Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0004

DE GRUYTER OPEN

Fundamental Rights in Early American Case Law: 1789-1859

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ABSTRACT

Fundamental Rights Law is a ubiquitous feature of modern American jurisprudence. Where did the term "Fundamental Rights" come from, and how was it applied in early American case law? This article outlines the genesis of fundamental rights law in early 17th century England and how this law developed and was applied over time. The English Bill of Rights of 1689 was the first attempt to codify these rights in English law. When the English legal system emigrated to America along with the early American colonists, it included the English conception of fundamental rights. The framers of the United States Constitution incorporated and expanded these rights. Early American Case law kept strictly within this tradition for the most past, and used the term "fundamental rights" usually for rights which had long been recognized in Anglo-American society. This article notes the concordance between the application of fundamental rights in early American case law and the long tradition of fundamental rights which ripened in the Anglo-American legal tradition.

KEYWORDS

Originalism; Natural Law & Fundamental Rights; Anglo-American Heritage; Bill of Rights; Corfield v. Coryell.

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Introduction

Although the concept that some rights are fundamental has become indispensable in modern American jurisprudence, relatively little research has been published on the use of the term "fundamental rights" in early American case law. Aside from a monograph and a handful of articles, the information regarding courts' understanding of the term in the late 18th and early 19th century must be gleaned from tangential sources, such as discussion on the Privileges and Immunities Clause, the Ninth Amendment, or philosophical or historical works on natural law.[1]

The purpose of this article is partially to fill this gap by analyzing early American courts' use of the term "fundamental right". First, we will consider in what instances the courts used the term "fundamental rights" and what they considered those rights to be. Secondly, we will look at what the courts perceived to be the source of fundamental rights. Were the rights bestowed upon the individual person by the Constitution, by the natural or the common law, or by something else?

For this article I have used cases from every type of court, state and federal, as well as the Supreme Court. I have restricted myself to looking only at the

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[1] *See, e.g.,* Milton R. Konvitz, Fundamental Rights. History of a Constitutional Doctrine (2001) (the only historical survey on the use of the term "fundamental rights" in American jurisprudence. Its heavy emphasis on the past one hundred years, however, makes it of only limited value to the historian of the early Republic); Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 Tex. L. Rev. & Pol. 225, (1999) (considers the notion of fundamental rights as based on a "higher" or natural law through the work of 19th century American jurist John Norton Pomeroy); Jason S. Marks, *Beyond Penumbras and Emanations: Fundamental Rights, The Spirit of the Revolution, and the Ninth Amendment*, 5 Seton Hall Const. L.J. 435, (1995); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. 305, (1987); David Crump, *How Do The Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv..J.L. & Pub. Pol'y 795 (1996). More plentiful are studies dedicated to the history and development of the Privileges and Immunities Clause or the Ninth Amendment. *See*, *e.g.*, The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1989) (a collection of essays submitted by various scholars regarding the Ninth Amendment); Bennett B. Patterson, The Forgotten Ninth Amendment. A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today (1955) (arguing that the Ninth Amendment protects men from acts of government inconsistent with fundamental human rights and that these rights are not necessarily fixed in time, but are discovered "as the race becomes more evolved, and as the respect for the dignity of human life increases."); David Skillen Bogen, Privileges and Immunities. A Reference Guide to the United States Constitution (2003). studies dedicated to the history and development of the Privileges and Immunities Clause or the Ninth Amendment. *See*, *e.g.*, Randy E. Barnett, The Rights Retained by the People: The History and Meaning of the Ninth Amendment (1989), (a collection of essays submitted by various scholars regarding the Ninth Amendment); Bennett B. Patterson, The Forgotten Ninth Amendment. A Call for Legislative and Judicial Recognition of Rights under Social Conditions of Today (1955), (arguing that the Ninth Amendment protects men from acts of government inconsistent with fundamental human rights and that these rights are not necessarily fixed in time, but are discovered "as the race becomes more evolved, and as the respect for the dignity of human life increases."); David S. Bogen, Privileges and Immunities. A Reference Guide to the United States Constitution (2003).

cases from the first seventy years following the ratification of the United States Constitution. As might be imagined, fundamental rights jurisprudence during the first half of the 19th century is relatively scant. Most of early fundamental rights jurisprudence dwells covertly in the dicta of obscure cases, now long forgotten. But there is a reason for undertaking an analysis of this era nevertheless. Although the mention of the term fundamental rights in case law between 1789-1859 is few and far between, this scarcity is compensated by the unparalleled access that the early courts had to the thought and intentions of the Founding Fathers. Therefore, if for no other reason than its antiquity, some type of purview of fundamental rights in this era is necessary to fill the lacunae of scholarship, even if it turns out that the fruit harvested from such an undertaking is relatively modest.

