6, at 262–69.

23. *Id.*

24. *Id.* at 269–71.

25. SOURCES OF OUR LIBERTIES, *supra* note 3, at 4 & n.11; *see also* ADAMS, *supra* note 12, at 279–83. The guarantees within Magna Carta saw changes in phrasing between iterations, with some clauses dropped altogether. SOURCES OF OUR LIBERTIES, *supra* note 3, at 4 & n.11. But by 1297 its text stabilized, and a copy of such version resides at The National Archives. *Featured Documents: Magna Carta Translation*, NAT'L ARCHIVES & RECS. ADMIN, www.archives.gov/exhibits/featured_documents/magna_carta/translation.html [perma.cc/C4UR-AHP2].

26. Professor Adams argues that Henry III "was not intentionally a bad king." ADAMS, *supra* note 12, at 284. Rather, he suffered from weak intellect and terrible judgment of character, and so his reign "never had a consistent policy for any length of time except under the influence of a stronger personality." *Id.*

27. *See* DANZIGER & GILLINGHAM, *supra* note 6, at 279.

count, from 1297 to 1461, seven successive monarchs between them confirmed the charter thirty-two times.[28]

Repetition is a lesson worth heeding. In England, it ensured the King would not forget, but must observe his prior gifts. In America, our rights are preserved in a context where government does not have the ability to simply forget or ignore them. And so, repetition in some respects goes by another name here—litigation.

II. THE MAYFLOWER COMPACT (1620)

The "state of nature" is a concept in moral and political philosophy that starts from the hypothetical conditions of what the lives of people might have been before societies came into existence.[29] The idea of natural law and natural rights itself has a prominent place in the development of our American concept of liberties, requiring deeper treatment than intended here.[30] But I will observe that our next step is as pristine an example of the state of nature as we have in our continent's history—the landing of the *Mayflower* at Cape Cod in 1620. That the Pilgrims reacted to this fact with the Mayflower Compact is quite remarkable.

The *Mayflower* set off on August 5, 1620, but due to problems at sea, twice turned back to port, though the passengers were not allowed to disembark during repairs.[31] The actual departure came on September 6—the equivalent of spending four weeks on the tarmac waiting for your plane to take off.[32] With 102 passengers and crew on board, they aimed for the Hudson River

28. *See* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 16 (William S. Hein & Co. 2006) (1908) England's monarchs between 1216 and 1461 were Henry III, Edward I, Edward II, Edward III, Richard II, Henry IV, Henry V, and Henry VI. *List of English Monarchs*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_English_monarchs [perma.cc/KH6K-MACL] (last visited Jan. 14, 2015).

29. *See, e.g.*, JOHN LOCKE: TWO TREATISES OF GOVERNMENT 330–32 (Peter Laslett ed., Student ed. 1988).

30. Thomas Jefferson, for instance, chose to lead the Declaration of Independence with his classic assertion:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

31. NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR 27–29 (2006).

32. *Id.* at 29.

Valley as the lands set for them by the London Company, but they were blown off course northward.[33] With a harsh, early winter approaching even as they were departing a month later than intended, and unable to round the shoals below Cape Cod to head south, they headed for shelter in Massachusetts Bay.[34] Starving, ill, cramped, and grouchy, there were threats of mutiny and lawlessness by the non-Pilgrims aboard—threats that the strong would take what they would from the weak, because they were coming ashore on lands outside their lawful charter.[35]

The wiser minds aboard quickly fashioned the Mayflower Compact, and made signature to it a condition of being permitted even to disembark on November 11, 1620.[36] Any could stay aboard if they so chose, but for those exiting into that unknown and untamed land, they would exit together. The core of that agreement was but a single sentence:

> [We] do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.[37]

Government was established from thin air, for the sake of survival, and "all due submission and obedience" would—or rather, must—be given to that government. But more importantly, the idea of majority rule was expressly and simply established; the individually powerful would not simply overawe the feeble. Yet the Compact constrained that majority in turn. Submission and authority would be owed only to the laws that protected the rights of all, for all agreed that the majority could enact only "just and equal" laws. It is no small irony that the Pilgrim Separatists—now in a struggle for their lives in a distant land because they objected to the institution of state religion

33. *Id.* at 29, 33.
34. *Id.* at 35–39.
35. *Id.* at 39–40.
36. *Id.* at 40–41, 43.
37. MAYFLOWER COMPACT (1620), *reprinted in* 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 610, 610 (Philip B. Kurland & Ralph Lerner eds., 1987).

back home[38]—found this simple way to assert, in a governing context, the Golden Rule: "do to others what you would have them do to you."[39] Just, and equal.[40]

One of those who signed the Compact, John Alden, in time was the forebear of two Presidents—John Adams and John Quincy Adams.[41] The latter reflected on it in an essay, considering it the "first example in modern times of a social compact or system of government instituted by voluntary agreement conformable to the laws of nature, by men of equal rights and about to establish their community in a new country."[42] The simplicity and unanimity expressed in this document should give us pause today when political differences appear insoluble, and we shall return to the idea of unanimity—not mere majority—on our last steps considering the ratification of the Constitution and drafting of the Bill of Rights.

Before moving on, it is worth recalling what happened after the signing of the Mayflower Compact. The Pilgrims were ashore and could forage, but the cold generally forced them to shelter on ship until spring.[43] Of the 102 aboard, 52—one more than half—did not survive that first, desolate winter.[44] The *Mayflower* set back to England in April 1621, and after some other commercial runs, unaware of her place in history, she was probably salvaged for scrap just three years later.[45] Even so, she and her passengers had brought a continuing lesson to

38. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 9–10.

39. *Matthew* 7:12; *see also Luke* 6:31 (New International Version).

40. The Compact also provided that the laws would be only those "thought most meet and convenient for the general good of the Colony." MAYFLOWER COMPACT, *supra* note 37, at 610. While not exactly a robust statement of limited government, it does express two limitations towards that goal. *See id.* The majority could not touch all or every imaginable aspect of life, but would only legislate for the "general good" of their whole society, and only those means "thought most meet and convenient" to a legitimate end would be deployed, not simply any approximation of what might reach a desired end. *Id.*

41. *Descent of John Quincy Adams from John Alden*, ROOTSWEB, http://homepages.rootsweb.ancestry.com/~pmcbride/rfc/lodus2.htm [perma.cc/9XFL-BGAL?type=image] (last visited Dec. 28, 2014).

42. *The Mayflower Compact*, SOC'Y OF MAYFLOWER DESCENDANTS IN THE ST. OF WASH., www.washingtonmayflower.org/01-compact.html [perma.cc/3FEN-CLBK] (last visited Dec. 28, 2014).

43. PHILBRICK, *supra* note 31, at 80–98.

44. *Id.* at 90.

45. *Id.* at 100–01. Legend has it that the *Mayflower*'s wood was used in the construction of a barn in the English countryside, somewhere between London and Oxford, but that has been largely discredited. *See* Caleb Johnson, *The End of the* Mayflower, CALEB JOHNSON'S MAYFLOWERHISTORY.COM, http://mayflowerhistory.com/end-of-the-mayflower [perma.cc/YZB5-6ZB7] (last visited Dec. 28, 2014).

American shores—that we must carry with us the rule of law wherever we go.

III. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641)

From Magna Carta to Mayflower Compact was a step of 400 years, from London to Cape Cod. Our next step is but twenty years, from Cape Cod to Boston. After surviving that first winter, the population of settlers in Massachusetts Bay quickly grew to outnumber the Native Americans in all of New England.[46] Governing that society became a more complex task. The Body of Liberties of the Massachusets Collonie in New England was the first attempt at a written legal code over the area.[47]

The Mayflower Compact was only a temporary charter among those that first arrived on shore, and it was not intended to establish a permanent form of government.[48] Subsequent charters from England saw discretionary laws emanating from later-appointed governors and magistrates.[49] The laws flowing on this ad hoc basis were not simply gathered and codified. Instead, a Puritan minister, Nathaniel Ward, sought to cast a seeming intersection between Common Law, Magna Carta, and Puritan theology—to varying degrees of success.[50]

Some of those laws were quite specific, and to our eyes today, perhaps surprising and certainly harsh. For instance, capital laws were set by Biblical citation, and so by reference to Leviticus 24 and Deuteronomy 13, a colonist could be put to death for blaspheming the name of God or worshipping another.[51] In

46. PHILBRICK, *supra* note 31, at 179.

47. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 428; THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641), *reprinted in* 5 THE FOUNDERS' CONSTITUTION: AMENDMENTS I–XII 46 (Philip B. Kurland & Ralph Lerner eds., 1987); *see generally Massachusetts Body of Liberties*, MASS.GOV, www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/body-of-liberties.html [perma.cc/Q4LC-WZCN?type=image] (last visited Dec. 28, 2014).

