Written Constitutions and Unenumerated Rights

ERIC SLAUTER

THE NINTH AMENDMENT to the Constitution of the United States, which declares that the 'enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,' raises an obvious problem for the practice of text-centered constitutional history. While scholars have traced the origins of most of the rights protected in the first ten amendments, sometimes devoting whole books to individual clauses, to date no one has written a similar study of the Ninth Amendment. It is easy to understand why. The enumerated rights of free speech or a free press present concrete objects for historical analysis, but because the nature and scope of the Ninth Amendment is itself subject to debate, it has not been especially clear what a prehistory of unenumerated rights would, should, or could examine.

Political and legal scholars, to be sure, have attended to the immediate context of the production of the Ninth Amendment and have tried to provide a sense of the content of its protections. Legislative histories focus especially on James Madison's proposals for amendments in June 1789 and on changes made to those proposals in Congress later that summer. Turning from the process by which the text was formulated to the question of what rights the Ninth Amendment was designed to protect, some legal commentators see rights not enumerated in the Constitution as

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enumerated somewhere else. To give content to the Ninth Amendment these readers collate revolutionary declarations of rights from individual states and look to the recommendations some states made about amendments in the process of ratifying the Constitution. Other legal interpreters contend that the Ninth Amendment protects rights that are essentially unenumerable because they are infinite. In an attempt to explain what they see as a pragmatic open-endedness behind the Ninth Amendment's protection of natural rights these interpreters point to pre-ratification explanations by the supporters of the Constitution that characterized a Federal bill of rights as 'dangerous.' James Wilson and Alexander Hamilton, among others, argued that a partial enumeration of rights would have the undesirable consequence of augmenting Federal power in any area not specifically and textually reserved. But despite the attention to political acts and political rhetoric, legal approaches can seem insensitive to the politics of the Revolutionary period. After all, not all of the state declarations of rights that provide evidence for 'positivists' were understood by contemporaries to have equal legitimacy; and the 'natural rights' school seems to accept one side of a political argument as if it was a widely held maxim—or indeed as if a strategic Federalist argument during ratification amounts to the same thing as the intention of the framers of the Ninth Amendment.[1]

In enumerating what had been left unenumerated legal scholars have set aside a deeper history of the idea of unenumerated rights

1. For the basic outline of debates over the meaning of the Ninth Amendment, see the articles by Raoul Berger, Charles L. Black, Jr., Thomas C. Grey, Sanford Levinson, Thomas B. McAfee, Calvin R. Massey, and Suzanna Sherry collected in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, ed. Randy E. Barnett, 2 vols. (Fairfax, Va.: George Mason University Press, 1989–93); and the exchange between Ronald Dworkin and Richard A. Posner on the concept of unenumerated rights in *The Bill of Rights in the Modern State*, eds. Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein (Chicago: University of Chicago Press, 1992), 381–450. Gaspare J. Saladino's bibliographic essay in *The Bill of Rights and the States*, eds. Patrick T. COnley and Joseph P. Kaminski (Madison: Madison House, 1992), 461–514, is the best guide to scholarship before 1991. For recent reflections, see Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004); and Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 327–29, 476–77.

and have largely ignored the cultural relation of writing to rights. In treating written constitutions cultural historians have emphasized textuality over (for want of a better term) atextuality. My purpose, then, is not to offer yet another history of the Ninth Amendment but to suggest some cultural strategies for thinking about the revolutionary relation of written constitutions and unenumerated rights.

A consideration of unenumerated rights in the late eighteenth century should begin by acknowledging the relatively recent expansion of enumerated rights. Between 1689 and 1789, discussions of rights in colonial British America and the early United States widened to include larger segments of the population and the kinds of rights claimed dramatically expanded. Rights were not 'invented' during this period. Historians of political thought make a convincing case that a modern language of rights was spoken in England by the close of the seventeenth century. But if the concept of rights was not novel, the rights themselves often were. A side-by-side comparison of declarations of rights made in the age of the American Revolution with similar documents produced in the English Revolution a century earlier confirms the relative novelty of some enumerated rights—from freedom of conscience, assembly, and speech to the right to consent to the quartering of troops in private houses during peacetime. Contemporaries sometimes tried to disguise the newness of certain rights by imagining ancient legal genealogies, though just as often they acknowledged that the rights they claimed had only been discovered and declared in their lifetimes; some took it further and observed that new experiences would inevitably lead to the discovery of other rights not yet known.[2]

2. On early modern ideas about rights, see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957); Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); Lois G. Schwoerer, *The Declaration of Rights, 1689* (Baltimore: The Johns Hopkins University Press, 1981); Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994); Kirstie M. McClure, *Judging Rights: Lockean Politics and the Limits of Consent* (Ithaca: Cornell University Press, 1996); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); and David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000).

Histories of the rise of rights in colonial British America and the early United States tend to minimize the dramatic expansion of enumerated rights in the eighteenth century. Working backward from declarations of rights in early state constitutions and the United States Constitution, legal scholars and historians have explained how enumerated rights developed either out of a long history of English legal precedent or out of a much shorter history of internal political struggle and practice during the American Revolution.[3] Working forward from the seventeenth century, historians of political philosophy have narrated the evolution of ideas about rights in Europe and the transmission of those ideas to America.[4] The former approach is more structured around clauses and the latter around concepts, but practitioners of both approaches have found surprisingly little to say about the period between the English Declaration of Right of 1689 and the discussion of rights in the context of colonial American reactions to Parliament in the

3. For legal and political histories, see Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill: University of North Carolina Press, 1953); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985); John Phillip Reid, *Constitutional History of the American Revolution*, 4 vols. (Madison: University of Wisconsin Press, 1986–1995), volume I: *The Authority of Rights*; Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (expanded ed.; Madison: Madison House, 1992); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996); *The Bill of Rights: Government Proscribed*, eds. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1997); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998); Leonard W. Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 1999); and for a recent narrative of the framing of the Bill of Rights, see Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (New York: Oxford University Press, 2006).

