

On Originalism and Liberty

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It is a great pleasure and honor to present the Cato Institute's 14th annual B. Kenneth Simon Lecture on Constitutional Thought. I have long admired the Cato Institute for its rigorous and principled adherence to liberty because I myself share that view. It is an especially great pleasure to speak to you on Constitution Day this year, which marks the 800th anniversary of Magna Carta, one of the greatest charters of human liberty the world has ever known. I will discuss the relevance of Magna Carta to liberty in U.S. constitutional law in my remarks today.

My talk is titled "Originalism and Liberty" because I am an originalist when it comes to constitutional interpretation and thus agree with the methodological approach of Justices Antonin Scalia and Clarence Thomas. I should mention at the outset that I clerked for former Justice Scalia, and I deeply admire him and am grateful to him because he was my mentor for 34 years.

Nonetheless, in the 25 years since I left Washington, D.C., to teach law at Northwestern University, I have studied the history of the Constitution and of the Fourteenth Amendment and Magna Carta in great depth and have concluded that the original meaning of those documents is somewhat more libertarian than Justice Scalia,

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for example, realized. I want today to present briefly my reasons for reaching the conclusion that originalism means endorsing a presumption of liberty and not a presumption of constitutionality when courts decide the cases that are before them.¹ In endorsing a presumption of liberty, I am agreeing with Randy Barnett's book, *Restoring the Lost Constitution: The Presumption of Liberty*, even though I do not agree with everything Randy says in that book.

Before beginning my proof that originalism leads to a presumption of liberty, I need to explain what I think it means to be an originalist. I think originalism requires that when one interprets any legal text, whether it be the Constitution, a statute, a contract, or a Supreme Court precedent, one must give the words of the text one is interpreting their original public semantic meaning. This means consulting dictionaries, grammar books, and newspapers published at the time the legal text became law. I do not believe it is appropriate for judges to consult the original *intent* that animated the adoption of a clause but only the original semantic *public meaning* of the words of the text. Laws adopted by dead people bind us but their *unenacted* intentions do not. My view of originalism is thus the view expressed by Justice Scalia when he spoke at Catholic University in the fall of 1996. In that speech, he said:

The theory of originalism treats a constitution like a statute, giving the constitution the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because I am first of all a textualist and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the Framers of the U.S. Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. . . . The words are the law. I think that's what is meant by a government of laws, not of men. We are bound not by the

¹ I have recently discussed this topic in two publications on which I draw in making my remarks today: Steven G. Calabresi & Sophia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 *Tex. L. Rev.* 1299 (2015); Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's The Classical Liberal Constitution*, 8 *N.Y.U. J. L. & Liberty* 839 (2014).

intent of our legislators, but by the laws which they enacted, laws which are set forth in words, of course.²

My task in this essay is to explain what I think was the original semantic public meaning of several words and clauses that appear in the text of the Constitution, the Bill of Rights, and the Fourteenth Amendment, which I think should lead to a presumption of liberty.

I should also define here what I mean by “liberty” because there are many different concepts of liberty that have been put forward over the years. I mean by liberty the ability of an individual to act free of governmental restraint when not harming others through the use of force or fraud. Liberty means much more than freedom from being held in jail. Liberty, however, does not require that the government make transfer payments to provide a social safety net for those in need, although I share Ronald Reagan’s view that some kind of social safety net is necessary. As a moral matter, I would also distinguish between ordered liberty and licentiousness, although that distinction would not necessarily entail government regulation.

I will begin in Part I by listing the words and clauses in the U.S. Constitution that I think create a presumption of liberty. In Part II, I will turn to history and discuss the libertarian constitutionalism of the American people in 1787 when the Constitution was written, in 1789 when the Bill of Rights was written, and in 1868 when the Fourteenth Amendment was ratified. History confirms what the constitutional text supports: There ought to be a presumption of liberty in constitutional law.

I. Liberty and the Relevant Texts of the Constitution

In discussing liberty and the original meaning of the Constitution, it makes sense to talk first about the structural Constitution and the grants of power in the Constitution to Congress and then to talk second about the restraints on congressional and state power in the Bill of Rights and in Section 1 of the Fourteenth Amendment.

² Associate Justice Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation*, Address at the Catholic University of America, Oct. 18, 1996, transcript available at <http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml>.

Accordingly, Section A below addresses the concept of liberty and natural law; Section B addresses the concept of liberty and the grants of power to Congress in the Constitution; Section C addresses the limits on congressional power imposed by the Bill of Rights; and Section D addresses the limits imposed on the states by Section 1 of the Fourteenth Amendment.

A. *Liberty and Natural Law*

The Framers of the Constitution and of the Fourteenth Amendment believed in natural law as described by the English political philosopher John Locke so we must begin with an explanation of Lockean natural law theory and how it protects liberty. Lockean natural rights theory underpins and provides the context for the Declaration of Independence and then for the Constitution's Preamble as well, both of which concern the legitimacy of government. In a nutshell, Locke argued that when we come out of the state of nature and into civil society, we give up *certain* rights—mainly, but neither entirely nor exclusively, the right of self-enforcement, Locke's "Executive Power," which becomes the police power—but we "retain" the rest of our natural rights, which is what the Ninth Amendment to the Constitution makes clear. Of course, those natural rights were also "retained" before the Bill of Rights was ratified, and included among them were the rights that text enumerates. Thus, all of those rights, enumerated and unenumerated alike, are not only *natural* rights but also, by virtue of having been *recognized* by the Constitution, properly understood, *positive* "constitutional rights" as well.

Enforcement and enforcement rights are a *separate* matter, and a complex one, made more so by dual sovereignty. We gave very little of our executive or enforcement power up to the federal government in the federal constitution. Instead, save for the right of self-defense, we gave most of it up to the *states*, calling it the general police power. The same state-of-nature approach applied in our relationships with our states, but as a practical matter those relationships varied, state by state. In particular, just as with the federal government—the Ninth Amendment or any state equivalent notwithstanding—what rights were *in fact* recognized varied. But because the Bill of Rights (including the Ninth Amendment) restrained only the *federal* government (*Barron v. Baltimore*), we could look only to our *state* constitutions for protection of whatever rights those constitutions had in

fact recognized, which was uneven. (In principle, at least, the full panoply of *federal* rights could be invoked against *federal* actions, although invocation of the doctrine of enumerated powers might be a surer path to that end. Thus, if Congress criminalized sodomy, say, one might object that it had no power to do so; the right was thus implicit.)

Once the Fourteenth Amendment was ratified, however, individuals could invoke that panoply of *federal* rights against *state* violations, because Section 1, by implication, gave federal courts jurisdiction over such complaints, and Section 5 gave Congress enforcement jurisdiction as well. Thus, as the Privileges or Immunities Clause clearly reads, “No state shall *make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States.” And those privileges or immunities include both our enumerated and our unenumerated rights, as outlined above, plus any other privileges or immunities Congress may have created through positive law. That’s how the Fourteenth Amendment changed federalism fundamentally. That, of course, is the theory. It’s been the practice unevenly, thanks to the incorrect decision in the *Slaughter-House Cases*—which I discuss later in this essay—and in modern cases like *Williamson v. Lee Optical*. But properly read and applied, the Fourteenth Amendment brings uniformity of rights across the nation while leaving states free to pursue separate policies, provided they’re consistent with those rights.

B. Liberty, the Text of the Constitution, and the Enumeration of Powers

One of the Constitution’s most effective guarantees of individual liberty comes from the fact that it sets up a complex federal republic with an elaborate system of checks and balances, which makes it hard for transient democratic majorities to take away individual liberties or property. The point is made so well by James Madison in Federalist 51 that I think it sufficient simply to quote Madison on this subject.³

³ This is perhaps the most famous passage in all of the Federalist:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the

As Madison predicted, a structural constitution of checks and balances, whereby ambition is made to counteract ambition, is a surer protector of liberty than a mere parchment barrier like the Bill of Rights, and especially the Ninth Amendment. I believe the Ninth Amendment has judicially enforceable content that is deeply rooted

interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . . Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. . . .

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. *Ambition must be made to counteract ambition.* The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

The Federalist No. 51 (James Madison) (emphasis added).

in history and tradition, but it pales in comparison to the importance of the six-year electoral cycle, with three elections held two years apart in which the president is picked by a national constituency, senators are picked by a state constituency, and representatives are picked in local districts. Making major and enduring changes requires winning at least two or three elections in a row and that is hard to do. Moreover, 39 of the 50 states pick their governors and state legislatures in off-year elections when the president is not on the ballot and the president's supporters tend to stay home while his opponents turn out and vote. The net result is that the party holding the White House almost always loses control of the states in its first mid-term election. This system of forced power-sharing creates a lot of entrenchment and makes it very hard to effectuate change. That in turn reduces the risk in making private investments, opening businesses, and writing books and articles. A stable polity is conducive to freedom.