48. *See* 1 THE ANNALS OF AMERICA: 1493–1754: DISCOVERING A NEW WORLD 64 (Mortimer J. Adler et al. eds., 1968) ("By . . . [the] Mayflower Compact, the Pilgrims agreed to govern themselves until they could arrange for a charter of their own.").

49. SOURCES OF OUR LIBERTIES, *supra* note 3, at 143–44; *see also* 1 THE ANNALS OF AMERICA, *supra* note 48, at 163 (observing that by the corporate charter of the Massachusetts Bay Colony, "there was no limit whatever to the authority of its all but self-appointed magistrates.").

50. SOURCES OF OUR LIBERTIES, *supra* note 3, at 144–46.

51. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, *supra* note 47, at 47, cl. 94 ("Capitall Laws").

other respects where the Body of Liberties attempted compassion, it overlooked inherent inconsistency—for instance, giving explicit sanction to slavery, while insisting on "Christian" and humane treatment of the slave.[52]

But to its lasting credit, the Body of Liberties began with a recitation of rights, not the dictates of law. As its very name indicates, the Body of Liberties intended—however imperfectly—to establish a governing policy respecting the rights of those within its jurisdiction. The preamble to the Body of Liberties speaks with no less purpose today as the moment pen was set to paper nearly 400 years ago:

> The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as due to every man in his place and proportion without impeachment and Infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof, the disturbance if not the ruine of both.
>
> We hould it therefore our dutie and safetie whilst we are about the further establishing of this Government to collect and expresse all such freedomes as for present we foresee may concerne us, and our posteritie after us, And to ratify them with our sollemne consent.[53]

The first two clauses then immediately captured Magna Carta's guarantee of equal protection, trials, and due process of law.[54]

52. *Id.* at cl. 91.

> There shall never be any bond slaverie, villinage or Captivitie amongst us unles it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.

Id. Massachusetts' experience with slavery may have been among the more moderate of the Colonies, but slavery was not effectively and entirely extinguished within it until the 1780s, in the wake of its post-Revolutionary Constitution. *See African Americans and the End of Slavery in Massachusetts*, MASS. HIST. SOC'Y, www.masshist.org/endofslavery/index.php?id=54 [perma.cc/6WAX-EE3X] (last visited Dec. 28, 2014).

53. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, *supra* note 47, at 428, pmbl.

54. *Id.* at cls. 1 & 2.

> 1. No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembered, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by

After that followed fifteen other enumerated categories of rights addressing in no uncertain terms life, liberty, just compensation for property, freedom of speech, religious toleration, and more.[55] All these rights were to be "impartiallie and inviolably enjoyed and observed throughout our Jurisdiction for ever."[56]

We will consider below why a declaration of rights did not attain this same favored position in the drafting of the federal Constitution. But surely, proclaiming rights first was no accident, and this provided a continuing message to succeeding generations regarding their primacy—before law would be commanded, rights should be established. And these rights were not something to be hoarded and parsed out with reluctance. Consider the treatment granted under a chapter titled "Liberties of Forreiners and Strangers":

> If any people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured amongst us, according to that power and prudence, god shall give us.[57]

This was all without question a religiously based call to law, as well as to rights; so yes, the requirement was that the contemporary pilgrims be Christian. But imagine, when fleeing persecution or famine or war—whatever devastation might befall life in another land—on reaching the shores of Massachusetts in the 17th century, the law accorded individual respect and protection. From their own harsh circumstances, these original settlers understood an important and continuing lesson. Recognizing the rights due to others in society recognizes their humanity and should make them strangers no more.

> a generall Court and sufficiently published, or in case of the defect of a law in any parteculer case by the word of God. And in Capitall cases, or in cases concerning dismembring or banishment according to that word to be judged by the Generall Court.
>
> 2. Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay.

Id.

55. *Id.* at cls. 3–17.

56. *Id.* at 428, pmbl.

57. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, *supra* note 47, at 47, cl. 89.

IV. THE ENGLISH BILL OF RIGHTS (1689)

On the last of our ten steps, we will observe James Madison move the First Congress to begin debate on our Bill of Rights in 1789.[58] As Americans, we tend to think of our Bill of Rights as "the one and only" Bill of Rights, but it is not. Exactly 100 years prior, in 1689, Parliament brought an end to a time of great turmoil in England—the Glorious Revolution—with the English Bill of Rights.[59]

Supremacy of the law after Magna Carta over time proved to be a fragile thing. The Crown was cunning and brazen in its expansion of power, and routinely disregarded rights. In direct response to royal provocation, the 1628 Petition of Right, among other things, deprived the King of power to collect taxes without an act of Parliament—no taxation without representation—and enacted clauses safeguarding personal liberty.[60] The Habeas Corpus Act of 1679 strengthened and extended the even-then ancient remedy requiring imprisonments to have a true cause in accord with law.[61]

In a brief three-year reign beginning in 1685, James II was a uniquely flagrant offender that proved an object lesson on the need for separation of powers.[62] He refused to be bound by duly enacted laws, suspended acts of Parliament, and collected unauthorized taxes.[63] He undermined the independence of the judiciary by discharging judges who opposed his will.[64] He interfered in the outcome of elections, and punished the right of petition.[65] He attempted to impose Catholicism, persecuting and forcibly disarming Protestant dissenters.[66] Parliament was dissolved, civil war ensued, and ultimately, James II fled to Paris.[67]

58. *See infra* Part X.

59. *See* BILL OF RIGHTS (1689), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 1 [hereinafter ENGLISH BILL OF RIGHTS].

60. SOURCES OF OUR LIBERTIES, *supra* note 3, at 62; *see also* THE PETITION OF RIGHT (1628), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 304.

61. SOURCES OF OUR LIBERTIES, *supra* note 3, at 193*; see also* Habeas Corpus Act (1679), *reprinted in* 3 THE FOUNDERS' CONSTITUTION: ARTICLE I, SECTION 8, CLAUSE 5, THROUGH ARTICLE 2, SECTION 1 310, 310 (Philip B. Kurland & Ralph Lerner eds., 1987).

62. SOURCES OF OUR LIBERTIES, *supra* note 3, at 222–33.

63. *Id.*

64. *Id.* at 225.

65. *Id.* at 227–28, 232–33.

66. *Id.* at 225.

67. *Id.* at 222. Much of this history can be discerned from the expansive list of grievances with which the English Bill of Rights commences, including its lead recital that "the late King James the Second, by the assistance of divers evil counsellors, judges, and

The British, however, did not seek to establish a new government without monarchy.[68] They had found themselves without a monarch forty years earlier, and their experience under Oliver Cromwell as Lord Protector of the Commonwealth was not one they longed to repeat.[69] Better, they thought, to establish a succession of the Crown under limits and restraints protecting the people.[70] And so, the former members of Parliament assembled in London to consider next steps, and drafted the English Bill of Rights.[71]

They began with a formal enumeration of grievances against King James II—things he did, and why they were wrong by law and by reason.[72] The Petition of Right had itself used this logical method of proof,[73] and it became a template for demonstration of a people's entitlement to change the condition of their government, culminating in Thomas Jefferson's use of the form in his *tour de force*. But our Declaration of Independence was just that—an enumeration of grievances by which to justify separate and independent government during the American Revolution.[74] The English Bill of Rights instead paired twelve grievances almost directly in the next section to a declaration of thirteen rights and liberties.[75] In this way, the Crown was offered to William of Orange and Mary, the daughter of James II, who promised by their acceptance to protect those rights as acceding monarchs.[76]

Some are stated as absolute rights:

ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom." ENGLISH BILL OF RIGHTS, *supra* note 59, at 1 recitals.

