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"The House Was Quiet and the World Was Calm The Reader Became the Book"

Burt Neuborne

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“The House Was Quiet and the World Was Calm The Reader Became the Book”*

Reading the Bill of Rights as a Poem: An Essay in Honor of the
Fiftieth Anniversary of *Brown v. Board of Education*

*Burt Neuborne***

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* The title of this piece, which argues for a holistic reading of the Bill of Rights, is drawn from Wallace Stevens’s celebration of the act of reading. WALLACE STEVENS, *The House Was Quiet and the World Was Calm*, in COLLECTED POEMS OF WALLACE STEVENS (1947). Wallace Stevens’s day job was as an officer of the Hartford Insurance Company. For a study of the relationship between Wallace Stevens’s poetry and the law, see TOM GREY, THE CASE OF WALLACE STEVENS (1992).

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Brown was the defining constitutional decision of my lifetime. It began the process of redeeming my country from racism, and inspired me to become a public interest lawyer. I pay homage to the decision by reflecting on the act of constitutional interpretation that underlies our ongoing search for equal justice under law.

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I. INTRODUCTION: OF TEXT AND CONTEXT

Legal text matters. Unlike literature, the text of the Constitution, a statute, or an administrative regulation is designed to be coercive, to implement an unequal relationship between a democratically privileged author and a politically subordinate reader.¹ In a democracy, literary theory assigning hegemony or even parity to the reader cannot be applied to a public legal text without doing serious damage to the political order.² The rub is

1. See Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601-02 (1985) (recognizing that judicial interpretation can be seen as a form of "violence" against individuals who, as a result of a judicial interpretation of the law, may lose their freedom, property, etc.). Public legal texts are addressed to at least two kinds of readers: "implementers" and "targets." Implementers are the government officials who carry a law into effect, ranging from the cop on the beat, to the Chief Justice. Targets are Holmes's "bad men," whose primary behavior a law is intended to regulate. While it is possible to imagine a system that applies different rules of reading to implementers and targets, I do not attempt to explore any potential differences between the two categories of readers. Compare *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (granting substantial authority to implementer) with *Screws v. United States*, 325 U.S. 91 (1945) (refusing to grant authority to target). Most current advice about reading legal text is aimed at implementers, especially judicial implementers. This Article is no exception. Nor do I attempt in this Article to explore the reading of private legal texts, like contracts or wills. See Michael Hancher, *Wills as Poems*, 60 TEXAS L. REV. 507 (1982); MORTON HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860 180-85* (1977) (construction of contracts).

2. See RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 209-68 (1988) (arguing that important differences exist between reading law and reading literature). Judge Posner's approach to law and literature is criticized in Stanley Fish, *Don't Know Much About the Middle Ages: Posner, Law and Literature*, 97 YALE L. J. 777 (1988). For a helpful

that even good-faith judicial readers bent on respecting their subordinate places in the political order cannot be bound by textual constraints that are not there.³ Given the limits of language, imagination, draftsmanship, and politics, many legal texts, especially the necessarily abstract provisions of a Constitution, do not do more than establish a set of parentheses around potential meanings, within which judges arm ambiguous words with coercive power in particular cases. True, the space within the parentheses is often a very small one, either because the textual command is intrinsically obvious,⁴ or because collateral institutional behavior, such as prior judicial construction,⁵ legislative activity,⁶

survey of recent literary theory ascribing significant creative power to the reader, see ELIZABETH FREUND, *THE RETURN OF THE READER: READER RESPONSE CRITICISM* (1987).

3. For examples of criticism questioning the power of legal text to constrain, see, for example, Sanford Levinson, *Law and Literature*, 60 TEXAS L. REV. 373 (1982); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 576-79 (1987); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 45 (1987); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 327 (1980); Mark Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 684 (1982). For a foundational discussion of the constraining power of language, see, for example, J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975), JACQUES DERRIDA, *GRAMMATOLOGY* (Gayatri Charkravorty Spivak trans., 1976), and HENRY STATEN, WITTGENSTEIN AND DERRIDA (1984).

4. For representative cases in three randomly selected terms (October Terms 1989, 1990, and 1991) where the Supreme Court (or at least five members of the Supreme Court) believed that textual "plain meaning" was obvious, see, for example, *Ardestani v. INS*, 502 U.S. 129, 135-37, 139 (1991) (plain meaning of Equal Access to Justice Act precludes award of attorneys' fees against the United States for unjustified commencement of deportation proceedings); *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-76 (1992) (plain meaning of a "person entitled to compensation" includes those who have not yet received compensation and those who have yet to have an adjudication in their favor); *Bus. Guides v. Chromatic Communications Enters.*, 498 U.S. 533, 551 (1992) (plain meaning of Rule 11 renders it applicable to good faith mistakes by represented parties); *Sullivan v. Stroop*, 496 U.S. 478, 482-84 (1990) (plain meaning of term "child support" excludes Social Security insurance benefits); *Dep't of the Treasury v. Fed. Labor Relations Admin.*, 494 U.S. 922, 931-32 (1990) (plain meaning of text requires rejection of contrary administrative construction). *But see Ardestani*, 502 U.S. at 139 (Blackmun, J., dissenting, joined by Stevens, J., arguing the phrase in question is subject to more than one reading); *Cowart*, 505 U.S. at 484 (Blackmun, J., dissenting, joined by Stevens, J. and O'Connor, J.) (same); *Bus. Guides*, 498 U.S. at 554 (Kennedy, J., dissenting, joined by Marshall, J., Stevens, J., and Scalia, J.) (arguing that Rule 11's structure and purpose do not support majority's interpretation); *Sullivan*, 496 U.S. at 485 (Blackmun, J., dissenting, joined by Brennan, J. and Marshall, J.) (arguing that the disputed term means just the opposite); *Dep't of the Treasury v. Fed. Labor Relations Admin.*, 494 U.S. at 934 (Brennan, J., dissenting, joined by Marshall) (same).

5. *E.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 868-69 (1992) (separate opinion of O'Connor, J., Kennedy, J., and Souter, J.) (declining to overrule prior judicial construction of due process clause as protecting abortion rights); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989) (citing past case law to support the broad reach of Section 1983 in supplying a remedy for a state violation of the NLRA); *United States v. United Verde Copper Co.*, 196 U.S. 207, 214 (1905) (declining to overrule a past judicial interpretation of a statute allowing citizens of U.S. territories to cut

administrative interpretation,⁷ or shared convention⁸, has imposed a clearly preferable meaning. Frequently, though, multiple plausible⁹ meanings generate ample space within the parentheses, providing an inescapable arena for judicial choice.¹⁰

Much of the modern debate over reading legal text is about how judges should behave when the space within the parenthesis is substantial.¹¹ The prescriptions range from putting the text down¹²

down timber growing on public lands for use in mining industry). *But see* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (declining to apply prior judicial construction of "arising under" in Article III to same phrase used in federal question statute); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938) (overruling century-old judicial construction of Rules of Decision Act). For a characteristically perceptive discussion of the effect of prior judicial construction on the meaning of the Constitution, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

6. Collateral legislative activity can shed light on the meaning of text in at least three ways: (1) traditional statements of purpose in legislative history; (2) legislative ratification of a preexisting meaning through reenactment or silence; and (3) legislative rejection. For examples of each, see, for example, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) (subsequent legislation helpful in determining meaning of prior statute); FAA v. Robertson, 422 U.S. 255, 265-67 (1975) (subsequent Congressional amendment and oversight indicates acceptance of prior meaning); Seatrain Shipbuilding Co. v. Shell Oil Co., 444 U.S. 572, 595-96 (1980) (view of subsequent Congress helpful in construing ambiguous phrase); Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 586 (1952) (relevance of legislative rejection).

7. Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 844 (1984); A.B.F. Freight Systems v. NLRB, 510 U.S. 317, 324 (1994).

8. STANLEY FISH, *supra* note 3, at 342-44; Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 551-52 (1982); David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 54-55 (1992); Burt Neuborne, *Of Sausage Factories and Syllogism Machines*, 67 N.Y.U. L. REV. 419, 420 (1992).

9. I use the word "plausible" instead of "possible" because linguistic and professional conventions place real limits on the legal meaning of most texts. A ban on "quartering" soldiers must talk about lodging them, not tearing them to pieces. A "right to bear arms" cannot be read to establish an allotment for taxidermists or freedom for illiterate nudity.

10. Steven L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L. J. 821, 821 (1985). *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 670 (1987) (recognizing that "statutory interpretation in the hard cases involves substantial judicial discretion and political judgment").

11. For thoughtful discussions of the issue, see Richard Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE. WES. L. REV. 179 (1986); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PENN. L. REV. 1479 (1987).

12. Frank J. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983); Frank J. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65-66 (1988). Judge Easterbrook's plea to put some ambiguous statutes down, thereby remanding the issue to the legislature, resembles the ban imposed by the French National Assembly on judicial construction of ambiguous statutes in the years immediately following the French Revolution. Beginning in 1790, French judges were obliged, under penalty of criminal prosecution, to refer ambiguous statutes to a committee of the National Assembly for definitive legislative interpretation. Law of 16-24 Aug. 1790, Title II, arts. 2, 3, 10, and 12; 1 DUVERGIER, *COLLECTION COMPLET DES LOIS*, 361, 363 (1924), *quoted in* SIR OTTO KAHN-FREUND ET AL., *A SOURCEBOOK ON FRENCH LAW* 211-13 (2d ed. 1979). The

and/or resorting to the dictionary,¹³ to searching for real¹⁴ or presumed¹⁵ authorial guidance, to elaborate efforts to construct “neutral” tie-breaking mechanisms,¹⁶ to avowed interstitial judicial policy-making.¹⁷

reference system was a disaster. Once the identities of the interested parties became known, the political nature of the National Assembly precluded a principled decision. The remand system was replaced in 1804 by Article 4 of the Code Napoleon making it a crime for a French judge to *refuse* to construe an ambiguous statute. CODE NAPOLEON art 4 (1804). The text of Article 4 reads: Le juge qui refusera de juger sous pretext du silence, de l'obscurite ou de l'insuffisance de la loi, pourra etre poursuivi comme coupable de deni de justice.

13. Justice Scalia has argued most forcefully for use of dictionary meaning. *See, e.g.*, U.S. v. Dixon, 509 U.S. 688, 705 n.10 (1993) (relying on Black's Law Dictionary to interpret the phrase “in connection with a commercial activity”); Republic of Argentina v. Weltover, 504 U.S. 607, 614-15 (1991) (referring to various dictionaries to interpret the term “incident”); California v. Hodari D., 499 U.S. 621, 624 (1991) (referring to Webster's Dictionary to interpret the term “seizure”).

14. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CHI. L. REV. 849, 852-65 (1989) (debating the strengths and weaknesses of originalism and nonoriginalism); Robert Bork, *Original Intent and the Constitution*, 7 HUMANITIES, Feb. 1986, at 26 (explaining that “[t]he originalist attempts to discern the principles the Framers enacted, the values they sought to protect”); RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987). The classic attack on originalism is Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). For sophisticated discussions of whether the Founders themselves viewed their individual intentions as relevant in construing the Constitution, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888, 948 (1985) (arguing that the Founders did not consider authorial or ratifier intent to be relevant) and Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 111 (1988) (arguing that the Founders believed ratifiers' but not authors' intent was relevant). A number of helpful essays on the originalist debate are collected in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990).

15. Ronald Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527, 527-30 (1980); RONALD DWORIN, *LAW'S EMPIRE* ch. 2 (1986); HENRY HART and ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1411 (tent. ed. 1958); Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE WES. L. REV. 179, 212-17 (1986).

16. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 114 (1990). *But see* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

17. Justice William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification Address* (1985), in *INTERPRETING THE CONSTITUTION* 23 (Jack Rakove ed., 1990); Justice William J. Brennan, Jr., Address (July 22, 1983), in 6 U. HAW. L. REV. 1, 3-7 (1984); Frank I. Michelman, *Super Liberal: Romance, Community and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1262 (1991); Stanley J. Friedelbaum, *Justice Brennan and the Burger Court: Policy Making in the Judicial Thicket*, 19 SETON HALL L. REV. 188, 211, 216-19 (1989); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 319, 330-33 (1990); *see also* Burt Neuborne, *The Origin of Rights: Democracy, the Stork, and the Democratic Dilemma*, in *THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS AND RESPONSIBILITIES* 145 (A.E. Dick Howard ed., 1992) [hereinafter Neuborne, *The Origin of Rights*]; Burt Neuborne, *Background Norms For Federal Statutory Interpretation*, 22 CONN. L. REV. 721, 725 (1990); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 899-901 (1989).

Although the prescriptions vary dramatically, common to virtually every modern approach to reading legal text is the paramount importance of context and structure.¹⁸ Whatever one's philosophy of text,¹⁹ unmoored words ripped from their contextual surroundings are notoriously arbitrary raw material for judicial ascription of coercive meaning.²⁰ Two garden-variety cases decided during the 1992 Term of the Supreme Court illustrate the Justices' intense—and admirable—preoccupation with context and structure. In *Rowland v. Men's Advisory Council*,²¹ the Court struggled with whether the word “person” as used in 28 U.S.C. Section 1915 (authorizing *in forma pauperis* litigation) included an association of prison inmates or was confined to individual prisoners.²² The Dictionary Act²³ provided a plausible “plain meaning” textual solution, directing that “person” be read to include natural persons and associations.²⁴ But Justice Souter, writing for five members of

18. Any attempt to use structure as a tool in understanding text, especially constitutional text, owes an enormous debt to Charles Black. See CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); see also CHARLES BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* (1963); CHARLES BLACK, *ESSAYS MOSTLY ON LAW* (1963); Charles Black, *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469 (1984).

My approach to structure differs somewhat from Professor Black's. He argues that the existence of certain institutions implies rights and duties needed to make them work. Thus, his appeal to structure is driven primarily by institutional efficiency. My effort to use structure as a guide to meaning is not driven by institutions, but by the formal order of words and ideas in a text. See FRANK KERMODE, *THE ART OF TELLING: ESSAYS ON FICTION* (1983). I do not believe the two approaches are mutually exclusive. Indeed, they are complementary.

19. Much of the current debate over the nature of legal text turns on whether it is “transparent,” acting primarily as a window into a deeper, authoritative legislative will, or “opaque,” a freestanding, self-contained phenomenon that subsumes the authors' subjective intentions in an objective legal act. Under either an “opaque” or “transparent” view of text, careful consideration of structure and context is a helpful guide to reading it. If, as most judges appear to assume, legal text is “transparent,” paying close attention to structure may well be the best evidence of what the authors intended. If, on the other hand, authorial intention is subordinate to the independent reality of an “opaque” text, respect for structure is a critical means of avoiding the potential for arbitrariness and incoherence that the literal reading of an “opaque” text always risks.

20. I take it that is what Learned Hand meant when he warned that “[w]ords are not pebbles in alien juxtaposition,” *NLRB v. Federbush Co.*, 123 F.2d 954, 956 (2d Cir. 1941), and what Justice Holmes meant when he opined that “[a] word is ... the skin of a living thought.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

21. 506 U.S. 194 (1993).

22. *Id.* at 196-97. Under 28 U.S.C. Section 1915(a), a qualifying indigent “person” may “commenc[e], prosecut[e] or defen[d] . . . any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefore.” Pursuant to Section 1915(d), the court may provide such a “person” with appointed counsel.

23. 1 U.S.C. § 1 (1958).

24. The Dictionary Act provides: “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] person. . . include[s] corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as

the Court, discerned signals sent by the whole document that trumped the text of the Dictionary Act. Since, Justice Souter reasoned, a “person” acting under Section 1915 must execute a qualifying affidavit and may appear *pro se*, the statute’s contextual signals pointed to a natural person, not an association.²⁵

Context and structure fared even better (and literal text fared even worse) in *U.S. National Bank of Oregon v. Independent Insurance Agents*,²⁶ in which the issue was whether a “scrivener’s error” in a 1918 recodification, resulting in improper punctuation materially affecting the statute’s meaning, could be ignored by the courts.²⁷ The Supreme Court held unequivocally that if context and structure is clear enough, it can supplant even the literal text. Justice Souter, writing for a unanimous Court, stated:

Over and over we have stressed that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” . . . No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute’s meaning. Statutory construction “is a holistic endeavor” . . . and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure and subject matter.²⁸

individuals.” Construing the word “person” in different contexts is a legal cottage industry. See JOHN NOONAN, “PERSONS” AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WYTHE AS MAKERS OF MASKS (1976); Sanford A. Schane, *The Corporation Is a Person: The Language of Legal Fiction*, 61 YALE L. J. 563 (1987); Julie Elizabeth Rice, *Fetal Rights: Defining “Person” Under 42 U.S.C. § 1983*, 1983 U. ILL. L. REV. 347. For judicial examples of the effort to give meaning to the term “person,” see, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (state not a person under 42 U.S.C. § 1983); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (United States not a person under Sherman Act); *Georgia v. Evans*, 316 U.S. 159, 162-63 (1942) (State of Georgia is a person under Sherman Act).

25. *Rowland*, 506 U.S. at 199-209. Justice Thomas, writing for Justices Blackmun, Stevens, and Kennedy, disagreed, arguing that the majority’s contextual signals were too equivocal to override the textual command of the Dictionary Act. *Id.* at 212.

26. 508 U.S. 439 (1993).

27. The precise question in *U.S. National Bank* was whether a provision of the United States Code enacted in 1916 authorizing national banks to sell insurance in small communities had been inadvertently repealed by the concededly erroneous placement of quotation marks in a 1918 recodification. The 1952 codifiers of the United States Code took the position that the literal placement of the quotation marks caused the provision to be repealed. Congressional staffers agreed. *Hearings on H.R. 107 and H.R. 6885 Before the Subcomm. on Bank Supervision and Ins. of the House Committee on Banking and Currency*, 89th Cong. 391 (1965). So did the D.C. Circuit in *Indep. Ins. Agents v. Clarke*, 955 F.2d 731, 737 (D.C. Cir. 1992). Regulatory agencies ignored the errant punctuation.

28. *U.S. Nat’l Bank*, 508 U.S. at 455. For a third example of the power of context and structure during the 1992 Term of the Court, see *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993). In *Musick*, the Court used the contextual geography of the Securities Acts of 1933 and 1934 to derive a right of contribution in Rule 10(b)(5) actions. *Id.* at 294-97. The Court reasoned that since Congress had actually provided for rights of contribution in two causes of action explicitly established by the securities acts, it probably would have wished to provide a right of contribution in a judicially implied 10(b)(5) claim. *Id.*

Reasonable people can differ with the Court's outcomes in both *Rowland* and *U.S. National Bank*.²⁹ Weighing ambiguous text against context and structure is not an exact science. But the process of looking for coercive meaning in the context and structure of the document in which the word appears, and not merely at the literal surface of a word or in an increasingly unpersuasive ascription of will to a fictive author seems unimpeachable.³⁰ Surely, this is how we should seek to read our most important legal text—the Bill of Rights.

But we do not even try to read the Bill of Rights as a structural whole.³¹ Instead, we read it as a set of self-contained commands, as if each Amendment, indeed, each clause of each Amendment, and at times, each word of each clause of each Amendment, had been conceived in splendid isolation.³²

at 296-97. When, however, Congress explicitly establishes a cause of action, the Court has refused to infer a right of contribution, deeming Congress's failure to have provided for contribution explicitly as conclusive. *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94-95 (1981); *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 639-40 (1981). Ironically, as with the Court's similar treatment of preemption clauses, *Musick* suggests that sometimes Congress is better off saying nothing than saying too little. See *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 517 (1992) (stating that Congress's enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted). For a discussion of the canon *inclusio unius est exclusio alterius*, see *infra* note 96 and accompanying text.

29. *Rowland* was a 5-4 case. *U.S. National Bank* was unanimous, but the D.C. Circuit did not believe that it was empowered to ignore the literal text. 955 F.2d 731, 734-35 (D.C. Cir. 1992). *Musick* was also closely contested. Justices Thomas, Blackmun and O'Connor dissented from Justice Kennedy's opinion for the Court. *Musick*, 508 U.S. at 298.