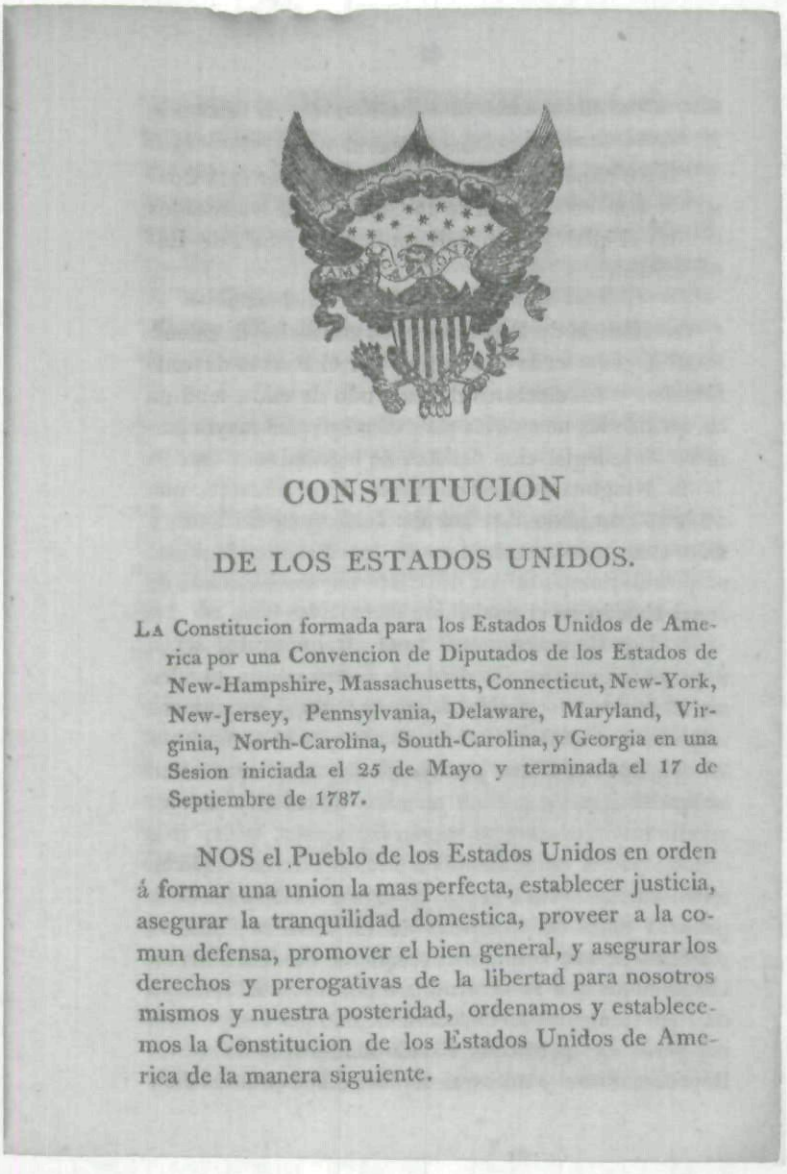
4. For philosophical approaches, see *The Virginia Statute of Religious Freedom: Its Evolution and Consequences in American History*, eds. Merrill D. Peterson and Robert C. Vaughn (Cambridge: Cambridge University Press, 1988); *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, eds. Michael J. Lacey and Knud Haakonssen (Cambridge: Cambridge University Press, 1991); Richard A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 1999); and Murray Dry, *Civil Peace and the Quest for Truth: The First Amendment Freedoms in Political Philosophy and American Constitutionalism* (Lanham, Md.: Lexington Books, 2004).

mid 1760s.[5] Perhaps less surprisingly, these examinations have also shed little light on the relation between practices of writing or enumerating rights and concepts of rights themselves. Both approaches have obvious merit, but between attention to particular clauses and to general philosophic trends—that is, between the traditional provinces of legal and intellectual history—remains a largely unexplored cultural history of rights.

Cultural historians of early modern Europe are beginning to shape such a history for France and Britain by putting pressure on the naturalness of conceptions of rights in the eighteenth century. In doing so they have described a series of paradoxes. Rights declared to be self-evident in late eighteenth-century France, Lynn Hunt has argued, were declared precisely because they were not in fact self-evident or at least not that evident to many. For Hunt, the rise of the epistolary novel helped pre-Revolutionary French readers conceptualize human rights and gave meaning and content to later declarations. In the case of late-eighteenth-century England, as Dror Wahrman has provocatively suggested, claims of individual rights might have inaugurated rather than simply ratified a modern sense of self: at the very least Wahrman finds that such claims historically preceded if they did not bring about the concept of individualism upon which they would seem to rest. For both of these historians, paradoxes of rights tell us about larger cultural formations and about new conceptions of self and others.[6]

5. Even the largest documentary collections skip most of the eighteenth-century: see, for instance, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, ed. Neil H. Cogan (New York: Oxford University Press, 1997) and *The Roots of the Bill of Rights: An Illustrated Source Book of American Freedom*, ed. Bernard Schwartz, 5 vols. (New York: Chelsea House, 1980), neither of which reprints material written between 1701 and 1760.