68. *See* ENGLISH BILL OF RIGHTS, *supra* note 59, at 1.

69. *See* 16 THE NEW ENCYCLOPAEDIA BRITANNICA 875–79 (15th ed. 2010) *available at* http://global.britannica.com/EBchecked/topic/143822/Oliver-Cromwell [perma.cc/4KBZ-EL8Y] (entry for "Cromwell"). After the restoration of Charles II, Cromwell's body was exhumed and desecrated. *Id.* at 879. While a figure of continual reassessment, he "was execrated as a brave bad man" through "the late 17th century." *Id.*

70. *See* ENGLISH BILL OF RIGHTS, *supra* note 59, at 1.

71. *See id.*

72. *See id.*

73. *See* THE PETITION OF RIGHT, *supra* note 60, at 304. The Petition of Right itself continued the path forged by Magna Carta of defining and expanding rights in terms of reaction to royal prerogative, which tradition continued into the English Bill of Rights. *See id.*; *see also* ADAMS, *supra* note 12, at 253. "Certain four acts of the king, which were thought to be of great importance, are alleged to be illegal, and the king is pledged in legal form to do them no more. Exactly the same thing is true of the corresponding portion of the Bill of Rights." *Id.*

74. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

75. *See* ENGLISH BILL OF RIGHTS, *supra* note 59, at 1.

76. SOURCES OF OUR LIBERTIES, *supra* note 3, at 222–23.

> [T]he pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.
> . . . .
> [I]t is the right of the subjects to petition the King, and all committments and prosecutions for such petitioning are illegal.[77]

But others are not absolute. Notice the crucial difference in these phrasings that parallel guarantees in our Bill of Rights:

> [T]he subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.
> . . . .
> [E]xcessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.[78]

A right to arms, but only as "allowed by law," and as to a certain class of persons.[79] A protection against certain punishments, but one which only "ought not"—as opposed to "shall not"—be disturbed.[80] Many of the liberties in the English Bill of Rights and other documents of the time were not made wholesale a matter of right, but instead remained of continuing discretion. This reflects more interest in confining the divine right of Kings—not eliminating it—and shifting the confined areas to the supremacy of Parliament, rather than directly to the people.[81]

Still, these thirteen expressed guarantees were deemed "the true, ancient, and indubitable rights and liberties of the people of this kingdom."[82] One hundred years later, our Framers not only had to determine which rights to consider "true, ancient, and indubitable" in America, but also the extent to which those rights should be absolute—and if not absolute, where to vest the power to define and limit them. As a society, we continue to wrestle with these same questions. Are there rights yet to be recognized, but which we may say are beyond doubt? If so, are those rights absolute or subject to regulation? If subject to

77. ENGLISH BILL OF RIGHTS, *supra* note 59, at 2, cls. 1 & 5.
78. *Id.* at cls. 7 & 10.
79. *See id.*
80. *See id.*
81. SOURCES OF OUR LIBERTIES, *supra* note 3, at 223. "In England the doctrine of parliamentary sovereignty makes impossible the imposition of restrictions upon the character of legislative enactments." *Id.* at 333.
82. ENGLISH BILL OF RIGHTS, *supra* note 59, at 3.

limitation, who decides those bounds? The President? Congress? Legislatures in the states? Or by persons directly affected, in litigation before judges?

Jeremy Bentham, a British philosopher, jurist, and social reformer of the late 18th century, cast more than a hint of the pejorative in his comment, "[T]he power of the lawyer is in the uncertainty of the law."[83] Yet that very power from uncertainty means that there have always been and always will be difficult questions—like those above—to sort out with a lawyer's skill. We should be careful and modest in the exercise of this power, if for no other reason than that Mr. Bentham is elsewhere reputed to have said, "Lawyers are the only persons in whom ignorance of the law is not punished."[84]

V. WILLIAM BLACKSTONE (1765)

Sir William Blackstone is someone we all know by reputation—or at least by the reputation of his *Commentaries on the Laws of England*. Legal scholars can rely on the *Commentaries* to be an objective chronicle of English legal history and an accurate statement of English law at the time of the American Revolution and Constitutional Convention. As far as he could see it, Blackstone aimed to present the trustworthy and honest view, leaving any partisan goals aside. In his last years, as a Member of Parliament, he described himself as "amid the Rage of contending Parties, a Man of Moderation."[85]

The *Commentaries* comprise four volumes. Blackstone simply and directly titled Book One as a consideration "Of the Rights of Persons," with Chapter One being his discussion "Of the Absolute Rights of Individuals."[86] From first word to last, he

83. *In re* Cheng, 943 F.2d 1114, 1117 (9th Cir. 1991) (quoting Letter from Jeremy Bentham to Sir Jas. Mackintosh (1808), *reprinted in* 10 THE WORKS OF JEREMY BENTHAM 429 (J. Bowring ed., 1962)).

84. THE DICTIONARY OF HUMOROUS QUOTATIONS 29 (Evan Esar ed., 1949). The Wikiquote entry for "Jeremy Bentham" notes a dispute on such attribution, as no direct sources appear. *Jeremy Bentham*, WIKIQUOTE, http://en.wikiquote.org/wiki/Jeremy_Bentham [perma.cc/7VQM-SSZZ] (last updated Dec. 10, 2014).

85. *See Blackstone, Sir William*, *in* 2 THE NEW ENCYCLOPAEDIA BRITANNICA 264 (15th ed. 2010) *available at* http://global.britannica.com/EBchecked/topic/68589/Sir-William-Blackstone [perma.cc/7XE6-T9JQ].

86. *See Blackstone's Commentaries on the Laws of England*, THE AVALON PROJECT, http://avalon.law.yale.edu/subject_menus/blackstone.asp [perma.cc/BR8Y-BPMF] (last visited Dec. 31, 2014).

expounds each of the absolute and relative rights of the English people and closes his opening twenty-five pages with this passage:

> In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties more generally talked of, than thoroughly understood . . . . And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliaments be supported in it's full vigor; and limits certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon farther enquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens.[87]

This was and is a powerful idea—that of rights attained by birthright. Approaching revolution, the citizens of the American colonies knew what Blackstone declared to be their "birthright" as Englishmen. The four volumes of Blackstone's *Commentaries* appeared between 1765 and 1769, quite proximate to the American Revolution.[88] A bookseller named Robert Bell published the first American edition beginning in 1771, in Philadelphia, at the moderate price of two dollars per volume.[89] In March of 1775, Edmund Burke observed to Parliament that there were "nearly as many of Blackstone's Commentaries in

87. WILLIAM BLACKSTONE, COMMENTARIES 1:120–41 (1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 388, 394.

88. *Blackstone, Sir William*, *supra* note 85, at "Early Life."

89. Gareth Jones, *Introduction* to THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S *COMMENTARIES ON THE LAWS OF ENGLAND*, at xlvii (Gareth Jones ed., 1973).

America as in England," and that this education in the law was a circumstance propelling what he called "[t]his fierce spirit of liberty" in the Colonies.[90]

With Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights, a truly significant array of rights came with being an Englishman in the latter half of the eighteenth century. And truth be told, for the longest time, the Colonists wanted to be more English, not less. The Founders saw no reason that birth across an ocean deprived them of rights unquestionably due to them—if not simply because they were born to the human race, then certainly because they had the good fortune to be born to enlightened England. They did not seek recognition of new rights, but rather, simple recognition that they were due the same rights owed to every Englishman.[91]

Blackstone's *Commentaries* did not change or enact law, but I mention it to emphasize the overall conversation with respect to rights and its accelerating pace in America. While harder to draw a modern lesson, perhaps we can simply learn from the man himself. William Blackstone was not born into nobility, but instead into the London middle class, the posthumous son of a silk mercer.[92] He was not destined for a life of great learning, but his quick mind led to education at Oxford.[93] Following his call to the bar in 1746, he experienced no greatness in practice as a barrister, which began slowly and not terribly successfully.[94] He turned to legal scholarship and eventually, to an absurd ambition to provide a complete and unified overview of English law.[95] He then labored for sixteen years and succeeded beyond the wildest imaginings, bringing forth a revered treatise that opened the law—and rights under the law—to an understanding by laymen.[96]

We should bear this in mind when undertaking our tasks as lawyers today, whether on behalf of a client or in public service. Sir Blackstone's experience says, "Aim high."