30. I do not wish to be drawn into the debate over whether a legal text is a self-contained phenomenon or whether it is merely evidence of authorial will. Under either assumption, the use of structure and context as an aid in reading text can only enhance the project. If the text is self-contained, reference to structure and context provide an important check against the risk of arbitrariness and incoherence latent in both the dictionary and plain meaning approaches. If the text is merely evidence of authorial will, structure and context are important clues in deciding what that will is.

31. Others have noted the failure to read the Bill of Rights holistically. EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 140-44 (1957); Jay Wisnograd, *The Bill of Rights*, 10 PACE L. REV. 609, 610 (1990).

32. For one of the few efforts to read the Bill of Rights holistically, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1132 (1991). Professor Amar's provocative invitation to read the Bill of Rights as a communitarian document yields the powerful insight of a close structural relationship among voting, jury service, and military service. *Id.* at 1164. Professor Amar has applied his holistic technique to the Second Amendment. Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 889-90 (2001) [hereinafter *The Second Amendment*]. There is an obvious affinity between Professor Amar's reading of the Bill of Rights and my suggested approach. Professor Amar appeals to communitarian values and uses intratextual comparison. I stress

II. THE BILL OF RIGHTS IN SPLENDID ISOLATION

We rarely ask why the Bill of Rights is ordered as it is. We do not ask why the First Amendment is first³³ and why the Eighth follows the Sixth and Seventh. We do not ask why the Fourth comes before the Fifth and why the Ninth and Tenth close the document. We do not ask why the almost ignored Second and Third have pride of place over the majestic Fourth, Fifth, and Sixth.

Nor do we ask whether there is a rhyme or reason for the internal order of each amendment. We do not ask why the religion clause treats establishment before free exercise, why the religion clauses precede the speech clause, why both religion and speech precede press, or why the First Amendment closes with the assembly and petition clauses. We do not ask why the Due Process Clause comes after the grand jury and self-incrimination clauses, and what the Takings Clause is doing in the same amendment with double jeopardy and self-incrimination.

In short, we do not ask whether an organizational plan informs the Bill of Rights, whether a structural design exists that can help us read the majestic text holistically. Instead, we read our most precious legal document as though the Founders had thrown a pot of ink at the wall, with the formal order of the Bill of Rights shaped by the splatter. Law professors are among the worst culprits, slicing the Bill of Rights into bite-sized pieces and parceling the fragments out in separate courses.³⁴ It is routine for an American law student to graduate without once having been

the formal order of the words and ideas, in large part because I want to avoid being forced to choose between communitarian and libertarian readings.

33. It is, of course, true that what we call the First Amendment was actually third, since the first two proposed amendments, altering the enumeration rules governing the size of Congress and deferring the effect of Congressional pay raises until the next Congress, were not ratified by a sufficient number of States. Both failed amendments were, however, clearly aimed at correcting perceived flaws in the original text of the Constitution. The addition of a Bill of Rights designed to enumerate and protect basic freedoms clearly begins with the current First Amendment. The text of the original twelve amendments submitted to the states for ratification is set forth in ANNALS OF CONGRESS 808-09 (Joseph Gales ed., 1834) [hereinafter ANNALS OF CONGRESS]. See *infra* note 120 for a discussion of the evolution of the Bill of Rights' final structure. In 1992, the provisions deferring the effective date of a Congressional pay raise until the next Congress were finally ratified by a sufficient number of state legislatures to qualify as the Twenty-seventh Amendment. Whether a ratification process that lasts for more than 200 years is effective is beyond the scope of this Article, although it is highly unlikely that the issue will ever be raised in the context of an amendment that codifies universal political reality.

34. See Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 327-31 (1981) (describing how the liberties protected by the Bill of Rights are presented as discrete subjects in law school curricula).

asked to read the Bill of Rights from beginning to end. The First and Fourteenth Amendments, or some morsels of them, get taught in Constitutional Law, along with mention of fragments of the Fifth Amendment and, occasionally, the Ninth Amendment. The First Amendment itself is ruthlessly divided into religion and speech components, with little attention paid to press, and assembly, and nothing at all to petition. The Fourth Amendment and fragments of the Fifth, Sixth, and Eighth Amendments are taught in Criminal Procedure. The Seventh Amendment is taught in Civil Procedure. The Tenth Amendment is discussed, if at all, in Federal Courts, and the Second and Third Amendments have passed into academic oblivion, although the Second may be making a modest comeback.

Nor do American judges attempt to read the provisions of the Bill of Rights in structural context, opting instead to parse the clause-bound text of each amendment, pulling small clusters of words from the whole and treating each cluster as if it were a self-contained command.³⁵ We are simply not in the habit of looking for an organizational structure, deep or otherwise, in the Bill of Rights in order to read the document holistically.

If, as we appear to assume, the Bill of Rights is a collection of random commands without an organizing principle, the current practice of treating each clause as a randomly-ordered, self-contained whole is inevitable. I believe, however, that an organizing principle undergirds the Bill of Rights—an organizing principle unique in our rights-bearing tradition that, once acknowledged, helps to give coherent meaning to the components that make up the whole. In short, I believe that we should read the Bill of Rights not as a set of commands shouted out in random order by the Founders, but as a great poem celebrating human freedom, with a deep structure that explains why each idea is in its proper place and that advances the poem's themes of democracy, freedom, and human dignity.

35. I will not seek to document the assertion that most American judges do not attempt to take structure and context into account when reading the Bill of Rights. The phenomenon of reading the Bill of Rights in a clause-bound way is so pervasive that virtually any constitutional case supports the proposition. For a relatively rare example of a judicial effort to read the Bill of Rights holistically, see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See also *Boyd v. United States*, 116 U.S. 616, 621-24 (1886) (seeking to build a zone of privacy from the holistic impact of the Fourth Amendment ban on unreasonable seizures and the Fifth Amendment ban on self-incrimination). The attempt at holistic reading has since been rejected. See, e.g., *Fisher v. United States*, 425 U.S. 391, 405-14 (1976); *United States v. Doe*, 465 U.S. 605, 610 n.8 (1984); *United States v. Leon*, 468 U.S. 897, 905-06 (1984). See generally Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977) (discussing how *Boyd* has been replaced by more narrow readings of the Fourth and Fifth Amendments).

My project must clear at least three hurdles. First, I must demonstrate that a discernible organizational plan underlies the Bill of Rights, informing the order in which our rights are described and catalogued. Second, I must assemble evidence that the order of the Bill of Rights was the result of choice, and not random accident.³⁶ Finally, in a later series of pieces, I must persuade a reader that recognition of, and respect for, the structural plan undergirding the Bill of Rights can help us to read its necessarily ambiguous text in a more coherent and principled manner.

III. DOES THE BILL OF RIGHTS HAVE A COHERENT ORGANIZING PRINCIPLE?

The search for an organizing principle for the Bill of Rights begins with description. By my count, the first ten amendments contain thirty-one ideas, in the following order:³⁷

36. Even if the Founders had stumbled onto the structure of the Bill of Rights by chance, the document's disciplined organization would provide an elegant and principled aid in reading it. The power of the document's deep structure as an aid in interpretation is, however, enhanced if I can demonstrate that the Founders intended to impose the structure. By stressing the intentionality of the document's structure, I hope to avoid the debate between originalism and more flexible theories of interpretation.

37. See SOURCES OF OUR LIBERTIES 425-29 (Richard L. Perry and John C. Cooper eds., 1959) (featuring a similar effort to catalogue the contents of the Bill of Rights); see also THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 218 (Eugene V. Hickok ed., 1991).

1. No establishment of religion	17. No taking of property for private use
2. Free exercise of religion	18. Just compensation
3. Free speech	19. Impartial criminal jury trial
4. Free press	20. Speedy and public trial
5. Free assembly	21. Criminal venue - vicinage
6. Petition for redress of grievances	22. Notice of charges
7. Right to keep and bear arms	23. Right of confrontation
8. No quartering troops	24. Compulsory process for defendants
9. No unreasonable searches	25. Counsel in criminal cases
10. No unreasonable seizures	26. Civil jury trial
11. Necessity of warrants	27. No excessive bail
12. Requirement of probable cause	28. No excessive fines
13. Right to Grand Jury	29. No cruel & unusual punishments
14. No double jeopardy	30. Enumerated rights do not preclude other rights
15. No compulsory self-incrimination	31. Powers not delegated to national government are reserved to states and people
16. No deprivation of life, liberty, or property without due process of law	

In searching for a formal organizing principle, the Bill of Rights should be viewed both “vertically,” by looking at the formal order of the ten amendments, and “horizontally,” by looking at the order of the ideas within each amendment.

A. The Vertical Organization of the Bill of Rights

The first ten amendments demonstrate a remarkably coherent “vertical” structure, a structure that is unique in the history of rights-bearing documents in our legal culture.³⁸

The First Amendment unites the six luminous ideas that describe the Founders’ substantive vision of an ideal democratic commonwealth: a place of religious toleration, expressive freedom, and robust political activity. The Second and Third Amendments protect the ideal commonwealth against military subversion. The

38. For a comparison between the structure of the Bill of Rights and the structure of antecedent rights-bearing documents, see *infra* Part IV.A.-D. For an explanation of why the first two original amendments, dealing with Congressional apportionment and Congressional pay raises do not count as integral provisions of the Founders’ Bill of Rights, see *supra* note 33.

Fourth through Eighth Amendments chronologically catalogue the risks to the ideal democratic commonwealth from law enforcement authorities -- and set forth structural protections against each risk. The Ninth and Tenth Amendments close the Bill of Rights by telling future generations how to read the constitutional text when rights and/or powers are at stake.

The First Amendment³⁹ is first, not because of random placement, but because the Founders viewed it as the substantive centerpiece of their efforts, a description of the ideal democratic commonwealth they hoped to found. The first six textual ideas in the Bill of Rights, gathered together in a single text for the first time, recapitulate the life-cycle of a democratic idea, moving in six expanding concentric textual circles from the generative phase of an idea within the mind of a free individual, to the initial expression of the idea to others, to the widespread discussion of the idea with the mass of citizens, to concerted action on behalf of the idea, and, finally, to formal interaction with government in support of the idea.

The Founders understood that the utopian democratic polity imagined in the First Amendment's six ideas was, and is, a fragile one. In an effort to defend it, they surveyed the perceived dangers to their ideal commonwealth, ranked them painstakingly by category and seriousness, organized them chronologically, and provided twenty-three precisely targeted structural antidotes in the Second through Eighth Amendments.

The Second and Third Amendments respond to the Founders' worst nightmare—the fear of military subversion.⁴⁰ The Second Amendment is second, not because of random placement, but because the Founders viewed protection against military

39. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition for redress of grievances." U.S. CONST. amend. I. The precursors of the First Amendment are discussed *infra* at Part III.B.1. No precursor prefigures the organization and structure of the First Amendment's six ideas.

40. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Third Amendment provides: "No soldier shall in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law." U.S. CONST. amend. III. The Founders' understanding that armed subversion by a military force that does not reflect the population as a whole is the chief threat to a democratic polity was remarkably prescient. The fate of many democracies has been shaped more by the sword than the ballot. While even a fully representative military poses a threat to democracy, most *putches* have involved a relatively insular military force that differs in ethnic, racial, and economic background from the target population.

subversion as the next most important task after the description of the ideal democratic commonwealth. Once military subversion had been dealt with in the Second and Third Amendments, the Founders turned to the next most troublesome threat to the First Amendment's ideal commonwealth—abuse of the law enforcement power. The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments are a meticulously organized, chronological overview of the criminal justice system, with structural protections against abuse imposed at each stage. The Fourth Amendment monitors the investigation stage, placing it under judicial supervision by requiring warrants and probable cause prior to search, seizure, or arrest.⁴¹ The Fifth Amendment deals with interrogation and formal accusation, providing safeguards to an individual once the investigation stage has narrowed the focus to a particular suspect.⁴² The Sixth and Seventh Amendments govern adjudication in criminal and civil contexts, assuring a fair trial once a defendant has been formally

41. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

42. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

charged or sued.⁴³ The Eighth Amendment limits the power to punish, once an accused has been found guilty.⁴⁴

It is possible, of course, that the chronological precision with which the Fourth through Eighth Amendments track investigation, interrogation, accusation, adjudication, and punishment is simply an accident. But I doubt it. The best reading is to accept the Fourth through Eighth Amendments as a holistic package, to be read in harmony with the rest of the Bill of Rights.

Finally, the Founders ended the Bill of Rights on a logical note with thoughtful instructions to future generations about how to read the Constitution's text. The last two ideas in the Bill of Rights, codified in the Ninth and Tenth Amendments, attempt to deal with the pitfalls inherent in relying on something as slippery as words both to describe human rights and to limit the powers of a feared sovereign.⁴⁵ The debate over the efficacy and wisdom of a Bill of Rights indicates that the Founders had a sophisticated understanding of the risks inherent in using words to catalogue fundamental human rights and to delineate the boundaries of a complex federal system. They understood that future readers would have a choice between two hermeneutic traditions. One tradition, linked to the British concept of "equity of the statute," would invite future readers to extend the literal text to analogous settings under

43. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

The Seventh Amendment provides:

In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

44. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

45. The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

appropriate circumstances.⁴⁶ The rival tradition, linked to the canon of *inclusio unius est exclusio alterius*, would forbid future readers from going beyond the strict literal text. Simply put, I argue that the Founders closed the Bill of Rights by announcing two metacanons of constitutional construction embracing the concept of textual expansion through analogy when future disputes about rights were at stake,⁴⁷ while forbidding the use of analogy as a device to increase government power. The eminently sensible instruction to future generations to read the rights-bearing provisions of the Bill of Rights generously, while reading the power-granting provisions of the Constitution narrowly, may well have been the Founders' greatest structural triumph.

Such a careful vertical order may have been random, but I doubt it.

B. The Horizontal Organization of the Bill of Rights

A careful plan is also evident when one views the "horizontal" organization of each amendment, as well as the "vertical" structure of the first ten amendments as a whole. Consider, for example, the unmistakable "inside out" horizontal order of ideas in the First Amendment.

1. The First Amendment: The Life-Cycle of a Democratic Idea

The First Amendment rightly begins in the interior recesses of the human spirit with protection of religious conscience. The Founders understood that respect for the interior freedom of the mind is the indispensable starting point of democratic politics. The Establishment Clause operates deep inside the individual psyche, in the private precincts of religious conscience, by assuring that no person is forced to affirm or support a religious belief he or she does not hold.⁴⁸ The iconic role played by *West Virginia Board of*

46. See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (criticizing Equity of the Statute doctrine as an inadequate tool for modern Constitutional interpretation).

47. See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (using analogy to expand beyond literal text of the First Amendment to insert a nontextual idea - freedom of association).

48. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-16 (1947) (reciting the history of the Establishment Clause). Madison was unable to persuade his colleagues to expand the protection of religious conscience in the Establishment Clause to a general protection of conscience. See *infra* note 151 and text accompanying note 186. Whether the Free Speech Clause should be read to expand the protection of religious conscience by analogy to cover aspects of secular conscience is discussed *infra* text accompanying note 187. See generally *United States v. Seeger*, 380 U.S. 163, 187-88 (1965) (holding that an individual met the

*Education v. Barnette*⁴⁹ in our First Amendment jurisprudence flows, not merely from Justice Jackson's inspired rhetoric, but from our intuitive recognition that coerced affirmations of belief, especially religious belief, gnaw at the human spirit like nothing else.

The Free Exercise Clause takes an incremental step outwards, protecting the ability to manifest deeply felt religious beliefs. Although some tension has arisen between the two Religion Clauses in the modern era,⁵⁰ their side-by-side placement in the text reveals that they are two sides of the protection of internal belief: the Establishment Clause protects against coercion of belief while the Free Exercise Clause protects its expression.⁵¹

The Free Speech Clause, the third idea in the text, continues the movement outward toward increasing interaction with other persons. The transitional nature of the Free Speech Clause is reflected in its Janus-like nature, looking inward toward the self-expressive nature of speech, and outward toward the instrumental effect of speech on others.⁵² Not surprisingly, the twin concerns of individual dignity and institutional efficiency underlying modern First Amendment theory mirror the transitional nature of the Free Speech Clause.

requirement of belief in a "Supreme Being" needed to qualify as a conscientious objector where the individual's motives for refusing service were primarily secular); *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (holding that a secular belief that opposed war is sufficient to qualify as a conscientious objector).

49. 319 U.S. 624 (1943). We often overlook the fact that the objection to compulsory flag salutes in *Barnette* was religiously based. *Id.* at 629.

50. For examples of the tension between a ban on governmental activity that fosters religion and an effort to assist individuals in freely exercising their religion, see, for example, *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13-14 (1993) (holding that a deaf student enrolled in a private school is entitled to sign language interpreter at public expense); *Rosenberger v. Rector & Visitors of the Univ. Of Virginia*, 515 U.S. 819, 842-45 (1995) (providing funding to religious student organization at public university is not a violation of the Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002) (holding that voucher program authorizing expenditure of state funds in school of parents' choice did not violate the Establishment Clause where money could be spent in religious schools); *Locke v. Davy*, 124 S.Ct. 1307 (2004) (rejecting free exercise challenge to refusal to fund devotional studies).

51. The Court's willingness in *Employment Division v. Smith*, 494 U.S. 872 (1990), to uphold unintended government violations of religious conscience without requiring a showing of serious social need appears inconsistent with the structural primacy accorded to conscience by the Founders.

52. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 57 (1948) ("Individual self-seeking has been given the same constitutional rating as national provision for the general welfare."); Edmund Cahn, *The "Firstness" of the First*, 65 YALE L. J. 464, 470-475 (1956) ("[T]he freedoms embodied in the First Amendment must always secure paramountcy.").

The Free Press Clause continues the outward movement, protecting forms of communication aimed at a mass audience. The Free Assembly Clause intensifies the inside out progression, protecting interaction with others in pursuit of collective goals. Finally, the Petition Clause closes the First Amendment by protecting the right to interact with government itself.

Given the inside out progression of the First Amendment, the outward-looking political act of petitioning for redress of grievances could not come before the Janus-like act of speech, and neither could precede the inward-looking concerns with religious conscience and belief. Despite such a precise organizational plan, however, I know of no case seeking to use the First Amendment's inside out structure as a help in reading its components. At a minimum, the careful inside out progression of ideas in the First Amendment reflects two important truths that should help us in reading it: (1) the structural primacy the Founders granted to belief and conscience, especially religious conscience; and (2) the sophistication of the Founders' understanding of the deep structure of democratic self-government. The formal order of the First Amendment draws a road map of democracy for us, from the genesis of an idea in the mind of a free citizen, to its initial communication to others, to mass dissemination of the idea, to collective action in advancement of the idea, to formal enshrinement of the idea in law.

2. The Second and Third Amendments: Preventing Military Overthrow

The most immediate danger to the ideal commonwealth envisioned by the Founders, both in terms of impact, chronology and likelihood, was subversion by force of arms. That is why the all-important description of the ideal democratic commonwealth in the First Amendment is immediately followed, in the Second and Third Amendments, by two structural protections against subversion by the military: the right to bear arms and the right to be free from military quartering of troops.

The formal order of the Second Amendment contains the only preamble in the Bill of Rights, a clause explaining the importance of a "well regulated militia" to a free people, followed by a substantive protection of the right to keep and bear arms. Current readings of the Second Amendment ignore its formal structure. One reading simply ignores the militia preamble, focusing on the libertarian right to possess weapons. One reading

privileges the preamble, subordinating the right to own a weapon to the participation in a militia that no longer exists. The Supreme Court's current reading borrows the worst of both, reading the amendment to protect ownership of weapons that were once used in the militia, but nothing else—the right to bear muskets.

A structural reading that seeks to give equal weight to both clauses reveals a very different Second Amendment. The Founders understood that the greatest threat to a democratic polity is the emergence of an “unrepresentative” armed force isolated from of the population it is designed to serve. By protecting the entire population's “right to keep and bear arms” as participants in a “well regulated,” universal militia, the Founders hoped to prevent the emergence of a dangerous imbalance between the organs of armed coercion and the general population.⁵³ Recapturing the crucial egalitarian role the Founders envisioned for the Second Amendment as a prophylactic against the development of a dangerous disconnect between the organs of armed coercion and segments of the people is one of the benefits of reading the Bill of Rights holistically.

