

# LIBERTY THROUGH LIMITS: THE BILL OF RIGHTS AS LIMITED GOVERNMENT PROVISIONS

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## Abstract

Under the modern view, individual autonomy has become the primary if not exclusive focus of the Bill of Rights. But the Bill of Rights came about not because of a desire to preserve individual autonomy, nor to insulate the individual from the democratic community. The impetus for the Bill of Rights arose from the same set of concerns that motivated the original Constitution. These concerns involved creating the appropriate structures so as to keep the new central government in check. The Bill of Rights sought to further ensure that the federal government would have limited power and operate in a limited role. Not only does this limited government model coincide with the original intent underlying the Bill of Rights, but it also provides for a more objective and manageable application. Under an individual autonomy view of the Bill of Rights, courts must define the ingredients necessary for such autonomy. However, this endeavor is fraught with ambiguity, and courts must constantly pit the individual against democratic society. But under the limited government model, the judicial role is more objective. Instead of trying to define an ambiguous individual autonomy, courts simply need to focus on whether a particular right is needed so as to maintain limited government. In addition, the limited government model does not put the Bill of Rights in conflict with democratic society. Instead, it just uses the Bill of Rights to maintain a check on government, just as the original Constitution seeks to do.

**Keywords:** Liberty, Bill of Rights, Government Provisions

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## 1 Introduction

The Supreme Court took a dramatic turn of direction under the leadership of Chief Justice Earl Warren during the 1950s and 1960s. In the Warren era, the Court adopted a very aggressive brand of individual rights jurisprudence, interpreting the Bill of Rights as setting out mandates for individual autonomy. But this individual autonomy was defined in isolation, focusing only on the individual and not on the larger social or political landscape occupied by the individual. Thus, during the Warren era, the Court frequently used individual rights set out in the Bill of Rights to trump the democratic process. And this type of aggressive individual rights jurisprudence has continued to this day.

Under the modern view of the Bill of Rights, individual autonomy has become the primary if not exclusive focus. According to this view, the Bill of Rights was included in the Constitution for the sole purpose of insulating the individual from various democratic outcomes. It is a view that was set in motion during the Court's New Deal period, and specifically articulated in the infamous footnote four in *United States v. Caroline Products Co.*, in which it was suggested that the Court would no longer strictly scrutinize the structural provisions of the Constitution, such as federalism and separation of powers, but

instead would give heightened scrutiny to individual rights, such as those contained in the Bill of Rights.<sup>3</sup> Unfortunately, this adopted orientation by the Court served to distort the meaning of the Bill of Rights. It cast the Bill of Rights as concerned exclusively with individual autonomy. It also served to separate the Bill of Rights from the overall structural orientation of the Constitution as a whole. Both these effects contradicted the original intent behind the Bill of Rights.

The Bill of Rights came about not because of a desire to preserve individual autonomy, nor to give the individual a greater trump card against the wider democratic community. The impetus for the Bill of Rights arose from the same set of concerns that motivated the original Constitution. These concerns involved creating the appropriate structures of government so as to keep the new central government in check. The Bill of Rights was just one more facet to that endeavor. Its purpose was to further ensure that the federal government would indeed have limited power and operate in a limited role. It simply used the subject areas of the Bill of Rights to specify areas in

<sup>3</sup> For a discussion of *U.S. v. Caroline Products*, 304 U.S. 144, 152 n. 4 (1938), as well as the Court's New Deal jurisprudence, see Patrick M. Garry, *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court* (2008) 102-08.

which the new central government could not act or become involved. It was as if the Bill of Rights reinforced the boundaries of power already set out, albeit more generally, in the original Constitution.

Unquestionably, the framers of the Bill of Rights were very much concerned about individual freedom and the natural rights of the individual. Indeed, this concern had played a primary role in the signing of the Declaration of Independence. However, the framers of the Bill of Rights were also leery of giving the judiciary the kind of unbounded power it would need to define and enforce individual natural rights. Moreover, the framers did not see the individual as living in a state of conflict with democratic society. Individual liberty was not defined in isolation, nor was it seen as something that should automatically trump the wishes of a democratic society. The Bill of Rights was not ratified so as to express or protect this view of individual autonomy. Instead, it was included in the Constitution so as to reinforce and harmonize with the general structural scheme of the Constitution—that is, the provision and maintenance of a system of limited government.

In Part II of this Article, the individual autonomy or natural rights view of the Bill of Rights is set forth. This is a view that has largely prevailed during the past half century. However, the Article then points out the problems and difficulties with such a view of the Bill of Rights. It argues that an individual autonomy view puts the Bill of Rights in conflict with the rest of the Constitution, pitting the individual against democratic society. It also argues that the judiciary is ill-equipped to enforce a natural rights model of the Bill of Rights.

Part III of the Article examines the general structural scheme of the Constitution. This scheme creates the structures necessary for a limited central government. In particular, those structures include federalism and separation of powers. The Article discusses not only the limited government focus of the Constitution, but also the values and purposes behind this limited government focus. The Article also argues that the Bill of Rights contains a similar structural focus. In its purpose of limiting the new central government, the Bill of Rights is consistent with the original Constitution. This consistency is illustrated through the concerns and viewpoints of the Anti-Federalists, who were the prime instigators of the Bill of Rights.

Not only does the limited government model of the Bill of Rights coincide with the original intent underlying the Bill of Rights, but it also provides for a more objective and manageable application. Under an individual rights view of the Bill of Rights, courts must define the ingredients necessary for a sufficient individual autonomy. However, this endeavor is fraught with ambiguity. Moreover, courts must constantly pit the individual against democratic society. But under the limited government model, the judicial role is more objective. Instead of trying to

define an ambiguous individual autonomy, courts simply need to focus on whether a particular right is needed so as to maintain limited government. In addition, the limited government model does not put the Bill of Rights in conflict with democratic society. Instead, it just uses the Bill of Rights to maintain a check on government and to ensure that government remains limited, just as the original Constitution seeks to do.

Finally, in Part IV, this Article examines specific applications of the limited government model of the Bill of Rights. It discusses how the various rights set out in the amendments were intended to act as a means of ensuring limited government. The Article focuses particularly on the First Amendment, illustrating how a limited government model would operate in that context. And in doing so, the Article discusses how the Court has already in many ways adopted a limited government model in its First Amendment decisions.

## **2 The natural rights view**

The argument that the Bill of Rights protects natural rights stems from the statement in the Declaration of Independence that all persons “are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.”<sup>4</sup> According to scholars like Henry Jaffa, the rights referenced in the Declaration are not civil or political rights, which result from human or positive law, but natural rights that predate civil society.<sup>5</sup> Jaffa argues that the natural law doctrines embodied in the Declaration of Independence are fully incorporated in the United States Constitution.<sup>6</sup> This natural rights argument also rests on the writings of John Locke, who argued that, preceding government, all persons lived in a state of nature, all possessing the same natural rights.<sup>7</sup> According to Locke, individuals form a society only by agreeing to relinquish some, but not all, of their natural rights.<sup>8</sup>

A natural rights theory was used to justify the American Revolution against Britain. According to the colonists, Britain’s violation of certain natural rights justified the American withdrawal from the British

<sup>4</sup> The Declaration’s reference to unalienable individual rights is said to reflect the natural rights theories of the founders. MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC*, p. 234 (1996) (examining how natural rights thinking pervaded and shaped the new republicanism of Jefferson and Madison, placing natural rights as being prior to and the precondition of republican government). See also Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 *EMORY L. J.* 585, 622 (2009).

<sup>5</sup> See Harry V. Jaffa, *Equality, Justice and the American Revolution*, in *MODERN AGE: THE FIRST TWENTY-FIVE YEARS*, ed., George Panickas (1988), p. 312.

<sup>6</sup> See HARRY JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION*, 60 (1994).

<sup>7</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 265, 269 (Peter Laslett, ed., 1988) (1691).

<sup>8</sup> *Id.* at 330-31.

Empire.<sup>9</sup> Under the notion of natural rights prevailing at the time, individual natural rights preceded the formation or existence of any government.<sup>10</sup> Moreover, since “natural and customary rights were believed to exist independently of any writing, it was not necessary to enumerate them textually or to otherwise enact them into positive law for them to function as limits on the actions of” newly formed governments.<sup>11</sup> Consequently, consistent with the natural rights theory embodied in the Declaration of Independence, the new U.S. Constitution “did not give the national government power to infringe upon natural rights.”<sup>12</sup>

Underlying a natural rights theory is the belief that each individual “possesses a profound, inherent, and equal dignity simply by virtue of his nature as a rational creature—a creature possessing, albeit limited measure (and in the case of some human beings, merely in root or rudimentary form), the godlike powers of reason and freedom.”<sup>13</sup> Professor John McGinnis, for instance, sees the free speech protections in the First Amendment<sup>14</sup> as protecting a natural right of the individual.<sup>15</sup> Professor Steven Heyman likewise advocates a natural rights view of the Bill of Rights.<sup>16</sup> Professor Randy Barnett also argues that the Bill of Rights serves to protect individual natural rights.<sup>17</sup> These natural rights precede the Constitution, and are not created by positive law.<sup>18</sup>

Related to a natural rights theory of the Bill of Rights is a view of the Bill of Rights as protecting

individual autonomy. For instance, the free speech clause of the First Amendment has long been seen as guaranteeing individual autonomy.<sup>19</sup> Moreover, the Court’s frequent embrace of individual autonomy as the basis of its Bill of Rights jurisprudence reflects a “widespread appeal of autonomy-based conceptions of individual rights.”<sup>20</sup>

Another related theory is that the Bill of Rights serves to protect fundamental rights. As Justice Cardozo stated in *Palko v. Connecticut*, there are certain rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>21</sup> The judicial recognition of a fundamental rights theory in constitutional jurisprudence occurred in *Corfield v. Coryell*, in which Justice Washington spoke of certain “fundamental” rights which belong “to the citizens of all free governments.”<sup>22</sup> Justice Harlan has likewise referred to rights, particularly those included in the Bill of Rights, as stemming from those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”<sup>23</sup> On other occasions, the Court has spoken of individual constitutional rights as those being “implicit in the concept of ordered liberty,”<sup>24</sup> or “deeply rooted in this nation’s history and tradition.”<sup>25</sup>

Viewing the Bill of Rights as protecting fundamental rights, however, has been troublesome for the Court. It is obviously difficult to define precisely the parameters of fundamental rights.<sup>26</sup> It is also impossible to list them all. As Supreme Court Justice James Iredell said to the North Carolina ratification convention, “Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.”<sup>27</sup> Of course, fundamental rights are not exhausted by the list set out in the Bill of Rights, and the real debate is over the meaning of those fundamental rights which are not textually defined within the Constitution.<sup>28</sup> But even when rights are

<sup>9</sup> See Gedicks *supra* note \_\_\_\_ at 624.

<sup>10</sup> *Id.* at 625.

<sup>11</sup> *Id.* (stating that “a textual enumeration was not understood to have created the rights it listed”).

<sup>12</sup> *Id.* at 637.

<sup>13</sup> Robert P. George, *Law and Moral Purpose*, FIRST THINGS (January 2008) p. 23. Natural rights are those which people have “independent of those they are granted by government and by which the justice or propriety of governmental commands are to be judged.” RANDY BARNETT, *RESTORING THE LOST CONSTITUTION*, 54 (2004). And the reason the framers did not include a complete list of natural rights in the Constitution is that “it would be impossible to do so.” *Id.* at 55.

<sup>14</sup> The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

<sup>15</sup> John McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 *UNIV. OF CHICAGO L. REV.* 49, 56, 64 (1996).

<sup>16</sup> Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 *BOSTON UNIV. L. REV.* 1275, 1280 (1998) (arguing for a return to the natural rights tradition of John Locke).

<sup>17</sup> Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *TEXAS L. REV.* 1, 14 (2006).

<sup>18</sup> *Id.* As Professor Barnett argues, “At least some of the rights in the Bill of Rights were natural, inherent, or retained rights.” 85 *TEXAS L. REV.* at 33. Under one view, natural rights “are the set of concepts that define the moral space within which persons must be free to make their own choices and live their own lives if they are to pursue happiness while living in society.” Barnett, *Restoring the Lost Constitution*, 80.

<sup>19</sup> Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 *MINN. L. REV.* 247, 248 (2005) (stating that, under this view, “all speech deserves the same degree of constitutional protection because all speech entails the same exercise of autonomous will.”).

<sup>20</sup> *Id.* at 249.