90. Edmund Burke, Speech on Conciliation with the Colonies (Mar. 22, 1775), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 3, 4–5.

91. *See infra* Part VI.

92. *Blackstone, Sir William*, *supra* note 85, at 263.

93. *Id.*

94. *Id.*

95. *Id.* at 264.

96. *See id.*

VI. DECLARATIONS, RESOLVES, AND ADDRESSES (1774)

After Blackstone, we reach the very point of the revolution. 1770 opened with the Boston Massacre, and 1773 closed with the Boston Tea Party.[97] In 1774, Parliament responded with what it deemed The Coercive Acts—closing the Port of Boston, stripping Massachusetts of self-governance, moving trials of royal officials to London, and quartering British troops in and around Colonial homes.[98] These came to be known domestically as The Intolerable Acts, crystallizing a view that England believed the rights of colonial Americans were simply of a lower order than the rights of the English themselves.[99] Reaction to those Acts was a principal catalyst for change.

Bunker Hill and the Revolutionary War were still a year away, and the Colonists had just about enough of imperious rule from afar in the form of a distant and seemingly disconnected King and Parliament.[100] That discontent shot through the whole of American society, finding expression in local, national, and international form. Various groups and governing bodies spoke sharply and more directly to the abrogation of the people's rights over time—while still trying to maintain at least the gloss of sworn allegiance to the Crown.

Fairfax County, Virginia, is just across the Potomac River from what is now Washington, D.C. Mount Vernon sits within it.[101] In early July of 1774, in a show of solidarity with Massachusetts in the face of The Intolerable Acts, Washington commissioned efforts in Fairfax County to "define our Constitutional Rights."[102] This became the Fairfax County Resolves, signed later that month "[a]t a general Meeting of the Freeholders and Inhabitants of the County of Fairfax . . . at the Court House," with Washington as chairman.[103] The first resolution proclaimed the American birthright described by Blackstone:

97. *Timeline of the Revolutionary War*, USHISTORY.ORG, July 4, 1995, www.ushistory.org/declaration/revwartimeline.htm [perma.cc/69X9-HP6G].

98. *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 233–40 (1st ed. 1982).

99. *See id.*; *see also* SOURCES OF OUR LIBERTIES, *supra* note 3, at 261 (noting the "indifference of England to American affairs").

100. SOURCES OF OUR LIBERTIES, *supra* note 3, at 272 (describing England's inept handling of colonial affairs and the driving away of American colonies from the crown).

101. *See Hours & Directions*, GEORGE WASHINGTON'S MOUNT VERNON, www.mountvernon.org/library/hours-directions [perma.cc/4W9N-DV9N] (last visited Jan. 4, 2015).

102. JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 65 (2006).

103. FAIRFAX COUNTY RESOLVES (July 18, 1774), *reprinted in* 1 THE FOUNDERS'

> That our Ancestors, when they left their native Land, and setled in America, brought with them . . . the Civil-Constitution and Form of Government of the Country they came from; and were by the Laws of Nature and Nations, entitiled to all it's Privileges, Immunities and Advantages; which have descended to us their Posterity, and ought of Right to be as fully enjoyed, as if we had still continued within the Realm of England.[104]

Thirty other counties in Virginia did likewise, as did counties throughout the Colonies.[105] Unity is the only strategy, they said; the troubles of one are the troubles of all.[106] "Join, or die."[107] Benjamin Franklin had famously cartooned this intensely local slogan in 1754, urging colonial support of Britain in the French and Indian War.[108] To unite the Colonies against England, Paul Revere co-opted the message in his engraving for a Boston paper on July 7, 1774.[109]

Local action became the tentative first steps of truly national action in September 1774, with the First Continental Congress organized in the wake of these resolves.[110] The next month, the Continental Congress issued its own Declaration and Resolves to speak in solidarity—if not quite yet nationally—to the Crown.[111] It called for the repeal of a host of laws and set out ten resolutions declaring that American colonists had the same rights as all English citizens: entitlement to life, liberty, and property; participation in legislation; protection of the common law and trial by jury; and peaceable assembly and petition.[112]

CONSTITUTION, *supra* note 37, at 633, 633.

104. *Id.* at cl. 1.

105. SOURCES OF OUR LIBERTIES, *supra* note 3, at 272–73.

106. For instance, a merchant committee from New York responded this way to an appeal from Boston merchants to halt trade with England: "As a sister colony, suffering in defense of the rights of America, we consider your injuries as a common cause, to the redress of which it is equally our duty and our interest to contribute." A Proposal for a Continental Congress (1774), *reprinted in* 2 THE ANNALS OF AMERICA: 1755–1783, RESISTANCE AND REVOLUTION 254, 254 (Mortimer J. Adler ed., 1968).

107. *See* Benjamin Franklin, *Join or Die*, PA. GAZETTE, May 9, 1754, at 2; *see also Benjamin Franklin . . .In His Own Words*: *Join or Die*, LIBR. OF CONGRESS (Aug. 16, 2010) www.loc.gov/exhibits/treasures/franklin-cause.html [perma.cc/BPH5-7DDF].

108. *See* Franklin, *supra* note 107; *see also* GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN 72–78 (2004).

109. Paul Revere, *Unite or Die*, MASS. SPY, July 7, 1774, at 1; s*ee also A More Perfect Union: Symbolizing the National Union of the States*, LIBR. OF CONGRESS, www.loc.gov/exhibits/us.capitol/s1.html [perma.cc/34Q6-7Y9U] (last visited Dec. 31, 2014) (entry for "Paul Revere Adopts Snake Device").

110. SOURCES OF OUR LIBERTIES, *supra* note 3, at 272–73.

111. CONTINENTAL CONGRESS, DECLARATION AND RESOLVES (Oct. 14, 1774), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 1.

112. *Id.* at nos. 1, 4, 5 & 8, at 2.

Two weeks later the Continental Congress reached out with an Address to the Inhabitants of the Province of Quebec.[113] Quebec had its own concerns under rule from abroad, particularly regarding the fit of its French Catholicism with the Anglican Church of England.[114] That letter from Congress closed with a pledge to consider a violation of Quebec's rights as a violation of our own and an invitation to the people of Quebec to join our struggle, our cause, and our formative union.[115] In plain language to Quebec's citizens, the Continental Congress reviewed what it considered the preeminent rights of trial by jury, writ of habeas corpus, freedom of the press, and liberty of conscience in choice of religion.[116] But the entire discussion led with this: "[T]he first grand right, is that of the people having a share in their own government by their representatives chosen by themselves, and, in consequence, of being ruled by *laws*, which they themselves approve, not by *edicts* of *men* over whom they have no controul."[117]

John Marshall gets a lot of credit for saying well what others said first. In *Marbury v. Madison*, he cast the more memorable phrasing: "The Government of the United States has been emphatically termed a government of laws, and not of men."[118] We should recall today that Marshall said this not merely in

113. Letter from Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 441.

114. *Id.* at 442.

> These are the rights *you* are entitled to and ought at this moment in perfection, to exercise. And what is offered to you by the late Act of Parliament in their place? Liberty of conscience in your religion? No. God gave it to you; and the temporal powers with which you have been and are connected, firmly stipulated for your enjoyment of it. If laws, divine and human, could secure it against the despotic caprices of wicked men, it was secured before. . . . Such is the precarious tenure of mere *will*, by which you hold your lives and religion.

Id.

115. *Id.* at 444.

> In this present Congress, beginning on the fifth of the last month, and continued to this day, it has been, with universal pleasure and an unanimous vote, resolved, That we should consider the violation of your rights, by the act for altering the government of your province, as a violation of our own, and that you should be invited to accede to our confederation, which has no other objects than the perfect security of the natural and civil rights of all the constituent members, according to their respective circumstances, and the preservation of a happy and lasting connection with Great-Britain, on the salutary and constitutional principles herein before mentioned.