I. The Origin of the Term "Fundamental Rights" in English Law

The pedigree of fundamental rights in Anglo-American legal history is long and complicated. The first mention of the term "fundamental right" in print is in a 1611 pamphlet entitled: *A record of some worthy proceedings in the honourable, wise, and faithfull Howse of Common in the late Parliament*.[2] It was, however, the Puritans of England who popularized the use of the term around the time of the English Civil War.

William Prynne, a Puritan and lawyer, inveighed against the trampling of fundamental rights by Cromwell's Commonwealth in his work: *A summary collection of the principal fundamental rights, liberties, proprieties of all English freemen*.[3] He argued that although the abuses of law and right under the monarchy were bad, the violations of fundamental rights under Cromwell's Protectorate were far worse.[4] Prynne then goes on to enumerate four fundamental laws as the cornerstones of the English legal system:

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2 England And Wales, Parliament, House Of Commons, A Record Of Some Worthy Proceedings In The Honourable, Wise, And Faithfull Howse Of Common In The Late Parliament (1611). This pamphlet numbers forty-eight pages and was possibly printed in Amsterdam by one G. Thorp (this is a conjecture from Pollard and Redgrave's: A Short-Title Catalogue of Books Printed in England, Scotland, and Ireland and English Books Printed Abroad (1473-1640). There is evidence that it includes a record of a speech given by Sir Francis Bacon to the King laying out certain grievances.

3 William Prynne, A Summary Collection of the Principal Fundamental Rights, Liberties, Proprieties of All English Freemen (1656). Reprinted in Stuart E. Prall, The Puritan Revolution: A Documentary History 268-279 (1968).

4 "The Grievances these Martial Reformers of our Laws have introduced, under pretext of reforming some petty Abuses in the practice of the Law and Lawyers, are of a far more grievous, general, and transcendent nature, subverting the very Fundamental Laws and Liberties of the whole Nation; and burdening them with two or three Millions of extraordinary Taxes, Expenses every year, whereas all the abuses in the Law if rectified, amount not above 5 or 6 thousand pounds a year at the most, and those voluntarily expended by litigious persons, not exacted from, or imposed upon any against their Wills, as Taxes, Excises, Imposts, Tunnage and Poundage now are by the Soldiers, without Act of Parliament against our Laws." *See* Prynne, *supra* note 3.

1) The Privileges and Freedom of their Parliaments and their Members; 2) The safety and liberty of their Persons; 3) The property of their Estates; and 4) The Free course of Common Law, Right, and Justice.[5]

Arguing from the opposite perspective is the pro-Cromwellian Puritan Isaac Penington who discusses fundamental rights in his work: *The fundamental right, safety, and liberty of the people.*[6] In it he argues that there are three basic fundamental rights of the people: "In the people's choice of their government and governors - in the establishment of that government and governors whom they shall choose - and in the alteration of either as they shall find cause."[7] It is not difficult to perceive echoes of these sentiments in the founding documents of the United States of America.

As is clear from the preceding examples, when the judges of early America referred to fundamental rights they were not inventing a new term, but were recalling an aspect of their own great Anglo-American legal tradition. When lawyers arguing before the modern Supreme Court invoke the term fundamental right in order to win their client's case, it is unlikely that they realize the historical foundation upon which the term and idea lay. Even the Court itself may not always be fully cognizant of the term's ancient pedigree or the historical conditions which served to shape and define it. The passage of time inevitably leads to a certain degree of memory loss unless one deliberately seeks to revisit that which one once had a clear idea. This article's purpose is to revisit some of the ancient ideas pertaining to fundamental rights through the lens of early American caselaw. The modern development of fundamental rights jurisprudence can then be measured by some historical standard and, if one is persuaded by historical evidence, judge it according to its conformity or deviation from this standard.