The structural key to the Second Amendment is the Founders' insight that the military poses a unique threat to democratic governance whenever a marked imbalance emerges between the makeup of the “people” and the makeup of the army.⁵⁴ The organs of armed coercion known to the Founders were profoundly threatening precisely because they were profoundly unrepresentative.⁵⁵ Eighteenth century standing armies were often

53. Amar, *The Second Amendment*, *supra* note 32, at 892; see also David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 469-72 (1999) (“[T]he Framers' Amendment rested on the idea that the right to revolution inhered in the ‘body of the people’ – a homogeneous, united citizenry that would rise up against a small set of tyrannical usurpers.”); Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 910 (2004) (reviewing DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003)). (“[T]he point of the Second Amendment is ... to ensure that the Body of the People retains the capacity to rise up and overthrow an oppressive government.”).

54. Concern with the unrepresentative nature of the organs of armed coercion was a staple of republican thought. *E.g.*, J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT* 416 (1975); John Trenchard & Thomas Gordon, *Cato's Letters No. 94*, reprinted in *THE ENGLISH LIBERTARIAN HERITAGE* 222-23 (David L. Jacobson ed., 1965).

55. George Mason captured the ethos of his age when he warned that “[w]here once a standing army is established in any country, the people lose their rights.” George Mason, Address at the Virginia Constitutional Convention (June 14, 1788), reprinted in NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS* 192 (1997). Elbridge Gerry explicitly stated during Congress's discussion of the Second Amendment: “What, sir, is the use of a militia? It is to

made up of mercenaries with no ties whatever to the polity.⁵⁶ Even when drawn from the indigenous population, the eighteenth century military was a caste apart.⁵⁷ Moreover, law enforcement in the eighteenth and early nineteenth centuries was often a private responsibility, leading to widespread self-help and to the persistence of private armed bands.⁵⁸ Finally, “select” militias drawn from an unrepresentative slice of the community posed a real threat of armed faction.

Faced with such unrepresentative institutions of armed coercion, the Founders turned in the Second Amendment to the idea of a universal “well regulated” citizens’ militia as the ultimate democratic deterrent to armed oppression.⁵⁹ Madison said it most clearly in *Federalist No. 46*:

[i]f a standing army were used to oppress the people]. . . [t]o these would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by [state] governments possessing their affections and confidence⁶⁰

To the Founders, the very idea of the militia was defined by its inclusionary, representative nature, and by the exclusionary, unrepresentative nature of the organs of armed coercion against which it was to be deployed.⁶¹ The antidote to armed subversion provided by the Second Amendment was an assurance that the ominous imbalance between the people and the wielders of armed force would be bridged by a universal citizens’ militia.

Of course, the universal citizens’ militia imagined by the Founders never existed. Even at its romantic peak, the citizens’ militia movement excluded blacks and women, to say nothing of

prevent the establishment of a standing army, the bane of liberty.” ANNALS OF CONGRESS, *supra* note 33, at 749-50.

56. DOUGLAS E. LEACH, *ROOTS OF CONFLICT: BRITISH ARMED FORCES AND COLONIAL AMERICANS, 1677-1763* 4 (1986); Andrew Fletcher, *A Discourse of Government with Relation to Militias*, in *SELECTED POLITICAL WRITINGS AND SPEECHES* 10 (David Daiches ed., 1979).

57. LAWRENCE D. CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812* 10 (1982).

58. Carol S. Steiker, *Second Thoughts on First Principles*, 107 HARV L. REV. 820, 830-38 (1994).

59. See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L. J. 551, 572 (1991) (discussing the Founders’ preference for a popular militia over a standing army because of the risk that an army would be usurped by the executive).

60. THE FEDERALIST NO. 46, at 264 (James Madison), *reprinted in* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS (E.H. Scott ed., 2002).

61. *Id.* at 577-79.

religious dissenters and the poor.⁶² Moreover, whatever vitality the militia concept may have had in the Founders' time, it certainly did not survive the nineteenth century. The Civil War destroyed political support for the idea of autonomous state or local armies. The rise of the "citizens' army" under Napoleon, and its tragic perfection during the American Civil War, eliminated the spectre of an alien and unrepresentative military standing apart from the citizenry. Moreover, the establishment of democratically controlled police forces in urban areas during the nineteenth century lessened the risk from privately armed law enforcers.

The nineteenth century shift to at least nominally representative institutions of armed coercion drained the idea of a universal citizens' militia of its functional importance. Indeed, in a real sense, the citizens' army and the democratic police force became the universal citizens' militia in microcosm. Originally conceived as a check on unrepresentative organs of coercion, the militia's theoretical role atrophied when the very institutions of coercion it was designed to check evolved into a citizens' army and a professional, democratically accountable police force.⁶³ Since a universal militia was no longer needed as a check on a representative citizen's army and a police force that were scaled-down versions of the militia itself, the very idea of a universal, armed citizens' militia disintegrated, leaving the Second Amendment entangled in its ruins.

Despite the demise of the militia concept, however, the modern Second Amendment retains its importance as one of the most important structural protections in the Bill of Rights. Read structurally, it continues to provide a critical bulwark against the emergence of a dangerous imbalance between armed forces and the people. The disappearance of the universal citizens' militia was premised on one critical assumption—the representative nature of the newly evolved organs of armed coercion. But if, as has been the case at every stage of our national existence, our organs of armed coercion are not representative because segments of the population

62. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-American Re-consideration*, 80 GEO. L. J. 309, 323-27 (1991).

63. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 150-55 (1993) (examining the nineteenth century evolution of American law enforcement agencies in becoming more militaristic and accountable to municipal and state governments); David H. Bayley, *Police: History*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1120, 1124-25 (Sanford H. Kadish ed., 1983) (discussing the centralization and professionalization of American police forces beginning in Boston in 1837); RAYMOND B. FOSDICK, AMERICAN POLICE SYSTEMS 58-117 (1920) (analyzing the evolution of American systems of law enforcement from colonial times to the early twentieth century).

are systematically denied the right to serve, the ominous gap between force and freedom re-emerges, at least for the excluded groups. It is at this critical point that the "right to keep and bear arms" in the modern Second Amendment plays its contemporary role by enforcing the promise of universal access to service in the contemporary citizens' militia—police and the military.

The Founders understood that a group systematically excluded from the organs of armed coercion will inevitably be treated as second-class citizens and will fall prey to private terror. Nowhere is the wisdom of the Founders' understanding better illustrated than by the tragic relationship between black Americans and armed force. Initially enslaved by force of arms, black Americans were not permitted to serve in the military until 1862. Once the Civil War was won, they were excluded from the officer corps. Even when allowed to serve, it was in segregated battalions, consigned to second-class status. Black Americans were also systematically excluded from the professional police forces that emerged after the Civil War. At the same time, they were the sustained targets of private, armed mobs like the Ku Klux Klan. It was not until the desegregation of the armed forces by President Truman in 1947 that legal barriers were removed to equal service in the military. Equal access to police forces still remains difficult to achieve.⁶⁴

The surprising, deeply egalitarian structural protection of the Second Amendment is that no group—not blacks, not women,⁶⁵ not gays⁶⁶—can be excluded from "the right to keep and bear arms"

64. See generally *Washington v. Davis*, 426 U.S. 229 (1976) (upholding examination for police recruits that disproportionately excluded African Americans in absence of a showing of intentional discrimination).

65. Women continue to be denied equal access to the armed forces. See generally *Rostker v. Goldberg*, 453 U.S. 57, 78-83 (1981) (upholding exclusion of women from military conscription). Much progress has, however, been made. See generally *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (prohibiting different standards of spousal benefits for male and female members of the armed services). Equal access to careers in law enforcement remains difficult to achieve for women. See *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 & n.22 (1977) (holding that it is not a violation of Title VII for women to be denied employment as prison guards where the jobs are deemed to be too dangerous for women).

66. Gays remain barred from the military and the police. Until they are present in substantial numbers in the organs of armed coercion, history and the Second Amendment warn that they will not achieve equal status in the society. Prior to 1981, although no formal regulation forbade service by gays in the military, informal policies resulted in numerous discharges. In *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978), the court ruled that a statement of reasons was required in connection with a decision to refuse to permit a gay person to serve in the military. In response, the Defense Department promulgated a series of Defense Directives requiring the discharge of gays. 46 Fed. Reg. 9571 (Jan. 29, 1981) (to be codified at 32 C.F.R. pt. 41). The flat ban on service in the

as equal participants in our contemporary institutions of armed coercion without risking the ominous imbalance between the “people” and the wielders of armed force that the Founders identified as the most serious threat to the First Amendment’s ideal commonwealth.

Unfortunately, the Second Amendment is currently mired in a series of unsatisfactory readings that mask its egalitarian underpinnings. One reading treats the amendment as a relic of pre-Civil War federalism⁶⁷ designed to protect autonomous state militias against the regulatory powers granted to Congress in the body of the Constitution.⁶⁸ As a textual matter, the federalism reading privileges the first clause of the amendment describing the importance of a “well regulated militia,” but it subordinates the second clause assuring the “people” the “right to keep and bear arms.” Moreover, with the demise of a strong theory of states’ rights after the Civil War, the political idea of autonomous state armies became all but obsolete. Thus, a federalism-driven Second

military by gays has been questioned by several courts. *See* *Pruitt v. Cheney*, 963 F.2d 1160, 1167 (9th Cir. 1991) (recognizing the plaintiff’s equal protection claim for discharge from the Army because of her homosexuality and remanding the case); *Falk v. Sec’y of the Army*, 870 F.2d 941, 947 (2d Cir. 1989) (failing to uphold the constitutionality of a “regulation discharging military personnel for their status as homosexuals”); *Stefan v. Aspin*, 8 F.3d 57, 70 (7th Cir. 1989) (holding that the Department of Defense Directives that compelled the plaintiff’s resignation because of his sexual orientation violated the equal protection component of the Fifth Amendment’s due process clause), *rehearing en banc granted and judgment vacated* (1994); *Watkins v. United States Army*, 875 F.2d 699, 712-716 (9th Cir. 1989) (Norris, J. concurring) (arguing that the army’s regulations “directly burden the class consisting of persons of homosexual orientation”); *Matthews v. Marsh*, 755 F.2d 182, 183-84 (1st Cir. 1985) (remanding for further consideration upon notice of additional evidence proving homosexual conduct as opposed to merely homosexual intent). *But see* *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (leaving the decision to the legislature and allowing the Army to regulate as it pleased until regulated by the legislature). The 1981 regulations were superseded by so-called “Don’t Ask - Don’t Tell” regulations, permitting gays to serve in the military if they do not reveal their sexual orientation. *See* Defense Directive 1332.14 (Dec. 21, 1993).

67. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 95, 227 n.76 (1980) (asserting that the Second Amendment was clearly directed toward well-regulated militias of colonial times); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 229 n.6 (2d ed. 1988); *see also* *United States v. Miller*, 307 U.S. 174, 178 (1939) (interpreting the Second Amendment as protection for the “preservation or efficiency of a well-regulated militia”).

68. Article I, Section 8 provides:

The Congress shall have power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions: To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. CONST. art. I, § 8.

Amendment does little more than provide extremely limited autonomy to state National Guard units which, in any event, remain subject to federalization at the President's option.⁶⁹ In effect, the federalism reading consigns the Second Amendment to historical irrelevance.⁷⁰

The alternative, individual rights reading of the Second Amendment, views it as a broad guarantee of the personal right to own firearms, an individual right that survives the demise of the "well regulated" citizens' militia.⁷¹ A constitutionally protected right to own firearms, argue individual rights readers, is necessary to reinforce individual autonomy and to check governmental tyranny. As a textual matter, the individual autonomy reading privileges the second clause of the amendment protecting the "right to keep and bear arms" at the expense of the amendment's "well regulated militia" preamble and fails to explain how the uncontrolled proliferation of privately owned firearms enhances the "security of a free state."

The Supreme Court's highly tentative reading of the amendment is an amalgam of the federalism and individual rights positions.⁷² Accepting the federalism argument that the amendment's principal purpose was the protection of state militias against congressional incursion, the Court has confined the protection of the amendment to the ownership of "arms" that might have been useful for militia service.⁷³ Thus, the amendment does

69. See Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L. Q. 961, 998 (1975) (citing *Presser v. Illinois*, 116 U.S. 252 (1886), for the idea that the Second Amendment merely protects members of state militias, primarily from disarmament by the federal government).

70. Williams, *supra* note 59, at 596, 602.

71. See generally STEPHEN HALBROK, *THAT EVERY MAN BE ARMED* 84-87 (1984) (arguing that the Second Amendment should be interpreted as a protection of individual rights to bear arms); Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) (same); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989) (same).

72. The Court has considered the Second Amendment on five occasions: *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) (Second Amendment does not protect a convicted felon's right to own a firearm); *United States v. Miller*, 307 U.S. 174, 178 (1939) (Second Amendment does not apply to ownership of weapons not useful for militia service, such as sawed off shotguns); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (refusing to apply Second Amendment against the states during pre-incorporation times); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (same); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (establishing that the Second Amendment does not protect against private violence). See also *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (warning that if African-Americans were deemed "citizens" they would have the right to keep and bear arms).

73. *Miller*, 307 U.S. at 178

not protect ownership of sawed-off shotguns.⁷⁴ But, apparently accepting aspects of the individual rights position, the Court has suggested that individual ownership of certain kinds of weapons (hunting rifles, for example) may be protected, even after the demise of the militia system.⁷⁵

Unfortunately, the Supreme Court's tentative approach borrows the worst of both worlds. If the Second Amendment was designed simply to preserve an autonomous state militia system that did not outlive the Civil War, it is unclear why it should provide any protection for private ownership of guns. On the other hand, if its protections survive the demise of the state militia system, it is unclear why the Second Amendment's protection should be confined to the ownership of weapons that threaten animals but pose no real check against the power of the modern state. Where, for example, should a Court wedded to militia usefulness theory place handguns (or antitank weapons) in its hierarchy of weapons?

Thus, I fear that existing readings of the Second Amendment protect too little, too much, or an arbitrary middle. Read as a structural guaranty of equal access to service in the police and the military, however, the Second Amendment can recover the vibrancy and significance of its original role as one of the most important provisions of the Bill of Rights. When the Second Amendment protects the "right to keep and bear arms" in the context of a "well regulated militia" designed to assure the "security of a free state", the Second Amendment assures the representative nature of the organs of armed coercion in a free society. Thus, "the right to keep and bear arms" is not the right to function as an autonomous armed island, but the right to participate equally in the common defense of the community through equal access to service in representative institutions of armed coercion.

Failure to permit otherwise qualified gays to serve in the military and the police violates the Second Amendment. Failure to include otherwise qualified women in the military draft and in combat positions violates the Second Amendment. Any rule that excludes a qualified segment of the citizenry from equal service in the armed organs of coercion creates precisely the ominous

74. *Id.*

75. *Id.* at 182 (recognizing that different states established varying degrees of protection of individual rights to bear arms).

imbalance between force and freedom that the Second Amendment is designed to prevent.⁷⁶

The Third Amendment, banning the quartering of troops in peacetime and requiring Congressional assent in wartime, is quite obviously designed to protect civilians from military occupation. One of the most fortunate aspects of our history has been the lack of a need to explore modern analogues of the Third Amendment's structural protection against military control of civilian society.⁷⁷

3. The Fourth Through Eighth Amendments: Regulating Law Enforcement

With the threat of armed subversion dealt with by the Second and Third Amendments, the Founders turned to the next most serious set of perceived threats, abuse of the law enforcement power. The twenty-three ideas in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments are a chronologically organized set of structural protections against abuse of civilian law enforcement authority keyed to the four classic law enforcement phases: (1) investigation; (2) prosecution; (3) adjudication; and (4) punishment.

The Fourth Amendment regulates the investigatory phase, placing it under judicial supervision and requiring probable cause and precise warrants before a search, seizure, or arrest. The Fourth Amendment, thus, continues the Founders' concern with abusive use of armed force, this time at the hands of the civilian authorities.⁷⁸

76. One objection to an equality reading of the Second Amendment is that it is redundant of the protections of equality in the Fifth and Fourteenth Amendments. There are, however, at least two powerful responses to such an objection. First, the Second Amendment long predated the explicit introduction of equality into the Constitution. Second, by providing a targeted protection for armed service, the Second Amendment should strengthen the protection of equality, much as the establishment and speech clauses of the First Amendment intensify protections that may also be analyzed as violations of equal treatment. For example, if equal access to armed service is protected by the Second Amendment as well as the Fifth, exclusionary techniques may be tested under an "effects" standard, as opposed to the "intent" standard governing equal protection challenges. See generally *Washington v. Davis*, 426 U.S. 229, 239-245 (1976) (discussing the different standards applicable under the Fifth Amendment for due process and under the Fourteenth Amendment for equal protection).

77. Contrast the suspicion latent in the Third Amendment with our current willingness to permit federal military personnel to vote in state and local elections. See *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (invalidating under the Fourteenth Amendment a Texas law that kept servicemen from voting in the state).

78. For a comprehensive review of Fourth Amendment jurisprudence, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). The civilian law enforcement authorities contemplated by the Founders did not include large professional police forces, which did not evolve until the middle of the nineteenth century. Instead,

The Fifth Amendment kicks in once the investigation has narrowed its focus to a particular target (typically after an arrest), ushering in the prosecution phase. The Founders' continuing concern with abusive use of force is reflected in the ban on self-incrimination, which was widely seen as a structural protection against torture. The Fifth Amendment also requires indictment by a Grand Jury, forbids multiple prosecution for the same offense, requires that government follow due process of law, and, finally, limits the government's power to seize private property without a public purpose and fair compensation.

The Sixth and Seventh Amendments govern the adjudicatory phase, assuring jury trials in both criminal and civil settings, as well as notice, venue, confrontation, compulsory process, and counsel in criminal trials. The Eighth Amendment provides protection during the punishment phase, banning excessive fines, cruel and unusual punishments, and excessive bail.

Concern with the abusive use of force is at the core of the Eighth Amendment. Thus, fears about abusive use of force underlie the Second Amendment (abusive use of force by military), part of the Fourth Amendment (abusive use of force by the police), part of the Fifth Amendment (abusive use of force by the police and prosecution), and the Eighth Amendment (abusive use of force by courts and prisons).⁷⁹

Thus, in strict chronological order, the law enforcement provisions of the Bill of Rights limits the government in the following ways:

- (1) selecting a target for investigation (4th);
- (2) investigating a target once selected (4th);
- (3) restraining or searching a target once investigated (4th);
- (4) interrogating a target once restrained (5th);
- (5) charging a target once interrogated (5th);
- (6) prosecuting a target once charged (5th);
- (7) convicting a target once prosecuted (6th and 7th); and
- (8) punishing a target once convicted (8th).

civilian law enforcement was the province of bounty hunters, individual officials, and/or *ad hoc* bodies, often using temporary personnel provided by powerful private interests or drawn from the local population.

79. Given such a careful effort to build constitutional bulwarks against abusive use of force in virtually every imaginable setting, the Court's narrow reading of the Eighth Amendment to deny protection against the abusive use of force in schools and mental institutions is doubly unfortunate. See *Ingraham v. Wright*, 430 U.S. 651, 664-71 (1977) (declining to extend Eighth Amendment protection to schoolchildren); *id.* at 683 (White, J., dissenting, joined by Brennan, J., Marshall, J., and Stevens, J.) (disagreeing with the majority's narrow reading of the Eighth Amendment).

No rights-bearing document in our tradition comes close to such organizational precision. Once again, however, I know of no modern case seeking to read the Fourth through the Eighth Amendments as a coherent whole.