Id.

116. *See id.* at 442–43.

117. *Id.* at 442.

118. 5 U.S. (1 Cranch) 137, 163 (1803).

service of defining and applying the power of judicial review. He asserted it in terms matching that "first grand right" claimed before the Revolution, a right respecting the very frame of government itself. Ours would and should always be a nation of just laws, determined by the people themselves, equally applicable to all.

VII. THE VIRGINIA DECLARATION OF RIGHTS, AND OTHERS (1776)

In the middle of the year 1776, the Declaration of Independence declared us to be a collection of free and independent states, with all ties of loyalty to England and her government dissolved.[119] This led to several interesting questions, including prominently: Well, now what do we do? We grew tired of the Crown, but how will we govern ourselves? Parliament failed us, so how will we establish and protect our own rights?

Several states were already crossing that bridge to independence. New Hampshire in January, South Carolina in March, and New Jersey in July each adopted their first fully autonomous constitutions.[120] Together with New York in 1777, these charters came with a list of grievances against the Crown—as seen a century before with the English Bill of Rights—but with no express enumeration of rights.[121]

Virginia struck a different path, becoming the model for other states. On June 12, Virginia formally adopted its own Declaration of Rights—sixteen rights it declared to be "the basis and foundation of government."[122] Only then did it adopt its Constitution on June 29, less than a week before July 4.[123] Later in 1776, Delaware, Maryland, North Carolina, and Pennsylvania each prefaced their own constitutions with their conception of a Declaration of Rights, as did Massachusetts in 1780.[124] The newly

119. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

120. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 309–10, 379; *see also* S.C. CONST. OF 1776, *available at* http://avalon.law.yale.edu/18th_century/sc01.asp [perma.cc/SA2L-G8PS]; N.J. CONST. of 1776, *available at* http://avalon.law.yale.edu/18th_century/nj15.asp [perma.cc/J576-ZPWS].

121. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 309–10.

122. VIRGINIA DECLARATION OF RIGHTS (June 12, 1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 3.

123. VA. CONST., *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 7; *see also* SOURCES OF OUR LIBERTIES, *supra* note 3, at 311.

124. DELAWARE DECLARATION OF RIGHTS (Sept. 11, 1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 5; PA. CONST. OF 1776, DECLARATION OF RIGHTS, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 6; MASS. CONST. OF

independent states fairly bristled with rights—more than 150 phrasings of various and overlapping guarantees.

Each of the individual liberties guaranteed in our Bill of Rights saw at least some phrasing in these earlier state declarations.[125] Yet many of those expressions of rights did not make our final, federal list. The breadth of those rights is something to keep in mind when puzzling the plain dictates of the Ninth Amendment that other rights exist and are retained by the people, neither denied nor disparaged merely because the Constitution did not enumerate them.[126]

Would express inclusion of any of those other rights at the national level have made a difference to the people and in our history? Consider:

- What if our Bill of Rights provided means to establish congressional term limits?[127]
- What if it enshrined widely open access to courts for injuries received?[128]
- What if the Bill of Rights granted an express and continuing right to alter or abolish the entirety of our governmental structure by majority vote?[129]

1780, PT. 1, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 7; MD. CONST. OF 1776, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 3, at 346; N.C. CONST. of 1776, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 3, at 355.

125. *See* U.S. CONST. amend. IX, X. The Ninth Amendment (consideration of non-enumerated rights) and the Tenth Amendment (consideration of powers not delegated to federal government or prohibited to states) were unnecessary to a state, rather than federal, charter.

126. "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.

127. The Virginia Declaration of Rights states:

> That the Legislative and Executive powers of the State should be separate and distinct from the Judicative; and, that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the law shall direct.

VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 4; *see also* MD. CONST. of 1776, DECLARATION OF RIGHTS, cl. XXXI, *available at* http://avalon.law.yale.edu/17th_century/ma02.asp [perma.cc/J5H7-TFKL].

128. The Delaware Declaration of Rights states:

> That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

DELAWARE DECLARATION OF RIGHTS, *supra* note 124, at 6, cl. 12; *see also* MASS. CONST. OF 1780, PT. 1, *supra* note 124, at 8, cl. XI.

- What if it specifically proclaimed that the President could not unilaterally suspend laws or their exercise?[130]
- What if the Bill of Rights admonished us to adhere to moral-first principles, with suggestions we monitor the same in our elected officials?[131]

The Virginia Declaration of Rights served as a template for many of these expressions of rights, and one of its clauses could well have merited inclusion within the federal listing of rights. For Virginia's first enumerated right anticipated the very best language from the Declaration of Independence, and announced:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[132]

129. The Pennsylvania Declaration of Rights states:

> That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.

PA. CONST. OF 1776, DECLARATION OF RIGHTS, *supra* note 124, at 6–7, cl. V; s*ee also* VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 3.

130. *See* VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 7. "That all power of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised." *See also* DELAWARE DECLARATION OF RIGHTS, *supra* note 124, at 6, cl. 7; MD. CONST., *supra* note 124, at 347, cl. VII; MASS. CONST. OF 1780, PT. 1, *supra* note 124, at 9, cl. XX; N.C. CONST., *supra* note 124, at 355, cl. V.

131. The Massachusetts Constitution of 1780 states:

> A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government: The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: And they have a right to require of their law-givers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

MASS. CONST. OF 1780, PT. 1, *supra* note 124, at 9, cl. XVIII; *see also* PA. CONST. OF 1776, DECLARATION OF RIGHTS, *supra* note 124, at 7, cl. XIV; N.C. CONST., *supra* note 124, at 356, cl. XXI.

132. VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 1; *see also* PA. CONST. OF 1776, DECLARATION OF RIGHTS, *supra* note 124, at 6, cl. 1.

Just imagine the traction a clause giving expression to rights in that form would have had in our history and in modern litigation. Perhaps it would have raised more questions than it answered. How can each of us better enjoy our life and liberty? Are the means by which to acquire and possess property sufficient? Is everyone equally entitled to pursue and obtain his or her own happiness and safety in this world? On the other hand, if we profess to care about rights, perhaps those are the very questions we should regularly ask and seek to redress through our political process, even today.

VIII. THE NORTHWEST ORDINANCE (1787)

In May of 1787 the Constitutional Convention assembled in Philadelphia, concluding its work on September 17, with a draft Constitution transmitted to Congress and suggested for ratification by the states.[133] Before taking that step, however, we must stop just short.

Sanction of slavery was a painful compromise thought necessary to establish and then continue the Union.[134] In a discussion of inalienable rights and liberties, we cannot just ignore the Constitution's clauses that accommodated slavery while going to great lengths to avoid even speaking its name—the "three-fifths" rule,[135] the continuance of the slave trade,[136]

133. *See* Federal Convention, Resolution and Letter to the Continental Congress (Sept. 17, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 194.

134. "The Southern States would not have entered into the Union of America without the temporary permission of that trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us." Debate in Virginia Ratifying Convention (June 15, 1788) (statement of Mr. Madison), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 292, 292; *see also* Letter from John Jay to Richard Price (Sept. 27, 1785), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 538; RECORDS OF THE FEDERAL CONVENTION (Aug. 8–25, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 279–82; James Wilson, Pennsylvania Ratifying Convention (Dec. 3–4, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 283–84; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 2:§§ 630–35, 641–47, 673–80 (1833), *reprinted in* 2 THE FOUNDERS' CONSTITUTION: PREAMBLE THROUGH ARTICLE 1, SECTION 8, CLAUSE 4, at 140 (Philip B. Kurland & Ralph Lerner eds., 1987).