Any discussion of originalism and liberty must thus begin by noting that the main way in which the Constitution secures our liberty is through the Madisonian system of checks and balances as augmented by American federalism. I will argue below that "mere parchment barriers" like the Ninth Amendment and the Privileges or Immunities Clause have a libertarian original meaning, but they have clearly not done as much in protecting our liberty as has the system of checks and balances.

That said, I want next to note the importance of the fact that the Constitution explicitly creates a federal government of limited and enumerated powers. This point is reaffirmed by the Tenth Amendment, which says that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In a case involving the application of federal law to a U.S. citizen, the federal government should have the burden of proof in establishing that it is acting within its enumerated powers. The federal government is quite simply not a government of general powers the way the state governments are. Its ends are enumerated and thus limited. There is thus a presumption of liberty. If the federal government has no power with respect to a given object, individuals are free concerning that object.

There are three main enumerated powers that have been read too sweepingly from the New Deal Revolution of 1937 to the present.

I am referring here to the powers delegated to Congress under the Taxing Clause, the Commerce Clause, and the Necessary and Proper Clause. The original meaning of the phrase “commerce among the states” is easy to discern. The Latin roots of the word commerce are “com,” which means “with,” and “merce,” which means buying and selling. The root “merce” in the Commerce Clause always appears in other English words as having an economic connotation. Consider the English words “mercantile,” “market,” and “mercenary,” all of which are derived from the same Latin root “merce.” The Commerce Clause thus applies only to activities where buying and selling among the states is going on.⁴ Wholly intrastate commerce cannot be regulated under the original meaning of the Commerce Clause, nor can Congress use this clause to, for example, ban the possession or growing at home of marijuana. I thus emphatically disagree with the Supreme Court’s opinion in *Gonzales v. Raich*.⁵

The other grant of national power that is often said to be sweeping and limitless is Congress’s power under the Necessary and Proper Clause, which empowers Congress to enact laws that are necessary and proper for effectuating its commerce power. The Necessary and Proper Clause constitutes a significant grant of power to Congress since most federal laws and regulations are based on it. Accordingly, it deserves some discussion. My thinking on the Necessary and Proper Clause has been greatly shaped by Gary Lawson.⁶

First, the Necessary and Proper Clause grants Congress the power to use new unenumerated means to make effective its other enumerated powers, but the means must not be so major that they ought to have been on the federal list of enumerated powers. Second, the clause authorizes Congress to use means toward the end of executing only some other enumerated power. Chief Justice John Marshall

⁴ My views on the Commerce Clause are set forth most recently in Steven G. Calabresi, *The Right to Buy Health Insurance across State Lines: Crony Capitalism and the Supreme Court*, 81 *Cin. L. Rev.* 1447 (2013) (The 2012 William Howard Taft Memorial Lecture).

⁵ 545 U.S. 1 (2005). See also Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from Law*, in *Nomos LV Federalism and Subsidiarity*, 123–89 (James E. Fleming & Jacob T. Levy, eds., 2014).

⁶ See, e.g., Gary Lawson, et al., *The Origins of the Necessary and Proper Clause* (2010).

said as much in *McCulloch v. Maryland*,⁷ and this is an explicit requirement of the constitutional text. Finally, for a law to be valid under the Necessary and Proper Clause, it must be both necessary and proper. Chief Justice Marshall construed the word “necessary” to mean convenient or useful to carrying into execution an enumerated power. He said “necessary” did not mean indispensable. But he said nothing in *McCulloch* about what limits are imposed by the word “proper” in the clause.

Two recent Supreme Court majorities have held that a federal law that invades the sphere of state power is not a “proper” law. In both *NFIB v. Sebelius*⁸ and *Printz v. United States*,⁹ the Court held that it was not “proper” for Congress to compel state officials to serve federal ends.

But infringing on personal liberties and fundamental rights is also not “proper” and so Congress cannot do those things either. Between March 4, 1789, and December 15, 1791, the United States had a Constitution but no Bill of Rights. The Bill of Rights passed in Congress in 1789, but it took two years for three-quarters of the states to ratify it. During those first two years of our history, could Congress have passed laws abridging the freedom of speech and of the press or establishing a religion or seizing private property without paying just compensation?

The Anti-Federalist critics of the Constitution asked precisely those questions, and Alexander Hamilton and many other Federalists insisted quite rightly that Congress had no enumerated power, even under the Necessary and Proper Clause, to do any of those things. Quite simply, laws invading fundamental individual rights are not “proper.” They would therefore have been unconstitutional even if the Bill of Rights had never been ratified.

This raises an enumerated powers/Ninth Amendment issue of vital importance. Would it be constitutional for Congress to enact a law, for example, forbidding married couples to use contraceptives, or a law criminalizing sodomy? There is nothing in the Bill of Rights expressly addressing such matters, so a justice like Hugo

⁷ 17 U.S. 316 (1819).

⁸ 132 S. Ct. 2566 (2012).

⁹ 521 U.S. 898 (1997).

Black might say that such laws are constitutional. Justices like John Marshall Harlan or Arthur Goldberg might disagree on Due Process or Ninth Amendment grounds, respectively. While I agree with Harlan's and Goldberg's conclusions in *Griswold v. Connecticut*,¹⁰ which involved a state law, I would argue that a national ban on the use of birth control or a federal law criminalizing sodomy is unconstitutional on enumerated powers grounds as well. Laws of this sort are quite simply not "proper" in an Anglo-American culture steeped in liberty. You do not need the Ninth Amendment to ban such laws at the federal level, since Congress has no enumerated power to pass them in the first place.

At this point some may wonder if I am using the tail of the requirement that federal laws be "proper" to wag the dog, which is the Constitution. Can the word "proper" do this much work? Consider first the following etymological definition of the word from *The Barnhart Dictionary of Etymology*:

proper adj. Probably [originated in English] before 1300 *propre* special, commendable, in *Kyng Alisaunder*; also, *proper* one's own (1303), and appropriate or correct (1340); borrowed from the Old French *propre*, learned borrowing from Latin, and directly borrowed from Latin *proprius* one's own, particular, special; peculiar; of uncertain origin. The specialized meaning of socially appropriate, decent, respectable, is first recorded in Swift's apology to *A Tale of a Tub* (1704). . . .¹¹

Consider second the following definitions of "proper" from Noah Webster's 1828 *Dictionary of the English Language*. This was the first major dictionary to be printed in the United States. Webster offers the following definitions of "proper," which are relevant to this essay as follows:

Proper, a [Fr. *propre*; It. *Propria* or *proprio*; Sp. *Proprio*; L. *proprius*, supposed to be allied to *prope*, near; W. *priawd*, proper, appropriate].

1. Peculiar; naturally or essentially belonging to a person or thing; not common. That is not *proper*, which is common to many. Every animal has his *proper* instincts

¹⁰ 381 U.S. 479 (1965).

¹¹ The Barnhart Dictionary of Etymology 850 (Robert K. Barnhart, ed., 1988).

and inclinations, appetites and habits. Every muscle and vessel of the body has its *proper* office. Every art has its *proper* rules. Creation is the *proper* work of an Almighty Being.

2. Particularly suited to. Every animal lives in his *proper* element.
3. One's own. It may be joined with any possessive pronoun; as our *proper* son.
4. Noting an individual; pertaining to one of a species, but not common to the whole; as a *proper* name. Dublin is the *proper* name of a city.
5. Fit; suitable; adapted; accommodated. A thin dress is not *proper* for clothing in a cold climate. Stimulants are *proper* remedies for debility. Gravity of manners is very *proper* for persons of advanced age.
6. Correct; just; as a *proper* word; a *proper* expression.
7. Not figurative.
8. Well formed; handsome.
9. Tall; lusty; handsome with bulk.
10. In *vulgar language*, very; as *proper good*; *proper sweet*. [This is very improper, as well as vulgar.]¹²

One thing that is striking in both the Barnhart Dictionary and Noah Webster's first dictionary published in 1828, is that the word "proper" was read somewhat differently from how it is now. Today, we read "proper" more as if it means polite or appropriate as in manners and behavior. Consider third the dictionary.com definition of "proper":

[prop-er] adjective

1. adapted or appropriate to the purpose or circumstances; fit; suitable: *the proper time to plant strawberries*.
2. conforming to established standards of behavior or manners; correct or decorous: *a very proper young man*.
3. fitting; right: *It was only proper to bring a gift*.
4. strictly belonging or applicable: *the proper place for a stove*.
5. belonging or pertaining exclusively or distinctly to a person, thing, or group.
6. strict; accurate.

¹² Proper, American Dictionary of the English Language (Noah Webster ed., 1828), <http://webstersdictionary1828.com/Dictionary/proper>.