<sup>21</sup> 302 U.S. 319, 325 (1937).

<sup>22</sup> 6 F.Cas. 546, 551-552 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>23</sup> *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (Harlan, J., dissenting).

<sup>24</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>25</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

<sup>26</sup> For a history of fundamental rights, see MILTON R. KONVITZ, *HISTORY OF A CONSTITUTIONAL DOCTRINE* (2001). For a discussion of the controversy surrounding fundamental rights, see Howard J. Vogel, *The Ordered Liberty of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art*, 70 *ALBANY L. REV.* 1473, 1477-1479 (2007).

<sup>27</sup> Jonathan Elliot, *Debates on the Adoption of the Federal Constitution*, Vol. 4 (Philadelphia: JB Lippincott, 1859) 316 (January 18, 1788).

<sup>28</sup> See Vogel, *Ordered Liberty*, at 1498.

explicitly mentioned in the Constitution, as they are in the Bill of Rights, defining those rights in terms of “fundamental” or “natural rights” still causes problems. Interpreting a right as a natural or fundamental right can permit a court to exercise “boundless power...to expand and contract constitutional standards to conform to the court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental principles of liberty and justice.’”<sup>29</sup> Moreover, if the Bill of Rights was meant to protect fundamental or natural rights, it is curious as to why those protections were not granted vis-à-vis the states. In other words, the Bill of Rights gave no protections against infringement by state governments. But if the Bill of Rights sought to protect fundamental or natural rights, it would seem as if the founders would certainly want to protect those rights in their entirety, from both the state and federal government.<sup>30</sup>

In *Barron v. Baltimore*, Chief Justice John Marshall wrote that the Bill of Rights acted as a restraint only on the actions of the federal government, not on the actions of the individual states. Consequently, if the Bill of Rights was not going to be applied to the states, it cannot be seen as securing individual natural rights, since the states could still abuse and infringe on such rights. In explaining his decision in *Barron*, Chief Justice Marshall explained that the Bill of Rights was specifically designed as limitations on the power of the federal government.

Even more evidence that the Bill of Rights was never meant to apply to the states can be found in James Madison’s initial effort to nationalize the Bill of Rights. He proposed in the First Congress of 1789, which the House of Representatives passed, a version of the original Bill of Rights that included a clause stating: “No state shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.”<sup>31</sup> Thus,

<sup>29</sup> *Adamson v. California*, 332 U.S. 46, 69 (1947) (Black, J., dissenting). See also BARNETT, *THE LOST CONSTITUTION*, 254 (stating that the “uncertainty of specifying unenumerated rights is the crucial issue that prevents some from taking the Ninth Amendment Privileges or Immunities Clause as seriously as the text would seem to require”). Similar criticisms have attached to the Court’s application of substantive due process (and its use of unenumerated fundamental rights), arguing that it “provides neither a sound starting point nor a directional push to proper legal analysis.” Akhil Amar, “The Supreme Court, 1999 Term—Forward,” 114 HARV. L. REV. 26, 123 (2000). Substantive due process jurisprudence has been called paradoxical ever oxymoronic.” CHARLES BLACK, *A NEW BIRTH OF FREEDOM*, 3 (1997). According to yet another critic, “neither historical evidence nor the doctrine of precedent support empowering courts to engage in the moral analysis required to discover, and then to impose, natural and inalienable rights and subjecting laws impacting on such rights to the strictest of judicial scrutiny.” Thomas McAfee, *Overcoming Lochner in the Twenty-First Century*, 42 U. RICH. L. REV. 597, 617 (2008).

<sup>30</sup> Indeed, James Madison believed that state governments posed the greatest threat to individual rights. THE FEDERALIST No. 10 at 78 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth*

Madison foresaw that the states could infringe on these rights just as much as the federal government could; however, his failure to nationalize the Bill of Rights reflects the overriding concern that they should apply as limits only to the federal government.<sup>32</sup>

A difficulty in viewing the Bill of Rights as protecting fundamental or natural rights lies in then drawing the proper boundaries around any regulation of those rights. According to Randy Barnett, a natural rights model does not preclude all necessary and proper regulations of those rights.<sup>33</sup> He argues that the model does not see natural rights as necessarily trumping all laws that may affect or regulate the exercise of those rights.<sup>34</sup> The natural rights model “would not end all regulation, but would instead scrutinize a regulation of liberty to ensure that it is reasonable and necessary, rather than an improper attempt by government to restrict the exercise” of the particular right.<sup>35</sup> Professor Barnett further argues that a natural rights model would not prevent the prohibition of wrongful behavior that violates the rights of others. Thus, while rightful exercises of liberty may only be regulated, wrongful acts that violate the rights of others may be prohibited outright.<sup>36</sup> Nonetheless, under this model, judges must make determinations of when certain regulations of certain rights are appropriate so as to protect the rights of others.<sup>37</sup>

Amendment in the 1866-1867, 68 OHIO STATE LAW JOURNAL 1509, 1530 (2007).

<sup>32</sup> See 1 ANNALS OF CONG. 452, 458, 784 (June 8, 1789) (1st Cong., 1st Sess.)

<sup>33</sup> Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 77 (2006).

<sup>34</sup> *Id.* at 14. For instance, the First Amendment speech clause does not preclude all time, place or manner regulations. The natural rights model defines a “private domain within which persons may do as they please, provided their conduct does not encroach upon the rightful domain of others.” BARNETT, *RESTORING THE LOST CONSTITUTION*, 58.

<sup>35</sup> *Id.* at 14. As Professor Barnett argues, regulations of natural rights or liberty can be done so long as such regulation is warranted to protect the liberties of others. Randy E. Barnett, *Whose Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L., 1, 18 (2006). Thus, the judicial inquiry should be “whether the regulation can be justified as necessary to protect the rights of others.” *Id.* at 19. But this obviously requires that judges make such a determination. Judges will also have to determine what aspects of natural rights have been surrendered upon joining society. As Robert Barnwell stated, a person gives up only “a part of our natural rights” when entering into society. Elliot, *Debates*, 4:295. James Madison made a similar point: “Individuals entering into society must give up a share of liberty to preserve the rest. James Madison, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (1987) 627.

<sup>36</sup> Moreover, eighteenth-century notions of natural rights “never totally supplemented the seventeenth-century American belief in a community held together by substantive values reflected in moral legislation.” McAfee, *Overcoming Lochner*, 42 U. RICH. L. REV. at 611. “An aspect of America’s lack of a libertarian heritage is its consistent dedication to the idea that one purpose of government is to develop or promote a public morality. *Id.* at 612.

<sup>37</sup> John Finnis outlines the limitations to which the exercise of natural rights are subject: “(i) to secure due recognition for the rights and freedoms of others; (ii) to meet the just

Another problem with a natural rights interpretation of the Bill of Rights, according to Professor Robert George, is that it is philosophically difficult to arrive at a sound theory of natural rights without arriving at some agreement on the existence of God and the role of God in human affairs.<sup>38</sup> Because when natural rights theories are “fundamentally concerned with human well-being and fulfillment,” the definitions of those rights can be somewhat fleeting and subjective.<sup>39</sup> Moreover, since human beings live not as isolated individuals but in various types of social communities, a natural rights perspective often fails to consider the whole realm of human fulfillment and well-being. Indeed, individual rights are just one aspect of the larger realm of human fulfillment and well-being.

Under a natural rights theory, the Bill of Rights did not create any of the rights it specifies; instead, the document merely restates or declares “the rights that were the moral claims the people already possessed or were entitled to keep.”<sup>40</sup> But a problem with a natural rights model, just as with a fundamental or individual autonomy model, is that it may give too much undefined power to the judiciary. Under these models, courts are free to define the dimensions and boundaries of any one natural right. And this unrestrained grant of judicial power may be “as likely to lead to injustice and the denial of basic rights as it is to advance those goals.”<sup>41</sup> Thus, the question is whether the framers intended to convey to judges all this power to determine the nature and boundaries of such rights.

Another problem with an individual autonomy view of the Bill of Rights is that it reflects and contributes to a therapeutic culture in which the central moral question has become individual fulfillment.<sup>42</sup> Such a culture does not ask whether individuals or society should conform to some external governance system, but whether individuals are simply happy or fulfilled. This kind of culture

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requirements of morality in a democratic society; (iii) to meet the just requirements of public order in a democratic society; (iv) to meet the just requirements of the general welfare in a democratic society. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) 213. Thus, a natural rights model also envisions the existence of duties on the part of the rights-holder. *Id.* at 219.

<sup>38</sup> Robert P. George, *Natural Law*, 31 *HARV. J. L. & PUB. POL.*, 171, 182 (\_\_\_\_\_) (arguing that the truths underlining natural rights must come from some source beyond the individual).

<sup>39</sup> *Id.* at 184.

<sup>40</sup> Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought*, 75 *UNIV. OF CIN. L. REV.*, 1499, 1503 (2007). Such rights were not based on “existing positive legal enactments such as the Constitution or the Bill of Rights.” *Id.* at 1504. Natural rights were those rights that people possessed “before forming a government.” *Id.* at 1549.

<sup>41</sup> *Id.* at 1589.

<sup>42</sup> See generally, Daniel F. Piar, *A Welfare State of Civil Rights: The Triumph of the Therapeutic in American Constitutional Law*, 16 *WM. & MARY BILL OF RIGHTS J.*, 649 (2008). In a therapeutic culture, the self is the moral order. *Id.* at 650. Such a culture views individuals as more dependent and weak, than autonomous and self-reliant. *Id.* at 652.

departs from the more traditional cultural models such as classical republicanism or Lockean liberalism, which tend to treat the individual as less important than some higher authority, or some larger moral or civil order existing outside of the individual.<sup>43</sup>

### 3 The Bill of Rights as provisions of limited government

#### 3.1 Limited Government in the General Constitutional Scheme

The framers focused on governmental structures when designing the United States Constitution. These structures, rather than any specific individual rights provisions, were seen to provide the greatest protections for liberty by limiting the power of government.<sup>44</sup> Within the constitutional scheme, federalism and separation of powers are the most prominent structural provisions aimed at ensuring limited government.

Although limited government is achieved primarily through the doctrine of enumerated powers, which prohibits the federal government from exercising any powers other than those granted by the Constitution, it is also served by the doctrine of separation of powers. Under this doctrine, the Constitution sets up a federal government consisting of three distinct branches, each possessing its own powers and functions.<sup>45</sup> By design, each branch has enough power to be able to check any abuses of the other branches.<sup>46</sup> This structural restraint on government power thus serves as a protection against governmental infringements on individual liberty.<sup>47</sup>

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<sup>43</sup> *Id.* at 654. “The boundaries of individual liberty and state power are set with reference to individual happiness and fulfillment rather than older concepts of duty, civic virtue, or democratic power-sharing.” *Id.* at 670. “As the therapeutic culture expands state power, it also threatens to diminish individual autonomy by discouraging self-reliance and encouraging dependence on therapeutic authority.... Thus, while the therapeutic uses of law ostensibly expand individual liberty, they may also have the effect of increasing state power at the expense of the self-reliance and personal autonomy necessary for the democratic freedom.” *Id.* at 673.

<sup>44</sup> The structures also reflected a states’ rights tradition “that extolled the ability of local governments to protect citizens against abuses by central authorities. AKHIL AMAR, *THE BILL OF RIGHTS*, 4 (1998).

<sup>45</sup> For a general discussion of the Doctrine of Separation of Powers and its role in the Constitutional scheme, see Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Affected a Shift in the Separation of Powers*, 57 *Ala. L. Rev.* 689 (2006). In connection with the doctrine of separation of powers, the framers also established a system of checks and balances in which each branch not only had its own powers, but was sufficiently independent so as to be able to keep the other branches in check. See Sunstein *supra* note \_\_\_\_ at 434.

<sup>46</sup> See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (stating that a system of separated powers is “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other”).

<sup>47</sup> See *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (stating that the separation of powers was meant to “diffuse power the better to secure liberty”).