135. U.S. CONST. art. I, § 2, cl. 3.

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

136. *Id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.").

and the recovery of slaves.[137] This was a conscious choice over the loud dissent of writers and orators who lamented the rationalizations that marginalized and diminished persons among us, who were indeed part of "us," even as they were not deemed to be part of "we, the people."[138]

Advocacy in the South acknowledged the reality of the harsh circumstances facing slaves:

> [W]hile there remain[s] one acre of swamp-land uncleared of South Carolina, I [will] raise my voice against restricting the importation of negroes. I am as thoroughly convinced as that gentleman is, that the nature of our climate, and the flat, swampy situation of our country, obliges us to cultivate our lands with negroes, and that without them South Carolina would soon be a desert waste.[139]

Opinion in the mid-Atlantic and Northeast ran just as passionately in opposition:

> It does not seem to be justice, that one man should take another from his own country, and make a slave of him; and yet we are told by this new constitution, that one of its great ends, is to establish justice; alas! my worthy friend, it is a serious thing to trifle with the great God; his punishments are slow, but

137. *Id.* art. IV, § 2, cl. 3.

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

See also id. art. V (forbidding amendment to Art. I, sec. 9, cl. 1 until 1808).

138. Brutus referred to the "three fifths of all other Persons" phrasing in the Apportionment Clause and wryly observed:

> What a strange and unnecessary accumulation of words are here used to conceal from the public eye, what might have been expressed in the following concise manner. Representatives are to be proportioned among the states respectively, according to the number of freemen and slaves inhabiting them, counting five slaves for three free men.

BRUTUS, NO. 3 (Nov. 15, 1787), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 134, at 115, 115. Condemning the practice, he also foresaw the political ramifications from allowing continuation of the slave trade to count towards later apportionment in the House:

> What adds to the evil is, that these states are to be permitted to continue the inhuman traffic of importing slaves, until the year 1808—and for every cargo of these unhappy people, which unfeeling, unprincipled, barbarous, and avaricious wretches, may tear from their country, friends and tender connections, and bring into those states, they are to be rewarded by having an increase of members in the general assembly.

Id.

139. Debate in South Carolina House of Representatives (Jan. 17, 1788) (statement of Gen. C.C. Pinckney), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 287, 287.

> always sure; and the cunning of men, however deep, cannot escape them.[140]

Was another path available? If immediate ratification by every state was the only and necessary goal, perhaps not. But politically, the Confederation Congress in New York actually cleared the path away from slavery even as the Framers proceeded in Philadelphia.[141] On July 13, 1787, the Northwest Ordinance established the temporary, territorial government over lands that would go on to become Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.[142] These areas lay outside the thirteen original states, and so they were without an inherent frame of government.[143] For those settlers and pioneers, it was a place upon which a framework of government could proceed from a genuinely national perspective when seeking to promote the purchase and settlement of these lands.[144] And it was here that Congress set down what truly may be called our first national bill of rights, "considered as articles of compact, between the original States and the people and States in the said territory" to "forever remain unalterable."[145]

These six Articles guaranteed rights including religious freedom, resort to habeas corpus, trial by jury, due process of law, no cruel or unusual punishment, and the like.[146] But one clause, Article VI, commands special respect: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . . ."[147]

In 1809, Abraham Lincoln was born in Kentucky to a father opposed to slavery.[148] As a young man he moved to Illinois, so he

140. A COUNTRYMAN (Dec. 13, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 284, 285; *see also* Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 517; Joshua Atherton, New Hampshire Ratifying Convention (1788), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 286.

141. NORTHWEST ORDINANCE (July 13, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 27, 29, sec. 14, art. VI.

142. *Id.* at 27.

143. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 389 (explaining how new territories were to establish their own governments).

144. *See id.* at 387–89.

145. NORTHWEST ORDINANCE, *supra* note 141, at 28, sec. 14.

146. *Id.* at 28–29.

147. *Id.* at 29, sec. 14, art. VI.

148. *Abraham Lincolns Slavery*, ABRAHAMLINCOLNS.COM, www.abrahamlincolns.com/abraham-slavery.php [perma.cc/C85A-U2H7] (last visited Dec. 31, 2014).

came of age within the promise of the Northwest Ordinance.[149] He looked to this document in his path-marking Peoria speech in 1854, arguing against the extension of slavery with the expansion of the boundaries of the United States.[150] The Ordinance set a policy of prohibiting slavery in new territory, and Lincoln said this was evidence of original intent.[151] And thus Lincoln pleaded for the nation to recognize that the founding generation venerated individual rights, largely deplored slavery, and intended for it never to exist outside the territorial bounds of the original Colonies.[152]

This was two years before *Dred Scott*,[153] and seven years before the conflagration of the Civil War.[154] But still that war came, a fate clearly foretold at the Constitutional Convention in 1787. Slavery was the focus of debate there at least three times.[155] Bluffs were made and not called, for instance, with respect to the Importation of Persons Clause:

> If the Convention thinks that N. C; S. C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States

149. *American President: A Reference Resource*, MILLER CENTER, http://millercenter.org/president/lincoln/essays/biography/2 [perma.cc/HYK3-FSVC] (last visited Dec. 31, 2014).

150. *See* Abraham Lincoln, Against the Extension of Slavery (16 Oct. 1854), *reprinted in* 8 THE ANNALS OF AMERICA: 1850–1857, A HOUSE DIVIDING 276, 276–82 (Mortimer J. Adler ed., 1968).

151. *See id.* at 281.

152. *See id.* Lincoln stated:

> I object to [the extension of slavery] because it assumes that there can be moral right in the enslaving of one man by another. I object to it as a dangerous dalliance for a few people; a sad evidence that, feeling prosperity, we forget right; that liberty, as a principle, we have ceased to revere. I object to it because the fathers of the republic eschewed and rejected it. The argument of "necessity" was the only argument they ever admitted in favor of slavery, and so far, and so far only as it carried them, did they ever go. They found the institution existing among us, which they could not help; and they cast blame upon the British king for having permitted its introduction. Before the Constitution, they prohibited its introduction into the Northwestern Territory—the only country we owned then free from it. At the framing and adoption of the Constitution, they forbore to so much as mention the word "slave" or "slavery" in the whole instrument.

Id.

153. 60 U.S. (19 How.) 393 (1856).

154. *American Civil War*, ENCYCLOPAEDIA BRITANNICA ONLINE, www.britannica.com/EBchecked/topic/19407/American-Civil-War [perma.cc/YTY2-4KW3] (last visited Dec. 31, 2014).

155. *See infra* notes 159–60 and accompanying text.

> will never be such fools as to give up so important an interest.[156]

In opposition, George Mason—credited by history as the author of the Virginia Declaration of Rights—argued the consequences of national acquiescence:

> Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes & effects providence punishes national sins, by national calamities.[157]

Not nearly enough was done on this issue and for these individual persons at the time of framing. Resolution in 1787—within the fabric of the Constitution as in the Northwest Ordinance—would have altered the history of our first hundred years, and thus also the history of our second hundred and beyond.[158] This was an opportunity missed, and that is a continuing lesson. History will set straight the path, but that is not enough—for it should always be today's task.

IX. THE CONSTITUTIONAL CONVENTION AND RATIFICATION DEBATES (1787)

When I teach my class on Origins of the Federal Constitution, a couple of my favorite documents are influential speeches from the day, which are somewhat lost now to the popular mind. One is Benjamin Franklin's speech to the Constitutional Convention,

156. RECORDS OF THE FEDERAL CONVENTION (Aug. 22, 1787), *supra* note 134, at 281 (John Rutledge). Rutledge was a delegate from South Carolina, and the second Chief Justice of the U.S. Supreme Court. EDWARD J. LARSON & MICHAEL P. WINSHIP, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 175–76 (2005). Hugh Williamson of North Carolina and Abraham Baldwin of Georgia flatly confirmed their states would not join a government under a Constitution that prohibited slavery. *See* RECORDS OF THE FEDERAL CONVENTION (Aug. 22, 1787), *supra* note 134, at 281.