7. in the strict sense of the word (usually used postpositively):
*Shellfish do not belong to the fishes proper. Is the school within Boston proper or in the suburbs?*¹³

My point is that the word “proper” in the Necessary and Proper Clause conforms more to the first two usages in Webster’s 1828 dictionary:

1. Peculiar; naturally or essentially belonging to a person or thing; not common. That is not *proper*, which is common to many. Every animal has his *proper* instincts and inclinations, appetites and habits. Every muscle and vessel of the body has its *proper* office. Every art has its *proper* rules. Creation is the *proper* work of an Almighty Being.
2. Particularly suited to. Every animal lives in his *proper* element.

I also would rely on the first usage in dictionary.com, which says that “proper” means: “adapted or appropriate to the purpose or circumstances; fit; suitable: *the proper time to plant strawberries.*” The word “proper” in the Necessary and Proper Clause thus allows Congress to use means to accomplish an enumerated end so long as they are adapted or appropriate to the purpose or circumstances and are thus “fit and suitable” means.

What about the “propriety” of a federal law, enacted under the Necessary and Proper Clause, that sought to outlaw the possession and use of contraceptives by married couples or that made it a crime for two same-sex people to have sexual relations? Could Congress constitutionally enact such laws? I think the answer is clearly “no,” both because Congress has no enumerated power to pass such laws and because such laws would not be a necessary and proper means for accomplishing an enumerated end. Such legislation is therefore not appropriate, well-suited, and adaptable to the carrying out of any enumerated power mentioned anywhere in the text of the Constitution. One can debate whether there is a constitutional right to privacy *ad infinitum*, but there cannot be anyone who truly thinks Congress has the enumerated power to prevent married couples

¹³ Dictionary.com, <http://www.dictionary.com/browse/proper?s=t> (last visited May 9, 2016).

from possessing and using birth control or same-sex couples from having sex.

The hypotheticals mentioned above, involving Congress outlawing the possession or use of contraceptives by married couples and the sexual acts of same-sex couples, do not engage the Commerce Clause, which concerns the buying and selling of merchandise or services, not possession or use. Congress could and has regulated the interstate buying and selling of sex under federal prostitution laws. What Congress cannot do, in my opinion, is regulate the possession and use of contraceptives or the sexual acts of same-sex couples on the grounds that, to quote *Wickard v. Filburn*,¹⁴ friendly sexual relations “overhang” the market for prostitution. *Wickard* goes one step too far, as this hypothetical indicates, and I think it ought to be overruled.

C. Liberty, the Text of the Constitution, and the Bill of Rights

The text of the Constitution, as it was originally understood, also protects liberty through the Bill of Rights, which was ratified in 1791. The first eight amendments in the Bill of Rights robustly protect important aspects of individual liberty. Religious freedom, freedom of expression, the right to own a gun, criminal procedure rights, and the right not to have your property taken except for a public use and with the payment of just compensation are all among the rights protected. These are critical civil liberties and the Supreme Court has quite rightly interpreted some of them expansively and purposively and not literally or in a wooden fashion.

Freedom of the press has been rightly applied not only to printing presses but also to communication through broadcasting and over the Internet, as well as to privately kept diaries and letters to a friend. The text addresses only freedom of speech and of the press, but we now understand it as a synecdoche that protects freedom of expression generally. The Free Exercise of Religion Clause has rightly been applied to give religious institutions a ministerial exception from anti-discrimination laws. The Second Amendment has rightly been read to give individuals the right to own a gun independently of whether they are part of a militia. The Fourth Amendment’s protection against unreasonable searches and seizures has

¹⁴ 317 U.S. 111 (1942).

quite rightly been applied to wiretaps and electronic surveillance. The Eighth Amendment's ban on cruel and unusual punishments has rightly been interpreted to encompass a proportionality requirement. And the Fifth Amendment's Takings Clause has rightly been read to apply to some regulatory takings and not only to physical invasions of property.

These broad interpretations of the first eight amendments are correct in my view as a matter of the original meaning of the terms involved. This is in part because the Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." At a bare minimum, I think this amendment commands interpreters of the Bill of Rights to construe the first eight amendments purposively, generously, and expansively, which is what the Supreme Court has for the most part done. But the Ninth Amendment does more than that. A brief discussion of how the Ninth Amendment came to be added to the Constitution will show how it protects liberty. My views on the Ninth Amendment have been shaped by conversations with Gary Lawson and Randy Barnett from 1990 until the present day.

The Anti-Federalist opponents of the Constitution complained bitterly about the Constitution's lack of a bill of rights. Some Federalists like Alexander Hamilton said that enumerating rights in a bill of rights might actually be dangerous because it might imply that the Constitution protects no other rights than those that were enumerated. The Ninth Amendment was added to address this concern. It is obvious from the face of the amendment that it was meant to protect other, unenumerated, rights like the right to privacy, which the Supreme Court correctly applied in *Griswold v. Connecticut*¹⁵ and *Lawrence v. Texas*.¹⁶ If the Ninth Amendment protects unenumerated rights, then at a bare minimum it also calls for an expansive interpretation of the enumerated rights mentioned in the first eight amendments.

Justice Scalia, Judge Robert Bork, and Attorney General Edwin Meese have all denied that the Ninth Amendment means what it plainly says on its face, which is that there are other, unenumerated, rights that are constitutionally protected above and beyond the rights

¹⁵ 381 U.S. 479, 502–07 (1965) (White, J., concurring).

¹⁶ 539 U.S. 558 (2003).

mentioned in the first eight amendments. They fear that judges will run wild with the Ninth Amendment and will have no solid standards to guide them. In essence, they believe that the Ninth Amendment is “void for vagueness” and that it is an undecipherable ink blot on the Constitution.

I will show in Part II of this essay that the void-for-vagueness argument against the Ninth Amendment is mistaken because of the long Anglo-American tradition of liberty. For now it will suffice to note that in ignoring the text of the Ninth Amendment, Justice Scalia, for example, is abandoning textualism in a context where he fears that there will be no sure rules to guide judicial discretion.¹⁷ In fact, he has argued that judges should abandon textualism and originalism wherever the text of the Constitution calls for a balancing test or in some other way provides for unguided judicial discretion. Scalia’s argument here is a Thayerian and Frankfurterian argument for judicial restraint whenever the text of the Constitution calls for balancing or leave judges with some degree of discretion.

By embracing the ideas of James Bradley Thayer and by refusing to follow the plain words of the Ninth Amendment, Justice Scalia is rejecting textualism and originalism. He calls on judges not to follow the original meaning of the Constitution. That document is full of clauses that give judges discretion, like the Fourth Amendment ban on “unreasonable” searches and seizures or the Eighth Amendment ban on “excessive” fines and bail. It is quite simply unconstitutional for a judge to refuse to enforce such a clause simply because he fears it will give him and other judges discretion.¹⁸ Judges should not legislate from the bench, and they should not make up new constitutional rights out of thin air, but they are obligated by their oath of office to enforce the standards in the Constitution as well as the rules. Standards are provisions in a legal text like “unreasonable” or “excessive” that plainly delegate discretion to judges.

Then what rights does the Ninth Amendment protect? Consider again the words of the amendment itself: “The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.” The other rights “retained”

¹⁷ See Antonin Scalia *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 117 (1989).

¹⁸ See Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483 (2014).

by the people are clearly rights that existed in 1791 when the Ninth Amendment was ratified, and they are rights that, as the Supreme Court likes to say, are so deeply rooted in history and tradition that they date back to 1776 and can be overcome only by just laws enacted for the general good of the whole people. Only rights that existed *prior* to the Ninth Amendment could be “retained.” The Ninth Amendment thus cannot be read to enact John Rawls, *A Theory of Justice* (1971), but it can be read to enact John Locke, *Two Treatises of Government* (1689).

The discussion has not yet addressed the original meaning of the Tenth Amendment or of the Fifth Amendment’s Due Process Clause. The Tenth Amendment on its face states only a truism: all rights not delegated to the federal government are reserved to the states or to the people. This tells us nothing about *what* powers are delegated. But, read holistically and in light of the structure of the Constitution, the Tenth Amendment reinforces the argument made for a constraining reading of the word “proper” in the Necessary and Proper Clause. The Ninth Amendment does the same thing in protecting individual liberty as the Tenth Amendment does in protecting state prerogatives.

The Fifth Amendment’s Due Process Clause reads, “nor shall any person . . . be deprived of life, liberty, or property, without due process of law.” The question as to what this clause means has vexed the Supreme Court since 1857¹⁹ because the justices have stubbornly refused to read the Ninth Amendment as meaning what it plainly says. Instead, the Court has embraced the view that it is the Due Process Clause of the Fifth Amendment that protects unenumerated rights from legislative invasion at the federal level. The Due Process Clause descends historically from the following clause in Magna Carta: “Article 39: No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

Many state constitutions in 1791, when the Bill of Rights was ratified, had similar clauses saying “No person shall be deprived of life, liberty, or property except by the lawful judgment of their peers or by the law of the land.” In other words, the Due Process

¹⁹ See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Clause protects against arbitrary and capricious executive branch actions but not against arbitrary and capricious acts of Congress, since under the Supremacy Clause of Article VI, acts of Congress are “the Supreme Law of the Land.” The original meaning of the Due Process Clause was that it mandated procedural justice, but it did not protect against congressional legislation that invaded unenumerated rights. Happily, the Ninth Amendment does protect unenumerated rights that are deeply rooted in history and tradition, subject to just laws enacted for the general good of the whole people. Thus, the fact that the Due Process Clause protects only procedural rights and not substantive rights does not in any way diminish the Constitution’s protection of individual liberty.