4. The Ninth and Tenth Amendments: Rules of Reading

Current readings of the Ninth and Tenth Amendments are trapped at the extremes. According to a number of judges and scholars, the judicially enforceable Bill of Rights ends with the Eighth Amendment. They read the two closing amendments as "truisms,"⁸⁰ or "ink blots."⁸¹ Others read the Ninth and Tenth Amendments as climactic events empowering judges to protect individual rights⁸² and develop a theory of federalism⁸³ without regard to the prior constitutional text.

Neither extreme reading is palatable. The minimalist reading is openly disrespectful of the Constitution's text. The Ninth and Tenth Amendments make up 20 percent of the Bill of Rights. The ideas, indeed the texts, of each were demanded by the state ratifying conventions,⁸⁴ were an integral part of Madison's June 8th

80. *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (labeling the Tenth Amendment a "truism"), *overruling* *Hammer v. Dagenhart*, 247 U.S. 251 (1918). *Cf.* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 560 (1985) (Powell, J., dissenting) (allowing Congress to enforce minimum wage and overtime provisions on the states, while the dissent argues that this ruling renders the Tenth Amendment meaningless).

81. Robert Bork analogized the Ninth Amendment to an ink blot. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Part I: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 249 (1987) (analogizing the Ninth Amendment to an ink blot because he thought it was difficult to interpret the amendment outside of a specific context). In fairness, Bork's characterization was a metaphor for the difficulty of finding substantive rights in the Amendment, a position I share.

82. For efforts to read the Ninth Amendment as an independent source of rights, see Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988), reprinted in revised form in *James Madison's Ninth Amendment*, 1 THE RIGHTS RETAINED BY THE PEOPLE 1 (Randy E. Barnett ed., 1989). See generally Norman Redlich, *Are There "Certain Rights . . . Retained By the People"?*, 37 N.Y.U. L. REV. 787 (1962) (outlining the background against which the rights retained by the people from the Ninth and Tenth amendments are judicially decided).

83. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985); *id.* at 579 (Rehnquist, J., dissenting); *id.* at 582-85 (O'Connor, J., dissenting). Chief Justice Burger and Justice Powell also dissented in *Garcia*.

84. Versions of what became the Ninth and Tenth Amendments were demanded by ratifying conventions in Massachusetts (February 6, 1788); South Carolina (May 23, 1788); New Hampshire (June 21, 1788); Virginia (June 25, 1788); New York (July 26, 1788); and North Carolina (Nov. 21, 1789). Each of the minority requests for amendments from Delaware, Maryland, and Pennsylvania contained a request for a version of the Ninth and Tenth Amendments. See COGAN, *supra* note 55, at 634-35, 674-75.

proposals⁸⁵ and were never questioned during the drafting and ratifying process.⁸⁶ It seems cavalier, especially for critics who claim to hew most closely to the Founders' will, to ignore such a large and intensely desired slice of their textual handiwork.

But the other extreme—using the Ninth and Tenth Amendments as free-standing sources of judicially enforceable rights and powers—is also disrespectful of the text. Licensing judges to pick and choose new personal rights with only the text of the Ninth Amendment as an anchor is a positivist version of natural law;⁸⁷ reading the Tenth Amendment as a general authorization to develop a nontextual, judicially enforceable theory of federalism is a judicial blank check.

Reading the Ninth and Tenth Amendments structurally as “second order” directions to future readers about how to read the Constitution's text avoids both extremes.⁸⁸ Read as canons of constitutional construction, the Ninth and Tenth Amendments neither merely take up space on the page, nor generate nontextual, free standing norms. Rather, they provide a logical end point to the text of the Bill of Rights by seeking to minimize the risks to the ideal commonwealth posed by the Founders' reliance on words to describe and preserve it.

85. See 1 ANNALS OF CONGRESS, *supra* note 33, at 452 (articulating James Madison's original version of the Ninth Amendment submitted to Congress on June 8).

86. Although the text of Madison's initial formulation was modified, the amendments were never seriously questioned. For the debates concerning the Ninth and Tenth Amendments, see COGAN, *supra* note 55, at 627-35, 642-43, 656, 663-74, 681-84, 698.

87. I have nothing against natural law. In authoritarian settings, natural law provides an indispensable rallying point for adherents of human rights. Moreover, even in democratic regimes, natural law provides valuable insights into the way people ought to behave. But, given its essentially subjective content, I question its role as a measure of how people must behave in a democracy. See Burt Neuborne, *The Evolution of Rights, the Stork and the Democratic Dilemma*, in THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS AND RESPONSIBILITIES 145, 146 (A.E. Dick Howard ed., 1992) (exploring the origins of rights, asserting that rights are not only “freestanding substantive phenomena” but are also “the real-world consequences of a complex institutional interplay that acts to deflect error”).

88. Reading the Ninth and Tenth Amendments as “second order” rules governing the construction of the “first order” rules in the text finds support in Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI-KENT L. REV. 177, 189 (1988) and in Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment?* 64 CHI-KENT L. REV. 239, 240-41 (1988). See also Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI-KENT L. REV. 211, 211-12 (1988) (analyzing the structure and ramifications of a “judicially enforceable unwritten constitution” that is based on “certain constitutional customs and practices, and their associated values and ideals”). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 34-41 (1980) (outlining different approaches used to interpret the Ninth Amendment).

Heirs to several hundred years of English hermeneutic tradition,⁸⁹ the Founders understood that their attempt to harness the power of words in the service of freedom could backfire in at least three ways. First, they feared that an incomplete or inadequate textual description of individual rights might result in a premature freezing of the concept.⁹⁰ Madison explicitly alluded to this concern in his June 8th speech introducing the Bill of Rights:

It has been objected also against a Bill of Rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against.⁹¹

Second, the Founders feared that the power of government might be inadvertently enhanced by a construction of the text that implied the existence of powers from the enumeration of rights.⁹²

89. For a comprehensive survey of the Founders' hermeneutical tradition, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888-902 (1985), reprinted in INTERPRETING THE CONSTITUTION 53-61 (Jack Rakove ed., 1990). See also DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* (1989) (advancing a reinterpretation of eighteenth century attitudes to social change and law reform).

90. The clearest expression of Madison's concern with the risk of underinclusion is in THE FEDERALIST NO. 37, at 194, 198 (James Madison), reprinted in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS (E.H. Scott ed., 2002) (inadequacy of words to convey complex ideas). See also Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 WRITINGS OF JAMES MADISON 271-272 (Gaillard Hunt ed., 1904):

[T]here is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely to be by an assumed power. . . .

For an expression of similar concern by Thomas Jefferson, see 3 WORKS OF THOMAS JEFFERSON 4, 13, 101 (P. Ford ed., 1892-1899).

91. It is at this point in his speech that Madison describes his initial version of the Ninth Amendment that provided:

The exceptions here or elsewhere in the Constitution made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

1 ANNALS OF CONGRESS, *supra* note 33, at 452.

92. The clearest expression of Hamilton's concern with the negative pregnant latent in a Bill of Rights is THE FEDERALIST NO. 84, at 469-70 (Alexander Hamilton), reprinted in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS (E.H. Scott ed., 2002); see also THE FEDERALIST NO. 44, at 250-52 (James Madison), reprinted in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS (E.H. Scott ed., 2002) (analyzing the adoption of the "necessary and proper" clause and the ramifications of enumerating all powers in the Constitution).

James Wilson put the issue most clearly in the Pennsylvania Ratifying Convention:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights that cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt enumeration, everything that is not enumerated, is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.⁹³

Third, they feared that incremental erosion of the power of the states might occur through reading the text of the Constitution as granting implied national powers.⁹⁴

The Founders' first two semantic concerns—fear of an inadequate or incomplete description of rights and fear that enumerating rights might imply residual governmental powers—reflected the Founders' fears about how the text of the Bill of Rights would be read. The third concern dealt, not with reading the Bill of Rights, but with possible expansive readings of the body of the Constitution. All three concerns were driven, however, by a sophisticated understanding of an enduring uncertainty at the core of the English hermeneutic tradition.

By the end of Henry VIII's reign, English lawyers were engaged in a debate about how to read the directives flowing in an increasing stream from parliament.⁹⁵ The debate pitted literalists

93. JONATHAN ELLIOT, 2 DEBATES OF THE STATE CONSTITUTIONS ON THE FEDERAL CONSTITUTION 436 (2d ed. 1836). John Ely has criticized Wilson's conflation of rights and powers as a "category mistake." ELY, *supra* note 88, at 35-36.

94. As the dispute between Hamilton and Jefferson over the constitutionality of Congress's effort to create a national bank in 1791 reveals, fears over implied national powers must be distinguished from arguments about how to read the "necessary and proper" clause. Compare Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, 8 THE PAPERS OF ALEXANDER HAMILTON 97, 101-08 (Harold C. Syrett ed., 1965) (arguing that a fair reading of the "necessary and proper clause" permits some activities not explicitly mentioned in the Constitution and arguing for a much broader reading of the word "necessary" than Jefferson, rendering the Tenth Amendment irrelevant), with Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (1791), reprinted in THE WORKS OF THOMAS JEFFERSON 284 (P. Ford ed., 1892-99) (failing to make the distinction and arguing that the Tenth Amendment forbids any national activity not expressly mentioned in the Constitution). Hamilton argues that a fair reading of the "necessary and proper clause" permits some activities not mentioned explicitly, rendering the Tenth Amendment inapplicable.

95. For the earliest known English work on the interpretation of statutes, dating from the late sixteenth century, see SAMUEL E. THORNE, AN INTRODUCTION TO THE DISCOURSE ON THE MEANING AND INTERPRETATION OF STATUTES (Huntington Library 1942). See generally SIR CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF (1677) (defining Acts of Parliament and divisions of statutes and discussing different interpretation methods of statutes). Since Sir Christopher Hatton died

armed with the canon *inclusio unius est exclusio alterius*⁹⁶ against the liberal construction crowd armed with the tradition of “equity of the statute.”⁹⁷ Unlike *inclusio unius*, which hews strictly to literal text, equity of the statute invites a judicial reader to extend literal text to cover closely analogous settings.⁹⁸ As Lord Coke, the preeminent lawyer of his age noted, in 1628:

[T]he equitie is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms.⁹⁹

Eighteenth century American legal culture recognized both hermeneutic traditions as legitimate, unpredictably applying one or the other in different contexts, much as we veer wildly today between literal and equitable readings of legal texts.¹⁰⁰

in 1591, Professor Thorne suggests that the publisher of the Hatton treatise “modernized” it prior to publication. For the treatment of earlier statutes, see THEODORE F.T. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* (R.H. Helmholz et al. eds., William S. Hein & Co. reprint 1980).

96. For cases applying *inclusio unius* to statutes in derogation of the common law, see *Ash v. Abdy*, 36 Eng. Rep. 1014 (Ch. 1678) and *Brown v. Barry*, 3 U.S. 365, 367 (1797) (deciding that the intention of the legislature prevails despite “any rule of construction declared by previous acts to the contrary”).

97. The concept of the equity of the statute is traceable to ARISTOTLE, *NICOMACHEAN ETHICS* 174-75 (Christopher Rowe transl., 2002). Equity of the statute is discussed in THORNE, *supra* note 95, at 140-154; HATTON, *supra* note 95, at 44-53 (discussing the equity of the statute and applying the equity interpretation to specific statutes of the time); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *61. *Heydon’s Case*, 76 Eng. Rep. 637 (Ex. 1584); is generally viewed as a principal judicial articulation of the doctrine.

98. See generally W. H. Loyd, *The Equity of a Statute*, 58 U. PA. L. REV. 76 (1909-10) (discussing the equity of the statute); James McCauley Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS (1934), reprinted in 2 HARV. J. ON LEGIS. 7 (1964-65) (same); Frederick J. deSloovere, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591, 591-604 (1935-36); S.E. Thorne, *The Equity of a Statute and Heydon’s Case*, 31 Ill. L. Rev. 202 (1936); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (recognizing a growing respect for legislation, as opposed to the historical deference to common law). The best modern treatment is in John F. Manning, *Textualism and Equity of the Statute*, 101 Colum. L. Rev. 1 (2001).

99. SIR EDWARD COKE, *COKE ON LITTLETON* (1628); Co. Litt. Lib. I, Ch. II, sec. 21, fol. 24b, quoting Bracton’s definition. Plowden discusses the equity of the statute in his report of *Eyston v. Studd*, 15 Eng. Rep. 688, 698 (C.B. 1573): “So that when the words of a statute enact one thing, they enact all other things which are in the like degree.”

100. For applications of equity of the statute in the United States, see *United States v. Freeman*, 44 U.S. 556, 565 (1845); *Simonton v. Barrell*, 21 Wend. 362, 365 (N.Y. Sup. Ct. 1839); *Hoguet v. Wallace*, 28 N.J.L. 523, 525-27 (N.J. 1860); *White v. Carpenter*, 2 Paige 217, 229 (N.Y. Ch. 1830); *Hersha v. Brenneman*, 6 Serg. & Rawle 2, 4 (Pa. 1820). The cases are drawn from LANDIS, *supra* note 98, at 11, 28 n.12. The history of equity of the statute in the United States is discussed in FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS*, 283-89 (William G. Hammond ed., 3d ed. 1880) and in BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF LAWS*, 42 (1896). Statutes in derogation of the common law were quickly removed from equity of the statute in favor of literal construction. *Brown v. Barry*, 3

It was, I believe, the Founders' understandable inability to predict with confidence which hermeneutic tradition—*inclusio unius* or equity of the statute—would influence the reading of what constitutional text that was the moving force behind the Ninth and Tenth Amendments.

As I have noted, Madison and Hamilton each feared that *inclusio unius* might be incorrectly applied to the text of the Bill of Rights to freeze the catalogue of rights prematurely and to imply a grant of power up to the limits of each express right. Similarly, Jefferson feared that equity of the statute might be incorrectly applied to the body of the Constitution to increase the power of the national government through the engine of implied powers.

The Ninth Amendment deals with the Madison's fear by instructing, or at least authorizing, future readers to apply the flexible construction techniques associated with equity of the statute when reading the Bill of Rights.¹⁰¹ Unlike the effort to read

U.S. 365 (1797). But equity of the statute survived in other statutory settings well into the nineteenth century. Indeed, under other rubrics, its spirit survives today. In Great Britain, the flexible approach to text that characterizes equity of the statute gradually gave way to a belief that parliamentary supremacy required rigid adherence to the literal text. See *Jones v. Smart*, 1 T.R. 44, 52 (Eng. 1785) (“[A] cause omissus,” observed Buller, J., “can in no case be supplied by a court of law, for that would be to make laws.”). Dean Landis has suggested that the eagerness of British judges to surrender the “equitable” power to expand statutes flowed from a lack of sympathy with the British parliamentary reform movement. LANDIS, *supra* 98, at 8-12. He noted that equity of the statute retained vitality in the United States until a similar judicial reaction against Jacksonian reform. *Id.* It is a paradox of statutory construction that the greater the ostensible judicial fidelity to legislative supremacy, the harder it may be for the legislature to effect broad changes in the *status quo*. When judges insist they must defer to the literal text, they shift an insuperable linguistic burden to the legislature. Given the limitations of language, legislators need judges as full partners in the reformative enterprise if their joint handiwork is to effect significant change in the *status quo*. Union organizers - and conservative judges - have long known that the best way to subvert a text is a rule book slowdown.

101. The Supreme Court has not developed a consistent institutional reading of the Ninth Amendment. Prior to *Griswold v. Connecticut*, 381 U.S. 479 (1965), the amendment's existence had scarcely been judicially acknowledged. Douglas's opinion for the Court recognized “penumbras” formed by “emanations” from the text. *Id.* at 484. While Justice Douglas's reading of the Ninth Amendment in *Griswold* is consistent with treating it as a canon of construction, he is vague about precisely how the canon works. See *Lubin v. Panish*, 415 U.S. 409, 722 (1974) (referring to the right to vote as a right retained by the people in the Ninth Amendment or as a penumbra of the First Amendment); *Doe v. Bolton*, 410 U.S. 179, 210 (1972) (arguing that though the Ninth Amendment does not create “federally enforceable rights,” it protects those retained rights that fall “within the sweep of the ‘the Blessings of Liberty’ mentioned in the Preamble to the Constitution”); *Palmer v. Thompson*, 403 U.S. 217, 231 (1970) (discussing that if some activity falls within the “penumbra of the policies of the Thirteenth, Fourteenth or Fifteenth Amendments,” then it should also “be in the category of those enumerated rights protected by the Ninth Amendment”); *Lewis v. United States*, 385 U.S. 206, 206-07 (1966) (concluding that no violation of the Fourth Amendment occurred when an undercover agent was invited to the plaintiff's home to participate in a drug deal, the deal was consummated, and the narcotics confiscated and later used in a criminal trial

the Ninth Amendment as a free standing source of rights, reading it as an authorization to use equity of the statute forces a judicial reader to cleave closely to the constitutional text. Equity of the statute takes as its point of departure a careful study of the text to determine its structure, underlying purpose, and animating principle. Applying Ninth Amendment equity of the statute to the Bill of Rights, a "nonliteral" personal right may be judicially recognized only if it is fairly derived from the constitutional text pursuant to one (or perhaps all) of three traditional equitable construction techniques:

(1) the nonliteral personal right must fit comfortably within the text;

(2) it must be necessary to the full enjoyment of a textual guarantee; and/or

(3) it must be so analogous to a literal right that it would be arbitrary to enforce one and not the other.

Justice Harlan's addition of a seventh, nontextual right—freedom of association—to the First Amendment's six textual ideas is a classic example of Ninth Amendment equity of the statute in action.¹⁰² If the First Amendment were read strictly in accordance with *inclusio unius*, the textual protection of "assembly" but not "association" would argue against Justice Harlan's pathbreaking decision in *NAACP v. Alabama*. But the Ninth Amendment freed Justice Harlan from the constraints of *inclusio unius* and challenged him to read the First Amendment against the background of the equity of the statute. As an exercise in applying the equity of the statute, interpolating freedom of association into the First Amendment is a walk in the park, meeting all three

against the plaintiff). Justice Goldberg's celebrated separate opinion in *Griswold*, 381 U.S. at 486-99, joined by Chief Justice Warren and Justice Brennan, argued that the Ninth Amendment authorized judicial recognition of a right of marital privacy. While Justice Goldberg's analysis fails to distinguish precisely between reading the Ninth Amendment as a source of substantive rights or as a canon of construction, his opinion is more consistent with a substantive rights reading. Other Justices have also interpreted the Ninth Amendment. *Hodson v. Minn.*, 497 U.S. 417, 447 (1990) (Stevens, J.); *Mass. v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J.); *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 579 (1980) (Burger, J.); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (Blackmun, J.). Chief Justice Burger's use of the Ninth Amendment in *Richmond Newspapers* comes very close to the technique urged in this Article. See Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 102 (1987) (underscoring the importance of the Ninth Amendment in enabling the court to expand protection of liberties under the Fourteenth Amendment for an entire line of right-to-privacy cases).

102. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *NAACP v. Button*, 371 U.S. 415, 437 (1963).

criteria for Ninth Amendment equity of the statute. As a textual matter, association fits neatly between press and assembly, filling out the idea of collective action. Association is, moreover, necessary to the full enjoyment of several textually guaranteed First Amendment rights such as speech and assembly. Finally, association is so closely analogous to textually described First Amendment rights that it would be arbitrary to protect one but not the other. Thus, when Justice Harlan used analogy and inference to insert a seventh idea—association—into the First Amendment, he was true to the ethos of the Ninth Amendment and the deep structure of the First.

Reading the Ninth Amendment as an authorization to use equity of the statute gives the amendment real bite.¹⁰³ It permits judicial readers to “perfect”¹⁰⁴ the text of the Bill of Rights (especially the First Amendment) by filling interstices, implying necessary adjuncts, and analogizing. Of course, the decision whether to exercise the Ninth Amendment power to interpolate, imply, and analogize will often be a controversial one, provoking intense disagreement over its wisdom and propriety.¹⁰⁵ Being empowered by the Ninth Amendment to eschew literalism and *inclusio unius* thinking does not mean that it is always proper to do so. Thus, recognizing the Ninth Amendment’s role as a permissible canon of construction is only the first step to developing a judicial philosophy about when to invoke it. Disagreement over whether a power is being wisely exercised is, however, a far cry from a claim that the power does not exist at all.