The primary motivation underlying the constitutional scheme of separation of powers was the framers' fear of centralized power.<sup>48</sup> The framers also saw that a scheme of checks and balances was necessary to combat the human urge toward abuse of power; to the framers, the reality of human nature was such as to require such controls on the use of power.<sup>49</sup> Consequently, the desirability of and need for a government of separated powers was never in dispute during the constitutional period. Nor was there ever any real debate during the constitutional convention that the new constitution should incorporate the doctrine of separation of powers.<sup>50</sup>

To further achieve a limited government and the protection of individual liberty, the framers employed the doctrine of federalism. Because federalism seeks to achieve a balancing of power between two different levels of government—state and national—it serves as a means of curtailing the power of each.<sup>51</sup> Federalism provided a kind of safety valve against all the new powers being delegated by the Constitution to the national government. This safety valve occurred because the states would still maintain their independence and could serve as a check on the new

federal government's use of power.<sup>52</sup> By preserving the competing layer of state government, federalism helped keep the national government from acquiring too much power. This "state/federal division of authority protects liberty both by restricting the burden that government can impose from a distance and by facilitating citizen participation in government that is closer to home."<sup>53</sup>

Federalism and separation of powers both try to limit government by fostering a competition for power between various governmental entities.<sup>54</sup> They both serve as structural restraints on government in general, not as substantive prohibitions on any one particular government action.<sup>55</sup> The doctrines of federalism and separation of powers, according to James Madison, empower the people "to conquer government power by dividing it."<sup>56</sup> As Alexander Hamilton wrote, both federalism and separation of powers act to check government abuse of power and its infringements on individual liberty.<sup>57</sup> Essentially, federalism and separation of powers accomplish a two-fold dilution of government power. As James Madison argued, "the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."<sup>58</sup> Thus, both federalism and

<sup>48</sup> Even though federalism and separation of powers are structural provisions within the U.S. Constitution, they were designed primarily to prevent governmental abuse of individual liberty. See Garry, *A One-Sided Federalism Revolution*, 36 SETON HALL L. REV. at 875. See also THE FEDERALIST NO. 46 (James Madison) (Clinton Rossiter, Ed., 1961) (arguing that the states "will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority"); THE FEDERALIST NO. 51, 322-323 (James Madison) (Clinton Rossiter, Ed., 1961) (stating that the framers believed that the states would serve to prevent federal abuse of individual liberties).

<sup>49</sup> According to John Adams, "By balancing each of these powers against the other two, the efforts in human nature towards tyranny can long be checked and restrained." Benjamin Madison, Rico, *Judicial Activism, and the Roots of Separation of Powers*, 43 BRANDEIS L. J. 29, 74 (2004). As James Madison write, "If angels were to govern men, neither external nor internal controls in government would be necessary." THE FEDERALIST NO. 51, 354 (James Madison) (J. B. Lippincott and Co., Ed., 1866). As Justice Black would later argue, America's colonial history "provided ample reason for people to be afraid there was too much power in the national government." Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869 (1960).

<sup>50</sup> THORNTON ANDERSON, *CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS*, 50-51 (1993).

<sup>51</sup> See *Younger v. Harris*, 401 U.S. 37, 44 (1971). A federalism structure, codified in the Tenth Amendment to the U.S. Constitution helps protect the independent integrity and lawmaking authority of the states. See Akil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1466 (1987). The Tenth Amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONSTITUTION, AMENDMENT X. Thus, sovereign power is divided between that given to the federal government by the U.S. Constitution and that reserved to the states through the Tenth Amendment. Amar, *supra* note \_\_\_ at 1492. For a general discussion of federalism and the role it plays in limiting the power of government, see Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 Seton Hall L. Rev. 851 (2006).

<sup>52</sup> See GARY WILLS, *EXPLAINING AMERICA: THE FEDERALIST*, 108-111 (1981). According to Professor Amar, state governments would serve as monitors against abuses committed by the federal government. Amar, *supra* note \_\_\_ at 1504. Professor Amar provides a number of examples in which states are able to provide remedies against federal abuses of individual rights. *Id.* at 1509.

<sup>53</sup> *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting). Federalism establishes a system of dual sovereignty, under which the states can be a localized control on the centralized federal government. Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 504 (1987). The principle of dual sovereignty also protects against a consolidation of power that could lead to a tyrannous federal government. See Gregory, 501 U.S. at 458-464.

<sup>54</sup> Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 949 (2005) (arguing that, to the framers, the competition among branches would result in "a balanced equilibrium, in which no branch can accumulate a potentially monarchical or tyrannical quantum of power, try as each of them will").

<sup>55</sup> Both federalism and separation of powers are structural provisions, insofar as they relate to constitutional structures and relationships. The structural provisions for separation of powers in the Constitution was seen by the framers as necessary to protect individual liberty by limiting government. Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 268 (2000). Federalism and separation of powers deal with the constitutional organization of and limitation on government power. See Amar, *supra* note \_\_\_ at 1440.

<sup>56</sup> Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450 (1987).

<sup>57</sup> THE FEDERALIST NO. 9, 72 (Alexander Hamilton).

<sup>58</sup> THE FEDERALIST NO. 51, 291 (James Madison) (Quinton Rossiter, Ed., 1999). While federalism allows the two levels of state and federal government to monitor each other, the separation of powers doctrine allows each level to check itself. *Id.* According to Professor Sager, "Our constitutional text and jurisprudence responded in part to concerns of political justice by architecting and protecting structural

separation of powers create a political system characterized by a two-tiered check on government.<sup>59</sup>

### 3.2 The Impetus for the Bill of Rights

Mirroring the scheme of the overall Constitution, the Bill of Rights serves as government-limiting provisions. The first eight amendments are all purely power-limiting clauses. The Anti-Federalists deemed them necessary so as to negate the implication of certain powers from the more open-ended clauses of the Constitution, such as a Necessary and Proper Clause.<sup>60</sup> While the limits of the original Constitution were implicit in the concept of enumerated powers, the Bill of Rights contained explicit limitations on government.<sup>61</sup>

Under the view of the Anti-Federalists, the Bill of Rights would set “limits” and build “barriers” against government abuse or enlargement of its powers.<sup>62</sup> Thus, the purpose of the Bill of Rights would be to limit the exercise of delegated powers.<sup>63</sup> It would provide a second limitation on the power of government. The first limitation arose from the fact that under the Constitution the federal government was one of enumerated powers, prohibited from exercising any power not explicitly granted to it by the Constitution.<sup>64</sup> But the Bill of Rights placed limits on even those enumerated powers, forbidding the federal government from using its enumerated powers to encroach on areas protected by the Bill of Rights.<sup>65</sup>

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features of government—the horizontal separation of powers and the vertical distribution of authority within a federal structure.” LAWRENCE G. SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE*, 154-155 (2004).

<sup>59</sup> This two-tiered system is what James Madison called the Constitution’s “double security” for individual rights. THE FEDERALIST NO. 51, 67 (James Madison) (Lester DeKoster, Ed., 1976).

<sup>60</sup> RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS*, 178-255 (2006).

<sup>61</sup> Another aspect of the limited government nature of the Constitution was the fact that the Constitution did not impose any substantial obligations on government—for instance, the Constitution did not mandate that it act in certain manners, nor that it had any discretion to decline to do so. Another way in which the Constitution limited government powers was to create competing centers of power within the constitutional structure, such as separation of powers and federalism. For a general discussion of the structural design of the Constitution and the goals of the framers, see generally JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* (2007).

<sup>62</sup> Letters from the Federal Farmer (October 9, 1787), reprinted in the *ORIGINS OF THE AMERICAN CONSTITUTION*, 272 (Michael Kammen, Ed., 1986); Brutus, Essay of November 1, 1787, reprinted in the *ORIGINS OF THE AMERICAN CONSTITUTION*, 313, 315 (Michael Kammen, Ed., 1986).

<sup>63</sup> See Kammen *supra* note \_\_\_ at vii, xix.

<sup>64</sup> See *United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995).

<sup>65</sup> See Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1189 (1996) (arguing that by “juxtaposing affirmative powers with negative limits, the Constitution’s architecture assumed that, even when the government pursues a permissible goal, the government might sometimes violate individual rights—and thus, the negative limits prohibit otherwise valid exercises of power”).

Therefore, as Professor Dorf argues, the “Constitution’s architecture reveals a two-fold strategy for limiting government—first, by delegating only certain powers, and second, by checking valid exercises of those powers with individual rights.”<sup>66</sup> In this way, the Bill of Rights serves primarily and fundamentally as a means of limiting government. Under this view, the Bill of Rights does not seek to fulfill or enhance certain individual values, but simply provides an additional constitutional mandate for limited government—e.g., providing a protection against government incursion into certain specified areas of human life. For instance, as Professor Dorf argues, “it may be possible to defend the privacy right in terms that focus more clearly on impermissible government action rather than on impermissible burdens on individuals.”<sup>67</sup> Thus, perhaps the strongest rationale for a constitutional right of privacy is based not on notions of individual rights but on the limits of government power. A similar argument can be made regarding the specific areas of individual freedom listed in the Bill of Rights.<sup>68</sup>

The motivation for drafting and ratifying the Bill of Rights was not out of a singular commitment to natural rights or individual autonomy. As one historian has concluded, “The Bill of Rights was more the chance product of political expediency on all sides than a principled commitment to personal liberties.”<sup>69</sup> James Madison, who ended up as the primary author of the Bill of Rights, had vehemently opposed such a bill during the ratification of the original Constitution.<sup>70</sup> But Madison’s eventual support for the Bill of Rights ended up being purely political, insofar as he had promised such a bill to the anti-federalists in return for their votes to ratify the Constitution.<sup>71</sup>

The proponents of the original Constitution objected to the inclusion of a Bill of Rights; they argued that the Anti-Federalists were fundamentally mistaken about the nature of that Constitution, ignoring the fact that Congress would not be a legislature of general powers, but was limited to the powers actually set out in the Constitution.<sup>72</sup> To the Federalists, the structural design of the Constitution would effectively protect individual’s rights and liberties by granting only limited powers to the new federal government.<sup>73</sup> The Anti-Federalist opponents

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<sup>66</sup> *Id.* at 1191.

<sup>67</sup> *Id.* at 1229.

<sup>68</sup> In a similar vein, Jed Rubenfeld has suggested that the right of privacy should protect against “a particular kind of creeping totalitarianism.” Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

<sup>69</sup> See LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: A LEGACY OF SUPPRESSION* at XXI-XXII (1963).

<sup>70</sup> See Paul Finkelman, *Intentionalism the Founders and Constitutional Interpretation*, 75 TEXAS L. REV. 435, 461-63 (1996).

<sup>71</sup> See Merrill Jensen, *Book Review*, 75 HARV. L. REV. 456, 458 (1961); Finkelman, *Intentionalism*, *supra* note \_\_\_ at 464.

<sup>72</sup> See McAfee, *supra* note \_\_\_ at 1516.

<sup>73</sup> See Philip Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 316 (1989) (arguing

of the Constitution, although agreeing that the conveyance of limited powers to the federal government may indeed serve to secure individual liberty, nonetheless claimed that the Constitution's actual granted powers were not clearly enough defined to supply a strong enough boundary against overreaching of that power.<sup>74</sup> The real danger of a bill of rights, according to the Constitution supporters, was that it could lead to an interpretation of the Constitution as creating a national legislative body of general powers, subject only to the specific limitations imposed by the Bill of Rights, thus fundamentally altering the existing structural design of the Constitution as creating a government of limited powers.<sup>75</sup>

The Anti-Federalists did not trust that the structural provisions in the original Constitution would sufficiently limit the power of government and thus protect liberty. They wanted even more assurances for limited government. Even though the Constitution granted only limited powers to the federal government, the Anti-Federalists were well aware of historical instances in which limited power had turned into unlimited power, and they argued that the new Constitution did not adequately guard against such an occurrence.<sup>76</sup> And even though the Anti-Federalists were largely responsible for the Bill of Rights, they were primarily concerned with structural limitations on federal power. This attitude was illustrated by a report to James Madison on the opinions of North Carolina Anti-Federalists. In this report, William Davie stated that: "Instead of a bill of rights attempting to enumerate the rights of the individual or the state governments, they (the anti-federalists) seem to prefer some general negative confining Congress to the exercise of the powers particularly granted, with some express negative restriction in some important cases."<sup>77</sup>

The Anti-Federalists prevailed on their insistence for a bill of rights in part because they persuaded the ratifiers that the proposed constitution so expanded the power of the new federal government that it presented

a potential threat to liberty.<sup>78</sup> In initially opposing the Bill of Rights, the Federalists had argued that "stating limits on government to secure rights might generate an inference that the national government was thought to be, like the states, a government of general legislative powers, subject only to the limits on powers stated in the Bill of Rights."<sup>79</sup> The Anti-Federalists replied that they could not trust that any power not granted to the federal government was in fact reserved to the states.<sup>80</sup> For them, a bill of rights was needed not only to prevent the government from exerting its power in certain areas concerning individual liberty, but to also reserve to the states all powers not granted to the federal government.<sup>81</sup> Thus, the primary concern was about limiting governmental power, and this was to be done both through such structural provisions as federalism and separation of powers, as well as through rights provisions in which the government was specifically prevented from acting in specific areas.