The Bill of Rights, as it was originally understood, offers powerful protection for individual liberty, as does the Constitution itself. So far, I have addressed only constitutional protections for liberty from federal intrusion. I will now discuss how the text of the Constitution protects liberty from state intrusion.

D. Liberty, the Text of the Constitution, and the Fourteenth Amendment

The Constitution in Article I, Section 9, protects against federal bills of attainder; *ex post facto* laws; the granting of titles of nobility; and direct taxes that are not apportioned according to the census. In addition, Article I, Section 10, protects liberty from state officials by banning bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. By far the most important protection of liberty from state intrusion appears, of course, in Section 1 of the Fourteenth Amendment. That section provides that:

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

Let’s begin with the clause that says that the states are forbidden from intruding upon liberty as to the privileges or immunities of citizens of the United States. The Supreme Court said in the

Slaughter-House Cases that this clause protected only privileges or immunities of national citizenship and not privileges or immunities of state citizenship.²⁰ The Court offered as an example the right freely to travel to the seat of government in Washington, D.C.—a right that obviously existed long before the Fourteenth Amendment was ever written or ratified. Four justices led by Justice Stephen J. Field dissented, saying that the majority had rendered meaningless the most important clause in Section 1 by finding that it did not protect privileges or immunities of state citizenship.

The dissenters in the *Slaughter-House Cases* were obviously right—and here are the reasons why. First, strictly as a textual matter the first sentence of Section 1 of the Fourteenth Amendment explicitly says that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” What that means is that all Americans are citizens both of the United States *and of the state wherein they reside*. The Privileges or Immunities Clause says, again, that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Since everyone who is a citizen of the United States is also a citizen of the state wherein he resides, it is obvious that the Privileges or Immunities Clause *must* be read as affording to individuals protection for their privileges or immunities of state citizenship *as well as* for their privileges or immunities of federal citizenship.

As it happens, the background history of the Fourteenth Amendment completely supports this interpretation. The Fourteenth Amendment grew out of an attempt by Congress to constitutionalize the Civil Rights Act of 1866, which President Andrew Johnson had vetoed as unconstitutional but Congress had overridden. The Reconstruction Congress, remembering the then-recent *Dred Scott Case*, feared the Supreme Court might strike down the Civil Rights Act of 1866 as unconstitutional, and so they drafted the Fourteenth Amendment to codify and broaden the Act’s protection of civil liberties. The 1866 act read as follows:

Be it enacted by the Senate and House of Representatives
of the United States of America in Congress assembled,

²⁰ 83 U.S. 36, 75 (1873).

that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such *citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.*²¹

The emphasized language makes it clear that the act was meant to protect the state common law rights of citizens of every race and color, like the right to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase and hold property; and to be equally treated by the courts under the law.

The Civil Rights Act of 1866 was focused on the protection of common-law rights of state citizenship, using federal enforcement powers to guarantee those rights to all U.S. citizens. It follows *a fortiori* that the Privileges or Immunities Clause of the Fourteenth Amendment protects privileges or immunities of state citizenship as well as those of national citizenship. This is nothing less than the original meaning of the Fourteenth Amendment. That amendment goes beyond the Civil Rights Act of 1866 in that it protects not only against “abridging” or “shortening” or “lessening” certain listed state common law rights but also against “abridging” all the privileges or immunities of state citizenship. Thus, states are not only forbidden to “abridge” the common law rights listed in the Civil Rights Act of 1866, they are also forbidden to “abridge” rights under state constitutional law and state statutory law. This is the original meaning of the Privileges or Immunities Clause. The dissenters in *Slaughter-House* were thus right.

If so, Section 1 of the Fourteenth Amendment becomes a powerful engine of liberty because it guarantees the equal citizenship of

²¹ Civil Rights Act of 1866, 14 Stat. 27–30 (1866) (emphasis added).

all citizens. It does not bar only race discrimination. Thus, liberty of contract and liberty to choose one's own occupation, for example, are constitutionally protected under the original meaning of the *Slaughter-House Cases*; they can be regulated by just laws enacted for the general good of the whole people. This reading echoes Justice Bushrod Washington's famous opinion in the 1823 case of *Corfield v. Coryell*, construing the Privileges and Immunities Clause of Article IV, Section 2.²² The Framers of the Fourteenth Amendment generally agreed that the Privileges or Immunities Clause meant what Justice Washington said in *Corfield* about the similarly worded clause in Article I, Section IV, and they often cited *Corfield* when discussing drafts of the Fourteenth Amendment:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. *They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.*

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These,

²² 6 Fed. Cas. 546 (C.C.E.D.Pa. 1823) (No. 3,230).

and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”²³

It is as clear as day from reading this passage that (1) the Privileges or Immunities Clause has a libertarian original meaning, but that (2) it applies only to liberties deeply rooted in history and tradition, and (3) those liberties are “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”

Given the clarity of libertarian original understanding of the Privileges or Immunities Clause, why did Justice Scalia believe the clause is void for vagueness and why did Judge Robert Bork call the clause an “ink blot” during his confirmation hearings? Scalia and Bork thought that the right to enjoy liberty and to seek and obtain happiness and safety subject to just laws enacted for the general good of the whole people was meaningless. The facts of the *Slaughter-House Cases* show that they were wrong. In those cases, special laws—not just and general ones—gave a legal monopoly to some butchers over others, thus depriving men of their livelihood. The monopoly violated liberty rights; it was not saved by the state’s police power because the law granting the monopoly favored only a few and was not just and general. Scalia and Bork were simply wrong on the facts as well as on the legal reasoning of the *Slaughter-House Cases*.

One reason for this is that Scalia and Bork were, when push came to shove, more disciples of James Bradley Thayer, Oliver Wendell Holmes, and Felix Frankfurter than they were of William Howard Taft or Hugo L. Black. Thayer, Holmes, and Frankfurter were Progressives and New Dealers: they disparaged the original Constitution because they thought it protected only the liberty of rich people, which is not true. They sought to dilute the original libertarian Constitution with a Progressive Constitution, where judges always deferred to the political branches unless those branches had

²³ *Id.* at 551–52 (emphasis added).

made what Thayer called “a clear mistake.” The presumption of constitutionality, which the Supreme Court gives to legislation, is the descendant of Thayer’s clear-mistake rule, just as surely as birds are the descendants of dinosaurs. Justice Scalia and Judge Bork were conserving the New Deal and not the original meaning of the Fourteenth Amendment when they read the Privileges or Immunities Clause out of the Constitution by calling it an inkblot. This is a *non-originalist* move on their part, which diminishes liberty.

In addition to containing the Privileges or Immunities Clause, the Fourteenth Amendment also has a Due Process Clause and an Equal Protection Clause. These clauses have been drafted into service to do some of the work the Privileges or Immunities Clause was meant to do. The original meaning of the Due Process Clause of the Fourteenth Amendment was that the clause protected procedural rights against the executive and not that it substantively forbade state legislatures from passing certain laws. Notwithstanding this clear original meaning of the clause, the Supreme Court has developed an elaborate body of *substantive* due process case law, which incorporates the Bill of Rights against the states and which protects unenumerated liberties like liberty of contract and the right to privacy. I agree with most of the Supreme Court’s substantive due process holdings, but on Privileges or Immunities Clause grounds. The one substantive due process holding of the Supreme Court with which I disagree is *Roe v. Wade*.²⁴ My personal view is that life begins at implantation and not at conception so I have no problem with IUDs, the morning-after pill, or stem-cell research. My legal and constitutional view is that the question of when life begins and ends is a political question because people of different faiths as well as people who are secular disagree about these topics. I would let legislatures figure out when life begins and when it ends.

The final clause in Section 1 of the Fourteenth Amendment provides that no state shall deprive any person of the equal protection of the laws. Together with the Privileges or Immunities Clause, the Equal Protection Clause is a ban on governmental discrimination on the basis of caste. It bans caste together with the Privileges or Immunities Clause, which forbids the states from making laws that give African-Americans an abridged or shortened or lesser grant of rights

²⁴ 410 U.S. 113 (1973).

than are enjoyed by white Americans. Under these two clauses, no state could adopt a system of European feudalism where some people are born lords while others are born serfs; no state could adopt the Hindu caste system under which some people are born Brahmins while others are born “untouchables”; no state could give more privileges or immunities to its white citizens as a matter of their birth than it gives to citizens of every other race and color; no state could give more privileges or immunities to one religion than it gives to another or discriminate on the basis of religion in any way; no state could set up a gender hierarchy whereby people who are born male have greater rights than people who are born female; no state could set up a sexual-orientation hierarchy whereby people who are born heterosexual have greater rights than those who are born lesbian, gay, bisexual, or transgender. The Privileges or Immunities Clause and the Equal Protection Clause are powerful sources of support for liberty against governments that want to pass class legislation that arbitrarily gives greater status to a select few.