103. In addition to the First Amendment applications discussed *supra* and *infra* in text accompanying notes 102-105, equity of the statute can help explain the recognition in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), of a nontextual equality right in the Fifth Amendment and clarify whether the prohibition on cruel and unusual punishment in the Eighth Amendment should be extended from prisons to schools, mental hospitals, and the military. See *Ingraham v. Wright*, 430 U.S. 651, 671 (1977) (holding that the Eighth Amendment was meant to apply to criminal procedures and is not applicable to corporal punishment in schools). Equity of the statute does not, however, help untangle the “incorporation” controversy or tell us whether the Eighth Amendment bars the death penalty. Those issues deal, not with the application of analogy, inference, or implication to existing text, but with the related task of giving precise meaning to ambiguous text.

104. The citation is intended to honor, but disagree with, Henry Monaghan’s *Our Perfect Constitution*, 56 N.Y.U.L. REV. 353, 396 (1981).

105. Despite invitations, the Supreme Court has, thus far, declined to analyze education as a First Amendment right. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 36 (1971) (addressing appellee’s contention that education is a fundamental right because it is essential to the effective exercise of First Amendment freedoms, the Court held, “[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech ...”).

Conversely, the Tenth Amendment deals with Jefferson's fear that future readers would use analogy and inference to expand the power of the national government at the expense of the states. Where questions of national power are at stake, the Tenth Amendment forbids the use of implication and analogy, commanding the use of *inclusio unius* to avoid undue accretions of central authority.¹⁰⁶ Unlike the effort to read the Tenth Amendment as a source of substantive federalism rights, reading it as a constitutional canon of construction does not invite a judge to develop a nontextual theory of federalism. It focuses judicial attention, instead, on the critical question of whether the best reading of an enumerated power actually authorizes the challenged federal action or whether the case involves an effort to expand beyond enumerated powers by the use of implication and analogy.¹⁰⁷ For example, rather than asking whether the Tenth Amendment substantively trumps a virtually unlimited conception of the commerce power,¹⁰⁸ reading the Tenth Amendment as a canon of construction would force a court to ask whether the best reading of the Commerce Clause actually authorized the government regulation or whether the Commerce Clause was being used as a springboard for an implied national power to do more than regulate commerce.¹⁰⁹ Such an exercise might cast doubt on the current practice of permitting a Rube Goldberg-like *de minimis*

106. See *infra* Part V.A. for a discussion of narrow construction techniques mandated by the Tenth Amendment.

107. Codifying *inclusio unius* should not be confused with a general command to read enumerated powers narrowly, any more than equity of the statute requires a broad reading of personal rights. The celebrated disagreement in 1791 between Hamilton and Jefferson over the constitutionality of the Bank of the United States illustrates the point. See *supra* note 94. Hamilton argued that the power to charter a national bank was contained in a fair reading of both the commerce clause and the necessary and proper clause. *Id.* Jefferson disagreed, arguing that the Tenth Amendment forbade the exercise of any national power not explicitly mentioned in the Constitution's text. *Id.* In my opinion, Jefferson's position begs the central question of whether the power to create the Bank was, in fact, granted by a fair reading of either or both of the commerce and the necessary and proper clauses. Jefferson's reading of the Tenth Amendment would not only forbid implied powers, but also require an extremely narrow reading of enumerated powers. *Id.* Thus, I believe that Hamilton has the better of the argument, at least as it implicates the Tenth Amendment. Reasonable people can disagree on the merits with Hamilton's expansive reading of the necessary and proper clause, but not because it violates the Tenth Amendment.

108. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842 (1976) (recognizing that under the Tenth Amendment, Congress cannot use the commerce clause in a fashion that interferes with the "States' integrity or their ability to function effectively in a federal system.").

109. Justice Harlan suggested such an approach in his decision in *Maryland v. Wirtz*, 392 U.S. 183, 198 (1968).

impact on interstate commerce to justify virtually unlimited intrusions into a state's reserved police powers.¹¹⁰

There are several troublesome textual placements. If the First Amendment is rigorously organized on an "inside out" axis, with rights flowing from the core of the human spirit outwards to formal political interaction with the State, shouldn't free exercise come before establishment? Which is a greater intrusion into the interior realm of spirit: refusing to permit worship or requiring involuntary support of someone else's worship?

In fact, in Madison's original June 8th formulation, protection of worship preceded establishment.¹¹¹ Establishment is placed before free exercise for the first time in the July 28th draft of the Committee of Eleven.¹¹² On balance, though, it seems right—certainly defensible—to treat establishment as the greater intrusion. George Orwell tells us that a state-compelled affirmative act of betrayal is vastly destructive of the human spirit, even more destructive than a prohibition.¹¹³ The Founders apparently thought so, too.

A more troublesome placement is the Takings Clause at the close of the Fifth Amendment. If the Fifth Amendment is about control of the power to initiate formal proceedings, why does it close with a protection against the unfair taking of private property? And, what is a clause protecting private property against unfair taking by the government doing in the same amendment as the privilege against self-incrimination, the privilege against double jeopardy, and the right to a grand jury indictment? The answer lies, I believe, in the relation of the Takings Clause to the immediately preceding Due Process Clause.

The first three clauses of the Fifth Amendment—grand jury, double jeopardy, and self-incrimination—protect against the state's power to initiate formal criminal proceedings. The last two

110. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding de minimis impact of school gun violence on interstate commerce does not justify congressional imposition of Gun Free School Zones Act under commerce clause power).

111. Madison's original June 8 version provided: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." BERNARD SCHWARTZ, 5 *THE ROOTS OF THE BILL OF RIGHTS* 1026 (1980).

112. The August 15 version of the Committee of Eleven provided: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 1088.

113. See generally GEORGE ORWELL, 1984. It is, I suggest, no coincidence that the most lyrical defense of the First Amendment in our literature was evoked by an attempt to compel a betrayal of religious conscience by schoolchildren. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (holding that schoolchildren cannot be forced to pledge allegiance to the flag over religious objections).

clauses—Due Process and Takings—prevent the state from acting summarily, either by depriving a target of life, liberty, or property without due process of law or by seizing a target's private property for an improper purpose or at an unfair price. Thus, at the moment the state has completed its investigation and decided on initiating coercive action against a particular target, either criminal or civil, the Due Process and Takings Clauses are logically placed to assure that state power cannot be used to short-circuit the important protections provided in connection with adjudication and punishment. The Fifth Amendment closes, therefore, with a thoughtful effort to prevent government from avoiding the adjudicatory protections provided in the Sixth and Seventh Amendments, at exactly the point when the temptation to do so would be greatest.

Finally, why is the excessive bail clause placed in the Eighth Amendment dealing with punishment? One answer is that excessive bail is a form of summary punishment, imposing incarceration without trial. Another is that the ban on excessive bail had been linked historically with the ban on excessive fines in an attempt to control the financial aspect of the criminal process.¹¹⁴ Rather than sever the two, the bail clause was simply linked to the fine clause in the punishment Amendment—not elegant, but defensible.

114. A similar formulation was contained in the preexisting constitutions of at least six states. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 90 (Madison House ed., 1992).

If I am right, the deep structure of the Bill of Rights looks like this, with candidates for equity of the statute protection listed in brackets:¹¹⁵

1. *Description of the Ideal Commonwealth:*

Internal dignity:

religious conscience: no establishment of religion
 free exercise of religion
 [secular conscience:]
 dignitary speech
 [right to privacy]
 [education]

External communication:

instrumental speech
 free press
 [access to mass media]

Collective behavior:

assembly
 [association: political, social, intimate]

Political action:

petition for redress of grievances
 [voting]
 [fair political representation]
 [ballot access]
 [funding the democratic process]

2. *Defense of the Ideal Commonwealth Against Military Threat:*

equal right to participate in modern organs of armed coercion
 no quartering of troops in peacetime

3. *Defense of Ideal Commonwealth Against Law Enforcement Threat:*

Abuse of Power to Investigate:

prior judicial control over search, seizure, arrest
 specificity of warrants

115. For another effort at setting forth the Bill of Rights in schematic form, see Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 218 (Hickock ed., 1991).

Abuse of Power to Prosecute: Interrogation and Accusation:

grand jury indictment
 no double jeopardy
 no self-incrimination
 due process
 no taking except for public purpose/just compensation

Fair Adjudication:

speedy/public trial
 criminal juries
 criminal venue and vicinage
 notice of charges
 confrontation
 compulsory process
 paid counsel in criminal cases
 [appointed counsel in criminal cases]
 civil juries
 [appointed counsel in civil proceedings]

Abuse of the Power to Punish

excessive bail
 excessive fines
 cruel and unusual punishments
 [schools]
 [mental institutions]
 [military]

4. Interpretive Guidelines:

involving personal rights:
 equity of statute authorized

involving national government powers:
inclusio unius compelled

IV. IS THE STRUCTURE OF THE BILL OF RIGHTS THE RESULT OF CONSCIOUS THOUGHT?

Skeptics may legitimately object at this point that the structure suggested in Part III is so obvious that it was inevitable or, alternatively, that it was merely a random event. Either the structure imposed itself, or monkeys on a typewriter produced it. In neither case should the structure be taken as an act of will by the

Founders.¹¹⁶ But the skeptics would be wrong. A study of the antecedents of the Bill of Rights and the contemporaneous textual sources make clear that the disciplined structure of the Bill of Rights was not inevitable and certainly did not happen by chance.¹¹⁷

The textual history of the Bill of Rights taps four sources: (1) English documents, (2) Colonial charters, (3) Revolutionary declarations, and (4) Contemporaneous formulations. None share the structure of the Bill of Rights.¹¹⁸

A. The English Documentary Sources

Conventional historical analysis cites four English documents as primary antecedents of the Bill of Rights: the Magna Carta; the English Petition of Right (1628); Cromwell's Agreement of the People (1649) and the English Bill of Rights (1689).

English rights-bearing documents are said to begin in 1215 with the Magna Carta. The numerous substantive and procedural rights set forth in the Magna Carta do not appear to have anything

116. Even if the structure were random, it would provide an elegant and principled method of interpreting the Bill of Rights. Even an unintentional structure is helpful in giving the best reading to text. When, however, the structure is intentional, its power as an interpretive guide is magnified.

117. Most of the documents discussed in this section are assembled in chronological order in Bernard Schwartz's multivolume compilation *THE ROOTS OF THE BILL OF RIGHTS*. The House debates (there is no record of the Senate debates) leading up to the adoption of the Bill of Rights are chronicled in 5 SCHWARTZ, *supra* note 111, at 1050-1140. See also COGAN, *supra* note 55; *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner, eds. 1987). In preparing this Article, I used the multivolume Schwartz compilation because it reproduces the relevant texts in chronological order. Cogan's extremely useful compilation is particularly valuable in tracing the chronological evolution of a particular clause. There is, of course, a vast historical literature on the intellectual origins of the Constitution and Bill of Rights. Among the leading works are BERNARD BAIYLYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (2d. ed. 1992) and J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975).

118. I confess to a certain cavalier approach to the texts that follow. I attempted to isolate the provisions that ultimately find their way into the Bill of Rights, ignoring the often revolutionary ideas that led to the body of the Constitution. The result of such an approach is to drain the historical documents of much of their coherence and intellectual importance. Such a process appeared necessary, however, in order to test for the antecedents of the organizational structure of the Bill of Rights.

in common with the final structure of the Bill of Rights,¹¹⁹ except that rights of religious conscience are listed first.¹²⁰

The English Petition of Right (1628), often cited as an antecedent to the Bill of Rights, contains several ideas that ultimately find their way into the document, but in no semblance of their final order:¹²¹

- (1) no deprivation of liberty or property without judgment of peers or due process of law - (5th, 6th, and 7th)
- (2) no quartering of troops - (3rd);
- (3) limits on martial law - (2nd, 3rd, and 5th.)

Cromwell's Agreement of the People (1649), also contains several ideas that eventually appear in the Bill of Rights but without anticipating its organizational structure:

- (1) limits on military draft - (2nd)
- (2) respect for common right and private property - (5th)
- (3) limited rights of religious conscience - (1st)

The most elaborate of the English antecedent documents was the English Bill of Rights (1689). Once again, while the document contains a number of important ideas that reappear in the Bill of Rights, the organizational structure does not closely prefigure the later document, although the beginnings of a structure are present:

- (1) right of petition - (1st);
- (2) no standing army in peacetime - (2nd and 3rd);
- (3) Protestants alone may bear arms for defense - (2nd);
- (4) no excessive bail, excessive fines, or cruel and unusual punishments - (8th);
- (5) jurors properly empanelled - (6th and 7th);
- (6) no fines without conviction - 5th

119. I do not assert that the Magna Carta lacks an organizing principle. A better understanding of its historical context might well reveal a disciplined structure. For my purposes, I need merely assert that the organizational structure of the Magna Carta does not prefigure the structure of the Bill of Rights.

120. The ideas that eventually find expression in the Bill of Rights are noted in Table A of the Appendix, *infra*.

121. In the material that follows, I identify the ultimate placement in the Bill of Rights in parenthesis immediately after a paraphrase of the English documentary provision. As I have noted, the description of the English documents is incomplete, since I make no effort to list the provisions in the English documents that ultimately found their way into the text of the Constitution itself.

While the four principal English rights-bearing documents do not prefigure the internal structure of the Bill of Rights, two organizational points do emerge. Rights of religious conscience and petition for redress of grievances open two of the three documents in which they appear, and protections against military oppression occur in all four major documents, in three of them at or near the document's beginning. Thus, by the time of the English Bill of Rights in 1689, a very rough outline of our Bill of Rights—a substantive description of religious and political rights, followed by protection against military incursion, followed by protection against civilian abuse—began to take shape.

B. The Colonial Charters

Colonial charters were the second set of rights-bearing textual antecedents of the Bill of Rights. As with the English historical documents, colonial charters contain many ideas that reappear in the Bill of Rights, but none has an organizational structure that resembles the Bill of Rights.

Three of the most elaborate colonial charters—the Massachusetts Body of Liberties (1641), the Pennsylvania Frame of Government (1682), and the New York Charter of Liberties and Privileges (1683), all of which predate the English Bill of Rights, are representative examples. The Massachusetts Body of Liberties (1641) is an extraordinarily detailed compilation. Many of its provisions contain ideas that reappear in the Bill of Rights, but in a wholly different order.¹²²

The Pennsylvania Frame of Government (1682) contains an explicit Bill of Rights. It begins with the right to vote and a guaranty of free elections - 1st?; moves to a rudimentary speedy trial clause - 6th; a jury clause - 6th and 7th; a provision governing prisons and workhouses - 8th; a right to bail - 8th; and closes with rights of religious conscience and worship - 1st.

The New York Charter of Liberties and Privileges (1683) opens with a guaranty that no person may lose his property except by a judgment of peers and by the laws of the province - 5th; moves

122. The order of ideas in the Massachusetts Body of Liberties is noted in Table B of the Appendix, *infra*. It may be unfair to charge the Massachusetts Body of Liberties with disorganization. In fact, real effort was made to organize the document by listing rights against the legislature first, followed by rights during the judicial process, political liberties, family rights, capital offenses, and religious liberty. It is enough to observe that the order, such as it is, bears no resemblance to the Bill of Rights. See *Massachusetts Body of Liberties*, in 1 SCHWARTZ, *supra* note 111, at 71.

to a jury clause - 6th and 7th; a Grand Jury clause - 5th; a bail guaranty - 8th; a limit on quartering troops - 3rd; and closes with a protection of religious conscience - 1st.¹²³

Thus, while the colonial charters undoubtedly played a significant role as a source of ideas for the Bill of Rights, they do not appear to have provided an organizational model. If anything, the tendency to place religious guaranties last outweighed the halting move towards a chronological organization of procedural rights that was occurring in the English documents.

C. *The Revolutionary Declarations*

The third set of rights-bearing documents preceding the Bill of Rights were eighteen Revolutionary Constitutions and Declarations of Rights. Not surprisingly, they contain the raw material of the Bill of Rights. But no Revolutionary document approximates the organizational structure of the Bill of Rights.

Prior to the Resolution of the Second Continental Congress in 1776 calling for the drafting of state constitutions,¹²⁴ four Revolutionary rights compilations were circulated. The Virginia Declaration of Rights and Grievances (1765) contained a jury trial provision but nothing else traceable into the Bill of Rights. The Massachusetts Statement of Rights of the Colonists and Listing of Infringements (1772) opens with a call for religious conscience (to all except Catholics) - 1st; assures equality before the law - 5th; contains a takings clause - 5th; forbids general warrants - 4th, and the quartering of troops - 3rd; assures local jury trials - 6th and 7th;

123. The other principal colonial charters present a similar difference in structure. The Maryland Act for the Liberties of the People (1639) contains a rudimentary due process clause. 1 SCHWARTZ, *supra* note 111, at 68. The Maryland Act Concerning Religion (1649) contains a rudimentary religious freedom clause. 1 *Id.* at 91. The Charter of Rhode Island (1663) contains an elaborate religious freedom clause, with the first recorded use of the term "free exercise" of religious rights. 1 *Id.* at 96. The Fundamental Constitutions of Carolina, drafted by John Locke, no less, contains rudimentary double jeopardy and jury trial clauses, a prohibition on writing commentaries on the law, forced support for the Church of England, a guaranty of religious toleration, an endorsement of slavery, and a duty to bear arms. 1 *Id.* at 108. The Concessions and Agreement of West New Jersey (1677) contains a strong free exercise clause - 1st; a jury trial clause - 6th and 7th; provisions on notice, confrontation, and public trial - 6th; and a right to appear *pro se* - 5th. 1 *Id.* at 126. The Pennsylvania Charter of Privileges (1701) contains elaborate provisions on religious freedom beginning with a right of conscience to religious profession, worship and practice, continuing with a right to be free from compulsion to do anything contrary to religious persuasion and closing with a ban on religious tests for office - 1st; right to counsel and defendant's presentation of testimony - 6th; a rudimentary takings clause; and a ban on seeking to amend the religious toleration clause. 1 *Id.* at 170.

124. 1 *Id.* at 229.

and extols religious toleration - 1st. The Declaration of the First Continental Congress (1774) complains of the loss of local jury trials - 6th, interference with peaceful assembly and the right to petition for redress of grievances - 1st, and of the maintenance of a standing army in peacetime - 2nd and 3rd. Finally, the Address to the Inhabitants of Quebec (1774) provides that life, liberty and property are protected unless twelve peers of the vicinage agree - 5th, 6th and 7th; and explicitly assures freedom of the press, perhaps for the first time - 1st.

The 1776 call of the Second Continental Congress provoked an avalanche of rights-bearing documents from Virginia (1776), New Jersey (1776), Pennsylvania (1776), North Carolina (1776), Connecticut (1776), Delaware (1776), Maryland (1776), Georgia (1777), New York (1777), Vermont (1777), South Carolina (1778), Massachusetts (1780), and New Hampshire (1783). More ink was spilled in the name of rights in the year following Congress' Resolution than in the preceding 500 years of the English legal tradition. But it was, to modern eyes, disorganized ink. No Revolutionary document approximates the disciplined order of the Bill of Rights.

As with the English documents, I do not claim that the Revolutionary documents are without structure. A better understanding of history might well reveal a careful organization. It is enough to observe that the order of rights in the Revolutionary documents does not resemble the structure ultimately chosen by the Founders.

The Virginia Declaration of Rights (1776) was the first full-scale Revolutionary compilation of rights.¹²⁵ It contains virtually the entire raw material of the First through the Eighth Amendments, but it does not anticipate the structure of the Bill of Rights.¹²⁶

125. Two earlier rights-bearing documents circulated: a draft Constitution written by Thomas Jefferson and the Declaration of Independence. Jefferson's Draft Virginia Constitution (1776) opens with a guaranty of jury trial - 6th and 7th; assures female inheritance; abolishes slavery; assures freedom of religion - 1st; bans compelled maintenance of religious institutions - 1st; protects the right of all to bear arms - 2nd; forbids a standing army - 2nd and 3rd; and guaranties a free press - 1st. 1 *Id.* at 243. Jefferson's draft contains the first mention of the ill-fated amendment limiting pay raises for legislators to the next sitting. The Declaration of Independence (1776) explicitly mentions only two ideas that reappear in the Bill of Rights, a complaint about standing armies and the quartering of troops - 2nd and 3rd; and a complaint about deprivation of the right to local jury trials - 6th. 1 *Id.* at 224.