157. RECORDS OF THE FEDERAL CONVENTION, *supra* note 134, at 280 (George Mason).

158. The design of the Northwest Ordinance also required a different, higher path with respect to Native Americans here before any settlers and colonists:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

NORTHWEST ORDINANCE, *supra* note 141, at 28–29, sec. 14, art. III. Within the Constitution, their fate was left simply to the shifting tides of popular opinion. *See* U.S. CONST. art. I, § 8, cl. 3 (commerce); art. II, § 2, cl. 2. (treaties).

who at age eighty-two urged not just unity, but unanimity on the very day the Framers accepted the final draft:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.
>
> . . . .
>
> . . . I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument.[159]

Franklin's was a call to reach across lingering differences, and to put aside vanity and individual preference in favor of the continued strength and security of a nation still struggling, in the words of the Declaration of Independence, "to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."[160] But unanimity faltered, with three of the forty-two delegates still involved that last day refusing to sign—due most directly to their objection that the Constitution provided no Bill of Rights.[161]

Was a Bill of Rights necessary to the new Constitution? The example of the Virginia Declaration of Rights was freshly before them, as were the recent declarations from several other states.[162] And a long tradition dating back to the Massachusetts Body of Liberties suggested that in America, recognition and protection

159. Benjamin Franklin to the Federal Convention (Sept. 17, 1787), *reprinted in* 4 THE FOUNDERS' CONSTITUTION: ARTICLE 2, SECTION 2, THROUGH ARTICLE 7, at 657, 657–58 (Philip B. Kurland & Ralph Lerner eds., 1987).

160. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

161. *See* LARSON & WINSHIP, *supra* note 156, at 156. Edmund Randolph and George Mason, both of Virginia, and Elbridge Gerry, of Massachusetts, refused. *Id.* Randolph ultimately switched his view, and worked in support of ratification. *Id.* at 175. Others of the fifty-five original delegates were absent or had previously departed in protest before the signature date. *See id.* at 168–78.

162. *See The Virginia Declaration of Rights*, THE CHARTERS OF FREEDOM, www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html [perma.cc/V26U-DN5Y] (last visited Dec. 31, 2014) (describing the Declaration's role in the drafting of the Bill of Rights).

of rights was not a matter separate from the frame of government and its laws.

Madison's notes from the Convention show that they took up the issue.[163] Very late in the process there came a request for provisions protecting habeas corpus, prohibiting religious tests or qualifications, preserving the liberty of the press, and forbidding the quartering of soldiers in homes in time of peace.[164] The first two found their way into later drafts of the Constitution; the latter two did not.[165] This led George Mason in the final week to seek more, and move inclusion of the important liberties that had not found their express place:

> A general principle laid down [as to civil jury trial] and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.[166]

They had been at it since May; it was now September and not a single state supported the motion.[167] Yet events quickly proved Mason correct, and that gap became a major flashpoint for opposition.[168]

This probably surprised the members of the Convention. The Articles of Confederation hardly addressed the protection of rights at all, beyond provision that "free inhabitants . . . shall be entitled to all privileges and immunities of free citizens in the several states."[169] But then again, the Articles established only a "firm league of friendship" between the States and reserved almost all powers to them.[170] The structure of that first national government indicates just how scant were the powers given to it: no chief executive, no national judiciary, no ability to take any

163. LARSON & WINSHIP, *supra* note 156, at 149–50.

164. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341–42 (Max Farrand ed., 1911).

165. U.S. CONST. art. I, § 9, cl. 2 (habeas corpus); U.S. CONST. art. VI, cl. 3 (prohibiting religious tests for federal office).

166. RECORDS OF THE FEDERAL CONVENTION (Sept. 12, 1787) (noting remarks of George Mason), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 447, 447.

167. *Id.*

168. *See infra* text accompanying notes 178–82.

169. ARTICLES OF CONFEDERATION (1 Mar. 1781), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 23, art. IV.

170. *Id.* at art. III.

significant action without a unanimous vote from the states.[171] The new federal Constitution would upend all that.[172]

At the Convention, the very structure of the new government was argued as its own protector and guarantor of rights.[173] Picking up and amplifying the theme, the Federalists in favor of ratification argued that, for the first time in history, the people themselves would establish a government of limited and enumerated powers, and where that government did not receive power, it did not have the means to infringe the rights of the people.[174] Alexander Hamilton expanded on this best, in Federalist No. 84:

> Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. "We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.[175]

The argument utterly failed to mollify the Anti-Federalists. They took the new Constitution at face value, and under pseudonyms took pen in hand to argue almost from syllogism. *Major premise*, from Federal Farmer: the Supremacy Clause establishes that the national Constitution, laws, and treaties will be the supreme law of the land, displacing contrary state laws.[176]

171. *See id.* at 23–26 (noting the lack of power given to the national government).

172. *See* Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 534–37 (1908) (discussing the defects of the Articles of Confederation and the Constitution's remedies).

173. RECORDS OF THE FEDERAL CONVENTION, *supra* note 166, at 447 (Sept. 12, 1787) (noting remarks of Roger Sherman, that "State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient").

174. *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 467.

175. *Id.* at 468.

176. FEDERAL FARMER, NO. 4 (Oct. 12, 1787), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 159, at 597.

> [W]herever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away: And not only this, but the laws of the United States which shall be made in pursuance of the federal constitution will be also supreme laws, and wherever they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away.

Id. at 598.

Minor premise, per Brutus: the Necessary and Proper Clause will come to mean that no limit exists on areas over which the federal government has power.[177] *Conclusion*, via An Old Whig: the federal government has power to trump all that has been set down in various state declarations of rights, and so the people's rights are at risk.[178]

George Mason intensified his objection from the Convention in his argument at the Virginia Ratifying Convention:

> All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people by their bill of rights declared to be paramount to the power of the legislature. He asked, why should it not be so in this constitution? . . . He declared, that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.[179]

Thomas Jefferson followed the Convention and ratification process from Paris while serving as Minister to France.[180] In various letters to James Madison and others, he expressed the rippling discontent many felt with the idea of an implied protection of rights—an implication itself resting only upon the self-restraint of the new federal government.[181] To Madison, in December 1787: "Let me add that a bill of rights is what the people are entitled to against every government on earth,

177. BRUTUS, NO. 1 (Oct. 18, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 240, 240 ("The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law.").

178. AN OLD WHIG, NO. 5 (Fall 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 85.

> Wise and prudent men always take care to guard against danger beforehand, and to make themselves safe whilst it is yet in their power to do it without inconvenience or risk.—[W]ho shall answer for the ebbings and flowings of opinion, or be able to say what will be the fashionable frenzy of the next generation?

Id. at 86.

179. George Mason, Virginia Ratifying Convention (June 16, 1788), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 472, 472.

180. *Colleagues and Friends: Thomas Jefferson*, JAMES MADISON'S MONTPELIER, www.montpelier.org/james-and-dolley-madison/james-madison/politician-and-statesman/colleagues/thomas-jefferson [perma.cc/YN28-QFMN] (last visited Jan. 3, 2015).

181. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 456.

general or particular, and what no just government should refuse, or rest on inference."[182]

But unlike the Anti-Federalists—who really wanted nothing much to do with the new Constitution except to see it voted down—Jefferson saw the means to a cure. To another friend, in February 1788:

> I wish with all my soul that the nine first Conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest conventions, whichever they be, may refuse to accede to it till a declaration of rights be annexed. This would probably command the offer of such a declaration, and thus give to the whole fabric, perhaps as much perfection as any one of that kind ever had. By a declaration of rights I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the habeas corpus, no standing armies. These are fetters against doing evil which no honest government should decline.[183]

The vote did not go down exactly as Jefferson hoped, but as noted next, it was a fair approximation.[184] We would have a new Constitution in force aiming to "establish Justice" and "secure the Blessings of Liberty to ourselves and our Posterity."[185] But that "more perfect Union" part would require a bit more work.

X. CONGRESSIONAL DEBATE ON THE BILL OF RIGHTS (1789)

All persons like to believe they live in extraordinary times, and so we commonly hear that our current Congress is the most fractious in history. But by any measure, when the First Congress assembled in March 1789, all was not harmony and grace. Six states had approved the Constitution in short order.[186] But Massachusetts ratified on a very close vote, and proposed nine amendments to "remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal

182. *Id.* at 457.

183. Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 159, at 663.

184. *See infra* Part X.