6. Lynn Hunt, 'The Paradoxical Origins of Human Rights,' in *Human Rights and Revolutions*, ed. Jeffrey N. Wasserstrom, Lynn Hunt, and Marilyn B. Young (Lanham, Md.: Rowman and Littlefield, 2000), 3–17; Hunt, *Inventing Human Rights: A History* (New York: W. W. Norton, 2007) Dror Wahrman, *The Making of the Modern Self: Culture and Identity in Eighteenth-Century England* (London: Yale University Press, 2004), 307–10. And for recent cultural analysis of women's rights in eighteenth-century America, see the essays by Sarah Knott and Rosemarie Zagarri in *Women, Gender, and Enlightenment*, ed. Sarah Knott and Barbara Taylor (New York: Palgrave Macmillan, 2005); and Mary Kelley, *Learning to Stand and Speak: Women, Education, and Public Life in America's Republic* (Chapel Hill: University of North Carolina Press, 2006).



CONSTITUCION

DE LOS ESTADOS UNIDOS.

La Constitucion formada para los Estados Unidos de America por una Convencion de Diputados de los Estados de New-Hampshire, Massachusetts, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, y Georgia en una Sesion iniciada el 25 de Mayo y terminada el 17 de Septiembre de 1787.

NOS el Pueblo de los Estados Unidos en orden á formar una union la mas perfecta, establecer justicia, asegurar la tranquilidad domestica, proveer a la comun defensa, promover el bien general, y asegurar los derechos y prerogativas de la libertad para nosotros mismos y nuestra posteridad, ordenamos y establecemos la Constitucion de los Estados Unidos de America de la manera siguiente.

Fig. 1. The opening page of the earliest separate printing of the United States Constitution in the Spanish language. Dedicated to the lawyers of Caracas, it was intended for export in teh cause of the Latin American independence movements. *Constitucion de los Estados Unidos de America.* Traducida del ingles al espanol por Don Jph. Manuel Villavicencio (Philadelphia: En la imprenta de Smith & M'Kenzie, 1810).

These findings provide benchmarks for considering the unique situation in colonial British America and the early United States, where the novel never achieved the prominence it attained in eighteenth-century Britain and France, where conceptions of liberal individualism were arguably delayed or eclipsed by expressed commitments to the corporate nature of the rights of mankind or the rights of the people, and where local institutions of colonialism and a system of slavery put a premium on ethnic and 'racial' difference at the same time that the reception of the European enlightenment helped crystallize ideas about universal humanity. Focused less on particular rights than on conceptions of rights, a cultural history of rights in early America might have a comparative advantage over purely political or legal histories insofar as it could illuminate the ways in which ordinary people made meaning of the rights declared in their name and contributed to the discovery (if not the declaration) of those rights.

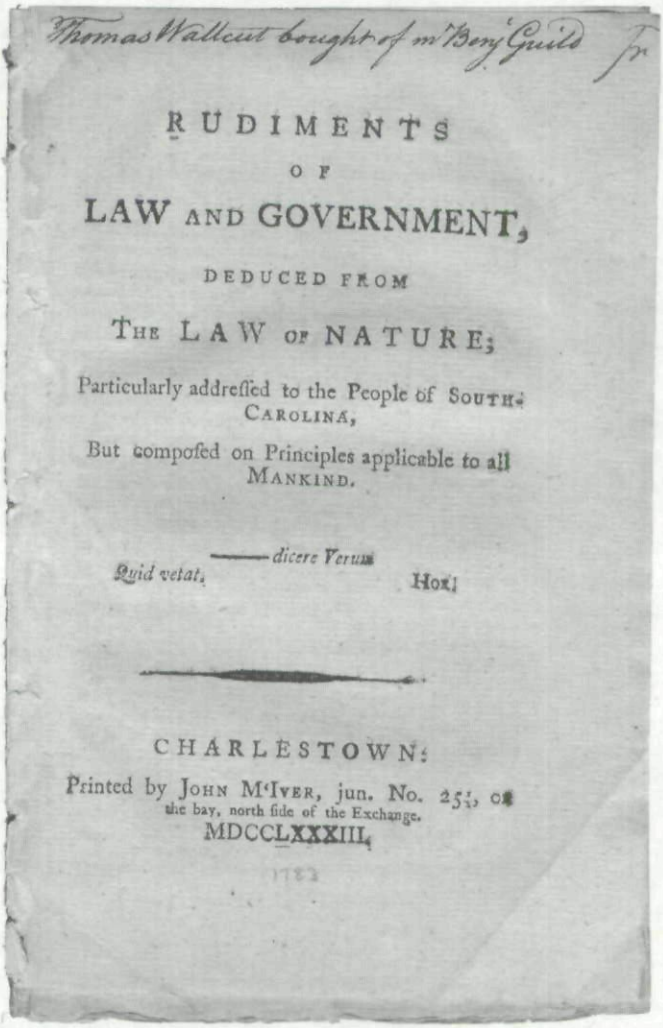
Such a history would necessarily focus on the crucial question of how contemporaries in the late eighteenth century understood the relationship between textualized and non-textualized rights. Were declarations of rights merely the textual citation of pre-existing rights or were they the source of rights themselves? As David Armitage has argued, the Declaration of Independence was more noteworthy for its declaration of sovereignty than for its declaration of rights.[7] Thomas Jefferson and Congress devoted energy to the enumeration of wrongs, not rights; the famous list of rights in the second paragraph is patently non-exhaustive: 'among these' rights 'are Life, Liberty, and the Pursuit of Happiness,' Jefferson and Congress observed before moving toward defining with much more care the specific right of the people to alter governments. In the declarations of rights made shortly before and after the Declaration of Independence, different states enumerated rights differently. Though many of

7. David Armitage, *The Declaration of Independence: A Global History* (Cambridge, Mass.: Harvard University Press, 2007).

the same core rights appear on all of the newly drafted declarations of rights of the 1770s and early 1780s, a considerable residue of rights declared in some states but not in others remains. And it is clear that the very idea of enumeration meant different things to different states and different legislators. The Virginia Declaration of Rights of 1776, as well as the Pennsylvania Declaration which largely mimicked it, included sixteen sections; Maryland's Declaration, also drafted in 1776 and the longest of the period, ran to forty-two articles.