126. For the order of rights in the Virginia Declaration of Rights, see Table C of the Appendix, *infra*.

Virginia's Declaration of Rights influenced the Pennsylvania Declaration of Rights (1776), drafted by Benjamin Franklin and Thomas Paine.¹²⁷ After a recitation that all are equally free and independent, the Pennsylvania document opens with an elaborate protection of religious freedom, including worship, freedom from compulsory support of religion, the right to hold office and respect for religious conscience - 1st; recites that people control the police - 4th; posits a duty to contribute to common protection, but adds a right not to bear arms - 2nd; adds counsel to the list of procedural rights spelled out in the Virginia Declaration - 6th; limits searches and requires specific warrants - 4th; provides for civil juries - 7th; assures freedom of speech and press - 1st; protects the right to bear arms, forbids standing armies, and subordinates the military to civilian rule - 2nd and 3rd; protects interstate travel - 5th?; guaranties the rights of assembly, consultation, instruction of representatives; petition and remonstrance - 1st; bans excessive bail - 8th; requires that all fines be moderate - 8th; and explicitly protects a free press - 1st.¹²⁸ Once again, although the Pennsylvania declaration is extraordinarily sophisticated, its structure does not hint at the organizational rigor to come.¹²⁹

The North Carolina Declaration of Rights (1776) also contains fragments of each of the first eight amendments, but not in the order in which they finally appear. The North Carolina declaration assures notice in a criminal case, confrontation, the right to present evidence and protection from self-incrimination - 5th and 6th; adds a guaranty of grand jury indictment and presentment - 5th; requires a unanimous jury in criminal cases - 6th; forbids excessive bail, excessive fines, and cruel and unusual punishment - 8th; bans general warrants - 4th; prohibits interference with life, liberty, or property except by law of the land - 5th; assures juries in civil cases - 7th; guarantees a free press - 1st; protects the right to bear arms, forbids standing armies and assures civilian control of the military - 2nd and 3rd; protects the

127. 2 *Id.* at 252-63.

128. 2 *Id.* at 263-75.

129. See 2 *Id.* at 263-75. New Jersey's 1776 Constitution, while lacking a formal Bill of Rights, assured that a defendant could testify and be represented by counsel - 6th; guaranteed free exercise of religious conscience - 1st; prohibited taxation to support someone else's religion - 1st; banned religious tests for office (as long as you were a Protestant); and preserved trial by jury - 6th and 7th. 2 *Id.* at 276.

rights of assembly and petition for redress - 1st; and assures worship according to conscience - 1st.¹³⁰

The Delaware Declaration of Rights (1776) assures the right to worship, freedom from forced worship or support of religion and prohibits interference with religious conscience - 1st; protects the right to petition for redress of grievances - 1st; forbids taking property without legislative consent - 5th; protects civil trial by jury - 7th; assures notice, counsel, confrontation, right to present evidence and call witnesses, speedy trial, impartial and unanimous jury and the privilege against self-incrimination in criminal cases - 5th and 6th; forbids excessive bail, excessive fines and cruel and unusual punishments - 8th; requires that warrants be specific and on oath and forbids general warrants - 4th; extols a well regulated militia and warns against standing armies - 2nd; bans quartering of troops - 3rd; and guarantees freedom of the press - 1st.¹³¹

The Maryland Declaration of Rights protects civil jury trials - 7th; assures the right to petition for redress - 1st; abolishes poll taxes; and bans cruel and unusual punishments - 8th; protects criminal venue - 6th; assures notice, the right to present a defense, counsel, confrontation, subpoena power, cross examination, speedy trial and an impartial, unanimous jury in criminal cases - 6th; bans self-incrimination - 5th; prohibits loss of liberty and property except by judgment of peers or law of the land - 5th; bans excessive bail, excessive fines, and cruel and unusual punishment - 8th; extols a citizens' militia, warns against standing armies, provides for civilian control of the military, forbids quartering of troops and limits martial law - 3rd and 5th; assures religious toleration and right to be free from compulsory support of another's church - 1st; bans religious tests for office; substitutes affirmations for oaths; and assures a free press - 1st.¹³²

The first two rights-bearing efforts of 1777 were in a minor key. Georgia's Constitution (1777) protected criminal venue - 6th; assured civil juries - 7th; guaranteed grand jury indictment - 5th; assured free exercise of religion and freedom from duty to support religion of others - 1st; banned excessive fine or bail - 8th; assured a free press - 1st; and provided for jury trials in criminal cases - 6th.¹³³ New York's Constitution (1777) provided that no one could be disenfranchised or deprived of rights and privileges except by the

130. Connecticut's Declaration of Rights (1776) forbade deprivation of life, liberty, or property unless clearly warranted by law - 5th; and assured a right to bail - 8th. 2 *Id.* at 289.

131. 2 *Id.* at 276-78.

132. 2 *Id.* at 280-85.

133. 2 *Id.* at 291-300.

law of land or judgment of peers - 5th and 6th; assured free exercise of religion - 1st; imposed a duty to bear arms, except for Quakers - 2nd; and provided for jury trials in criminal cases - 6th.¹³⁴

Vermont's Declaration of Rights (1777)¹³⁵ contained a takings clause - 5th; a guarantee of religious toleration and freedom from compelled support of religion - 1st; a right not to bear arms, the right to be heard in a criminal case, counsel, notice, confrontation, right to present evidence, speedy and public trial, vicinage, unanimous jury, and freedom from self-incrimination - 5th and 6th; a right to be free from deprivations of liberty except by laws or the judgment of peers - 5th; a requirement of specific warrants only on oath - 4th; a right to jury trial in civil cases - 7th; protection of free speech and free press - 1st; the right to bear arms - 2nd; the right to travel - 5th?; and the right to assemble, to instruct legislators, and to seek redress of grievances by address, petition, or remonstrance - 1st.¹³⁶

The Vermont Constitution assembles for the first time in a single document, but not in the same clause, the six ideas that eventually coalesce into the First Amendment. The ideas appear in the third, fourteenth, and eighteenth clauses of the Vermont document.¹³⁷ Significantly, the inside out progression of the six ideas in the Vermont Constitution is almost identical to their final order in the First Amendment. The only difference is that free exercise precedes establishment.¹³⁸

The last two states to enact Revolutionary declarations were Massachusetts (1780) and New Hampshire (1783). When John Adams drafted the Massachusetts Declaration of Rights (1780), he was able to draw on the ten Revolutionary models that preceded it.¹³⁹ Not surprisingly, the Massachusetts declaration reaches a new level of substantive sophistication. But, although the substance of

134. 2 *Id.* at 301-13.

135. Vermont did not succeed in separating from New Hampshire until 1787. Thus, the Vermont Constitution of 1777 never went into effect. 2 *Id.* at 319.

136. 2 *Id.* at 319-24.

137. 2 *Id.* at 322-24.

138. South Carolina's Constitution (1778) shares several ideas in common with the Bill of Rights: a rudimentary protection of religious worship and a freedom from compelled support of religion, coupled with a ban on criticizing another's religion - 1st; a call for proportionate penal laws - 8th; a guaranty against deprivation of life, liberty or property except by judgment of peers or law of the land - 5th; and a guaranty of a free press - 1st. 2 *Id.* at 325.

139. 2 *Id.* at 337-44.

the Bill of Rights is prefigured in the Massachusetts declaration, the declaration does not prefigure the form of the Bill of Rights.¹⁴⁰

The New Hampshire Bill of Rights (1783) closes the Revolutionary era, and glimmers of the form as well as the substance of the Bill of Rights begin to appear. Concern for religious conscience opens both the Massachusetts and New Hampshire declarations.¹⁴¹ The substance and much of the internal structure of the Fourth through Eighth Amendments are in place, but the amendments themselves are not internally organized as in the Bill of Rights.¹⁴²

D. The Founders' Era

It remained for the Founders to take the raw material of our rights-bearing tradition and turn it into a precisely organized whole. The Founders' era opens with the Northwest Ordinance and the text of the Constitution itself,¹⁴³ neither of which order rights according to the structural principle underlying the Bill of Rights.¹⁴⁴ The Northwest Ordinance protects modes of worship and religious sentiments - 1st; assures jury trials - 6th and 7th; assures bail - 8th; requires moderate fines - 8th; bans cruel and unusual punishments - 8th; bans deprivations except by judgment of peers or law - 5th; and bans takings of property without compensation - 5th.

140. See Table D of the Appendix, *infra*, for the organization of rights in the Massachusetts Declaration of Rights.

141. 2 *Id.* at 340, 375.

142. See *id.* at 340-44, 375-79. For the organization of rights in the New Hampshire Declaration, see Table E of the Appendix, *infra*.

143. The text of the Constitution contains many of the provisions dealing with democracy, legislative authority, separation of powers, independent judiciary, habeas corpus, privileges and immunities, the primacy of civilian power and the rights of the states *vis a vis* each other that appeared in earlier Revolutionary texts. But, apart from a guaranty of jury trials in criminal cases - 6th; and a prohibition of religious tests for holding office - 1st, the ideas in the Constitution do not preview the Bill of Rights. Charles Pinckney's helated effort to add provisions protecting a free press and prohibiting the quartering of troops failed. The free press clause was defeated 7-4. 2 SCHWARTZ, *supra* note 111, at 439.

144. The Articles of Confederation did not contain material that reappeared in the Bill of Rights. A rudimentary privileges and immunities clause exhausts its right-bearing language. 2 *Id.* at 383. The Articles contained, as well, a reserved powers clause that anticipates the Tenth Amendment. *Id.*

The responses of the states to the call to ratify the Constitution provide the most direct raw material for the Bill of Rights.¹⁴⁵ Formal requests for amendment were submitted by Massachusetts, South Carolina, New Hampshire, Virginia, and New York. North Carolina submitted a verbatim copy of Virginia's request. Minority reports seeking amendments were submitted from Delaware, Pennsylvania, and Maryland.

The first set of suggested amendments from Massachusetts were unremarkable. They open with a protection of the state's reserved powers - 10th; require grand jury indictments - 5th; and assure jury trials in diversity cases - 7th. Samuel Adams's effort to add provisions protecting a free press, conscience, the right to bear arms, petition for redress, and unreasonable searches and seizures failed. New Hampshire adopted the Massachusetts provisions, but added a ban on quartering soldiers - 3rd; provided that Congress shall make no law touching religion or infringing the rights of conscience - 1st; and protected the right to bear arms - 2nd.¹⁴⁶

Virginia and New York proposed elaborate amendments foreshadowing every concept in the Bill of Rights. While the internal structure of the amendments shows a heightened organizational structure, neither the Virginia¹⁴⁷ nor the New York¹⁴⁸ amendments follow the order eventually adopted by the Bill of Rights.

145. Opposition to the Constitution centered on the absence of a Bill of Rights. 2 *Id.* at 443. Federalist strategy called for ratification, coupled with a request for prompt amendment. 2 *Id.* Anti-federalists urged defeat of the Constitution, in part because of the failure to include a Bill of Rights. 2 *Id.* The order of ratification was Delaware (Dec. 2, 1787) (minority call for amendments); Pennsylvania (Dec. 12, 1787) (minority call for amendments); New Jersey (Dec. 18, 1787); Georgia (Jan. 2, 1788); Connecticut (Jan. 9, 1788); Massachusetts (Feb. 6, 1788) (call for amendments); Maryland (April 26, 1788) (minority call for amendments); South Carolina (May 23, 1788) (call for amendments); New Hampshire (June 21, 1788) (call for amendments); Virginia (June 25, 1788) (call for amendments); New York (July 26, 1788) (call for amendments); North Carolina (Nov. 21, 1789) (call for amendments). Rhode Island declined to ratify the Constitution. 3-4 SCHWARTZ, *supra* note 111, at 439.

146. South Carolina's proposed amendments included only one idea that reappears in the Bill of Rights - a call for protection of reserved state powers - 10th. 4 SCHWARTZ, *supra* note 111, at 739.

147. 4 SCHWARTZ, *supra* note 111, at 756. For the order of rights in the Virginia Amendments, see Table F of the Appendix, *infra*.

148. 4 SCHWARTZ, *supra* note 112, at 911-18. For the order of rights in the New York Amendments, see Table G of the Appendix, *infra*.

E. The Drafting of the Bill of Rights

Madison's genius was not substantive; it was structural. Virtually every idea in the Bill of Rights had been widely rehearsed at least twice: once in the Revolutionary declarations and, again, in the numerous amendments proposed by the state ratifying conventions. For example, the Virginia Declaration of Rights of 1776 contained elaborate criminal procedure protections that presaged the Sixth and much of the Fifth Amendments. The Massachusetts Declaration of Rights of 1780 presaged the ban on unreasonable searches and seizures that became the Fourth Amendment. The literal text of the Eighth Amendment appears in the English Bill of Rights of 1689 and was commonplace in the Revolutionary declarations. The substance and even the form of the Second and Third Amendments appear repeatedly in the Revolutionary declarations. The guaranty of civil jury trial in the Seventh Amendment appears in all but two of the Revolutionary declarations. The Vermont Constitution of 1777 united the six ideas that eventually became the First Amendment, albeit in three separate clauses.

In fact, every Revolutionary declaration contained some protection of religious freedom and some protection of speech or press. Madison himself observed that no idea was placed into his June 8th draft of the Bill of Rights unless it had been sought by at least three ratifying conventions.

Nothing in our rights-bearing tradition, however, prefigured Madison's reworking of a set of broadly held, but randomly ordered, intuitions about the indicia of freedom into a rigorously organized blueprint for a free and democratic society. Most strikingly, Madison perceived that rights of conscience, communication, collective action and politics are intimately connected to one another as the preconditions for democratic governance. Instead of dispersing them, as had the Revolutionary declarations, Madison gathered them into a unified description of the ideal commonwealth for the first time in our legal tradition, in what became the First Amendment.

Madison's efforts at structural coherence were initially limited by his belief that the Bill of Rights should be interpolated into the body of the Constitution itself at appropriate points. Thus, his June 8th draft proposes one set of restrictions binding on Congress to be interpolated in Article 1, Section 9 between clauses 3 and 4; a second set governing the states to be interpolated in Article 1, Section 10 between clauses 1 and 2; a third set restricting the

judiciary to be inserted at the end of Article III, Section 2 and in place of Section 2 clause 3; and a fourth set to be added as a new Article VII.

The proposed limitations on the judiciary included jury trials and venue in criminal cases, grand jury indictments, and civil jury trials—ideas that would eventually appear in the final version in the Sixth, Fifth, and Seventh Amendments. It was, however, the organization of Madison's proposed limits on congressional authority under Article I Section 9 that broke new conceptual ground. Although important structural changes were still to come, Madison's proposed additions to Article I, Section 9 begin the deep structure of the Bill of Rights.¹⁴⁹

Most importantly, Madison's June 8th proposal contains the first effort to integrate the protections of conscience, communication, collective action, and democracy into a single text. Although his language was edited, and although Madison put free exercise before establishment, his June 8th proposal determined the structure and content of the First Amendment.

Madison also set the relationship between the First Amendment and the rest of the Bill of Rights, placing the protections against military abuse immediately after the description of the ideal commonwealth, protections against civilian abuse after the military clauses, and directions about retained rights and reserved powers at the close of the document.

After desultory debate, on July 21, Madison's June 8th proposals were referred to a Select Committee of Eleven, consisting of one representative from each of the ratifying states, chaired by Congressman Vining of Delaware, with Madison representing Virginia.¹⁵⁰ The Committee of Eleven reported on July 28, retaining the vast bulk of Madison's handiwork as well as Madison's suggestion that the amendments be interpolated into the body of the Constitution. Three important editorial changes were made in the nascent First Amendment: establishment was placed before free exercise, explicit protection of worship was temporarily collapsed

149. For a table including all of Madison's proposed amendments, see Table H of the Appendix, *infra*. The proposed amendments to Article III involving criminal juries, venue, grand jury indictment, and civil juries are not yet in their final order. 5 SCHWARTZ, *supra* note 111, at 1042.

150. 5 *Id.* at 1061. The members of the Select Committee of Eleven were John Vining of Delaware, James Madison of Virginia, Abraham Baldwin of Georgia, Roger Sherman of Connecticut, Aedanus Burke of South Carolina, Representative Gilman of New Hampshire, George Clymer of Pennsylvania, Egbert Benson of New York (the first Chief Judge of the Second Circuit), Benjamin Goodhue of Massachusetts, Elias Boudinot of New Jersey, and George Gale of Maryland.

into protection of equal rights of conscience,¹⁵¹ and Madison's cumbersome formula "speaking, writing and publishing" was condensed into "speech." In addition, the rights to fair procedure in criminal trials, ultimately codified in the Sixth Amendment (originally envisioned by Madison as interpolations to Article I, Section 9), were repositioned with the material to be interpolated into Article III.

The House debated the Committee of Eleven's proposed amendments from August 12-24, 1789. During the debates, an explicit protection of free exercise reappeared, echoing Madison's original protection of religious worship. But the most important change made by the House was structural. After several false starts, the House decided to place the Bill of Rights in a single document instead of interpolating them into the body of the Constitution. While Madison had already done much of the organizing himself, especially of those provisions originally designed to be interpolated into Article I, Section 9, the House appointed a three-person Committee on Arrangement¹⁵² to prepare a final, self-contained version of the Bill of Rights. Two days later, the Committee on Arrangement recommended two crucial structural changes. For the first time, the provisions governing the investigation phase (search and seizure) were placed before the provisions governing prosecution, and the provisions governing trial were placed after prosecution but before punishment. If Madison's June 8th proposal fixed the formal order of the First Amendment and its relation to the rest of the document, the unheralded Committee on Arrangement, of which Madison was not a member, fixed the order of investigation, prosecution, adjudication, and punishment, giving the Bill of Rights structural integrity for the first time.¹⁵³

The Senate debated the House version of the Bill of Rights from September 2-9, 1789. During the Senate debates, Madison's clause protecting the equal rights of conscience was deleted, arguably because it merely restated the Establishment and Free

151. 5 *Id.* at 1145-46. The Senate would ultimately collapse equal rights of conscience back into free exercise. 5 *Id.*

152. 5 *Id.* at 1158. The Committee on Arrangement consisted of Egbert Benson and Roger Sherman, both of whom had served on the Select Committee of Eleven, and Theodore Sedgwick of Massachusetts. Madison was not a member. 5 *Id.*

153. 5 *Id.* at 1146. The Committee on Arrangement made one other unfortunate structural change that was vetoed by the Senate. The Committee broke Madison's protection of the rights of conscience, communication, collective action, and democracy into two separate articles, one dealing with religion and one dealing with speech, press, assembly and petition. The Senate reunited the articles into a single unit. 5 *Id.*

Exercise Clauses.¹⁵⁴ The final structural change was made when provisions dealing with Grand Jury indictment were severed from the petit jury provisions, with the Grand Jury clause opening the section dealing with prosecution and the petit jury guaranties remaining in the two sections dealing with adjudication—both civil and criminal.¹⁵⁵ While the Conference Committee made important changes in wording, strengthening the Establishment Clause and adding a criminal venue protection, the final, fully disciplined order of the Bill of Rights was achieved when the Senate separated the accusatory and adjudicative functions of the Grand and petit jury.