To sum up, Section 1 of the Fourteenth Amendment incorporates the Bill of Rights against the states; it forbids all systems of caste or class legislation; and it protects unenumerated liberties from state intrusion (although abortion cases in my opinion raise a political question). The bottom line is that the text of the original Constitution, the text of the Bill of Rights, and the text of the Fourteenth Amendment as originally understood are very libertarian so long as one insists that laws regulating rights must be “just” and that they must serve “the general good of the whole” people. The mistake made by the conservative originalists on the Supreme Court is that they are conserving the legacy of the Progressives and the New Dealers when they ought instead to be conserving the legacy of the American Founding and Reconstruction.

II. Historical Background to the Constitutional Texts

In Part I, we saw that the Necessary and Proper Clause, the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth Amendment all seem to create a presumption of liberty rather than constitutionality. But for originalists, one must reach beyond dictionaries and grammar books to discover what the constitutional text means: One must also discern what the meaning of a constitutional text was to the American people when it was enacted into constitutional law.

Originalists do not look at legislative history, which is easily manipulated by special-interest groups, but they do consider the background history and social context that gave rise to a constitutional text because doing so helps us discern the original meaning of the Constitution. As it happens, there were powerful libertarian currents of opinion at work at the time of the American Framing that confirm my libertarian reading of the Constitution and of the Fourteenth Amendment. I will discuss three such currents that were at work in the 1780s and in the 1860s. First, I will consider what the Framers thought were the traditional rights of Englishmen, which they believed were being abused by King George III. Second, I will consider evidence from state bills of rights in the 1780s that suggests the Framers had libertarian leanings. And, third, I will discuss the libertarianism that was widespread in the state constitutional law of the 1860s when the Fourteenth Amendment was written and ratified and that remains widespread in state constitutional law today.

A. The Liberties of Englishmen under the Ancient Constitution

Prior to 1776, the American colonists were Englishmen, and they were heirs to a centuries' long tradition of liberty that went back not only to Magna Carta but to the years before the Norman conquest in 1066. Colonial Americans were followers of the constitutional history of England offered up by Sir Edward Coke during his struggles with the Stuart despots, King James I and King Charles I, both of whom believed in the divine right of kings. Coke and his many followers countered these claims of absolute royal power with a theory that England had an Ancient Constitution of liberty that dated back to the laws of King Edward the Confessor, the so-called *Leges Edwardii*. I will first describe Coke's theory of the Ancient Constitution of liberty and then discuss why colonial Americans came to adhere to it.²⁵

²⁵ John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (2005); Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (1965); *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Ellis Sandoz, ed., 1993); Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward's "Laws" in Early Modern Political Thought* (2001). But see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1957).

England's Ancient Constitution of liberty had its origins in the forests of Germany where, as the Roman historian Tacitus explains, the German tribes governed themselves with a remarkable degree of democracy. As Viscount Bolingbroke explained in a pamphlet published in the 1730s, "From the earliest accounts of time, our ancestors in Germany were a free people, and had a right to assent or dissent to all laws; that right was exercised and preserved under the Saxon and Norman Kings, even to our days."²⁶

Bolingbroke claimed the Saxon tribes in Germany picked their leaders and generals themselves, and those leaders had to get the consent of the elders and members of the tribes for whatever they did. Tacitus confirms this account of the democratic libertarianism of the Saxon tribes in Germany. As Trevor Colbourn explains:

Seventeenth-century whig writers discovered in Tacitus, author of the famed *Germania*, a useful source for contentions that the Saxon *witan* was the original of Parliaments. Tacitus had described how the Saxons chose their kings and generals, how they restricted the authority of those they set up to rule, how frequent assemblies were held for discussion of tribal affairs. Tacitus contributed to the popular notion of a golden age of political liberty in the past—ancient laws and customs were the best. Liberty did not have to be created; it had only to be restored. . . .

Tacitus's *Germania* enjoyed a remarkable vogue in the eighteenth century [in colonial North America.] John Adams read Tacitus frequently. Jefferson would enthusiastically tell any inquiring student to look to Tacitus as "the first writer in the world without a single exception."²⁷

The Saxons brought their democratic and libertarian ways with them when they conquered England, and the constitution of England was therefore "from time immemorial" one of liberty and of democratic self-rule. Some decisions were made by the witenagamot—a group of wise old men. Other decisions were made by the witan, or nobility, along with the folkmoets, which consisted of ordinary men in the tribe. The last Anglo-Saxon king, Edward the Confessor, supposedly codified these liberties in the *Leges Edwardii*.

²⁶ As quoted in Colbourn, *supra* note 25, at 7.

²⁷ *Id.* at 8, 31.

When William the Conqueror and his Norman troops invaded and conquered England in 1066, they were immediately faced with a major problem. William won the Battle of Hastings with 10,000 men, but he had to govern a population of somewhere between one and three million Anglo-Saxons. Accordingly, William took great care to claim that he was the legitimate successor to Edward the Confessor, and he proceeded to take his coronation oath in Westminster Abbey, a church which Edward the Confessor had built and in which he was buried. William pledged in his oath to respect all the ancient Saxon liberties expressed in the *Leges Edwardii*. These acts of fealty to the Ancient Constitution were essential to maintaining William's control over the Anglo-Saxon population.

Henry I, William the Conqueror's son, took his coronation oath in 1100 in Westminster Abbey as well, and he too pledged to follow the ancient Anglo-Saxon constitution. Henry I issued a Charter of Liberties when he was crowned king, indicating his respect for the *Leges Edwardii*. Article 13 of the Charter of Liberties reads as follows: "I restore to you the law of King Edward with those amendments introduced into it by my father with the advice of his barons."²⁸ England's Ancient Constitution of liberty thus survived the Norman Conquest as did all the other liberties that the Anglo-Saxons had had "since time immemorial."

King John, who reigned from 1199 to 1216, was a tyrant who did not follow the rules of the Ancient Constitution. It was for this reason that his barons and earls forced King John on June 15, 1215—800 years ago—to sign Magna Carta. Magna Carta was seen, according to Sir Edward Coke, as being no new thing but merely an affirmation of fealty to the ancient Anglo-Saxon constitution. "Coke had approached Magna Charta as 'no new declaration' but as a reaffirmation 'of the principal grounds of the laws of England.'"²⁹ "Magna Charta could not and did not give anything to the people, who 'in themselves had all.' The chief merit of the document was bringing John to admit that there were popular rights 'perpetually inherent, and time out of mind enjoyed.' (So said Coke in the *Institutes*.)"³⁰

²⁸ Charter of Liberties of King Henry I, Nat'l Hum. Inst., <http://www.nhinet.org/ccs/docs/char-lib.htm>.

²⁹ Colbourn, *supra* note 25, at 44.

³⁰ *Id.* at 45.

Many subsequent English monarchs and parliaments pledged fealty to Magna Carta and thus to the Ancient Constitution, which it had restored. Henry III, King John's son, was a weak monarch who wrapped himself in the mantle of Edward the Confessor by rebuilding Westminster Abbey with the Confessor's body in the highest place of honor in a special vault and by naming his first born son, the future Edward I, after Edward the Confessor. Edward I famously organized the ancient witan and folkmoot of the Anglo-Saxons into a parliament, which had the power of the purse and which soon came to be divided into a House of Lords and a House of Commons.

The vibrancy of the Ancient Constitution, and the proof that England's kings were under and not above the law, is illustrated by the fact that between 1300 and 1485 five English kings were removed and executed. The five unfortunate monarchs were: (1) Edward II, (2) Richard II, (3) Henry VI, (4) Edward V, and (5) Richard III. Pre-Tudor England was a very unsafe kingdom in which to be a king because Englishmen fought vigilantly to maintain the Ancient Constitution. Three of the Tudor monarchs, Henry VII, Henry VIII, and Elizabeth I, proved to be very powerful but they all took great care to get Parliament's approval for everything they did. When James I inherited the English throne in 1603, the English people did not believe in absolute monarchy or the divine right of kings. Since James I, and his son Charles I, did believe in those things, the stage was set for a century of conflict, which included the English Civil War and ended with the Glorious Revolution of 1688, which restored the Ancient Constitution in England. Many Englishmen during the 17th century wrote that the Stuarts were trying to restore the "Yoke of the Norman Oppression" on the English people.