A cultural history of rights should take stock of the range of claims about natural rights made in the period and should move beyond the question of enumeration in state declarations. A census of the various suggestions about what exactly natural rights were in the Revolutionary period reveals some surprises. Consider, for instance, the natural rights described in a pamphlet published in Charlestown, South Carolina, in 1783. The anonymous author of *Rudiments of Law and Government, Deduced from the Law of Nature* held that the 'Rights of Individuals from society by Natural Law, are Safety, Liberty, Kindness, and Due Portions of Common property, of Political Consequence, and of Social Emoluments.'[8] To be sure, while liberty, safety, and property were frequently mentioned in revolutionary declarations of rights, no state declared an individual right to kindness or, for that matter, a right to a portion of common property. This anonymous author obviously spoke for himself and, though he addressed lawmakers in South Carolina and elsewhere, he probably reached few readers. Nevertheless, the claims on behalf of such rights made by this author offer a suggestive preview of what might happen if analysts of the Ninth Amendment shifted attention away from legal enactments and declarations into a broader culture of rights or at the very least toward those period voices

8. *Rudiments of Law and Government, Deduced from the Law of Nature; Particularly addressed to the People of South-Carolina, But composed on Principles applicable to all Mankind* (Charleston: McIver, 1783), 15. The author seems to have had 'hospitality' in mind as the reciprocal duty (p. 18).


Thomas Wallcut bought of m^r Benj^a Guild Jr

RUDIMENTS

OF

LAW AND GOVERNMENT,

DEDUCED FROM

THE LAW OF NATURE;

Particularly addreſſed to the People of SOUTH-CAROLINA,

But compoſed on Principles applicable to all MANKIND.

——— *dicere Verum*
Quid vetat? Hor.

CHARLESTOWN:

Printed by JOHN M'IVER, jun. No. 25, on the bay, north ſide of the Exchange.

MDCCLXXXIII.

1783

Fig. 2. The anonymous pamphlet, *Rudiments of law and government, deduced from the law of nature; : particularly addressed to the people of South-Carolina, but composed on principles applicable to all mankind*, was printed in Charlestown, S. C. in 1783. The inscription, 'Thomas Wallcut bought of Mr. Benj. Guild,' indicates that this is one of the items retrieved from Wallcut's personal library by AAS Librarian Christopher Columbus Baldwin in 1834. Baldwin observed that he had to search through 'ancient trunks, bureaus, and chests, baskets, tea chests, and old drawers . . . and everything was covered with venerable dust. As I was under a slated roof and the thermometer at ninety-three, I had a pretty hot time of it. The value of the rarities I found, however, soon made me forget the heat and I never have never seen such happy moments.'

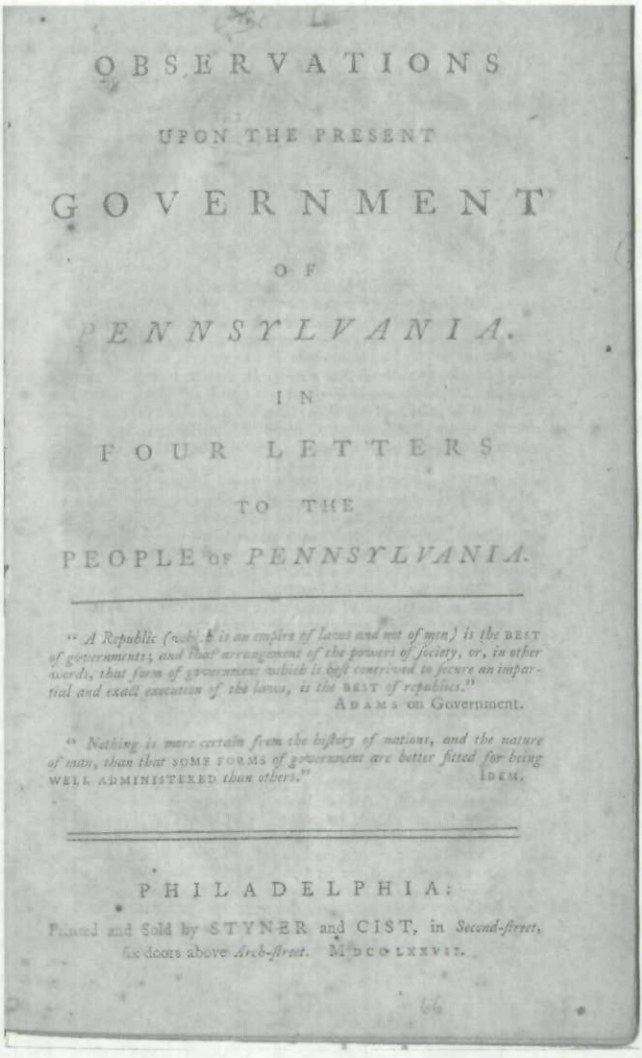
that argued for a broad range of rights requiring acknowledgement and protection.