Given the Anti-Federalists' views about limited government and structural protections against the overreaching of federal government power, it is entirely consistent then that they would have looked upon the Bill of Rights as a further limitation of federal power, rather than as guarantees of individual autonomy through the exercise of specifically designated natural rights.<sup>82</sup> As one scholar observed:

"...it would be a mistake to characterize the Bill of Rights as a guarantee of the rights of the people in general; instead it was a limited protection against depredation by the national government. It supplemented the enumerated powers limitation by further requiring that even if the national government were engaged in an activity authorized by Articles I, II or III of the Constitution, it could only do so within the boundaries set up by the Bill of Rights. What is typically forgotten (or deliberately obscured) in the popular telling of the story of the Bill of Rights is that the states retained the power to do precisely those things (establishing a state religion, punishing

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that the Constitution's defenders "insisted that the enumeration of federal powers provided a clear boundary between federal power and the people's rights and that an enumeration of rights would be used to imply the existence of congressional powers where rights were not mentioned").

<sup>74</sup> McAfee, *supra* note \_\_\_ at 1562. In fact, a number of the Constitution's critics argued that a reservation of all the powers not granted by the Constitution could be an adequate alternative to a bill of rights. *Id.* at 1562, note 319. "That such an argument could be made...reflects that such an anti-federalist position was not rooted in reading federal powers through the lens of inherent rights assumptions." *Id.*

<sup>75</sup> McAfee, *supra* note \_\_\_ at 1563.

<sup>76</sup> David DeWolf, *Ten Tortured Words*, 85 DENVER UNIV. L. REV. 443, 448 (2007).

<sup>77</sup> Letter from William R. Davie to James Madison (June 10, 1789) in *Creating the Bill of Rights: The Documentary Record from the First Congress* (Helen E. Veit, et al. eds., 1991) at 245-246.

<sup>78</sup> Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought*, 75 UNIV. OF CINN. L. REV. 1499, 1519 (2007) (hereinafter "McAfee").

<sup>79</sup> *Id.* at 1527-1528.

<sup>80</sup> *Id.* at 1528. During the debate over ratification, for instance, Thomas Jefferson argued that there was no specific assurance in the proposed Constitution that in all cases where specific powers had not been delegated to the federal government those powers had been retained by the states. ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776 TO 1791* (1955) at 129.

<sup>81</sup> As Professor McAfee argues, "Modern commentators' dichotomy between power allocative and rights protective provisions is foreign to the thinking of the founders. McAfee at 1529. What has been lost in the contemporary debate on the Bill of Rights "is the crucial Madisonian insight that localism and liberty can sometimes work together rather than at cross-purposes." AMAR, *THE BILL OF RIGHTS*, 7.

<sup>82</sup> To the Anti-Federalists, "because of the attenuated chain of representation, Congress would be far less trustworthy than state legislatures," AMAR, *THE BILL OF RIGHTS*, 11. Their highest concern with the Bill of Rights was "the idea of limiting federal power." *Id.* at 14.



unpopular speech, denying the right to trial by jury, etc.) that were forbidden to the national government.”<sup>83</sup>

Thus, the purpose of the Bill of Rights was aimed not at individual fulfillment or autonomy, but at further ensuring limited government. Under this view, the rights set out in the Bill of Rights were those seen to be particularly necessary to limit the power of government and to preserve the people’s right to keep government in a limited position—a means by which to further limit and control the power of government. This point was made by Hardin Burnley in a letter to James Madison, in which Burnley stated: “By protecting the rights of the people and of the states, an improper extension of power will be prevented and safety made equally certain.”<sup>84</sup> And as Professor Barnett argues, James Madison likewise equated the protection of individual rights with limiting the powers of the central government.<sup>85</sup>

The supporters of the Constitution believed that the protection of individual rights depended on “a free and limited government structured to prevent any interests from becoming an overbearing majority.”<sup>86</sup> The Anti-Federalists believed this as well. However, they thought that without the Bill of Rights the Constitution did not sufficiently limit government. Consequently, the Bill of Rights was a collection of “provisions clearly designed to provide a direct limit to government power, at least to the extent that such a limit was needed.”<sup>87</sup> Indeed, James Madison came to regard such rights as constituting “a source of meaningful legal limits on government power.”<sup>88</sup> For Madison, the Bill of Rights was to be a means of bringing more effective checks on central government power.<sup>89</sup>

### **3.3 The Consistency with the Overall Constitutional Scheme**

As provisions aimed at limiting government power, the Bill of Rights was consistent with the overall constitutional scheme. According to Akhil Amar, the

Bill of Rights is each “part of a single coherent constitution; and are reflective of a deep design; aimed at limiting government power.”<sup>90</sup> Under this view, the Constitution and all its provisions are to be understood as “one piece.”<sup>91</sup> When seen as a whole, the Constitution is primarily one of “powers, structures and procedures, not of values.”<sup>92</sup> Envisioning the Constitution as a coherent whole rather than a collection of assorted clauses, Amar similarly sees the Bill of Rights as “largely republican and collective, sounding mainly in political rights.”<sup>93</sup> In his interpretation of the Bill of Rights, Amar stresses the collective nature of the bill and downplays the role of individual rights.<sup>94</sup>

Therefore, the rights set out in the Bill of Rights should be seen as a way of limiting government power, not as expressing independent rights or values in themselves.<sup>95</sup>

According to Amar, the Bill of Rights is “more structural than not.”<sup>96</sup> Even though natural rights were very important to the framers, they almost uniformly agreed that the critical issue on which protection of those rights turned “was the character of the new national government.”<sup>97</sup> By including a Bill of Rights, supporters like James Madison did not want to include rights that would deprive the government of a needed strength or stability, but instead wished to create the structural provisions ensuring limited government that

<sup>90</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 814 (1999).

<sup>91</sup> William Michael Treanor, *Taking Text Too Seriously*, 106 MICH. L. REV. 487, 492 (2007).

<sup>92</sup> Robert Delahunty, 1 UNIV. OF ST. THOMAS JOURNAL OF PUBLIC LAW AND POLICY, 1, 68 (2007). In THE FEDERALIST NO. 38, James Madison argued that the Bill of Rights “ought to be declaratory, not of the personal rights of individuals, but of the rights reserved to the states in their political capacity.” THE FEDERALIST NO. 38, at 235 (James Madison) (Clinton Rossiter, ed., 1961). Likewise, in THE FEDERALIST NO. 84, Alexander Hamilton argued that “one object of the Bill of Rights is to declare and specify the political privileges of the citizens in the structure and administration of the government.” *Id.* at 515 (Alexander Hamilton).

<sup>93</sup> Amar, *Intratextualism*, 133.

<sup>94</sup> Treanor, *supra* note \_\_\_ at 531 (arguing that the Bill of Rights reflected republican concerns and collective rights of the people).

<sup>95</sup> In connection with individual rights, it is better to speak of powers being delegated to the government—the rights retained by the people “provide the measure of how these powers should be exercised.” BARNETT, *RESTORING THE LOST CONSTITUTION*, 75.

<sup>96</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, xiii (1998) (arguing that the Bill of Rights “seems largely Republican and collective, sounding mainly in political rights, in the public liberty of the ancients.”). *Id.* at 133. According to Amar, the Bill of Rights is “a document attentive to structure, focused on the agency problem of government, and rooted in the sovereignty of we the people of the United States.” *Id.* at 127.

<sup>97</sup> Richard S. Kay, *Book Review*, 44 AM. J. LEG. HIST. 430, 431 (2000). According to Professor Ketcham, the framers’ goal for the Constitution was as much to secure political freedom as it was to secure personal liberty. RALPH KETCHAM, *FRAMED FOR POSTERITY*, 166-167 (1993).

<sup>83</sup> See DeWolf, *Ten Tortured Words*, 85 DENVER UNIV. L. REV. at 448.

<sup>84</sup> Letter from Hardin Burnley to James Madison (November 28, 1789) in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1188 (Bernard Schwartz, ed. 1971) (arguing that protecting the rights set out in the Bill of Rights is a means of further limiting governmental power by preventing it from improper extension).

<sup>85</sup> Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEXAS L. REV. 1, 55 (2006).

<sup>86</sup> LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS*, 21 (1999).

<sup>87</sup> McAfee, *supra* note \_\_\_ at 1522-1523.

<sup>88</sup> *Id.* at 1523. Madison, for instance, recognized that the Necessary and Proper clause could be susceptible to abuse, and that a bill of rights may be needed “to constrain the means chosen by the general government.” Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 14 (1988).

<sup>89</sup> McAfee, *supra* note \_\_\_ at 1555. See also G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS*, 76 (1998) (outlining Madison’s views on the relationship between the Bill of Rights and a limitation of government power).

would in turn lead to the enjoyment of rights.<sup>98</sup> To the framers, the only real way to prevent government from violating the liberty of its citizens was to give those citizens the capacity to limit government.<sup>99</sup> Institutional checks on the exercise of government power “were the constitutional instruments chiefly relied upon by the framers for the preservation of liberty.”<sup>100</sup>

If consistent with the constitutional scheme and its emphasis on structure, the Bill of Rights should not be seen as about individual autonomy; it is about using the language of rights to limit the power of government.<sup>101</sup> According to Professor Clor:

“The Bill of Rights is no list of natural rights. (There could hardly be any natural right to due process of law or to petition the government for redress of grievances.) It is a summary of civil liberties that (taken into conjunction with the original Constitution) define a relationship between government and citizen that is in accord with the philosophy of natural rights.”<sup>102</sup>

Professor Gary Lawson likewise argues that the meaning of the Bill of Rights lies primarily in the structure and history of the original Constitution, rather than in the specific wording of each of the amendments.<sup>103</sup> To Lawson, the Bill of Rights largely reformulates the restrictions on federal power that were built into the Sweeping Clause.<sup>104</sup> The true meaning of the Bill of Rights was to “principally

restate” limitations on federal power.<sup>105</sup> Given the original design of the Constitution and the nature of the limited government that it created, according to Gary Lawson, the entire Bill of Rights was “primarily an exercise in clarification.”<sup>106</sup> This clarification related to the limits on governmental power outlined in the Constitution.<sup>107</sup>

### **3.4 The Bill of Rights as Transcending the Individual**

Two of the jurists most responsible for the development of modern First Amendment law, Harvard law professor Zechariah Chafee and Supreme Court Justice Oliver Wendell Holmes, argued that the First Amendment protected free speech not as a matter of natural individual right, but because such a freedom was vital to the conduct and operation of democratic government.<sup>108</sup> In other words, under the Chafee and Holmes model, the right of free speech was not included in the First Amendment so as to ensure individual autonomy; rather, it existed so as to limit governmental encroachment on the free and open social discussion of public issues.<sup>109</sup> To Chafee, the right of free speech was justified not as a protection of a natural right in and of itself, but as a means to secure a particular constitutional aim—that of limiting government power in certain areas of individual and social life.<sup>110</sup>

Chafee viewed individual rights as only secondarily aimed at the individual.<sup>111</sup> For Chafee, “an

<sup>98</sup> HARRY M. CLOR, REFLECTIONS ON THE BILL OF RIGHTS, IN OUR PECULIAR SECURITY: THE WRITTEN CONSTITUTION AND LIMITED GOVERNMENT, 158 (Eugene W. Hickok, Gary L. McDowell and Philip J. Costopoulos, eds., 1993). As defenders of the Constitution argued: “It is in such structural elements of a well-modeled government and not in the parchment’s careful listing of powers that the people must find safety,” for it is the structure that can “preserve that necessary energy while discouraging its unnecessary use or abuse.” DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST, 49 (1984). Thus, “careful students of the debate over ratification have noted the constant linkage of the personal liberty issue with the larger question of the nature and structure of government.” McAfee supra note \_\_\_ at 1571.

<sup>99</sup> McAfee, supra note \_\_\_ at 1572.

<sup>100</sup> Terence Sandalow, Social Justice and Fundamental Law, 88 NORTHWESTERN UNIV. L. REV. 461, 465 (1993). A primary concern of many of the framers involved how “to reconcile the power of government with the liberty of citizens.” JAMES H. READ, POWER VS. LIBERTY, 4 (2000).