Sir Edward Coke was the preeminent lawyer and judge of his generation, and he was very active politically during the reign of James I and at the beginning of the reign of Charles I. He fought both monarchs tirelessly, and he was fired by James I from his position as lord chief justice of England for issuing injunctions and writs of mandamus which nullified orders issued by James I on the ground that they violated the Ancient Constitution. Coke denied that James I had the power to issue monopolies and to create special courts that intruded upon the jurisdiction of the common law courts. After being fired from his judgeship, Coke ran for and was elected to be a member of the House of Commons. By then King Charles I was

engaging in the unseemly practice of arresting wealthy individuals and then offering to free them for a “loan,” which would never be repaid. Coke led the House of Commons in securing passage of the Petition of Right, which restated the validity of Magna Carta, forswore any royal power to arbitrarily imprison people, acknowledged that only Parliament had the power to raise taxes, and secured the right of *habeas corpus* to the English people.

Charles I reneged on all of his promises and tried to arrest five members of parliament by sending troops into the House of Commons. Thus began the English Civil War, which ended in the execution of Charles I. The monarchy was restored in 1660, but when James II claimed tyrannical powers under the divine right of kings, he was overthrown in the Glorious Revolution of 1688, which once and for all settled the principle that the king was a constitutional monarch who was under the law and who had no royal prerogative.³¹ In the Act of Settlement of 1701, Parliament changed the line of succession to the monarchy to exclude Catholics and to ensure a steady supply of docile and subservient kings and queens. The views of Sir Edward Coke, and his championing of the Ancient Constitution, eventually triumphed completely after a century of struggle.

As John Fortescue-Aland wrote in 1714:

Thus, sir, we find the Stream of the Laws of Edward the Confessor, flowing from a Saxon Fountain, and containing the Substance of our present Laws and Liberties, sometimes running freely, sometimes weakly, and sometimes stopped in its Course; but at last breaking thro’ all Obstructions, both mixed and incorporated it self, with the great Charter of our English Liberties, whose true Source the *Saxon* laws are, and are still in being, and still the Fountain of the Common Law. Therefore it was a very just Observation of my Lord Coke, who says, that *Magna Charta*, was but a Confirmation, or Restitution of the Common Law of England; so the Common Law really is an Extract of the very best of the Laws of the *Saxons*.³²

The brief account of English legal history that I have just offered is sometimes called the Whig theory of history (or the Protestant

³¹ Michael Barone, *Our First Revolution: The Remarkable British Upheaval that Inspired America’s Founding Fathers* (2007).

³² Reid, *supra* note 25, at 18.

theory of English legal history). The great English historians A.V. Dicey, Frederic William Maitland, and Sir Frederick Pollock were all adherents in one way or another to this view, and it was the prevailing view until Sir Herbert Butterfield, a devout Christian, and his doctoral student J. G. A. Pocock challenged it in the 20th century. Pocock's *The Ancient Constitution and the Feudal Law* made the argument that Sir Edward Coke's theory that England had and followed an Ancient Constitution was a myth constructed by Coke for use in his political struggles with James I and Charles I.³³

I disagree strongly with Pocock as to his conclusions about English legal history, but the truth or falsity of Pocock's book as to English legal history is irrelevant to my thesis here. The fact of the matter is that it was Sir Edward Coke's reading of English legal history and not Pocock's that was accepted and followed by the North American colonists. The Massachusetts Bay colony was founded in 1628, and it was settled by Puritan dissenters from the Church of England, all of whom worshipped Coke and hated King Charles I. During the 1630s when there was a great migration of 20,000 Englishmen from England to Massachusetts, the migrants were all Puritan opponents of Charles I and followers of Coke.

The North American colonists believed that they were the heirs of an Ancient Constitution born in the forests of Germany, which limited governmental power and which preserved liberties that had existed since time immemorial. Puritan settlers in the New Haven Colony made their views known by naming a neighboring town Cromwell, Connecticut, and by hiding for 30 years three of the English parliamentarians who were sought by King Charles II for voting to execute his father.

In 1761, James Otis, in arguing the famous *Writs of Assistance Case* in the Massachusetts statehouse, contended that general warrants were unconstitutional under England's Ancient Constitution, citing Sir Edward Coke. Otis's argument had a huge effect on the young John Adams, who was present in the audience to hear it. Americans' resistance to efforts by the English parliament to tax them, even though they were not represented in parliament, drew on Coke's Petition of Right in arguing against taxation without representation.

³³ J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (reprint 1987) (1957).

Resistance to English efforts to tax Americans was strongest in Massachusetts, which had been settled by Coke supporters and was where the Boston Tea Party occurred. The British reacted to that original Tea Party by closing the port of Boston and placing the city under military rule. That led to the battles of Lexington and Concord, which in turn caused the other 12 original North American colonies to rally behind Massachusetts's views as to the liberties of Englishmen in North America. Thomas Jefferson said that under George III the North American colonies had been placed under that yoke of Norman oppression. Trevor Colbourn writes that the American colonists in the 1760s and 1780s "presented an idealized version of an Anglo-Saxon democracy, which they usually found overturned by Norman treachery and feudalism."³⁴ As described by Obadiah Hulme, who was probably the author of the *Historical Essay on the English Constitution*, wrote:

Our Saxon forefathers founded their government upon the common rights of mankind. They made the elective power of the people the first principle of our constitution, and to protect it, they delegate power for no more than one year.' Hulme called for annual Saxon parliaments along with an elective monarchy.³⁵

Colbourn concluded that, in American eyes, "English medieval history settled into a pattern of periodic efforts to reestablish pre-Norman liberties."³⁶

John Philip Reid observes that "[t]he ancient constitution had been a central element of the prerevolutionary debate from its beginning with the passage of the Stamp Act to its conclusion with the Declaration of Independence."³⁷ Reid quotes James Otis as saying in 1764 that "liberty was better understood and more fully enjoyed by our ancestors before the coming in of the first Norman tyrants than ever after, till it was found necessary for the salvation of the kingdom to combat the arbitrary and wicked proceedings of the Stuarts."³⁸

³⁴ Colbourn, *supra* note 25.

³⁵ As quoted in *id.* at 37.

³⁶ *Id.*, at 43.

³⁷ Reid, *supra* note 25, at 8.

³⁸ *Id.* at 10.

I have spent so much time discussing the Ancient Constitution because, until 1776, Americans were Englishmen, and we are just as much the heirs of the Ancient Constitution as the English are. Judge Douglas Ginsburg has commented memorably on the current belief by many American libertarians that we have a “Constitution in Exile” thanks to the New Deal.³⁹ And Randy Barnett has written an important book about U.S. constitutional law, *Restoring the Lost Constitution: The Presumption of Liberty*. He believes, as do I, that we are a nation groaning under the yoke of the New Deal oppression. In 1776, the American colonists believed that they were the heirs of an ancient English constitution of liberty that went back to time immemorial and that was epitomized by Magna Carta, the Petition of Right, the Glorious Revolution of 1688, and the writings of Sir Edward Coke.

I want to close my discussion of the English legal history inheritance of Americans in 1776 by mentioning two specific, important, and famous English cases in which Randy Barnett’s presumption of liberty carried the day. These cases were well known to educated Americans at the time of the Founding.

First, in the *Case of the Monopolies*, which was reported by Sir Edward Coke some years after the case had been decided, the Court of Queen’s Bench, the highest court in England, was asked to rule on the legality of a grant of a monopoly to sell playing cards in the city of London, granted by Queen Elizabeth I to one of her favorites at court.⁴⁰ The monopoly was challenged by a competitor who also wanted to sell playing cards in London. The court held the Queen’s monopoly to be illegal because at common law there was a right to buy and sell non-hazardous products that could only be interfered with by Parliament and not by the Queen acting alone. A presumption of liberty carried the day in this case.

Second, in *Somerset v. Stewart*, the Court of King’s Bench was asked to rule on a petition of *habeas corpus* filed on behalf of an African slave who had been brought by his American owner to London where the owner was conducting business.⁴¹ The case raised a question as

³⁹ Orin Kerr, Is “The Constitution in Exile” a Myth?, Volokh Conspiracy (Dec. 29, 2004), <http://www.volokh.com/posts/1104346631.shtml>.

⁴⁰ [1599] 74 Eng. Rep. 1131.

⁴¹ [1772] 98 Eng. Rep. 499.

to whether people held in slavery in parts of the British Empire became free once they entered England, given that England had no history of slavery and no law sanctioning it. Lord Mansfield ruled for Somerset in 1772 saying that slavery was so odious that it could be suffered to exist only where positive law expressly provided for it. Since under the common law all men had been free, the court ruled that the slave Somerset became free as soon as he entered English waters. Once again, the presumption of liberty carried the day. The case bound all 13 of the American colonies because they had not yet declared independence, and was relied upon by Dred Scott when he argued that he had become a free man once his owner had brought him into Illinois, where slavery was illegal.

In summary, Americans in 1776 were heirs to a long tradition of liberties held since time immemorial under an Ancient Constitution that dated back to Edward the Confessor and the forests of Germany. The United States in 1776 inherited this Ancient Constitution with its presumption of liberty, and all of the liberty-enhancing texts discussed in Part I should be read with this point firmly in mind.