Public debates about enumerating rights within the individual states provide another way to rethink the problem of unenumerated rights. Take the case of Pennsylvania. In May 1777, the physician Benjamin Rush, writing under the pseudonym 'Ludlow,' argued in a Philadelphia newspaper that the authors of the Pennsylvania Constitution of 1776 had failed to announce all the principles upon which the rights therein declared were based and, even worse, had made a crucial error by not restricting the legislature from altering the bill of rights. A number of writers came forward to answer various other charges of 'Ludlow,' but Thomas Paine was the only one to take up the question of rights. Writing under the familiar name of 'Common Sense,' Paine argued that an unalterable bill of rights was dangerous since new civil rights were emerging all the time. Given new situations, Paine wrote, 'it is impossible to say what improvements may be made.' But he strenuously objected to the idea that the bill of rights should enumerate all natural rights, 'for were all the great natural rights, or principles, as this writer calls them, to be admitted, it would be impossible that any government could be formed thereon, and instead of being a Bill of Rights fitted to a state of civil government, it would be a Bill of Rights fitted in a state of nature without any government at all.' 'It would be,' he joked, 'an Indian Bill of Rights.' Paine alluded to the widely held notion that native Americans stood as empirical examples (as political scientist Sankar Muthu has recently put it) 'of pure humans, that is, as human beings who inhabit a state of nature and who thus exhibit purely natural qualities, such as . . . an unmediated knowledge of natural laws and rights.'[9] Paine ignored descriptions of native American politics made by recent natural historians in order to make his point.

9. [Thomas Paine] 'Common Sense,' 'Candid and Critical Remarks on a Letter Signed Ludlow,' *Pennsylvania Journal*, June 4, 1777, reprinted in *Complete Writings of Thomas Paine*, ed. Philip S. Foner, 2 vols. (New York: Citadel Press, 1945), 2: 274; Sankar Muthu, *Enlightenment Against Empire* (Princeton: Princeton University Press, 2003), 7.

Governmental power derived from surrendered rights, hence overenumeration of rights risked the existence of government altogether. Though much more needs to be known about contemporary conceptions of native Americans as emblems of natural rights, the exchange between Rush and Paine highlights an important tension in period understandings of rights: Rush and Paine agreed that unenumerated rights were not protected rights, but Rush wished for a full and final enumeration of natural rights that could not be touched by successive legislatures and Paine held out the possibility of as yet unknown rights that would need the protection of precisely those legislatures.

The notion, advanced by both Rush and Paine in 1777, that rights enumerated on paper declarations were the only legitimate rights stood in stark contrast to pre-revolutionary claims that the rights of man derived from human nature and from God and were not to be, as Alexander Hamilton put it in 1775, 'rummaged for, among old parchments, or musty records.' But despite much verbal antipathy to the idea of documents as sources of rights, late colonial graphic artists routinely rendered portraits of prominent politicians and lawyers with copies of such documents. Bostonian Nathaniel Hurd's 1762 rendering of William Pitt, seated at a desk and surrounded by books, a quill, and a scroll inscribed 'Magna Carta et Libertas'—an image that suggested that Pitt had just composed the Magna Carta—was typical of a British graphic tradition. Late colonial lawyers and politicians appealed less and less to such documents, but graphic art remained static. A popular almanac image of John Dickinson, the author of a widely read series of essays by the 'Pennsylvania Farmer' in the late 1760s, portrayed Dickinson resting on a copy of Magna Carta, despite the fact that he had not mentioned the text. So too, the first official emblem for the Continental Congress in 1774 displayed a pillar of liberty perched atop Magna Carta, even though Congress repeatedly held that rights were pre-textual and God-given and that prior declarations on paper or parchment were not the source. It would have been easy for



OBSERVATIONS

UPON THE PRESENT

GOVERNMENT

OF

PENNSYLVANIA.

IN

FOUR LETTERS

TO THE

PEOPLE OF *PENNSYLVANIA.*

"*A Republic (reader) is an empire of laws and not of men) is the* BEST *of governments; and that arrangement of the powers of society, or, in other words, that form of government which is best contrived to secure an impartial and exact execution of the laws, is the* BEST *of republics.*"

ADAMS on Government.

"*Nothing is more certain from the history of nations, and the nature of man, than that* SOME FORMS *of government are better fitted for being* WELL ADMINISTERED *than others.*" IDEM.

PHILADELPHIA:

Printed and Sold by STYNER and CIST, in *Second-street*, six doors above *Arch-street*. M,DCC,LXXVII.

Fig. 3. Benjamin Rush criticized the Pennsylvania Constitution for failing to make civil rights unalterable by the legislature and for an incomplete enumeration of natural rights. Thomas Paine responded that legislatures must be allowed to incorporate newly discovered civil rights and that a full enumeration of natural rights, which he termed 'an Indian Bill of Rights,' was suitable only for a state of nature. When Rush selected Paine's printers to reissue the articles as a pamphlet, opponents objected that he was deliberately trying to confuse readers. [Benjamin Rush], *Observations upon the present government of Pennsylvania.* : In four letters to the people of Pennsylvania (Philadelphia: Styner and Cist, 1777).

most who saw these images to be confused, and to think that the paper documents were the true source of those rights. If we hope to understand the relationship between natural rights and positive rights, such images have much to tell us.[10] The division between verbal and visual representations suggests a larger tension about how political documents like constitutions and declarations of rights might be understood—indeed, the tension was at the heart of conversations about precisely what such texts were and what they documented.