<sup>101</sup> As Stephen Macedo has theorized, the Constitution established islands of governmental powers “surrounded by a sea of individual rights,” not islands of rights “surrounded by a sea of governmental powers.” STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987) 97.

<sup>102</sup> Harry M. Clor, Reflections on the Bill of Rights, appearing in OUR PECULIAR SECURITY: THE WRITTEN CONSTITUTION AND LIMITED GOVERNMENT, 172 (Eugene M. Hickok, Jr., Gary L. McDowell and Philip J. Costopoulos, eds. 1993).

<sup>103</sup> Gary Lawson, A Truism with Attitude: The Tenth Amendment in Constitutional Context, 83 NOTRE DAME L. REV. 469, 471 (2008) (arguing that the Bill of Rights was effectively redundant because federal laws abridging rights contained in the Bill of Rights had not been delegated to the federal government).

<sup>104</sup> Id. at 472.

<sup>105</sup> Id. at 472. Although, according to the Federalists, the original Constitution, “by virtue of the structure of enumerated powers, already prohibited virtually any law that would run afoul of what ultimately became the Bill of Rights.” Id. at 478.

<sup>106</sup> Id. at 488.

<sup>107</sup> As Gary Lawson explains this clarification:

“Just as the First Amendment restates limitations on the federal government’s power of speech and religion contained in the original Constitution, the Fourth Amendment restates limitations on the federal government’s law enforcement powers contained in the original Constitution, and the Sixth Amendment restates limitations on federal power with respect to criminal juries contained in the original Constitution, the Tenth Amendment restates limitations on the federal government’s power to regulate states contained in the original Constitution. These limitations...are conceptions of state sovereignty that are textually embodied in the sweeping clause and then textually restated in the Tenth Amendment.” Id. at 493.

<sup>108</sup> Zechariah Chafee, Freedom of Speech in Wartime, 32 HARVARD L. REV. 932, 956-957 (1919); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>109</sup> To Chafee, the right of free speech reflected the reality that government was to be the servant and not the master of the people. 32 HARVARD L. REV. at 947.

<sup>110</sup> Likewise, in connection with the Fifth Amendment, James Madison viewed property rights as imposing a limit on government power. James W. Ely, Jr., Economic Liberties and the Original Meaning of the Constitution, 45 SAN DIEGO L. REV. 673, 705 (2008).

<sup>111</sup> Chafee, supra note \_\_\_ at 957. Similarly, Roscoe Pound saw social interests, rather than individual interests, as underlying all of law. For Pound, laws that appeared to protect simply individual rights or interests in reality had been enacted or created to protect social interests. Roscoe Pound,

individual interest was served by the constitutional protection of free speech, but only in a derivative, instrumental sense.”<sup>112</sup> Akhil Amar likewise sees the Bill of Rights as primarily reflecting republican rights of “the people” rather than individual rights.<sup>113</sup> Although the Bill of Rights does protect certain individual rights, that function is “not the sole, or even the dominant, motif.”<sup>114</sup> Instead, according to Amar, the framers were concerned primarily with limiting governmental power.<sup>115</sup> With respect to the Ninth Amendment,<sup>116</sup> for instance, Amar argues that the rights referenced in that amendment mean rights of the people collectively, rather than individual rights.<sup>117</sup> And collective rights can mean a right of a democratic people to constitutionally limit the power of government. Individual rights, on the other hand, would be the right of each individual to, for instance, engage in the kind of free speech activities that would serve her notion of individual autonomy.

The structural role of the Bill of Rights is illustrated by the Fifth Amendment’s Due Process Clause.<sup>118</sup> Under this Clause, according to Amar, “the jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”<sup>119</sup> Thus, to Amar, the jury right was not so much an individual right as it was a structural provision aimed at limiting government.<sup>120</sup> Robert Palmer has similarly argued that the jury trial was intended more for “maintaining local communal standards than for protecting

individual liberties.”<sup>121</sup> The jury served as an important check on the power of the central government, and jury trials became an avenue by which to challenge abusive action by that government. Similarly, the Second Amendment<sup>122</sup> was concerned not so much about individual rights as about “populism and federalism”—concerns which relate to structural protections of limited government (e.g., preventing federal government from prohibiting state militias).<sup>123</sup>

Not only can the argument be made that the Bill of Rights was aimed at ensuring limited government, but it can also be argued that courts can better define limits on government than they can the parameters of individual natural rights. The framers would probably not have intended the Bill of Rights to give such open-ended, undefined powers to courts; yet that would be the case if the Bill of Rights were seen as singularly concerned with protecting individual natural rights, because the courts would have to decide in each case where the boundary lines of individual natural rights occurred. But, courts are in a much better situation to decide on whether a particular individual right is necessary as a limitation on government power. This interpretation would mean that the framers drafted a more defined and usable Bill of Rights—one that the courts could apply with much more direction and ease.

### 3.5 The Ninth Amendment Model

The limited government theme is often overlooked in the analysis of individual rights.<sup>124</sup> Although the first eight amendments did in fact protect personal rights, “the intent and effect of those protections was to leave control over such matters in the collective hands of the people in the states,” and not in the hands of the federal government.<sup>125</sup> Indeed, this limited government theme is particularly evident in the Ninth and Tenth Amendments, both of which aim directly to limit centralized government authority.<sup>126</sup> According to Kurt Lash, the Ninth Amendment “was conceived and received as a federalist provision preserving the people’s retained right to local self-government.”<sup>127</sup>

Interests of Personality, 28 HARVARD L. REV. 343, 345, 356 (1915).

<sup>112</sup> Charles Barzun, Politics or Principle? Zechariah Chafee and the Social Interest In Free Speech, 2007 BYU L. REV. 259, 314 (2007).

<sup>113</sup> William Michael Treanor, Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights, 106 MICH. L. REV. 487, 487 (2007).

<sup>114</sup> AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xii (1998).

<sup>115</sup> Id. at 159 (arguing that during the constitutional period liberty “was still centrally understood as public liberty of democratic self-government—majoritarian liberty rather than liberty against popular majorities”).

<sup>116</sup> The Ninth Amendment states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

<sup>117</sup> AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, 120.

<sup>118</sup> The Fifth Amendment states that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation.” U.S. CONST. amend. V.

<sup>119</sup> AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, 97.

<sup>120</sup> The jury trial was fundamentally more “a question of government structure, than one of ‘individual right.’” Id. at 104.

<sup>121</sup> Robert C. Palmer, Liberties as Constitutional Provisions, appearing in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC, 55, 101 (1987).

<sup>122</sup> The Second Amendment states that “a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>123</sup> AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, 46.

<sup>124</sup> Mark Rahdert, In Search of a Conservative Vision of Constitutional Privacy, 51 VILLANOVA L. REV. 859, 882 (2006).

<sup>125</sup> Lash, 93 IOWA L. REV. at 832.

<sup>126</sup> Rahdert, supra note \_\_\_ at 882.

<sup>127</sup> Kurt Lash, The Inescapable Federalism of the Ninth Amendment, 93 IOWA L. REV. 801, 805 (2008). As Lash argues: “The Ninth Amendment was understood to preserve all retained rights, whether individual, majoritarian, or collective, from undue federal interference, reserving control of the same to state majorities. This understanding makes the Ninth Amendment an active federalist provision that calls upon courts to limit the interpretation of enumerated federal

This federalist model of the Ninth Amendment looks at retained rights in a much broader way than simply through an individual natural rights lens; instead, the model applies the Ninth Amendment anytime federal power is unjustifiably extended, regardless of whether that extension affects individual rights or collective rights, such as the right to local self-government.<sup>128</sup>

James Madison likewise saw the Ninth Amendment as serving to limit overly broad interpretations of federal power, and to preserve state autonomy.<sup>129</sup> According to Kurt Lash's review of the early case law and scholarly literature, the Ninth Amendment was consistently seen as a federalist provision protecting the autonomy of the states—it was not interpreted as an individual rights provision.<sup>130</sup> For more than 100 years after its adoption, according to Lash, the Ninth Amendment, as well as the Tenth, was used “to limit federal power in order to preserve the right to local self-government.”<sup>131</sup>

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power in order to preserve the people's retained right to local self-government.” *Id.* at 806.

<sup>128</sup> *Id.* at 809.

<sup>129</sup> *Id.* at 844. In summing up his argument that the Ninth Amendment served to protect the autonomy of the states, James Madison argued that overly broad readings of federal power should not be allowed to infringe on state autonomy. 1 ANNALS OF CONG., 1951 (Joseph Gales, ed., 1834) (statement of Representative Madison).

<sup>130</sup> Lash, 93 IOWA L. REV. at 854. Consistent with its federalist character, the Ninth Amendment established a rule of strict construction of federal power. *Id.* at 871. The protection of individual rights was not the single or even primary goal of the Ninth Amendment. *Id.* at 853. According to Amar, the Ninth Amendment “explicitly sought to protect liberty by preventing Congress from going beyond its enumerated powers.” AMAR, THE BILL OF RIGHTS, 123.

<sup>131</sup> Kurt Lash, A Textual-Historical Theory of the Ninth Amendment, 60 STANFORD L. REV. 895, 897 (2008). As neither a grant of power nor a source of rights, the Ninth Amendment simply forbids interpreting particular provisions in a particular way—it thus controls the interpretation of other provisions of the Constitution. *Id.* at 903. Similar to the rest of the Bill of Rights, the Ninth Amendment's rule of strict construction served to limit the power of the federal government. *Id.* at 904. Even though the retained rights of the Ninth Amendment may refer to either individual or collective rights, the amendment nonetheless protects the people's collective right to control the retained matter on a state level. *Id.* at 912. Thus, both the Ninth and the Tenth Amendments work in tandem to keep these retained matters under local control. *Id.* at 913. As a way of limiting the federal government, the retained rights referred to in the Ninth Amendment are those rights withheld from the federal government, yet still under control of the people on a state-by-state basis. Lash, 60 STANFORD L. REV. at 914 (arguing that the Ninth Amendment is a guardian of the sovereign rights of the people on a state-by-state basis, with the right of local self-government being one of those retained rights). Under the Ninth Amendment, even after forming a national government through adoption of the Constitution, the people of the individual states retained their right to control all matters not delegated to the federal government. See Amendments Proposed by the New York Convention (July 26, 1788), in *Creating the Bill of Rights*, at 21-22 (stating that “the powers of government may be reassumed by the people, whenever it shall become necessary to their happiness; that every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United

As one of the preeminent experts on the Ninth and Tenth Amendments, Professor Lash concludes that the Ninth works alongside the Tenth to preserve the retained state right of “self-preservation.”<sup>132</sup> Under Lash's interpretation, the Ninth Amendment forbids any constitutional interpretations that interfere with that right to local self-government.<sup>133</sup> While the Tenth Amendment limits the federal government to only enumerated powers, the Ninth Amendment limits the interpretation of enumerated powers.<sup>134</sup> In a speech to the House of Representatives, James Madison argued that the Ninth Amendment represented a rule of strict construction of federal power, one which protected the people's right to regulate local matters free from federal interference.<sup>135</sup> As Madison stated, the Tenth Amendment restricted the federal government to the powers enumerated in the Constitution, and the Ninth Amendment guards “against a latitude of interpretation” when it comes to interpreting the scope of those powers.<sup>136</sup>

Another preeminent scholar of the Ninth Amendment has argued that the amendment was adopted to combat the risk that the existence of the Bill of Rights might lead to the inference that the federal government had the power to do whatever was not prohibited by the Bill of Rights.<sup>137</sup> According to

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States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same”). Thus, the people of any individual state still have the authority to delegate any and all retained powers or rights to their own state governments if they chose to do so. This essentially left all retained rights to the local control of state majorities. Lash, 60 STAN. L. REV. at 915. As Akhil Amar describes the distinction: the Tenth “says that Congress must point to some explicit or implicit enumerated power before it can act; and the Ninth addresses the closely related but distinct question of whether such express or implied enumerated power in fact exists.” AMAR, THE BILL OF RIGHTS, 124.

<sup>132</sup> 60 STAN. L. REV. at 918-919 (arguing that “the Ninth Amendment as a provision reserving all retained rights, individual and majoritarian, to the control of local majorities”).

<sup>133</sup> *Id.* at 919.