B. Liberty and the State Declarations of Rights, 1776–1787

In May of 1776, George Mason wrote the first draft of the Virginia Declaration of Rights, two months before Thomas Jefferson wrote the Declaration of Independence. The first article of the draft read as follows:

That all Men are born equally free and independant, and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing and obtaining Happiness and Safety.⁴²

George Mason's first draft was adopted in slightly altered form by the Virginia Constitutional Convention in June of 1776. In the Declaration of Independence, Thomas Jefferson rewrote the first clause of George Mason's draft to say: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these

⁴² The Virginia Declaration of Rights (first draft ca. May 20–26, 1776) (on file with Gunston Hall).

are Life, Liberty and the pursuit of Happiness." Thus was born the American creed of liberty.

On September 28, 1776, Pennsylvania adopted a constitution, which began by saying: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." On April 20, 1777, not to be outdone, the state of New York wrote the whole of the Declaration of Independence into its state constitution. The Massachusetts Constitution of 1780 began with the words: "Article I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." And, the New Hampshire Constitution of October 31, 1783 said that "[a]ll men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good."

Even more boldly, the territory of Vermont's Declaration of Rights of July 8, 1777, said:

THAT all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one Years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.

It turns out that in 1791, seven of the 14 states (Georgia, Virginia, New York, New Hampshire, Massachusetts, Pennsylvania, and Vermont) all contained Lockean natural-rights guarantees in their state bills of rights, which provided in effect that:

Article I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may

be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.⁴³

Fifty-nine percent of the population in 1791, when the federal Bill of Rights was ratified, lived in states that had such Lockean guarantees in their state bills of rights. That is a large majority of the population living at the time. Recall that, in *Corfield v. Coryell*, Justice Bushrod Washington recognized all the liberties in the state constitutions mentioned above, although he did say that they could be overridden by “*just laws enacted for the general good of the whole people.*” Monopolies and excessive occupational licensing do not survive review under that standard.

Finally, we cannot finish our discussion of the 1790s without noting that the Marquis de Lafayette, inspired by the American state declarations of rights, in 1789 wrote the following articles of the Declaration of the Rights of Man and of the Citizen:

1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
2. The aim of all political association is the preservation of the natural and imprescriptible rights of man.
3. These rights are liberty, property, security, and resistance to oppression.
4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

It bears repeating that in the fourth article, the French Revolutionaries, anticipating John Stuart Mill by 50 years, explained that “[l]iberty consists in the freedom to do everything which injures no one else.”

The point that should be noted here, however, is that all four of the politically most important of the 13 original American states—Virginia, Pennsylvania, New York, and Massachusetts, joined by three other states—adopted sweeping constitutional Lockean guarantees

⁴³ The clause reproduced is from the Massachusetts Constitution of 1780, but it is substantially similar to the other Lockean natural-rights guarantees.

of liberty by saying that all men are born free; that all men have the right to enjoy life and liberty; that all men have the right to acquire and hold property; and that all men have the right to seek and obtain happiness and safety. In short, the natural-law libertarianism of the Declaration of Independence was written into state constitutional law.

It is important to pause and think about that point for a moment. Justice Scalia sometimes says natural-law language is suited to a declaration of independence but not to a written constitution, which judges must interpret and apply. The Founders disagreed. They wrote judicially enforceable rights to enjoy life, liberty, property, and the pursuit of happiness into the texts of their state constitutions subject to such laws being overridden via just laws enacted for the general good of the whole people. These are fundamental rights that are deeply rooted in American and English history and tradition. The Framers thought this point so important that they made it the first article of their state bills of rights. And, in doing so, they wrote into state constitutional law England's Ancient Constitution with its liberties dating back "to time immemorial." The Framers would have cited Sir Edward Coke back at Justice Scalia as evidence that judges have in the past enforced natural-liberty guarantees.

The original meaning of the Constitution can be understood only in light of the background history under which it was written. We should thus all rise up and overthrow the "Yoke of the *New Deal* Oppression" just as our ancestors 800 years ago overthrew the Yoke of the Norman Oppression in Magna Carta.

C. Liberty and the Fourteenth Amendment

The Fourteenth Amendment was ratified in July 1868. An important window into the rights it protects is provided by state bills of rights as they were written in 1868. Just as the states define the "property" the Takings Clause protects, so too do state bills of right in 1868 define some of the "fundamental liberties" the Privileges or Immunities Clause protects. In July 1868, 24 of the 37 states had Lockean clauses in their state bills of rights.⁴⁴ Those states included such important ones as California, Florida, Illinois, Massachusetts, New

⁴⁴ See Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 *Tex. L. Rev.* 1299 (2015).

Jersey, Ohio, Pennsylvania, South Carolina, Virginia, and Wisconsin. Lockean state-constitution guarantees generally mimicked the language of the Lockean clauses in the original state bills of rights from 1776 on.

The question now is how this historical background of state constitutional law affects our reading of Section 1 of the Fourteenth Amendment. We can start with the Privileges or Immunities Clause. That clause descends directly from the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution and from the Privileges and Immunities Clause of the Articles of Confederation. These two clauses provide that when a citizen of state A travels to state B, he shall enjoy all the civil rights, or privileges and immunities, held by citizens of state B. Citizens of state A who travel to state B do not, however, acquire political rights like the right to vote or to sit on juries unless they explicitly change their state citizenship.

What then are the civil rights to which a citizen of state A is entitled in state B? The answer is all civil rights under the common law of state B, all civil rights under the statutory law of state B, and all civil rights under the constitution of State B. We saw just above that in a majority of the states in 1868, Lockean natural rights would have been among the civil rights or privileges or immunities to which a citizen of state A traveling in state B would have been entitled. It is thus fair to say that the Lockean natural-rights guarantees are privileges or immunities of state citizenship under the Fourteenth Amendment, which no state can abridge except by passing a just law for the general good of the whole people.

What does it mean in practice to say that the Lockean guarantees are incorporated into Section 1 of the Fourteenth Amendment and extended even to states whose constitutions lack such natural-rights provisions? It means that Americans have a constitutional right to enjoy life, liberty, property ownership, and the pursuit of happiness and safety. How does this square with recent Supreme Court case law? I think it means that *Griswold v. Connecticut* was right on Fourteenth Amendment grounds because the ability of married couples to enjoy their liberty and to pursue and obtain happiness and safety is abridged by a state law that forbids married couples from obtaining contraceptives.⁴⁵ The state's defense of the law failed the

⁴⁵ 381 U.S. 479 (1965).

brilliant proportionality review applied to it by concurring Justice Byron White. Justice White in effect showed that the Connecticut law was not a just law enacted for the general good of the whole people. I also think the prevalence of the Lockean clauses when the Fourteenth Amendment was drafted means that *Lawrence v. Texas*⁴⁶ and *Obergefell v. Hodges*⁴⁷ are rightly decided, because gay, lesbian, bisexual, and transgender (LGBT) people cannot enjoy their liberty or pursue happiness and safety unless they have the right to engage in sexual relations and to have their partnerships recognized as marriages by the states. Laws that curtail LGBT rights are not just laws enacted for the general good of the whole people. I do not think the Lockean clauses support *Roe v. Wade*, however, because the whole issue in that abortion case was when does life begin and when do rights attach to the fetus. This, quite simply, is a political question as I have explained in a prior law review article.⁴⁸

So what do the Lockean clauses mean for the Due Process Clause of the Fourteenth Amendment? I think this clause protects only procedural, not substantive due process, as I explained above when I discussed the Due Process Clause of the Fifth Amendment. I therefore think that as a matter of originalist interpretation, the Lockean clauses do not have much to say as to the meaning of the Due Process Clause of the Fourteenth Amendment. Most of the Supreme Court, however, has disagreed, and in *McDonald v. Chicago*, eight of nine justices relied on the Due Process Clause, to discuss whether Second Amendment rights should be “incorporated” against the states—four saying yes, four saying no—although Justice Clarence Thomas provided the decisive pro-incorporation vote by relying on the Privileges or Immunities Clause.⁴⁹ I agree with Justice Thomas.

I find it bizarre that the Supreme Court insists on using the largely artificial doctrine of substantive due process to accomplish what the Privileges or Immunities Clause clearly was meant to accomplish. But if the Court is unwilling to overrule the *Slaughter-House Cases*, it ought to continue using substantive due process to protect rights

⁴⁶ 539 U.S. 558 (2003).

⁴⁷ 135 S. Ct. 2584 (2015).

⁴⁸ Steven G. Calabresi, Substantive Due Process after *Gonzales v. Carhart*, 106 Mich. L. Rev. 1517 (2008).