The fact that constitutions were written documents was significant and novel, but it was not writing itself that made them meaningful or workable. It is a striking fact that *The Federalist*, often taken to be the best contemporary commentary on the meaning of the Constitution, rarely quotes the actual language of the text it defends. Though the series began in late October 1787, 'Publius' did not cite the text of the proposed Constitution until January 1788, after more than thirty essays had appeared. In part this stemmed from a strategic decision to treat the general concept of the union and the threats to its preservation before examining the proposed Constitution as the solution. In the end, just over a quarter of the eighty-five papers reproduced the language of the Constitution, but some citations are paraphrases or misquotations set within quotation marks rather than precise reproductions of constitutional language. Anti-Federalists frequently couched their objections to the Constitution by reference to the language of the text, and 'Publius' may have shied away from citation for that reason. But it is worth recalling James Madison's claims that 'parchment barriers,' 'mere declarations in the written constitution,' or 'a mere demarcation on parchment' served as insufficient safeguards for either the rights of citizens or the powers of

10. Alexander Hamilton, *The Farmer Refuted* (New York, 1775), in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett and Jacob E. Cooke (New York: Columbia University Press, 1971–1987), 1: 122. For an extended discussion of the problem, see Eric Slauter, 'Being Alone in the Age of the Social Contract,' *William and Mary Quarterly*, 3d Ser., 62 (January 2005): 31–66.

particular branches of government.[11] The way to ensure such things was not through written constitutions per se but by drafting constitutions in a way that would allow parts of the government to check other parts and by finding protections for the rights of minorities through extra-textual means such as the scale of the republic. These were the topics Madison addressed in the papers that are now most read, *Federalist* 10 and 51, neither of which appealed to the actual language of the Constitution.

The printed Constitution emerged at a moment when political argumentation was undergoing a radical change in the nature and locus of authority, a fact that can be registered in the shifting ways authors cited texts. On the whole, in newspapers and in pamphlets, political writers tended to cite fewer and fewer authorities to make their points. The larger change can be seen in a dramatic, and admittedly extreme, comparison of the layout of typical pages in John Dickinson's *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*, published in book form in 1768 after serialization in newspapers, and Thomas Paine's *Common Sense*, published first as a pamphlet in 1776. As arguments from precedent gave way to arguments from natural rights, citations declined dramatically. While the body of Dickinson's text often rested on half a page of citations in smaller type, Paine rarely cited other writers. One of Paine's few quotations was to the person he introduced as 'that wise observer on governments, Dragonetti.' Few of Paine's readers had probably heard of Giacinto Dragonetti's *Treatise of Virtues and Rewards*, an answer to Cesare Beccaria's *On Crimes and Punishments*; indeed, the reference raises questions about how political writings circulated in the late eighteenth-century Atlantic world. London booksellers in the

11. For Madison's remarks on 'parchment barriers' and governmental structure, see *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 333, 338, 343. For 'parchment barriers' with respect to rights, see Madison to Jefferson, October 17, 1788, in *The Papers of James Madison*, eds. William T. Hutchinson, William M. E. Rachel, Robert Rutland et al., 17 vols. (Chicago: University of Chicago Press; Charlottesville: University Press of Virginia, 1962–91), 11: 298.

late 1760s and into the middle of the 1770s worked to stock the bookshelves of colonial radicals; and colonial booksellers stocked such books and occasionally reprinted shorter ones. But while a Charleston printer in 1777 and a Philadelphia printer in 1778 reprinted Beccaria's essay, Dragonetti's book was not a popular text. It does not seem to have been serialized in newspapers or other periodicals, and existed in a single, dual-language edition printed in London in 1769. Modern search engines for digital texts suggest that Paine was the only writer citing this text in print in the period. How did he find it? Asking such questions allows us to move away from influence studies that center on citations to 'liberal' or republican texts and towards an appreciation not simply of the sources of political thought but the way in which sources were marshaled and, in some cases, even circulated.

Paying more attention to the market for political writing in the period and to the empirical realities of printing can help us assess period claims for the significance of written constitutions. For all of our rough sense of the availability of certain texts on revolutionary bookshelves, we know little about the real market for political literature or, for that matter, the marketing of political literature. How should we interpret the fact that *Rudiments of Law and Government*, the anonymously authored fifty-six-page pamphlet that stipulated a right to kindness and due portions of common property, sold for a dollar in Charleston in August 1783, for half-a-dollar in September, and for two shillings and four pence in December?[12] The declining price suggests both a lack of demand and the possibility of appeal to different audiences over a short span of time. Does it matter that Benjamin Rush, after publishing his critique of the Pennsylvania Constitution's failure to fully enumerate natural rights in a Philadelphia newspaper, reprinted his 'Ludlow' letters in a pamphlet? The fact that Rush repackaged his newspaper articles as a new essay and had selected

12. On the declining price of *Rudiments*, see *South Carolina Weekly Gazette*, August 16, 1783, and December 12, 1783; and *South Carolina Journal*, September 2–9, 1783. A dollar was the equivalent of six shillings.

the same printers and booksellers who distributed Paine's *American Crisis* angered an opponent named 'Whitlocke,' who grumbled that readers were buying them under a '*double* mistake.' The notion that a reader might mistake one of the opponents of 'Common Sense' for 'Common Sense' himself was a problem. The physical marketplace of ideas, with its pseudonymous authors and with printers who played both sides of an issue, was a confusing place.[13]

The printed constitution was part of a larger movement for new standards of transparency in government, but some of these standards tested the limits of empirical possibility. Defenders of Pennsylvania's unicameral Constitution of 1776 believed that the public could function as an effective second legislative branch with oversight of the first. Section 15 of the Pennsylvania Constitution stipulated that all bills of a public nature would be printed before they were approved and that the preambles would be written specifically to help readers understand what the laws were designed to do. Critics of that Constitution, like Rush as 'Ludlow,' complained that this provision offered no real check on legislative overreaching, since citizens depended on the good will of the legislature to print unenacted legislation. Rush pointed out that the legislature had failed to comply with this provision in early 1777. But beyond the issue of compliance it was not clear just how public oversight by means of print would work: How exactly were laws to be circulated? How long did the public have to read them? Would citizens express consent or disapproval by voting or by rioting? The theory of print as a check against government was clearly in advance of technologies to make that theory practicable.