<sup>134</sup> *Id.* at 920. Both the Ninth and the Tenth Amendments preserve the autonomy of the states by requiring that all retained powers and rights are left under the control of the people of the states who may then delegate those powers and rights to their own state governments. Thus, the Ninth Amendment limits the undue extension of enumerated federal powers and rights against state majorities. *Id.* at 928. For instance, in the debate over the bank charter in 1791, James Madison argued that the power to charter a bank reflected an attempt to construe the enumerated powers of the federal government in such a way as to alter the essential nature of limited government, and that this violated the Ninth and Tenth Amendments. James Madison, Speech in Congress Opposing the National Bank (February 2, 1791), in Writings (Jack Rakove, ed. 1999), 489. See also Memorandum from Roger Sherman to James Madison (February 4, 1791) in THIRTEEN, THE PAPERS OF JAMES MADISON, 382 (Charles F. Hobson and Robert A. Rutland, eds. 1981).

<sup>135</sup> James Madison, Speech on the Constitutionality on the Bank of the United States (February 2, 1791, in James Madison: Writings, 480, 489 (Jack Rakove, ed. 1999).

<sup>136</sup> *Id.*

<sup>137</sup> Thomas B. McAfee, The Foundations of Anti-Foundationalism—or, Taking the Ninth Amendment Lightly: A

Professor McAfee, the Ninth Amendment served “to ensure that a Bill of Rights would not support the inference that Congress held general or plenary powers to do whatever was not forbidden by the Bill of Rights.”<sup>138</sup> Thus, the Ninth Amendment acted as a limitation on government power, not as a clause making natural rights legally enforceable.<sup>139</sup> Indeed, for many in the founding generation, “The most important right held by the people was the right to alter or abolish their form of government,” a right that “enabled them to amend the Constitution.”<sup>140</sup> But of course, this right to alter or abolish the form of government is essentially a right to maintain limited government. As Professor McAfee argues, “The purpose of the Ninth Amendment was therefore not to secure unenumerated natural and inalienable rights, but to assure that the insertion of a federal bill of rights would not undermine the security already provided by the enumerated powers scheme.”<sup>141</sup> According to Professor McAfee, the Bill of Rights should not be seen “as a manifesto of my moral principle” or as an open-ended invitation for judges to select their own preferred social values for constitutional protection, but rather as a “limited set of eighteenth century precepts” about limited government.<sup>142</sup>

### 3.6 Applying the Bill of Rights as Government-Limiting Provisions

The Bill of Rights came into being because of a mistrust that the general structural provisions of the Constitution would sufficiently limit governmental power. Consequently, the Bill of Rights specified particular areas in which government could not exert power. To interpret particular provisions of the Bill of Rights is to determine what rights are necessary to limit the power of government in a way so as to

preserve an area of private social life that can be free to direct and control government. Thus, the focus is not on the individual, on what the individual needs to feel and exercise a certain sense of autonomy, but rather on the state, on what ways it should be limited and on how to keep it limited. This is a more objective and defined focus. The first inquiry when an issue of government restriction of a right contained in the Bill of Rights involves whether that restriction is necessary. The next question is whether, in that case, the right is needed to keep an effective limit or control on government. If, on the other hand, government restriction of the right will eliminate an effective source of individual or social control over government, then that government restriction is unconstitutional. The burden here is on the government to prove that right is not necessary to keep government limited.

In the area of speech, for instance, obscenity and defamation have never been given constitutional protections. This is because obscene and defamatory speech is not necessary to limit the power of government. The freedom of individuals to engage in obscene or defamatory expressions is not necessary or valuable to controlling or limiting the power of government.<sup>143</sup> Furthermore, the courts have often allowed restrictions on free speech when those restrictions are necessary to protect the rights of others and yet not necessary to limit government, since the restrictions do not represent governmental suppression of unpopular ideas. In *Sherry v. Perkins*, for instance, the Massachusetts Supreme Judicial Court upheld an injunction of labor picketers on the grounds that such picketing violated the property rights of others.<sup>144</sup> Later, in *Vegetahn v. Guntner*, the same court upheld an injunction preventing individuals from patrolling the streets outside plaintiff’s business in an effort to obtain better wages, noting that such picketing would injure the property of the plaintiff.<sup>145</sup> In *Gompers v. Bucks Stove and Range Co.*, the Supreme Court upheld an injunction against the president of the American Federation of Labor, preventing him from organizing a boycott of the plaintiff’s business, again arguing that such a boycott could cause irreparable damage to that business.<sup>146</sup> Thus, the Supreme Court draws the boundary of free speech at the point when it interferes with the property rights of another. It is important, incidentally, to note that the speech in these cases was directed not against the government but against private employers.<sup>147</sup>

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Comment on Daniel A. Farber’s Book on the Ninth Amendment, 9 NEV. L. J. 226, 229 (2008).

<sup>138</sup> *Id.*

<sup>139</sup> See generally THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION AND POPULAR SOVEREIGNTY: THE FOUNDERS’ UNDERSTANDING* (2000); Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 Wake Forest L. Rev. 747, 792-93 (2001).

<sup>140</sup> McAfee, *The Foundations of Anti-Foundationalism*, 9 NEV. L. J. at 232.

<sup>141</sup> *Id.* at 235. On the other hand, a number of scholars believe that courts should use the Bill of Rights to protect and enhance a more broad vision of natural rights. However, this view of the Bill of Rights oftentimes overestimates the actual capacities and inclinations of judges. For an argument asserting that courts should act to make sure that natural rights are enforced by judges, see CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997). For criticism of such an approach, see STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997).

<sup>142</sup> McAfee, *The Foundations of Anti-Foundationalism*, at 240.

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<sup>143</sup> See Thomas Cooley, *A Treatise on the Constitutional Limitations which Rests Upon the Legislative Power of the States of the American Union*, 422 (Legal Classics Ed. 1987 (1868) (arguing that obscenity and defamation are not related to public issues on which citizens need to form opinions).

<sup>144</sup> 17 N.E. 307, 310 (Mass. 1888).

<sup>145</sup> 44 N.E. 1077, 1078 (Mass. 1896).

<sup>146</sup> 221 U.S. 418, 436-437 (1911).

<sup>147</sup> See also DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS*, 176 (1997) (outlining the courts’ frequent use of property rights as a grounds for defeating free speech defenses).

The limited government model can also explain the court's decision in *Associated Press v. United States*.<sup>148</sup> In *Associated Press*, the Court upheld the application of anti-trust laws to the press, stating that such laws actually furthered the values underlying the First Amendment.<sup>149</sup> The freedom of the press from anti-trust laws—or, conversely, the freedom of the press to become a monopoly—is not a freedom that will help limit government. A similar justification supported the Supreme Court's decision in *FCC v. National Citizens Committee for Broadcasting*.<sup>150</sup> In that case, the Court, in upholding restrictions on the number of communications outlets a single entity could own, stated that such laws were necessary to achieve the "widest possible dissemination of information from diverse and antagonistic sources," which was an important First Amendment goal.<sup>151</sup> Here again, a First Amendment freedom to narrow the range of information sources is not a freedom necessary to limit and control government.

The Second and Third Amendments<sup>152</sup> likewise serve to limit the power of the central government. In John Locke's *Second Treatise of Government*, the people's right to control or eliminate an abusive government required a popular appeal to arms.<sup>153</sup> Therefore, the Second Amendment was aimed at the fear that Congress could use its power to disarm the state militia.<sup>154</sup> Under the Second Amendment, any such Congressional action was prohibited. The framers were very suspicious about a standing army kept by the central government, and to alleviate this suspicion they strove to maintain their state militias.<sup>155</sup> Likewise, the Third Amendment aims at limiting the power of an overbearing federal army. Essentially, the Third Amendment forbids Congress to conscript civilians as involuntary innkeepers and roommates of soldiers in peacetime.<sup>156</sup> As Amar argues, the Third Amendment "stands as an important reaffirmation of separation of powers, and limited executive authority."<sup>157</sup>

The jury provisions in the Fourth<sup>158</sup> and Seventh<sup>159</sup> Amendments likewise serve to empower the people against an overreaching and abusive central government. As Amar argues, the dominant strategy of Amendments V, VI, VII and VIII was to keep agents "of the central government under control" by using the populist and local institution of the jury.<sup>160</sup> Thus, just as a state militia could provide a check on a standing army of the central government, a jury, which had the power to investigate suspected wrongdoing of central government officials, could similarly check abuses by powerful prosecutors and judges. As *Tocqueville* observed, the jury "places the real direction of society in the hands of the governed...and not in that of the government."<sup>161</sup> Thus the "jury trial was not simply and always an individual right but also an institution of localism and popular sovereignty."<sup>162</sup>

Interpreting the Bill of Rights as provisions by which to limit governmental power allows for a more dynamic and flexible process of balancing individual rights against the needs of society.<sup>163</sup> As provisions seeking to limit governmental power, the Bill of Rights does not elevate individual rights to an untouchable place, as a trump card against all other social interests. It serves not only to protect individual interests, but also to keep government in its prescribed position. Individual rights thus can be regulated so long as the government power behind that regulation remains limited and does not in any way affect a democratic society's ability to monitor, criticize and direct its government. Zechariah Chafee's theory of free speech, which rests upon the social interest in the democratic value of free discussion on public matters, similarly views free speech in a social context. This context draws a connection between individual rights and the conduct of democratic self-government. Such a balancing between social and individual interests is also present in the government limiting aspect of the

<sup>148</sup> 326 U.S. 1 (1945).

<sup>149</sup> Id. at 20 (stating that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

<sup>150</sup> 436 U.S. 775 (1978).

<sup>151</sup> Id. at 795, 802.

<sup>152</sup> The Third Amendment states that "no soldier, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

<sup>153</sup> JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT SECTIONS 221-243 (Thomas P. Peardon, ed. 1952).

<sup>154</sup> 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 48, 52, 169, 386 (Jonathan Elliot, ed., Ayer Co. reprint edition 1987) (1836).

<sup>155</sup> AMAR, THE BILL OF RIGHTS, 53-54.

<sup>156</sup> Id. at 61.

<sup>157</sup> Id. at 62 (arguing that as illustrated by the Third Amendment, the federalism and separation of powers implications of the Bill of Rights often go unnoticed because of our modern-day fixation on individual rights).

<sup>158</sup> The Fourth Amendment states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>159</sup> The Seventh Amendment states that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in the court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

<sup>160</sup> AMAR, THE BILL OF RIGHTS, 83 (arguing that juries, guaranteed in no fewer than three amendments, were at the heart of the Bill of Rights).

<sup>161</sup> 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-294 (Phillips, Bradley ed., vintage 1945).

<sup>162</sup> AMAR, THE BILL OF RIGHTS, 106.

<sup>163</sup> See Van Vechten Veeder, Freedom of Public Discussion, 23 HARV. L. REV. 413, 413-414 (1910) (noting that the process of continual readjustment between the needs of society and the protection of individual rights is nowhere more conspicuous than in the history of the law of defamation).

Bill of Rights.<sup>164</sup> The beauty of seeing the Bill of Rights as provisions aimed at limiting government is that in this way they can strike a balance between liberty and governmental authority, whereby each individual surrenders enough control over his or her rights so as to permit government to maintain an organized, stable and peaceful pattern of human relations.<sup>165</sup>

Current notions of property rights, as well as the way they have been protected by law, also coincide with the limited government model of the Bill of Rights. For instance, property owners are free to use their property as they see fit, providing that they do not infringe on the rights of others.<sup>166</sup> Thus, individuals have no natural right to do with property whatever they desire. The doctrine of eminent domain similarly implies that private property rights are subject to broader public rights.<sup>167</sup> Although the government is allowed to tax property, exercise eminent domain over property, and regulate certain uses of property, individual property rights nonetheless limit governmental power in various ways. However, if property rights were seen as inviolable natural rights, then all regulations or taxes would constitute impermissible restrictions on that property; but such a result would essentially overturn much of the modern law regarding property.<sup>168</sup>

In contrast to Lockean liberalism, which focuses on natural rights, historians such as Bernard Bailyn and Gordon Wood have articulated a model of civic republicanism as the underlying current of American constitutionalism.<sup>169</sup> Whereas Lockean liberalism focuses on individual rights, the civic republican tradition sees property as a social right, one that was created by society and hence can be regulated in the public interest. And indeed, this is what occurred during the colonial and revolutionary periods, with governmental regulation of property being pervasive during this time.<sup>170</sup> Consistent with this civic republican view, Thomas Jefferson rejected the Lockean idea that property rights were rooted in

nature, instead arguing that “society creates property rights and ought continually to control them.”<sup>171</sup>

Viewing rights, such as the right of property, in terms of limitations on government power, rather than as individual natural rights, provides a better and more objective guidance to courts. For instance, Justice Iredell rejected judicial review based solely on the principles of natural law and natural rights.<sup>172</sup> Since the parameters of natural law and natural rights are indeterminate and uncertain, they cannot form an adequate basis of constitutional adjudication. According to Iredell, “The ideas of natural justice are regulated by no fixed standard.”<sup>173</sup> When the framers sought to protect a right or freedom on its own accord, rather than as a means of limiting power, they did so in a manner that would protect that right or freedom from all governments, including state governments. The Contract Clause, for instance, specifically applies to both the federal and state governments.