Finally, recognition of the unique structure of the Bill of Rights is reinforced by a comparison with the French Declaration of the Rights of Man and Citizen (1789).¹⁵⁶ While the French Declaration is substantively richer in its treatment of equality (the formal concept of equality does not find its way into the United States Constitution until the Reconstruction Amendments), its effort to integrate democracy, rights theory, and natural law (Madison's efforts to add an overarching theoretical preamble to our Bill of Rights were rejected), and its visionary recognition of economic and social rights (unlike the Northwest Ordinance, the Bill of Rights ignores education and care of the poor), the French Declaration displays a very different organizational structure.¹⁵⁷

The outlines of the French Declaration's organizational plan are clear. After reciting that the general goal of government is to protect the enjoyment of four natural rights: equality, liberty,

154. 5 *Id.* at 1146. The Committee of Eleven had also seen the equal right of conscience clause as coterminous with the clause protecting religious belief and worship. It recommended collapsing the belief and worship clause into the equal right of conscience clause. 5 *Id.* The Senate simply reversed the order of collapse. 5 *Id.* The Senate deleted, as well, Madison's effort to bind the states in the areas of religious freedom (expressed as equal rights of conscience), free speech, free press, and criminal jury trials. 5 *Id.* Madison's efforts to set a national minimum, binding on the states in areas crucial to liberty did not bear fruit until the Supreme Court incorporated virtually the entire Bill of Rights into the Fourteenth Amendment's due process clause. Madison defeated an effort by the Senate to weaken establishment protection in Conference and managed to reinsert a criminal venue clause. 5 *Id.* at 1159.

155. 5 *Id.* at 1147. The Senate rejected Madison's effort to limit appeals to the Supreme Court, but salvaged his effort to preserve jury verdicts from appellate review, tucking it into the Seventh Amendment as part of the protection of civil jury trial. 5 *Id.*

156. The Declaration of the Rights of Man and Citizen was adopted by the French National Assembly on August 26, 1789. The text of the declaration is reproduced in the Avalon Project of the Yale Law School, at [www.yale.edu/lawweb/avalon/right of.htm](http://www.yale.edu/lawweb/avalon/right%20of.htm) declaration (last visited March 30, 2005).

157. See Table I of the Appendix, *infra*, for the structure of rights in the French Declaration. The French Declaration is procedurally weaker than the Bill of Rights, lacking many of the structural protections against governmental abuse contained in the Fourth through Eighth Amendments, as well as an establishment clause.

security and property, the French Declaration seeks to define the minimum attributes of each. In one remarkable sense, though, the two great rights-bearing documents resemble each other closely. Each places the minimum attributes of an ideal political commonwealth in an integrated clause for the first time.

Substantively, the only difference between the two clauses' definitions of the fundamentals of liberty is the omission of an establishment clause guaranty in the French Declaration. Structurally, the French Declaration places protection of expression before religion and places petition in a separate clause. The degree of substantive consensus is extraordinary.

I hope that those of you who have survived the forced march through history I have imposed on you in this section agree that the final order of the Bill of Rights cannot be explained as a random accident or an adoption of the obvious. The internal order and organizational structure of the Bill of Rights stands as a triumph of the Founders' coherent vision of what it takes to live as a free and tolerant people in a functioning democracy.

V. DOES STRUCTURE AFFECT THE MEANING OF THE BILL OF RIGHTS?

Respect for structure is not a panacea for linguistic uncertainty. Serious engagement with structure can, however, provide a politically constrained judicial reader with a valuable, principled tool for interpreting an ambiguous text. While the structurally-driven readings of controversial provisions of the Bill of Rights that follow are not the only possible readings, they are, I believe, the best readings because they attempt to be faithful to what matters most: the holistic text.

A. A Structural Reading of the Ninth and Tenth Amendments

Reading the Ninth and Tenth Amendments structurally as metacanons of construction would have two effects. First, it would permit judges to follow Justice Harlan's lead in using techniques historically associated with the equity of the statute methodology to supplement the text of our rights-bearing documents. Just as freedom of association fits well as a nontextual extension of the literal words of the First Amendment, the technique can be used profitably to deal generally with interstitial lacunae in our rights-bearing documents. More generally, the interplay between the Ninth and Tenth Amendments provides a principled tie-breaking mechanism to help a judge resolve close constitutional cases.

Two significant cases decided during the 1994 Term of the Supreme Court illustrate the role of the Ninth and Tenth Amendments as tie-breakers in close cases.

In *U.S. Term Limits v. Thornton*, the Court was asked to rule on whether the three textual eligibility criteria for Congress recited in the Constitution—age, citizenship, and residence—describe a constitutional ceiling or merely a floor.¹⁵⁸ The constitutional text itself does not answer the question.¹⁵⁹ Since a literal reading does not yield an answer, the Court was challenged to select the “best” reading.¹⁶⁰ Both sides produced extraordinary efforts. Justice Stevens, writing for the majority, argued that the “best” reading was a ceiling. States should not be permitted to impose additional qualifications, he argued, because Congress is a national body, designed to achieve a national perspective.¹⁶¹ Since congressional legislation affects everyone, Justice Stevens argued that all voters have a reciprocal interest in the qualifications of members of Congress, arguing for a single, uniform set of qualifications.

Justice Thomas, writing for the dissent, argued that states should be permitted to add new qualifications because members of Congress should be seen as agents of the people of the several states who select them.¹⁶² According to Justice Thomas, the fundamental duty of a member of Congress is to represent her constituents, not the nation as a whole. Thus, argued Justice Thomas, the constituents should be able to tailor the criteria of representation to their wishes, as long as a substantive provision of the Constitution is not violated.¹⁶³

158. 514 U.S. 779, 783 (1995).

159. Art. I, § 2, cl. 2, provides: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” Art. I, § 3, cl. 3, provides: “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”

160. Both Qualifications Clauses are silent on the minima/maxima question.

161. *Term Limits*, 514 U.S. at 822 (“Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure.”).

162. *Id.* at 858-60 (Thomas, J., dissenting) (arguing that the Representatives of each State are agents of the people of that State, not agents of the “undifferentiated people of the Nation as a whole”).

163. *Id.* at 925. (“But laws that allegedly have the purpose and effect of handicapping a class of candidates traditionally are reviewed under the First and Fourteenth Amendment rather than the Qualifications Clause.”). Thus, for example, it is common ground that racial or gender qualifications would be invalid under the Equal Protection Clause.

Each side produced formidable historical and philosophical support for its descriptive position, although Justice Thomas's opinion is perhaps too heavy on the pre-Civil War conception of the nation.¹⁶⁴ Whether viewed in descriptive historical terms, or as a philosophical choice between theories of representation, however, the opposing sides battled to a textual draw in *Term Limits*. Both opinions are right. Congress is an untidy institution reflecting the untidy nature of our federal structure. It is designed both to reflect the national common good (arguing in favor of a uniform, national definition of eligibility) and to advance the parochial interests of the states (arguing in favor of latitude in the states to add qualifications).

When the dust clears, neither opinion succeeds in driving the other from the field. What is needed, therefore, is a way to break a textual tie between two plausible "best" readings of the Qualifications Clause. Justice Kennedy's decisive concurrence¹⁶⁵ confronts the tie-breaking problem openly by admitting that he reads the Qualifications Clause as a ceiling, not because he is driven to do so by either text, history, or philosophy, but because a contrary reading would interfere with the right to vote by denying an individual voter the ability to support a candidate who lacks the "new" qualification. In short, according to Justice Kennedy, the burden of nonpersuasion rests on the side seeking to curtail the exercise of an important right. That is exactly what the Founders hoped the Ninth Amendment would do.

The second difficult textual case was *United States v. Lopez*,¹⁶⁶ in which the Court was asked to decide whether a congressional ban on guns in, or near, schools could be justified as a

164. Although the issue was not pressed, it is possible to argue that the pre-Civil War conception of the nation favored Justice Thomas's position, while the post-Civil War conception, evidenced by the Reconstruction Amendments, supported the Stevens position. The important descriptive disagreement between Justices Stevens and Thomas over whether a member of Congress is more committed to the common good or to the advancement of the parochial interests of her constituents mirrors the debate between communitarians and public choice theorists about the nature of representation in a democracy. See generally *Madison's Nightmare: The Tax-Driven Exclusion of Disinterested Voices from the Legislative Process* (1994) (discussing public choice and public interest theories in the context of "describ[ing] the role of the tax system in shaping the legislative process", at <http://www.law.nyu.edu/ncpl/library/publications/Conf1994Neubornepaper.pdf>; Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371 (1992) (discussing the competing values of self and community in the context of hate speech).

165. *Term Limits*, 514 U.S. at 844-45 (Kennedy, J., concurring) (arguing that the imposition of "new" qualifications "exceeds the boundaries of the Constitution" because it interferes with the "rights of resident voters in federal elections").

166. 514 U.S. 549 (1995).

regulation of interstate commerce. As in *Term Limits*, the 1787 constitutional text fails to deliver a clear answer. Article I is a visionary effort to divide power between the national government and the states. The formal division of power is straightforward. As with the Bill of Rights, the organization of the federalism component of the 1787 text demonstrates a thoughtful effort at structure and organization. Article I lays out the “vertical federalism” rules governing the relationship between the national government and the states in a logical sequence: Section 8 grants specific powers to the national government, Section 9 denies specific powers to the national government, and Section 10 denies specific powers to the states. Article IV then sets out the “horizontal federalism” rules governing the states’ relationships with one another. Even within the sections, concern with structure and organization is evident. For example, Article I, Section 8 contains eighteen clauses setting forth Congress’s enumerated powers. The first eight, dealing with taxation, borrowing, regulation of commerce, bankruptcy (and naturalization), coining money, preventing counterfeiting, building post roads and post offices, and patent and copyright are powers needed to nurture the growing economy. Even the ninth clause, granting power to establish inferior courts, is related to commerce, since the fundamental reason for the lower federal courts was to hear commercial disputes between and among citizens of different states. The tenth clause, granting power to punish piracy and offenses against the law of nations, is transitional. Since both piracy and offenses against the law of nations (as it existed in 1787) were commercial crimes, the tenth clause looks back to the first nine. But since armed force is contemplated, the piracy clause looks forward to Clauses 11 through 16, all of which relate to the governance and administration of the armed forces. The two final clauses, Clauses 17 and 18, deal with administration of the District of Columbia and with the grant of a general power to enact laws that are “necessary and proper” to carry into execution the enumerated powers.

Care was also taken with the organization of the eight clauses of Article I, Section 9, denying powers to the national government. The first clause is the infamous promise to permit the importation of slaves until 1808. Viewed as a perverted protection of the slaveholders’ substantive liberty, it fits well with Clauses 2 and 3, protecting habeas corpus and prohibiting bills of attainder and ex post facto laws. Clauses 4 through 7 then govern the federal government’s financial powers, banning taxes unless in proportion to the census, prohibiting export duties on goods exported from the

states, requiring equal treatment of ports, and, most importantly, forbidding spending that is not pursuant to an appropriation, and subject to an accounting. The eighth clause bans titles of nobility.

The organizational structure of the three clauses of Article I, Section 10, denying powers to the states, is less obvious. Clause 1 is a catchall provision forbidding states from signing treaties, granting letters of marque, coining money, using anything but gold or silver coin as legal tender, passing bills of attainder, ex post facto laws or laws impairing the obligation of contract, or granting titles of nobility. Even within the catchall first clause, a loose organization is discernible. The first two prohibitions—on treaties and letters of marque—restrict a state's temptation to have a foreign policy. The next two—limits on coining money and establishing soft money legal tender—restrict a state's ability to execute a debtor-driven commercial policy. The next three—bans on bills of attainder, ex post facto laws, and laws impairing the obligations of contract—are substantive rights protections (perhaps related to fear of debtor-driven laws), and the last forbids titles of nobility. This is hardly a model of organizational clarity, but it is far from a random ordering.

Clause 2 restricts the states from imposing import or export duties. Clause 3 forbids states from keeping troops, entering into alliances, or engaging in war. The first two items in Clause 1—a prohibition of treaties and letters of marque—fit more comfortably into Clause 3. The third and fourth items in Clause 1—banning the coining of money and the adoption of soft money legal tender—arguably fit more comfortably into Clause 2. The organizational redundancy in Section 10 is one of the relatively few examples of sloppy structure in the federalism provisions of the 1787 document.

Article IV completes the 1787 text's effort to describe the new federal structure by setting forth the rules governing the states' relationships with one another. Article IV, Sections 1 and 2 describe reciprocal promises made by the states to each other. Section 1 requires the grant of full faith and credit to the judgments and public acts and records of another state. Article IV, Section 2, Clause 1 guarantees the citizens of one state enjoyment of the "privileges and immunities" of citizens in the several states. Both provisions are linked by a common desire to assure that states resist the temptation to discriminate in favor of their own citizens, either by ignoring foreign judgments, or by setting up discriminatory regimes that treat citizens differently from outsiders.

Article IV, Section 2, Clauses 2 and 3, prevent one state from seeking to interfere in the internal affairs of another state. Clause 2 provides for mandatory extradition from one state to another. It is obviously linked with Clause 3, the Fugitive Slave Clause, designed to avoid *Somersetts Case*,¹⁶⁷ by forbidding free states from applying the law of the forum to test demands for the return of escaped slaves.

Article IV, Section 3 deals with future expansion. Clause 1 authorizes Congress to admit new states but forbids creating new states from within, or by combining existing states. Clause 1 is both a protection against the national government and a guarantee against the territorial ambitions of neighboring states. Clause 2 authorizes Congress to administer the territories.

Article IV, Section 4 describes the collective obligations of the states, organized as the United States, to each state. It obligates the United States to guarantee a Republican form of government to each state and assures individual states of federal protection against invasion and, when desired, protection against domestic violence.

Thus, an overview of the federalism provisions of the 1787 text demonstrates a careful organization and a straightforward plan. But the challenge of defining the precise extent of federal power has been anything but straightforward. First, the enumerated powers described in Article I, Section 8 must be given concrete meaning. The extended effort to define the meaning of commerce is merely the best known example. The century-long evolution of meaning from viewing "commerce" as either transportation or the physical movement of goods, to a recognition that "manufacture" is a part of commerce, is an example of the textual difficulty.¹⁶⁸ Moreover, the pristine scheme of confining the

167. *Somerset v. Stewart*, 20 State Trials 1, 79-82 (K.B. 1772) (applying the law of the forum to determine the lawfulness of slavery, thus effectively abolishing slavery in England).

168. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 191-92 (1824) (holding that navigation is within the meaning of commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 14 (1895) (holding that manufacturing precedes commerce such that they are distinct from one another); *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (holding that the making of goods and the mining of coal are not commerce); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (holding that the making of goods and the mining of coal are not commerce); *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 37 (1937) (holding that the power of Congress to protect interstate commerce is plenary and includes the power to regulate conditions of manufacture). See also Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), reprinted in 8 PAPERS OF ALEXANDER HAMILTON 97 (H. Syrett ed., 1965); Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (1791), reprinted in THE WORKS OF THOMAS JEFFERSON 284 (P. Ford ed., 1892-99).

federal government to its enumerated powers was shaken by the addition in Clause 18 of the “necessary and proper” authority, which functions as an invitation to a theory of implied federal power.¹⁶⁹ The invitation in the Necessary and Proper Clause can lead to a theory of causation that permits regulation of behavior by Congress based on its effect on an enumerated power, even though the regulated activity, strictly speaking, falls outside the power.

By the time Congress enacted the statute in *Lopez*, a combination of an expansive reading of commerce to include manufacture and consumption taking place wholly in one place,¹⁷⁰ coupled with an extremely broad idea of causation,¹⁷¹ had resulted in a Congressional power to regulate commerce that verged on a national police power.¹⁷² In defense of the statute in *Lopez*, the Solicitor General argued that guns in or near schools adversely affect the educational climate, which, in turn, adversely affects the quality of the work force. Thus, he argued, the statute was a permissible exercise of Congress’s power to regulate interstate commerce. Chief Justice Rehnquist, writing for the Court, argued that the governments’ theory that education is inherently linked to commerce without any necessity of documenting the linkage would authorize the creation of a national school board.¹⁷³ In effect, he suggested, the theory would turn the Commerce Clause into a national police power, since almost anything regulable under the police power would have a similar linkage to an efficient

169. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 344 (1819) (discussing the possibility that the “necessary and proper” clause could expose the States “to great dangers, and the most humiliating and oppressive encroachments” by the federal government).

170. See *Jones & Laughlin Steel Co.*, 301 U.S. at 37 (stating that Congress can regulate activities that are intrastate in character if they have such a close and substantial relation to interstate commerce).

171. *United States v. Darby*, 312 U.S. 100, 114 (1941) (adopting the broad view that Congressional authority to regulate commerce is plenary and is limited only by specific Constitutional restrictions); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (“But even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .”).

172. See, e.g., *Champion v. Ames*, 188 U.S. 321, 363 (1903) (holding that the transportation of lottery tickets from one State to another is interstate commerce that may be regulated by Congress); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (“Thus the power of Congress to promote interstate commerce also includes the power to regulate local incidents thereof . . .”); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (holding that Congressional power to regulate commerce “extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce”); *Perez v. United States*, 402 U.S. 146, 154 (1971) (“Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.”).

173. *U.S. v. Lopez*, 514 U.S. 549, 565.

economy.¹⁷⁴ Accordingly, writing for the Court, the Chief Justice held that when Congress seeks to regulate noneconomic activity, it must demonstrate the linkage between the noneconomic activity and the commerce power.¹⁷⁵ When, however, economic activity is the target of the regulation, the strong presumption of causation would permit Congress to dispense with a formal showing of causation. Challengers would bear the burden of proving that the required causal nexus did not exist.

The Chief Justice's opinion in *Lopez* implies that once Congress makes its required showing, the Court would use a highly deferential rational basis standard to test its validity.¹⁷⁶ If *Lopez* requires merely that Congress put its thought process on the record whenever it seeks to regulate noneconomic activity under the commerce clause, the opinion is hardly revolutionary.¹⁷⁷

Justices Souter and Breyer, writing in dissent, argued that the Court should uphold congressional regulation under the Commerce Clause, even in the absence of a formal factual predicate, if the reviewing court is able to construct the predicate for itself.¹⁷⁸ Justice Breyer questioned the need for Congress to go through the formalistic ritual of putting on the legislative record material that is well known and fully available to the Court. Justice Breyer then proceeded to lay out a formidable array of social science data that demonstrates the close link between safety, effective education, and an efficient workforce.

The text of the Commerce Clause supports both the Rehnquist and the Souter/Breyer opinions. When questions arise about the sufficiency of an alleged link between a noncommercial activity and commerce, the text of the Commerce Clause is silent about who should bear the risk of nonpersuasion. Indeed, from the beginning, we have disagreed vigorously over the impact of the Necessary and Proper Clause on the regime of enumerated powers.

174. *Id.* at 564.

175. See *id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

176. See *id.* at 562-63 (discussing the importance of congressional findings in the Court's evaluation of legislative judgment).

177. Even read narrowly, *Lopez* is significant, since it is the first time in sixty years that the Court has rebuffed Congress's effort to invoke the commerce clause in support of an exercise of Congressional authority.

178. *Lopez*, 514 U.S. at 615. Justice Stevens and Ginsburg also dissented. Traditional "rational basis" analysis requires a court to uphold a challenged practice if a rational basis can be imagined to support it, without any inquiry into whether the legislature was actually motivated by it.

Thus, as with the *Term Limits* case, *Lopez* forces us to confront the meaning of a key provision of the 1787 text, but it does not yield a textual, historical, or philosophical answer. Once again, what is needed is a way to break the linguistic tie between a reading of the Commerce Clause that places the burden of proving a factual nexus between a regulated activity and an enumerated power on the government, and one that excuses the government from developing a factual record, relying instead on the courts to imagine a *post hoc* justification, if one can be shown to exist.

Excellent policy arguments exist on both sides. The Rehnquist position has the institutional benefit of assuring that Congress actually thinks about the link before it enacts statutes on the margin between commerce and a national police power. The Souter/Breyer opinion has the benefit of avoiding unnecessarily formalistic approaches to legislation. If everyone knows that the sun comes up, why make Congress go through the formal exercise of putting the fact on the record? If text, history, and policy do not yield the answer, which argument should prevail?