The real world of price and printers raises a more central question about the availability of printed constitutions. Trish Loughran's recent reassessment of Paine's claims for sales of *Common Sense* should perhaps make us suspicious of the cherished

13. For Rush's pamphlet, which identified John Adams as the author of *Thoughts on Government* by way of an epigraph, see *Observations upon the Present Government of Pennsylvania* (Philadelphia: Styner and Cist, 1777); and see 'Whitlocke,' 'Letter III. To Ludlow,' *Dunlap's Pennsylvania Packet*, June 10, 1777.

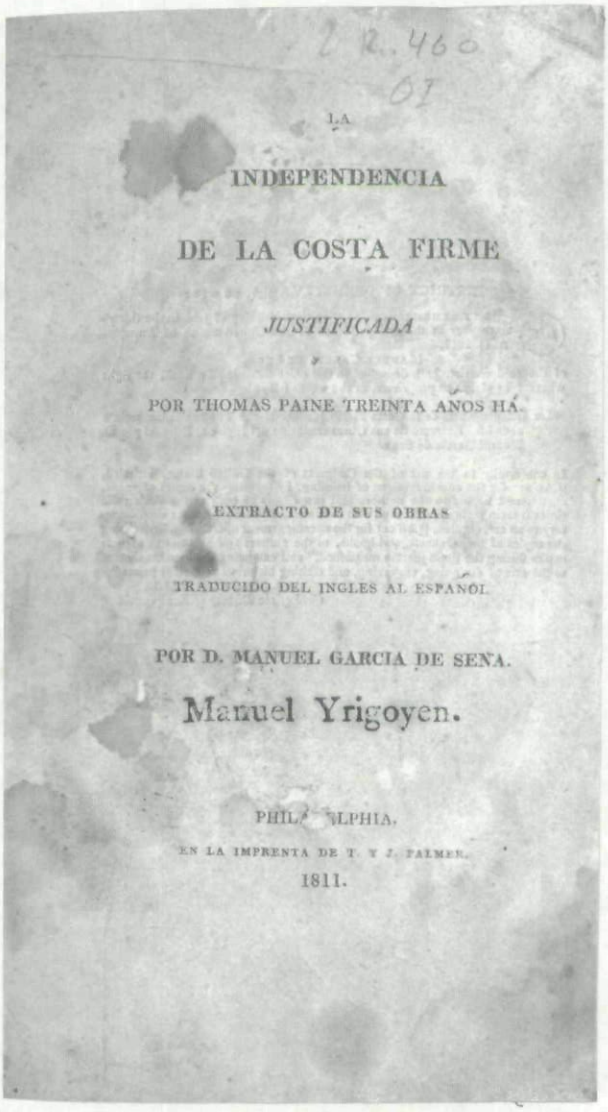


Fig. 4. Produced in Philadelphia for export to Buenos Aires, Manuel Garcîa de Sena's Spanish translation of Paine's *Common Sense*, the Declaration of Independence, and the Constitution of the United States influenced discussions about federalism during the framing of the 1811 Constitution of Venezuela and was later included on a list of books forbidden by the Inquisition of New Spain. *La independencia de la Costa Firme justificada por Thomas Paine treinta años há extracto de sus obras, traducido del inglés al español por D. Manuel Garcia de Sena* (Philadelphia: T. & J. Palmer, 1811).

claim in *Rights of Man* that almost every family in Pennsylvania had a copy of a constitution, and that legislators and ordinary citizens could pull them from their pockets at will. For all of the special supplements in newspapers and the printings in almanacs, small-scale copies of the Constitution of the United States or of the individual states were simply not as plentiful as Paine would have it. Pennsylvania never issued a copy of the Constitution that was truly pocket-sized. But with five editions of its Constitution printed between 1776 and 1786, Pennsylvania was atypical: most states did not have so many; and some state constitutions seem never to have been printed separately in the period.[14]

Available or not, the printed constitution was and is often celebrated as the great political innovation of the age. During the bicentennial of the Constitution a number of scholars placed the revolutionary-era constitutions in the context of larger transformations in the history of printing, but by far the most subtle and suggestive analysis came from Michael Warner, who delivered a lecture at the American Antiquarian Society in April 1987 that was subsequently printed in these pages as 'Textuality and Legitimacy in the Printed Constitution.' Warner's brilliant essay, later republished in his *Letters of the Republic: Publication and the Public Sphere in Eighteenth Century America*, offers one of the most compelling explanations not just for the writing of constitutions but for how such texts were understood and valued by contemporaries. American revolutionaries confronted a peculiar problem: how to give law legitimacy? Written constitutions literalized popular sovereignty; and the process of diffusion through print allowed constitutions to break off from the specific individuals who framed them and to become or seem to become, by a sleight of hand that forestalled a legitimation crisis, expressions of the

14. Trish Loughran, 'Disseminating *Common Sense*: Thomas Paine and the Problem of the Early National Bestseller,' *American Literature* 78 (March 2006): 1–28. For Paine's remarks on the ubiquity of the Pennsylvania Constitution, see *The Rights of Man, Part 2* (1792), in *Complete Works*, ed. Foner, 1: 378. The smallest surviving copy of the Pennsylvania Constitution, issued by John Dunlap in 1777 (Evans 15512), was a duodecimo pamphlet; most were octavo-sized.

people themselves. The mechanism that made the Constitution meaningful to its immediate contemporaries, Warner argued, would have made judicial appeals to the intentions of particular framers illegitimate, a contention he raised against the hermeneutics of original intention endorsed by then Attorney General Edwin Meese. When Gordon S. Wood came to review Warner's book he observed that 'many revolutionaries actually thought that written texts . . . would eliminate judicial and magisterial interpretation.' What they needed, Wood quipped, was 'some postmodern literary critics to tell them how naïve they were in believing that texts could be determinate and stable.' Despite the dig, Warner and Wood were on very similar interpretive ground—indeed, eight of Warner's twenty-six footnotes approvingly cited Wood's scholarship or acknowledged citations of primary sources reproduced from citations in Wood's *Creation of the American Republic, 1776–1787*. From different perspectives, Wood's review and Warner's work both described the written constitution as a tool designed to limit particular kinds of interpretation; both reflected the public debate over original intent.[15]