In *Ogden v. Saunders*, more justices than not rejected the view that property rights could be determined by reference to natural law. According to Justice Washington, “Whenever they come into collision with each other, positive law is paramount and natural law is to be taken in strict subordination to it.”<sup>174</sup> The *Taney* Court further developed the theory that property rights were to be constitutionally protected under the contracts or charters that created them, rather than as natural rights existing independent of those contracts or charters.<sup>175</sup> The nature of property rights in the Constitution as means by which to limit the power of government, rather than protection of natural rights, can be seen in the Court’s takings opinions. For instance, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a

<sup>164</sup> Zechariah Chafee, 32 HARV. L. REV. 932, 957 (1919) (arguing that social individual interests need to be balanced against each other in order to define the meaning of the First Amendment).

<sup>165</sup> CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC, 443, 442 (1953).

<sup>166</sup> See Brett Boyce, Property as a Natural Right and as a Convention Right in Constitutional Law, 29 L.A. INTERNAT’L AND COMPARATIVE L. REV. 201, 218 (2007).

<sup>167</sup> Id. at 220.

<sup>168</sup> See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 281 (1985). The U.S. Constitution has not adopted an explicit theory of the nature of the right to private property, and the Supreme Court’s rulings on property rights has continually reflected a deep conflict over the nature of these rights. See Boyce, supra note \_\_\_ at 270.

<sup>169</sup> See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

<sup>170</sup> See generally William J. Novak, Common Regulation: Legal Origins of State Power in America, 45 HASTINGS L. J. 1061, 1070-95 (1994).

<sup>171</sup> See Boyce, supra note \_\_\_ at 207. James Madison, however, saw as a threat to private property various governmental actions, including agrarian laws, debtor relief, paper money, and other redistributive schemes. Id. at 242. Consequently the Due Process and Taking clauses of the Fifth Amendment were means of limiting the power of government over private property.

<sup>172</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798).

<sup>173</sup> Id. at 399.

<sup>174</sup> *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 259 (1827). Justice Johnson also noted that “Our Constitution nowhere speaks the language of men in the state of nature,” and that in civil society “The state decides how far the social exercise of the rights of contract can be justly asserted.” Id. at 290, 282.

<sup>175</sup> Boyce, supra note \_\_\_ at 273 (arguing that the court recognized the right of democratic governments to define those rights perspectively as they saw fit, provided that they did not trench upon invested interests created by prior enactments). This approach was done away with by the *Lochner* court, which elevated the principle of laissez-faire capitalism to a status of natural and fundamental right. Id. at 276. However, this approach by the *Lochner* court, “as evidenced by its expansive view of property rights at the expense of legislative reform efforts, undermined respect for the institution of constitutional judicial review both within the United States and throughout the world.” Id. at 276.

taking.”<sup>176</sup> Thus, it is clear that property can be somewhat regulated; however, when it goes “too far” or when government overreaches beyond its limited functions, then the Takings Clause will come into effect.

#### 4 First Amendment Applications of the Limited Governmental Model

##### 4.1 The Protection of Rights That Limit Government

The First Amendment begins with the words “Congress shall make no law.” This language expresses the notion that Congress lacked any enumerated power to regulate religion, speech or press. In this respect, the First Amendment does not express or protect a private right of citizens based on personal liberty, but rather a state’s structural right rooted in federalism.<sup>177</sup> Thus, as with all of the first ten amendments, the First Amendment focuses on the protections of structural rights related to restrictions upon federal government power—restrictions meant to prohibit interference with the rights of the states and of their citizens.<sup>178</sup> As Akhil Amar notes, a remarkable fact is that prior to the adoption of the Fourteenth Amendment the Supreme Court “never—not once—referred to the 1791 [Bill of Rights] as ‘the’ or ‘a’ ‘Bill of Rights’.”<sup>179</sup>

In its free exercise decisions, the Court has seemed to follow a limited government model of the First Amendment.<sup>180</sup> In *Employment Division v. Smith*, the Court upheld an Oregon statute outlawing the use of peyote, a hallucinogenic cactus, and which implicated the right of Native Americans to use that substance in their religious ceremonies.<sup>181</sup> The Court adopted a narrow construction of the Free Exercise Clause and denied the availability of free exercise exemptions from neutral, generally applicable laws. In

this way, the Court moved away from any fundamental rights or natural rights view of the First Amendment, instead using the Free Exercise Clause as a way to limit government’s power to target particular religious practices or groups. The *Smith* decision thus undercut the Free Exercise Clause as “best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, general applicable law.”<sup>182</sup> In using the limited government model, *Smith* bans government from singling out the weak or minority religions, whereas majority or dominant religions can obviously survive on their political strength. Thus, the Court in *Smith* did not try to protect religious exercise as some kind of fundamental individual right. Instead, the crux of the decision focused upon limiting government to act in certain ways.

The Speech and Press Clauses are structural provisions, focusing on the “representational linkage between Congress and its constituents.”<sup>183</sup> They serve to safeguard the power of a democratic people against “a possibly unrepresentative and self-interested Congress.”<sup>184</sup> Obviously, free speech plays an important role in a democratic society—that of allowing local majorities to form opinions and alliances that can control and limit the actions of the federal government.<sup>185</sup> Thus, as Amar notes, the First Amendment is not about protecting minority rights from majoritarian rule, but about trying to achieve local control of a more distant central government.<sup>186</sup> This role of limiting government can be seen through First Amendment caselaw.

In *Reno v. ACLU*, the Court by striking down the Communications Decency Act limited the government from controlling the Internet and kept that medium as a free and open venue of communication, which in turn would provide a check on government.<sup>187</sup> Previously, in *New York Times Company v. Sullivan*, the Court held that defamatory speech about public officials enjoys First Amendment protection, unless

<sup>176</sup> See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>177</sup> See AMAR, THE BILL OF RIGHTS, 233.

<sup>178</sup> *Fox v. Ohio*, 46 U.S. (5 How), 410, 434 (1847).

<sup>179</sup> AMAR, THE BILL OF RIGHTS, 284.

<sup>180</sup> Of course, the Establishment Clause is a blatantly structural limitation on the federal government. It prohibited Congress from “interfering with, or trying to disestablish, churches established by state and local governments.” AMAR, BILL OF RIGHTS, 32. Moreover, the First Amendment specifically suggests that Congress has no power to regulate religion. This very much reflects a federalism-based approach. The possibility of national control over such a powerful social institution as religion, which shaped the behavior and cultivated the habits of the citizenry, struck fear in the hearts of Anti-Federalists. AMAR, BILL OF RIGHTS, 45. However, “local control over such intermediate organizations seem far less threatening, less distant, less aristocratic, less monopolistic.” *Id.* National control over religion would have been horribly oppressive to many of the framing generation, but local control over religion “would allow dissenters in any place to vote with their feet and find a community with the right religious tone.” *Id.*

<sup>181</sup> 494 U.S. 872, 876 (1990).

<sup>182</sup> *Id.* at 548 (O’Connor, J. dissenting).

<sup>183</sup> AMAR, THE BILL OF RIGHTS, 20.

<sup>184</sup> *Id.* at 21.

<sup>185</sup> According to Amar, the “right of the people to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the collective rights...to assemble in a future convention and exercise our sovereign right to alter or abolish our government.” AMAR, THE BILL OF RIGHTS, 26. This right is the right of the people to “bring wayward government to heel by assembling in convention.” *Id.*

<sup>186</sup> AMAR, THE BILL OF RIGHTS, 31. One way to achieve citizen control over the central government is to have free social institutions that provide for citizen education. As Amar argues: “The idea of popular education resurfaces over and over in the Bill of Rights. As we have seen, each of the three intermediate associations it safeguards—church, militia, and jury—was understood as a device for educating ordinary citizens about their rights and duties. An educated populous cannot be a truly sovereign populous.”

AMAR, THE BILL OF RIGHTS, 133.

<sup>187</sup> 521 U.S. 844, 880 (1997).



that speech is made with a knowledge of falsity or a reckless disregard for the truth.<sup>188</sup> By protecting speech directed at public officials, *Sullivan* allows a democratic society to engage in the kind of political speech necessary to control and limit its government.

In *Burson v. Freeman*, the Court upheld a content-based restriction against campaign speech within 100 feet of a polling place.<sup>189</sup> Even though the law singled out speech of a particular content, the subject speech was not necessary to limit government. In fact, the law actually assisted the political process, and in this way helped a democratic society shape and control its government. Likewise, the Court in *Austin v. Michigan Chamber of Commerce*, upheld a law regulating corporate expenditures in political campaigns.<sup>190</sup> According to the Court, such corporate activity could have a corrosive and distorting effect on political campaigns, and thus detract from a democratic society's ability to control and limit its government. On the other hand, general corporate speech on matters of public interest "can serve as an effective check on government excess."<sup>191</sup>

In giving commercial speech less constitutional protection than political speech, the Court has recognized that such speech is less vital to the democratic society's ability to control and limit its government, since such speech is primarily about economic or consumer transactions occurring within the economic sphere of society.<sup>192</sup> In contrast to political speech, commercial speech occupies a "subordinate position...in the scale of First Amendment values."<sup>193</sup> Consequently, commercial speech is not given full constitutional protection.<sup>194</sup> The argument that commercial speech should not be given full constitutional protection because it causes more harms than do other kinds of fully protected political speech is made irrelevant by the limited government model. Under this model, the question is

not one of what kind of speech is "better" or "less harmful." Instead, the question is what kind of speech should be insulated from government control because that speech is necessary to insure maintenance of a limited government.

In *Gentile v. State Bar of Nevada*,<sup>195</sup> the Court held that a defense attorney could be punished for conducting a press conference during which the lawyer opines about the innocence of the client and the occurrence of any police corruption in a pending case. Although such speech would be protected if made by a private individual or a member of the press, this decision can be explained in terms of the limited government model. Restrictions on lawyers' speech during the pendency of a court action do not infringe on a democratic society's ability to control and limit government. Indeed, a criminal case is supposed to be free from democratic governmental control. Moreover, any speech by the lawyer involving innocence of a client or the occurrence of police corruption can be made within the courtroom, where such speech is the most relevant and has the most impact.

In *Turner Broadcasting System Inc. v. FCC*,<sup>196</sup> the Court upheld the must-carry regulations, which required cable operators to carry the signals of broadcast television stations. Although this law seemingly restricted the editorial autonomy of cable systems operators, it did not infringe on the ability of a democratic public to limit and control its government. In fact, the law arguably promoted the diversity of voices and information available to the public, which in turn helps limit government.

The Court's refusal to give journalists a special immunity from grand jury subpoenas requiring the identification of confidential sources has been interpreted in some quarters as an anti-First Amendment ruling. In *Branzburg v. Hayes*, the Court refused to grant to the press a special right, unavailable to the general public, to refuse to reveal confidential sources.<sup>197</sup> Such rights would have boosted the power of the press; however, there is no proof or necessary connection that such special privileges under the First Amendment were needed so as to limit the power of government. The privilege would not necessarily limit government; it would only enhance the power of the press.

The Court has also upheld disclosure requirements for contributors to political campaigns.<sup>198</sup> However, the Court has required that an exception be made to this rule when enforcement would deter contributions to unpopular political groups, thereby jeopardizing their speech rights.<sup>199</sup> Thus, according to the Court, there is no fundamental right of anonymity in political campaigns. Again, a right of anonymity does not necessarily help limited

<sup>188</sup> 376 U.S. 254 (1964).

<sup>189</sup> 504 U.S. 191 (1992).

<sup>190</sup> 494 U.S. 652, 659-660 (1990).

<sup>191</sup> Martin Redish & Howard Wasserman, What's Good for General Motors, 66 Geo. Wash. L. Rev. 235, 248, 262 (1998) (arguing that "corporations are uniquely suited to provide the electorate with information that will make it more informed as to many of the socio-economic issues facing the nation").