⁴⁹ 561 U.S. 742 (2010).

that are deeply rooted in American history and tradition, as it said it would do in *Washington v. Glucksberg*, unless it is confronted with a just state law enacted for the general good of the whole people.⁵⁰

The final text of the Fourteenth Amendment that protects liberty is the Equal Protection Clause, which forbids states from adopting discriminatory legislation or executive branch rules. The Lockean clauses speak directly to equal protection since they begin by saying “All men are born free and equal.” The rule of the Lockean clauses, which inform the original meaning of the Fourteenth Amendment, is a rule of birth equality, as Professor Akhil Amar has described it. Thus, under both the Lockean clauses and the Equal Protection Clause, everyone is born equal, including European nobles and serfs; Hindu Brahmins and “untouchables”; Southern slave owners and slaves; newly freed African Americans and white Americans descended from the Mayflower; Chinese, Japanese, and Caucasian Americans; men and women; straight and gay people. All of these groups are *born free and equal* under American constitutional law.

D. Liberty, Equality, and the Constitution: 1868–1945

There remains, however, an important question: If I am right about the Lockean clauses, why has the Supreme Court been so reticent to rely on the Ninth Amendment and the Privileges or Immunities Clause? Why did the Supreme Court wait until the 1930s and 1960s to more fully incorporate the Bill of Rights against the states? Why did the Fourteenth Amendment’s protection of the liberty and equality rights of African Americans lapse so appallingly between 1877 and 1954? Answering those questions will show why originalism leads to libertarian outcomes while living constitutionalism can lead to racism and the loss of constitutional rights.

I mentioned above that the Marquis de Lafayette wrote the French Declaration of the Rights of Man and of the Citizen to include the bold libertarian language of the American states’ bills of rights with respect to all men being born free and equal. The French Declaration is quite wonderful, and today it is part of the constitutional law of France. However, not everyone living in the 1790s shared my enthusiasm for the French Declaration. The English political philosopher Edmund Burke subjected the French Declaration to a blistering

⁵⁰ 521 U.S. 702 (1997).

attack, saying quite falsely that it was the glittering generalities of the French Declaration that had led to the Reign of Terror and to despotism.⁵¹ Thomas Paine wrote in opposition to Burke,⁵² but during the long period of the Napoleonic Wars, English political opinion swung in Burke's direction and toward the conclusion that libertarian bills of rights were a bad thing. Subsequent to Burke, English political philosophy abandoned the natural rights thinking of John Locke for the skepticism of David Hume and the utilitarianism of Jeremy Bentham, who famously said that "Natural rights is . . . nonsense upon stilts."⁵³ It became accepted dogma in Britain and her empire that bills of rights were a bad thing. Thus, the Canadian Constitution of 1867 and the Australian Constitution of 1901 were written to have no bills of rights. It was not until the Holocaust and World War II that bills of rights came back into fashion. Since 1945, almost every country in the world has a bill of rights in its constitution and, in addition, many countries have signed international human rights accords like the European Convention on Human Rights.⁵⁴

Just as the American Founders' belief that all men were born with natural and inalienable human rights came under attack, so too did the idea that "all men are created equal." Thanks to the widespread Lockean clauses, the Framers of the Fourteenth Amendment, who had been moral abolitionists, were deeply committed to the idea that "all men are born free and equal." Yet in 1859, Charles Darwin published his famous book setting forth the theory of evolution, *On the Origin of Species*, and, in 1871, he extended his theory of evolution further by showing that it applied to human beings. Darwin built on the prior work of Thomas Malthus and Herbert Spencer, the latter of whom coined the phrase "the survival of the fittest."

⁵¹ George H. Smith, Edmund Burke, Intellectuals, and the French Revolution, Part I, Libertarianism.org (Mar. 14, 2014), <http://www.libertarianism.org/columns/edmund-burke-intellectuals-french-revolution-part-1> (explaining that "Burke condemned the French *Declaration of Rights* as a 'digest of anarchy'").

⁵² Thomas Paine, *The Rights of Man* (1791).

⁵³ Jeremy Waldron, *Nonsense upon Stilts* (Routledge Revivals): Bentham, Burke and Marx on the Rights of Man (reprint 2014).

⁵⁴ The spreading of bills of rights and of international human-rights agreements after 1945 is extensively described in Steven G. Calabresi, Bradley G. Silverman & Joshua Braver, *The U.S. Constitution and Comparative Constitutional Law: Text, Cases and Materials* 701–834 (2016).

Darwin's first cousin, Francis Galton, picked up on those ideas and started an international eugenics movement.⁵⁵ Three international eugenics conferences were held, and many universities taught courses on eugenics. The history and nature of the international eugenics movement are described in excruciating detail in recent books by Victoria Nourse, Edwin Black, Stefan Kuhl, and Harry Brunius.⁵⁶ The goal of the movement was to ensure the survival of only the fittest human beings by compulsorily sterilizing those who were "feeble minded." All of this was contrary to the idea in the Declaration of Independence that "all men are created equal." Eugenics was implemented first in the United States where it targeted African Americans and so-called white trash.

The Social Darwinist impulse that gave rise to the eugenics movement also gave rise to a burst of European colonialism between 1870 and 1914 in which Europeans conquered many African and Asian nations so that they could take up "the white man's burden" of caring for lesser beings. In the United States, Social Darwinism contributed to the growth of Jim Crow segregation, the resurgence of the Ku Klux Klan, and deepened racism.

By the 1920s, the eugenics movement was supported by intellectuals everywhere, and it was decided that a test case was needed that would legitimize it in the United States.⁵⁷ In *Buck v. Bell*, an eight-justice majority, in an opinion by Oliver Wendell Holmes, blessed the eugenics movement and gave it the imprimatur of Supreme Court approval.⁵⁸ Justice Holmes said in his opinion that:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped

⁵⁵ *Id.* at 730–39.

⁵⁶ Victoria Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near-Triumph of American Eugenics (2008); Edwin Black, War Against the Weak: Eugenics and America's Campaign to Create a Master Race (2012); Stefan Kul, The Nazi Connection: Eugenic, American Racism, and German National Socialism (1994); Harry Brunius, Better for All the World: The Secret History of Forced Sterilization and America's Quest for Racial Purity (2007).

⁵⁷ Nourse, *supra* note 56.

⁵⁸ 274 U.S. 200 (1927).

with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough.⁵⁹

In the wake of *Buck v. Bell*, 60,000 Americans were compulsorily sterilized. The opinion and the American eugenics movement inspired Adolf Hitler, and one of the first things Hitler did upon coming to power in Germany in 1933 was to adopt a eugenics law following the American model. It is hard not to conclude that the endorsement of eugenics in Nazi Germany must have played some role in the Holocaust.

The Holocaust and World War II proved to be so nightmarish that in the 1940s, the tide of intellectual opinion turned back to the idea that “all men are born free and equal.” The Supreme Court essentially overruled *Buck v. Bell* in *Skinner v. State of Oklahoma, ex. rel. Williamson*.⁶⁰ The first two articles of the 1948 Universal Declaration of Human Rights explicitly repudiated eugenics and endorsed the Lockean idea that “all men are born free and equal.” Consider the language below:

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁵⁹ *Id.* at 207.

⁶⁰ 316 U.S. 535 (1942).

Notice how in the Universal Declaration the idea of the survival of the fittest is repudiated in favor of the United States' founding ideal that "all men are born free and equal." In American constitutional law, this marks a return to the original Founding ideal that animated Americans in 1787, in 1791, and in 1868. The rebirth of liberty and equality is a return to the original meaning of the Constitution and the Fourteenth Amendment and a rejection of the evolved meaning as represented by the "separate but equal" of *Plessy v. Ferguson*.⁶¹ Originalism led to liberty and equality in constitutional interpretation. Evolved meaning led to *Plessy*, *Buck v. Bell*, and the Holocaust.

Conclusion

We have seen a stunning rebirth of liberty on originalist grounds in the modern era. Almost all of the Bill of Rights has been incorporated against the states, which is a libertarian outcome. Unenumerated constitutional rights have been recognized under the Fourteenth Amendment, which is a libertarian outcome. The Equal Protection Clause has been read as applying to women and to LGBT people, which is a libertarian outcome. Limits on the enumerated powers of the federal government have been recognized, which is a libertarian outcome. In a host of ways, originalism in constitutional interpretation has led to libertarian outcomes. According to their state constitutions, the American people remain committed to the Lockean clauses that appear in 31 state constitutions today, more than a three-fifths majority of the 50 states.⁶² To put a finer point on it, most modern Americans live in states with Lockean clauses in their state constitutions.

My conclusion is that an original-public-meaning reading of the Constitution as it has been amended leads inexorably to many, although not all, libertarian outcomes. The Ancient Constitution of King Edward the Confessor still has sway over American constitutional law, and I hope only that some day it will allow us to overthrow the Yoke of New Deal Oppression.

⁶¹ 163 U.S. 537 (1896).

⁶² Steven G. Calabresi, Sarah E. Agudo & Katherine L. Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J. L. & Liberty 685 (2015).