But we inhabit a different moment, one that compels us to think about written constitutions in different ways. Since the celebrations of the bicentennial of the Constitution of the United States, sixty-nine countries–from the nations of post-Communist Central and Eastern Europe, to South Africa, to Afganistan and Iraq–have drafted constitutions. Over the past decade and a half, as constitutional consultants have traveled a circuit from law schools in the United States to the former Eastern Bloc and to Kabul and

15. Michael Warner, 'Textuality and Legitimacy in the Printed Constitution,' *Proceedings of the American Antiquarian Society* 97 (April 1987): 59–84; Warner, *Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge: Harvard University Press, 1990), 97–117; Gordon S. Wood, 'The Liberation of Print,' review of *The Letters of the Republic*, by Michael Warner, *New Republic*, November 12, 1990, p. 42. For other treatments of print and constitutionalism during the bicentennial, see Patrick H. Hutton, 'The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions,' *Vermont History* 56 (Summer 1988): 154–65; and Walter F. Pratt, Jr., 'Oral and Written Cultures: North Carolina and the Constitution, 1787–1791,' in *The South's Role in the Creation of the Bill of Rights*, ed. Robert J. Haws (Jackson: University Press of Mississippi, 1991), 77–99.

Baghdad, it has perhaps become difficult to think of modern written constitutions as fundamental expressions of a particular people. It has also become harder to distinguish between culturally conditioned constitutional practices and putatively culture-free constitutional norms. The major cultural question about written constitutions of our moment is not about hermeneutics or intentionality, but about whether constitutions travel well.

It is an Enlightenment question. One of the great constitutional debates American Revolutionaries engaged in was about which came first, culture or politics? Some were cultural determinists: they held that manners, morals, customs, and tastes were the foundations upon which governments were erected. Others were political determinists: they affirmed that manners, morals, and tastes were really the product of political form and could be molded accordingly.[16] Though revolutionaries disagreed whether constitutions were best thought of as expressions of a people or as a way of reforming a people, most would have agreed with John Adams, who described the last quarter of the eighteenth century and the first part of the nineteenth century as 'the age of revolutions and constitutions.'[17] Adams gave a name to the period in a letter on the prospect of revolutionizing South America written in March 1815; Adams thought the prospect was doubtful. In a more sanguine mode that same month the architect of the Capitol, William Thornton, published in Washington his *Outlines of a Constitution for United North & South Columbia*. Thornton fantasized that all of the revolutions of the age might give way to a single constitution, a 'general plan of a grand government' for the hemisphere.

Between 1776 and 1826, the new states of the Americas drafted almost sixty constitutions, twenty of them in Latin America.[18] In

16. I discuss this debate in *The State as a Work of Art: The Cultural Origins of the Constitution* (forthcoming).

17. John Adams to James Lloyd, March 29, 1815, in *The Works of John Adams*, ed. Charles Francis Adams, 10 vols. (Boston: Little, Brown, and Co., 1850–56), 10: 149.

18. For a list of Latin American constitutions, see Keith S. Rosenn, 'The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation,' *University of Miami Inter-American Law Review* 22: 1 (1990–1991): 1–37.

1811, Manuel García de Sena, a native of Venezuela, translated Paine's *Common Sense*, the Declaration of Independence, and the Constitution into Spanish and had these works published in Philadelphia. A decade later, also in Philadelphia, Vincente Rocafuerte published a similar anthology of constitutional documents from the United States. But while some Latin Americans dreamed of exporting the language and concepts of United States constitutionalism to Latin America, Simón Bolívar objected to the very idea that one nation's constitution could serve as a model for any other's; and he did so in the name of the Enlightenment's major constitutional thinker. Does not Montesquieu state, he asked, 'that laws should be suited to the people for whom they are made; that it would be a major coincidence if those of one nation could be adapted to another; that laws must . . . be in keeping with . . . the religion of the inhabitants, their inclinations, resources, number, commerce, habits, and customs?' 'This is the code we must consult,' Bolívar exclaimed, 'not the code of Washington!'[19] Many of the newly independent states of the Americas did look to the United States Constitution for inspiration and even for particular language. It was an age of revolutionary and constitutional mimesis, but Bolívar's remark is a powerful reminder that Enlightenment and revolution meant textually enshrining local customs and rights as often as it meant transcending them in favor of another nation's self-evident truths.

19. On the circulation of constitutions, see Robert J. Kolesar, 'North American Constitutionalism and Spanish America,' in *American Constitutionalism Abroad*, ed. George A. Billias (New York: Greenwood, 1990), 41-63; and Bernard Bailyn, 'Atlantic Dimensions,' in *To Begin the World Anew* (New York: Knopf, 2003), 131-49. For Manuel Garcîa de Sena's translations and the Inquisition of New Spain, see Pedro Grases's introduction to the second edition of *La independencia de la Costa Firme justificada por Thomas Paine treinta años ha* (Caracas: Imprenta López de Buenas Aires, 1949) and Harry Bernstein's review of this volume in *The Hispanic American Historical Review* 31 (1951): 127-28.Simón Bolívar, 'Address Delivered at the Second National Congress of Venezuela in Angostura' (February 15, 1819), cited in Miguel Schor, 'Constitutionalism Through the Looking Glass of Latin America,' *Texas International Law Journal* 41 (Winter 2006): 16–17.