<sup>192</sup> See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770 (1976) (stating that "some forms of commercial speech regulation are surely permissible"). To judge whether regulatory restrictions on commercial speech are permissible, the court has evolved a four-part test that is less stringent than the strict scrutiny test used to evaluate restrictions on political speech. See *Central Hudson Gas & Electric Corporation v. Public Services Commission*, 447 U.S. 557, 566 (1980).

<sup>193</sup> *Unites States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993).

<sup>194</sup> See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Courts have "upheld the ability of government to categorically exclude ordinary business corporations from participation in core political speech, an exclusion that would be unthinkable with respect to an individual citizen wishing to participate in a public debate." James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism*, 54 CASE WEST. RES. L. REV. 1091, 1115-16 (2004).

<sup>195</sup> 501 U.S. 1030 (1991).

<sup>196</sup> 520 U.S. 180, 189 (1997).

<sup>197</sup> 408 U.S. 665, 690-91 (1972).

<sup>198</sup> See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

<sup>199</sup> See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95, 98 (1982)..

government; instead, disclosure requirements produce a transparency that can be good for the democratic process.

The limited government aspect of the First Amendment can be seen in the example of the federal securities laws, which compel certain disclosures such as a corporation's financial condition and restrict speech such as unapproved proxy solicitations. Although the Supreme Court has not directly addressed the First Amendment application to such securities regulations, it is generally believed that the Free Speech Clause should not apply to the speech affected by such regulation.<sup>200</sup> Thus, speech subject to securities regulation can be restricted because such speech—e.g. fraudulent or misleading speech about a corporation's financial condition—is not necessary to limit the power of government. Regulation of securities speech provides for the effective functioning of the capital markets; it does not diminish a democratic society's ability to control and direct its government. Consequently, the First Amendment should not apply to securities regulation because such regulations do not unduly expand the power of government such that a democratic public will be less able to control and direct that government.

#### 4.2 Political Speech and the Limited Government Model

In the free speech area, the limited government model is further supported by the argument that political speech should be given the highest First Amendment protections. This is because free political speech is needed to maintain democratic control of government. As long as a democratic society has the freedom to engage in open and uninhibited political speech, that society is able to direct, control and alter the course of its government. But if any laws infringe on political speech, those laws essentially enlarge the power of government by making it less amenable to change and alteration by a democratic society. As Justice Douglas explained in *Terminiello v. City of Chicago*, "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people."<sup>201</sup>

Under the political speech doctrine, the First Amendment gives its primary and highest protection to that speech which is vital in sustaining self-government. According to this theory, the role of free speech in the process of self-government provides the only compelling justification for the constitutional protection of speech; thus, under this theory, individual self-actualization or autonomy cannot provide a sufficiently strong basis for such constitutional protection.<sup>202</sup> Alexander Meiklejohn

was an early advocate of the self-governance value of free speech.<sup>203</sup> He limited the First Amendment's free speech protections to political speech, viewing those constitutional protections as existing primarily to serve democratic processes.<sup>204</sup>

Subsequently, a number of contemporary legal scholars have adopted at least a form of Meiklejohn's political speech theory. According to Professor BeVier, "The sole legitimate First Amendment principle protects only speech that participates in the process of representative democracy."<sup>205</sup> Professor Sunstein proposes a "two-tier First Amendment," whereby restrictions on political speech are subjected to the strictest scrutiny, whereas restrictions on nonpolitical speech are given a much lower level of scrutiny.<sup>206</sup> Moreover, on numerous occasions, the Supreme Court has stated similar opinions regarding the role of political speech within the First Amendment. In *Burson v. Freeman*, the Court stated that the First Amendment serves primarily "to protect the free discussion of governmental affairs."<sup>207</sup> According to the Court in *FCC v. League of Women Voters*, political speech occupies the "highest rung" of constitutional concerns and is the "most protected" by the First Amendment.<sup>208</sup> The Court in *Buckley v. Valeo* stated that "The First Amendment affords the broadest protection to such political expression."<sup>209</sup> And in *Mills v. Alabama*, the Court wrote that "A major purpose of the First Amendment was to protect the free discussion of governmental affairs."<sup>210</sup>

Of course, there is no question that political speech is difficult to define.<sup>211</sup> Nonetheless, the task is not an impossible one, and a number of legal scholars have made efforts in this regard. For instance, Cass Sunstein defines political speech as speech "both

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to protect political speech, see Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communications*, 72 Mo. L. REV. 477, 514-520 (2007); PATRICK M. GARRY, *REDISCOVERING A LOST FREEDOM: THE FIRST AMENDMENT RIGHT TO CENSOR UNWANTED SPEECH*, 113-127 (2006).

<sup>203</sup> See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965).

<sup>204</sup> For an analysis of Meiklejohn's views, see Garry, *The American Vision*, supra note \_\_ at 74-80.

<sup>205</sup> Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STANFORD L. REV. 299, 358 (1978).

<sup>206</sup> Cass Sunstein, *Free Speech Now*, U. OF CHI. L. REV. 255, 301-312 (1992).

<sup>207</sup> 504 U.S. 191, 196 (1992).

<sup>208</sup> 468 U.S. 364, 383, 381 (1984).

<sup>209</sup> 424 U.S. 1, 14 (1976).

<sup>210</sup> 384 U.S. 214, 218 (1966). See also *Federal Election Commission v. National Conservative Public Action Committee*, 470 U.S. 480, 493 (1985) ("There can be no doubt that the expenditures at issue in this case [expenditures by independent political committees] produce speech at the core of the First Amendment.")

<sup>211</sup> For a discussion of the difficulties inherent in such a determination, as well as a discussion on how such political speech is to be defined, see PATRICK M. GARRY, *REDISCOVERING A LOST FREEDOM*, at 115-116.

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<sup>200</sup> See Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S. CAR. L. REV. 789, 789-790 (2007).

<sup>201</sup> 337 U.S. 1, 4 (1949).

<sup>202</sup> For a detailed description of the political speech doctrine and the argument that the First Amendment served primarily

intended and received as a contribution to public deliberation about some issue.”<sup>212</sup> Professor Sunstein argues that words or expressions made “in a way that is not plausibly part of social deliberation about an issue” should not qualify for constitutional protection.<sup>213</sup>

The First Amendment’s focus on political speech fits perfectly with the limited government model of the Bill of Rights. Political speech receives highest protection under the First Amendment because such speech directly relates to the conduct of democratic self-government, for it is within the process of self-government that democratic society can control and limit the power of its government. On the other hand, speech on matters of merely private concern is not the kind of speech needed to limit government; therefore, its restriction can be tolerated more by the First Amendment.

Laws impacting or restricting political speech can hobble the individual’s or public’s ability to control or limit government. For instance, a law banning all flag burning, given the fact that the burning of a flag is most likely a means of communicating a political idea, can effectively eliminate a way for the public to protest the activities of the government.<sup>214</sup> Similarly, a law imposing a special tax on newspaper ink may very well restrict the flow of political speech by penalizing newspapers that criticize the government.<sup>215</sup> However, when political speech is not involved, then the issue of limited government and the public’s ability to limit government may not be present.

In *United States v. Playboy Entertainment Group*, the Court overturned regulations requiring sexually-oriented cable providers, like the Playboy Channel, to limit their programming transmission to the late-night hours of 10:00 p.m. to 6:00 a.m.<sup>216</sup> Prior to this law, sexually-explicit cable operators had used signal scrambling as a means of limiting programming access to their subscribing customers. But this scrambling had proven ineffective, often leading to signal bleed, which allowed non-paying viewers, including children, to hear and see the sexually-explicit programming.<sup>217</sup> Although recognizing the states’ interest in shielding children from such programming, the Court nonetheless struck down the law on the grounds that it was too burdensome on adult viewers.<sup>218</sup> In dissent, Justice Breyer argued that the law placed only a burden on sexually-explicit

cable programming, not a ban.<sup>219</sup> Second, he argued that the law applied only to programming involving “virtually 100% sexually-explicit material.”<sup>220</sup> And finally, Justice Breyer argued that due to signal bleed almost thirty million children each year were exposed to sexually-explicit cable programming.<sup>221</sup> Thus, according to Justice Breyer, the programming involved in *Playboy* was not the kind of speech on which the First Amendment should confer its highest protections.

In *Playboy Entertainment Group*, the requirement that cable purveyors of sexually explicit material had to confine their programming to nighttime hours when young children would least likely be watching television, had no real impact on the public’s structural ability to limit government. Unlike the flag burning case and the newsprint tax case, which affected the ways in which individuals could engage in political speech, *Playboy Entertainment* only dealt with scheduling issues surrounding when certain commercial cable vendors of sexually explicit material could transmit its programming.

## 5 Conclusion

The framers and ratifiers of the Bill of Rights very much believed in the theory of natural rights. This theory had greatly inspired the Declaration of Independence and America’s break with England. However, despite this strong belief, the ratifiers did not intend that the Bill of Rights would serve exclusively or even primarily as a protection or expression of individual natural rights. Although much of the scholarly literature focuses on the Bill of Rights as concerned exclusively or primarily with individual rights or autonomy, this focus deviates from the framers’ intent underlying the Bill of Rights. What is often ignored about the Bill of Rights is that it was drafted and ratified with a view toward integrating it into the overall scheme of the original Constitution. This scheme or focus, according to near unanimous historical opinion, was one of structure. The original Constitution set out to create certain types of governmental structures; it did not seek to incorporate or dictate substantive values and norms. The most important structural aspect of the original Constitution

<sup>212</sup> CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, 130 (1993).

<sup>213</sup> Cass R. Sunstein, Free Speech Now, 59 U. OF CHI. L. REV. 255, 312 (1992).

<sup>214</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that a conviction for burning the American flag violates the First Amendment).

<sup>215</sup> See *Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 578 (1983).

<sup>216</sup> 529 U.S. 803, 806-807 (2000).

<sup>217</sup> *Id.* at 806.

<sup>218</sup> *Id.* at 807.

<sup>219</sup> *Id.* at 845.

<sup>220</sup> *Id.* at 839.

<sup>221</sup> *Id.* at 842. A similar decision was reached in *Denver Area Educational Telecommunications Consortium Inc. v. FCC*, 518 U.S. 727 (1996). *Denver Area* involved a challenge to regulations requiring cable operators to segregate indecent programs on separate blocked channels, which could be unblocked after a subscriber made a written request for unblocking. *Id.* at 732-735. But the Court overturned these regulations, even though any interested viewer could obtain access to the programming merely by submitting a written request, and even though the Court recognized that the regulations were meant to protect children and that they only applied to sexual material.

was one of limited government. The whole scheme of the Constitution focused on setting up structures ensuring that the new central government was a limited one.

The Bill of Rights simply sought to reinforce the limited government focus of the original Constitution. It continued the goal of ensuring limited government, but it did so through specifying particular areas in which the government was prohibited from extending its power. Thus, the Bill of Rights, as was the entire Constitution, focuses not on individual values or norms, but on governmental structure. The focus of the Bill of Rights is on limiting government, not on providing for individual autonomy or fulfillment.

One justification for the limited government model of the Bill of Rights is that it would have been impossible to list all of the natural rights the framers wished to protect. Furthermore, the framers would not have wanted to give the judiciary the kind of wide-ranging power needed to define the parameters and scope of each natural right to be protected. It was much more manageable for the courts to focus on limiting government than on ensuring individual autonomy in a democratic society. With a limited government focus, the courts could approach Bill of Rights issues more objectively and consistently. As will be discussed in future articles, it was later left to the Equal Protection Clause of the Fourteenth Amendment to provide for the adequate protection of individual rights. In a subsequent article, it will also be argued that the Fourteenth Amendment maintained the limited government aspect of the Bill of Rights, but simply applied this model to state governments in addition to the federal government.

During the New Deal constitutional revolution, the Court, in order to accommodate the New Deal legislation, retreated from enforcing the Constitution's structural provisions. Instead, the Court suggested that it would concentrate its attentions on individual rights matters, scrutinizing them much more closely than structural matters. However, this turned out to be a contradictory approach. Since the Bill of Rights was essentially structural, the Court was simply choosing one set of structural provisions to enforce while ignoring other structural provisions, such as federalism and separation of powers. Moreover, the Court made a fundamental mistake when it chose to wage its individual rights revolution through the Bill of Rights. The mistake was interpreting the Bill of Rights as exclusively concerned with individual rights and autonomy, rather than with providing structural limitations on government.

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