185. U.S. CONST. pmbl.

186. By February 1788, Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut had each in turn ratified the proposed Constitution. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 6 (2005).

government."[187] With that, the cascade began.[188] South Carolina ratified and proposed two amendments.[189] New Hampshire, twelve.[190] Virginia, twenty.[191] New York, thirty-three, while barely ratifying by a 30–27 margin.[192] When that First Congress met, two of the original Colonies were not yet even part of the United States.[193] Rhode Island refused entirely to call a ratification convention.[194] And while the North Carolina convention met, it refused to ratify until Congress considered a declaration of twenty proposed rights and twenty-six amendments.[195]

So profound was this division that George Washington directed large concern to it in his first inaugural address. "[I]t will remain with your judgment to decide," he told Congress, "how far an exercise of the occasional power delegated by the Fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the System, or by the degree of inquietude which has given birth to them."[196] And he reposed great faith and trust in Congress, urging them to amend the fledgling Constitution after considering how best, in his words, to "impregnably

187. MASSACHUSETTS RATIFYING CONVENTION, RATIFICATION AND PROPOSED AMENDMENTS (Feb. 6, 1788), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 461, 461; *see also* AMAR, *supra* note 186, at 6.

188. *See generally* FRAMERS OF THE CONSTITUTION 94–96, (James H. Charleton, Robert G. Ferris & Mary C. Ryan eds., Nat'l Archives and Records Admin. 1986) (1976).

189. *Ratification of the Constitution by the State of South Carolina; May 23, 1788*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/ratsc.asp [perma.cc/TQ52-XJSY] (last visited Jan. 3, 2015).

190. *Ratification of the Constitution by the State of New Hampshire; 21 June, 1788*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/ratnh.asp [perma.cc/PKS2-W5JW] (last visited Jan. 2, 2015).

191. VIRGINIA RATIFYING CONVENTION, PROPOSED AMENDMENTS TO THE CONSTITUTION (June 27, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 15, 16–17.

192. NEW YORK RATIFICATION OF CONSTITUTION (July 26, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 11, 13–15; AMAR, *supra* note 186, at 6; *see also* FRAMERS OF THE CONSTITUTION, *supra* note 188, at 99.

193. FRAMERS OF THE CONSTITUTION, *supra* note 188, at 99. *See generally The American Constitution: A Documentary Record*, THE AVALON PROJECT, http://avalon.law.yale.edu/subject_menus/constpap.asp [perma.cc/7DJ2-CDET] (providing documents related to the ratification of the Constitution in North Carolina (Nov. 21, 1789) and Rhode Island (May 29, 1790)).

194. *See* FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 417 (Transaction Publishers 1992) (1958); FRAMERS OF THE CONSTITUTION, *supra* note 188, at 99.

195. AMAR, *supra* note 186, at 6; NORTH CAROLINA RATIFYING CONVENTION, DECLARATION OF RIGHTS AND OTHER AMENDMENTS (Aug. 1, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 17, 17–20.

196. President George Washington, First Inaugural Address (Apr. 30, 1789), *available at* www.archives.gov/exhibits/american_originals/inaugtxt.html [perma.cc/ZKG8-Q354].

fortif[y]" the people's liberties and "safely and advantageously promote[]" public harmony.[197]

And so on the floor of the First Congress, in the fourteenth week of its very first session, James Madison rose to move that body towards a Bill of Rights.[198] Madison said he considered himself "bound in honor and in duty" to bring such a bill before the First Congress so as to "render [the Constitution] as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."[199] Like Franklin at the Convention, Madison strove for unanimity not mere majority, because many who struggled with us through the Revolutionary War feared as inadequate the protection afforded the liberties for which we all fought: "We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. The acquiescence which our fellow-citizens show under the Government, calls upon us for a like return of moderation."[200]

On first glance, the lesson seems obvious enough. This matter of rights, in its origin, was not about what sets apart each from the other. This was not about wedge issues or partisan goals. Our Founders viewed this conversation about rights as a means by which to draw the Nation more closely together. And so, this impulse all persons of good faith feel respecting the recognition of rights is one on which we should patiently seek agreement, together as Americans.

I think we can all admire that sentiment, even if we do not quite know how to pursue its accomplishment today in line with yesterday's aspirations. It seems so contrary to modern dialogue and politics. Indeed, the entirety of law school is a seemingly endless array of litigated cases, to say nothing of the headlines on any given day, and so we have in mind countless situations where agreement on fundamental issues perhaps never can be reached. And is that really so surprising? The history of these rights

197. *Id.*

198. *Primary Documents in American History: The Bill of Rights*, THE LIBR. OF CONGRESS, www.loc.gov/rr/program/bib/ourdocs/billofrights.html [perma.cc/YQ8V-M52H?type=image] (last updated Sept. 14, 2014).

199. House of Representatives, Amendments to the Constitution (June 8, 1789) (James Madison), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 20, 20, 24.

200. *Id.* at 24.

reflects bitter acrimony and difficult lessons obtained over centuries. Remember that it was only drawn swords that compelled King John's acquiescence to Magna Carta.[201] Yesterday's battles were hard-fought among fierce opponents—today's are little different.

Before preparing my class, if I had heard of Roger Sherman, it had not stuck. From Connecticut, he is the only person to sign all four great charters of the United States: the Continental Association in 1774, the Declaration of Independence in 1776, the Articles of Confederation in 1778, and the Constitution in 1787.[202] Though not widely recalled today, in John Trumbull's famous painting of the presentation of the Declaration of Independence at the Continental Congress, Sherman stands front and center with the other members of the Committee of Five that drafted the document—Thomas Jefferson, John Adams, Benjamin Franklin, and Robert Livingston.[203]

At the Constitutional Convention, Madison recorded Sherman as the only spoken opposition to Mason's call for a Bill of Rights.[204] Sherman did not oppose the idea of guaranteed rights—far from it. He simply believed the various states' declarations of rights to be sufficient, since they were not repealed.[205] But Sherman was also on the floor as a member of the First Congress when Madison spoke that day.[206] He thought it impossible that a Bill of Rights could be drafted agreeably to the chamber, and even if it could, that it would not obtain the three-fourths support necessary in the states.[207] In this, Sherman had no illusions:

201. *See supra* note 10.

202. *See* FRAMERS OF THE CONSTITUTION, *supra* note 188, at 200–01.

203. *See Explore Capitol Hill: Declaration of Independence*, ARCHITECT OF THE CAPITOL, www.aoc.gov/capitol-hill/historic-rotunda-paintings/declaration-independence [perma.cc/WX8B-SP8A] (last updated Oct. 10, 2014). John Trumbull's painting, *Declaration of Independence* (1817), resides on permanent display in the United States Capitol Rotunda. *Id.*

204. THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 114 (Patrick T. Conley & John P. Kaminski eds., 1992).

205. RECORDS OF THE FEDERAL CONVENTION, *supra* note 166, at 447 (Sept. 12, 1787) ("Mr. Sherman[] was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient—There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.").

206. *See* House of Representatives, Amendments to the Constitution, *supra* note 199, at 22 (June 8, 1789) (Roger Sherman).

207. *Id.* at 31–32.

> I do not suppose the Constitution to be perfect, nor do I imagine if Congress and all the Legislatures on the continent were to revise it, that their united labors would make it perfect. I do not expect any perfection on this side the grave in the works of man; but my opinion is, that we are not at present in circumstances to make it better.[208]

Even with those doubts, Roger Sherman helped draw that day's debate to closure by inviting Madison to commence work on a draft in consultation with each and every member of Congress.[209] Madison did, and so Congress set its face towards our Bill of Rights.[210] We know the result, and the Constitution was brought one step closer to the first-enumerated purpose of the Preamble: formation of that "more perfect Union."[211]

Of Roger Sherman, Thomas Jefferson once said: "That is Mr. Sherman, of Connecticut, a man who never said a foolish thing in his life."[212] Let us take this last lesson from Mr. Sherman. Perfection will elude us in this world. But we can—and we must—continue to seek it together.

208. *Id.* at 31.

209. *Id.* at 32.

210. *See generally* MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 133–41 (2013).

211. U.S. CONST. pmbl.

212. ROBERT WALN, 3 BIOGRAPHY OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE (1823), *reprinted in* 18 THE PORT FOLIO 441, 450 (John E. Hall ed., 1824), *available at* https://archive.org/details/portfolio02hallgoog [perma.cc/X8UC-NBZX].