As in *Term Limits*, Justice Kennedy alone faced up to the textual tie and sought a tie-breaking mechanism to guide his vote. Viewing the case as a question of the existence of federal power, he ruled that doubts about the existence of federal power should be resolved against its existence. Thus, he placed the risk of nonpersuasion in a "powers" case on the federal government. A blank record in a tie case causes the federal government to lose.

In *Term Limits*, Justice Kennedy broke the textual tie in favor of the exercise of an individual right; in *Lopez*, he broke the textual tie against the existence of federal power. Alone among the Justices, Justice Kennedy was in the majority in both *Term Limits* and *Lopez*, applying a tie breaker in favor of federal power in *Term Limits* and against the federal government in *Lopez*. The other eight Justices went down the line in support of their conception of federal powers or states rights. Justices Stevens, Ginsburg, Souter, and Breyer voted in favor of the federal position in both cases. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas voted in favor of the states' position in both cases.

I believe that Justice Kennedy was not only right on the merits in both cases, but that he is well on the way to a jurisprudence that uses the structure of the Bill of Rights, especially the Ninth and Tenth Amendments, to break textual ties in close cases -- just what the Founders had in mind when they gave us metacanons of construction in the Ninth and Tenth Amendments.

B. A Structural Reading of the First Amendment

Once it is understood that Ninth Amendment equity of the statute authorizes the use of analogy, inference, and implication in reading the First Amendment's text, the theoretical underpinnings of several nontextual constitutional rights like freedom of association, the right to vote, a secular right of conscience, and several recent controversial privacy and substantive due process decisions become much less problematic. Each is explicable as an application of Ninth Amendment equity of the statute to the First Amendment.

As we have seen, Justice Harlan's recognition of a seventh nontextual right—freedom of association—in the First Amendment is a classic exercise of equity of the statute analogy contemplated by the Ninth Amendment.¹⁷⁹ If association fits neatly between press and assembly, the right to vote and to run for office is equally comfortable following petition. When petition fails, resort to the ballot is the next logical democratic act. If association is necessary to the enjoyment of several textually enumerated rights, suffrage is the key to virtually all other rights. If association is closely analogous to several textually enumerated rights, voting is both a quintessential expression of individual political belief and an effort to associate with like-minded voters, as well as the candidate. Perhaps most importantly, the order of rights in the First Amendment reflects the life-cycle of the democratic process. Thus, using the Ninth Amendment as a canon of construction, the First Amendment may be read as protecting the right to vote and to run for office.

Unfortunately, for most of our history, the Supreme Court invoked the wrong canon in deciding voting cases. Using precisely the type of *inclusio unius* reasoning the Ninth Amendment was intended to forestall, the Court had repeatedly refused to grant general federal constitutional protection to the right to vote and to run for office because no such protections appeared in the constitutional text.¹⁸⁰ In fact, the Court did not begin to protect the

179. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Button*, 371 U.S. 415 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Healy v. James*, 408 U.S. 169 (1972); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

180. *Minor v. Happersett*, 88 U.S. 162, 178 (1875) (upholding disenfranchisement of women); and *Giles v. Harris*, 189 U.S. 475, 486-88 (1903) (declining to interfere with state disenfranchisement of blacks) are the leading examples. Modern examples of *exclusio unius* reading of the constitutional text in voting settings include: *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 53-54 (1960) (upholding literacy tests); *Richardson v.*

right to vote until 1965¹⁸¹ and the right to run for office until 1968.¹⁸² Even then, the Court ignored the First Amendment, basing constitutional protection of the franchise on the Equal Protection Clause, thus linking the right to vote to the unstable vagaries of fundamental rights jurisprudence.¹⁸³ This is not the place to attempt a democracy-centered reading of the First Amendment. Suffice it to say that if the Court disentangled the law of democracy from the Equal Protection Clause and viewed protection of democracy as a structural imperative of the First Amendment, our democracy jurisprudence might look very different. For one thing, the correct outcome in *Bush v. Gore*,¹⁸⁴ would turn on the substantive right to vote, not on equality distinctions invisible to the naked eye. Similarly, the outcome in *Vieth v. Jubelirer*, would require discussion of the idea of fair representation in a democracy, not whether equality norms are violated by outrageous partisan gerrymanders.¹⁸⁵

Unlike recognizing a First Amendment right to participate in the democratic process, invoking equity of the statute to recognize a First Amendment secular right of conscience is not merely a matter of avoiding *inclusio unius* thinking. After all, Madison's effort to insert explicit textual protection against state interference with the "equal right of conscience" was initially rejected by the House, reinstated in the final House version and ultimately rejected by the Senate. While a possible explanation for

Ramirez, 418 U.S. 24, 54-56 (1974) (upholding disenfranchisement of felons). See also *Williams v. Mississippi*, 170 U.S. 213, 223-25 (1898) (upholding broad discretion to determine voter qualifications); *United States v. Cruikshank*, 92 U.S. 542, 554-57 (1875) (holding that the Fifteenth Amendment does not bar states from prescribing the qualifications of electors); *United States v. Reese*, 92 U.S. 214, 217-18 (1875) (holding that the Fifteenth Amendment does not confer the right of suffrage). Voting was, of course, granted important textual protection by the Fifteenth, Nineteenth, and Twenty-sixth amendments, extending the franchise to racial minorities, women, and eighteen year olds. Indeed, of the seventeen amendments enacted since the Bill of Rights, eleven seek to improve the democratic process.

181. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). *Carrington* was quickly followed by *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666-67 (1966), and *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 636-37 (1969). The cases, which utilized the equal protection clause as a bootstrap for the missing substantive text, triggered an avalanche of voting cases. See Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. L. REV. 1055, 1059 n. 23 (1999).

182. *Williams v. Rhodes*, 383 U.S. 23, 31 (1968) (holding that no state can pass a law regulating elections that violates the equal protection clause); see also Neuborne, *supra* note 181, at 1059 n. 24.

183. Compare *Rosario v. Rockefeller*, 410 U.S. 752 (1973) with *Kusper v. Pontikes*, 414 U.S. 51 (1973).

184. 531 U.S. 98 (2000).

185. 124 S.Ct. 1769 (2004).

the rejection is the apparent belief of at least some members of both the House and Senate that Madison's formulation merely restated the protection already granted by the establishment and free exercise combination,¹⁸⁶ the rejection of Madison's language creates a real obstacle to using equity of the statute to protect secular conscience. Nevertheless, I believe that Justice Harlan's constitutional protection of secular conscience in *United States v. Seeger*¹⁸⁷ was a defensible, indeed preferable, use of the technique.

Secular conscience fits neatly into the First Amendment's logical progression from internal belief to external politics. The inside out structure of the First Amendment reflects a remarkable understanding of the ontogeny of democratic governance. The Founders knew that without effective protection of the interior of the human spirit, free discussion and debate could not ripen into a stable and collaborative government. And while the protection of religious conscience explicitly provided in the text is of critical importance to any effort to build a free society, religious conscience does not exhaust the range of internal protections that are the necessary preconditions of a functioning democracy. Protection of secular conscience is equally needed.

In the 200 years that separate us from the Founders, the concept of conscience has undergone a dramatic expansion. In the late eighteenth century, conscience and religious belief were coterminous to many, perhaps most Americans. With the decline of religion as an all-pervasive organizing force, however, secular substitutes for religion have emerged as the driving force in the lives of many. To the extent secular conscience functions for many today identically to religious conscience in providing the organizing core of an individual's life, it would be arbitrary in the sense of equity of the statute to protect one and ignore the other. Indeed, I believe that the primary structural role of the Ninth Amendment is to authorize readers of the constitutional text to recognize just such changed circumstances and to permit the use of analogy to cope with them.

Construction techniques associated with equity of the statute provide a plausible account, as well, of cases protecting intimate association from arbitrary governmental interference. When Justice Powell refused in *Moore v. Village of East Cleveland*

186. Madison's original draft of the First Amendment contained several redundancies ultimately subsumed under the word "speech." At several stages in the process, the House treated Madison's provision on conscience as interchangeable with free exercise. See 5 SCHWARTZ, *supra* note 111, at 153.

187. 380 U.S. 163, 173-80 (1965).

to permit a zoning ordinance to destroy an extended family, he couched his opinion in substantive due process terms.¹⁸⁸ It would, I suggest, be more persuasive as an application of equity of the statute similar to Justice Harlan's in *NAACP v. Alabama*.¹⁸⁹ Justice Harlan mapped the associational space in the First Amendment needed for external politics. His right of political association looked outward, fitting neatly before assembly and petition. Justice Powell's protection of internal association looks the other way along the First Amendment's axis, inward to the relationships that nurture the human spirit: marriage, family, and friendship. As Professor Karst has suggested, many of the Court's privacy and substantive due process cases can be reinterpreted as a sustained effort to protect a freedom of intimate association that is latent in a First Amendment read against the background of the equity of the statute.¹⁹⁰

VI. CONCLUSION

Reading the Bill of Rights holistically as you would a great poem does not eliminate hard cases. It does, however, direct a judicial reader to a confrontation with the text in ways that are deeper and more likely to generate coherence than other competing ways to read the document. We owe the text the effort.

188. 431 U.S. 494, 500-06 (1977).

189. 357 U.S. 449, 462 (1958).

190. See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624 (1980). I have attempted to describe the Court's efforts to prevent government from placing obstacles in the path of individuals seeking to form a close personal bond. See Neuborne, *supra* note 164, at 384-86.

Appendix

Table A
Order of Rights in Magna Carta

Order of Rights in Magna Carta	Placement in Bill of Rights
Freedom of English church	First Amendment
Rights of local autonomy	Tenth Amendment
Access to courts at definable place and time	Fifth and Sixth Amendments
Proportionality of fines	Eighth Amendment
Earls and Barons tried only by peers	Sixth Amendment
No seizure of property without compensation	Fifth Amendment
No commencement of suit by bailiff without trustworthy testimony of witness (probable cause)	Fourth Amendment
No serious punishment without lawful judgment or law of the land (due process)	Fifth Amendment
Right to travel abroad	Fifth Amendment ?
Respect for territorial jurisdiction of courts	Fifth and Sixth Amendments
Foreign troops withdrawn	Third Amendment

1 SCHWARTZ, *supra* note 111, at 8-16.

Table B
Order of Rights in the Massachusetts Body of Liberties

<i>Order of Rights: Massachusetts Body of Liberties</i>	<i>Placement in Bill of Rights</i>
No loss of life or property except according to law	Fifth Amendment
Oaths only if prescribed by General Court - religious freedom	First Amendment
No seizure of property for public use without just compensation	Fifth Amendment
Right to travel	Fifth Amendment?
Pretrial bail guaranteed	Eighth Amendment
Notice provisions	Sixth Amendment
Limit on technical reversals of jury verdicts	Seventh Amendment
Right to unpaid assistance in court	Sixth Amendment
Right to written pleadings	Sixth Amendment
Mutual consent for judge; jury; right to jury challenge for cause	Sixth and Seventh Amendments
Protection of jury fact-finding	Seventh Amendment
Speedy trial	Sixth Amendment
Double jeopardy	Fifth Amendment
Limit on whipping	Eighth Amendment
Limit on torture	Eighth Amendment
No infamous, barbarous or cruel bodily punishment	Eighth Amendment
Defendant has right to put in proof	Sixth Amendment
Primacy of civil over religious jurisdiction	First Amendment
Narrow right to decline to testify on grounds of conscience	Fifth Amendment?
Protection of local government	Tenth Amendment
Right to cast dissenting vote	First Amendment?
Right to abstain	First Amendment?
Right of Christian dissenters to worship	First Amendment

1 SCHWARTZ, *supra* note 111, at 71.

Table C
Order of Rights in the Virginia Declaration of Rights

<i>Order of Rights: Virginia Declaration of Rights</i>	<i>Placement in Bill of Rights</i>
No taxes or taking of private property for public use without legal ground	Fifth Amendment
Notice of charges in criminal cases	Sixth Amendment
Confrontation	Sixth Amendment
Defendant's right to present evidence	Sixth Amendment
Speedy trial	Sixth Amendment
Jury trial	Sixth Amendment
Criminal venue	Sixth Amendment
Self-incrimination	Fifth Amendment
No deprivation of liberty except by law of land or judgment of peers	Fifth Amendment
No excessive bail	Eighth Amendment
No excessive fines	Eighth Amendment
No cruel and unusual punishment	Eighth Amendment
No general warrants	Fourth Amendment
Jury trial in civil cases	Seventh Amendment
Free press	First Amendment
Guaranty of militia; ban on standing armies	Second and Third Amendments
Free exercise of religion	First Amendment
Duty of toleration	First Amendment

2 SCHWARTZ, *supra* note 111, at 231-36.

Table D
Order of Rights in the Massachusetts Declaration

<i>Order of Rights in the Massachusetts Declaration</i>	<i>Placement in Bill of Rights</i>
Right to worship as you wish	First Amendment
Power to establish churches	rejected in First Amendment
Compensation for takings for public use	Fifth Amendment
Notice of charges in criminal cases	Sixth Amendment
No self-incrimination	Fifth Amendment
Right to present favorable evidence	Sixth Amendment
Right to counsel or <i>pro se</i> appearance	Sixth Amendment
No deprivation except by judgment of peers or law of the land	Fifth Amendment
Right to jury trial before infamous punishment	Sixth Amendment
Criminal venue	Sixth Amendment
Freedom from unreasonable searches	Fourth Amendment
Freedom from unreasonable seizures	Fourth Amendment
Warrants must be supported by oaths	Fourth Amendment
Warrants must be specific	Fourth Amendment
Civil jury trial	Seventh Amendment
Free press	First Amendment
Right to keep and bear arms for the common defense	Second Amendment
Freedom of assembly	First Amendment
Right to instruct representatives	rejected
Right to request of legislature through address, petition or remonstrance	First Amendment
No excessive bail	Eighth Amendment
No excessive fines	Eighth Amendment
No cruel and unusual punishment	Eighth Amendment
No quartering troops	Third Amendment

2 SCHWARTZ, *supra* note 111, at 369-73.

Table E
Order of Rights in the New Hampshire Declaration

Order of Rights in New Hampshire Declaration	Placement in Bill of Rights
Freedom to worship	First Amendment
No obligation to support another's religion	First Amendment
Right not to bear arms	Rejected- Second Amendment
Notice of criminal charges	Sixth Amendment
No self-incrimination	Fifth Amendment
Right to present evidence	Sixth Amendment
Confrontation	Sixth Amendment
Counsel or <i>pro se</i> appearance	Sixth Amendment
No deprivation without judgment of peers or law of the land	Fifth Amendment
Double jeopardy	Fifth Amendment
Jury trial for capital crimes	Sixth Amendment
Criminal venue/vicinage	Sixth Amendment
Proportional penalties	Eighth Amendment
Freedom from unreasonable searches	Fourth Amendment
Freedom from unreasonable seizures	Fourth Amendment
Warrants on oath	Fourth Amendment
Specific warrants	Fourth Amendment
Civil jury trials	Seventh Amendment
Freedom of the press	First Amendment
No quartering soldiers	Third Amendment
Freedom of assembly	First Amendment
Right to instruct representatives	Rejected
Petition by remonstrance for wrongs and grievances	First Amendment
No excessive bail	Eighth Amendment
No excessive fines	Eighth Amendment
No cruel and unusual punishment	Eighth Amendment

Table F
Order of Rights in Virginia Amendments

Order of Rights in Virginia Amendments	Placement in Bill of Rights
Notice in criminal cases	Sixth Amendment
Confrontation	Sixth Amendment
Right to present evidence	Sixth Amendment
Counsel	Sixth Amendment
Jury	Sixth Amendment
Criminal venue	Sixth Amendment
Unanimous jury	Omitted
Privilege against self-incrimination	Fifth Amendment
No deprivation of life, liberty or property unless by law of land	Fifth Amendment
Civil jury trial	Seventh Amendment
No excessive bail	Eighth Amendment
No excessive fine	Eighth Amendment
No cruel and unusual punishments	Eighth Amendment
No unreasonable searches	Fourth Amendment
No unreasonable seizures	Fourth Amendment
No general warrants	Fourth Amendment
Right of assembly	First Amendment
Petition for redress	First Amendment
Free speech	First Amendment
Free press	First Amendment
Right to bear arms	Second Amendment
No quartering troops	Third Amendment
Free exercise of religion	First Amendment
No establishment of religion	First Amendment
Retained powers of states respected	Tenth Amendment
Enumerated rights do not denigrate other rights	Ninth Amendment

4 SCHWARTZ, *supra* note 111, at 756.

Table G
Order of Rights in New York Amendments

Order of Rights in New York Amendments	Placement in Bill of Rights
Respect for retained rights	Ninth and Tenth Amendments
Free exercise of religion	First Amendment
No establishment of sects	First Amendment
Right to bear arms	Second Amendment
No quartering troops	Third Amendment
No deprivation without due process of law	Fifth Amendment
Double jeopardy	Fifth Amendment
No excessive bail	Eighth Amendment
No excessive fines	Eighth Amendment
No cruel and unusual punishment	Eighth Amendment
Grand jury indictment	Fifth Amendment
Speedy trial	Sixth Amendment
Public trial	Sixth Amendment
Jury trial in criminal cases	Sixth Amendment
Criminal venue	Sixth Amendment
Unanimous verdicts	Omitted
Notice of charges	Sixth Amendment
Confrontation	Sixth Amendment
Right to present evidence	Sixth Amendment
Counsel	Sixth Amendment
No self-incrimination	Fifth Amendment
Civil jury trial	Seventh Amendment
No unreasonable searches	Fourth Amendment
No unreasonable seizures	Fourth Amendment
No general warrants	Fourth Amendment
Free assembly	First Amendment
Petition for redress	First Amendment
Free press	First Amendment

4 SCHWARTZ, *supra* note 111, at 911-18.

Table H
Order of Rights in Madison's June 8th Draft

<i>Order of Rights: Madison's June 8th Draft</i>	<i>Placement in Bill of Rights</i>
Right to religious belief	First Amendment
Right to religious worship	First Amendment
No establishment	First Amendment
Equal rights of conscience	omitted
Right to speak	First Amendment
Right to write	omitted
Right to publish	omitted
Free press	First Amendment
Free assembly	First Amendment
Petition for redress	First Amendment
Right to bear arms	Second Amendment
Conscientious objection to bearing arms	omitted
No quartering troops	Third Amendment
Double jeopardy	Fifth Amendment
No self-incrimination	Fifth Amendment
No deprivation without due process	Fifth Amendment
No taking private property except for public use	Fifth Amendment
Just compensation for taking private property	Fifth Amendment
No excessive bail	Eighth Amendment
No excessive fines	Eighth Amendment
No cruel and unusual punishments	Eighth Amendment
No unreasonable searches	Fourth Amendment
No unreasonable seizures	Fourth Amendment
Specific warrants under oath	Fourth Amendment
Speedy trial	Sixth Amendment
Notice of charge	Sixth Amendment
Confrontation	Sixth Amendment
Compulsory process	Sixth Amendment
Counsel	Sixth Amendment
Nondisparagement of retained rights	Ninth Amendment
No state interference with conscience	omitted
No state interference with press	omitted
No state interference with jury trial rights	omitted
Limits on appeals to Supreme Court	omitted
Limits on appellate review of facts	Seventh Amendment
Jury trial in criminal cases	Sixth Amendment

Criminal venue	Sixth Amendment
Grand jury protection	Fifth Amendment
Civil jury trials	Seventh Amendment
Separation of powers clause	omitted
Reserved powers to states	Tenth Amendment

5 SCHWARTZ, *supra* note 111, at 1042.

Table I
Rights in the French Declaration

<i>French Protections of Liberty</i>	<i>First Amendment</i>
Right to express opinions by press or otherwise	No establishment of religion
Right to assembly	Free exercise of religion
No interference with right of worship	Free speech
Right of petition ¹	Free press
	Right of assembly
	Right of petition

1. The right of petition in the French Declaration is located in a separate clause toward the close of the document. The Declaration also contains separate clauses protecting the equal right to run for office, the equal right to vote, and an early term limitation clause. The Bill of Rights says nothing about participating in the democratic process, except for the right to petition.