II. Fundamental Rights Cross the Atlantic with the Colonists

The use of the term "fundamental right" makes its first appearance on the stage of American jurisprudence in 1793 in the Virginia case *Kamper v. Hawkins*.[8] This case is replete with allusions and useful observations for the issue at hand.

The question presented to the court was whether an act passed by the General Assembly granting the lower district courts power to provide certain equitable

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5 This list is consistent with William Blackstone's understanding of the fundamental laws of the English nation 130 years later; s*ee, infra* note 43.

6 Isaac Penington, The Fundamental Right, Safety, and Liberty of the People (1651).

7 *Id.* For other uses of the term "fundamental right" in early English texts s*ee,* Henry Care, English Liberties, or, The Free-Born Subject's Inheritance Containing, I. Magna Charta, the Habeas Corpus Act, and Divers Other Useful Statutes (1682); James Tyrrell, Bibliotheca Politica: Or, an Enquiry into the Ancient Constitution of the English Government Both in Respect to the Just Extent of Regal Power, and the Rights and Liberties of the Subject(1694).

8 1 Va. Cas. 20 (1793). This case was decided in the General Court of Virginia. For a brief history of this court *see,* Hugh F. Rankin, *The General Court of Colonial Virginia: Its Jurisdiction and Personnel*. The Virginia Magazine of History and Biography. Vol. 70, No. 2, Apr., 1962.

relief was unconstitutional and therefore void. Predating *Marbury v. Madison*[9] by ten years, Spencer Roane in his opinion essentially anticipates the basic holding of Chief Justice John Marshall, namely, that the judiciary branch of government has the right and the duty to review legislative acts and to determine whether such acts are consistent with the Constitution.[10]

Ultimately, the court held that the act violated the judicial structure instituted by the Virginia Constitution and deemed that the district court was unable to grant injunctive relief. What makes this case so pertinent for our purposes, however, aside from its interesting holding on judicial review, is its mention of fundamental rights. Judge James Henry, a former delegate to the Continental Congress, writing his own opinion in the case, is the first judge to use the term fundamental rights in an American judicial opinion. Referring to the deputies of the Constitutional Convention, he states:

> Our deputies, in this famous convention, after having reserved many fundamental rights to the people, which were declared not to be subject to legislative control, did more; - they pointed out a certain and permanent mode of appointing the officers who were to be instrusted [sic] with the execution of the government.[11]

Henry refers to the Constitution as having *reserved* fundamental rights to the people. This type of language is very common in early case law. For example, courts and advocates refer to *reserving, securing,*[12] and *recognizing*[13] fundamental rights. Never does a judge refer to the Constitution as *bestowing* or *creating* a fundamental right. This fact is important. As stated earlier, the notion of fundamental rights precedes the establishment of the American Republic, and the Constitution was seen as a written instrument necessary to safeguard these pre-existing rights. As Randy E. Barnett points out, a certain degree of controversy existed as to whether it was necessary to enshrine some of these rights in the Bill of Rights, the fear being that by listing some, it would be assumed that only those existed and no others.[14] This

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9 5 U.S. 137 (1803).

10 Kamper v. Hawkins, 1 Va. Cas. 35-40 (1793). *See* John Radabaugh, *Spencer Roane and the Genesis of Virginia Judicial Review*. 6 Am. J. Legal Hist. 63, 65-66 (1962). Interestingly, Roane vigorously criticized Chief Justice John Marshall's expansion of judicial review for the federal courts, believing that such power ought only be exercised within the states. Notwithstanding their differences, however, their idea of the role of the judiciary in arbitrating conflicts between legislative law and state or federal constitutions was the same.

11 Kamper v. Hawkins, 1 Va.Cas. 48 (1793).

12 *See* State v. Sheriff of Charleston Dist., 1 Mill Const. 145, 72 (1817); Stokes v. Scott County, 10 Iowa 166, 172 (1859); Commonwealth v. Milton, 12 B. Mon. 212, 220 (1851).

13 *See* Kilham v. Ward, 2 Mass. 236, 260 (1806).

14 *See,* Barnett, *supra* note 1, Randy E. Barnett. *Introduction: James Madison's Ninth Amendment* ("Enumerating rights in the Constitution was seen as presenting two potential sources of danger. The first was that such an enumeration could be used to justify an unwarranted expansion of federal powers...The second potential source of danger was that any right excluded from an enumeration would be jeopardized. In his speech to the House explaining his proposed amendments, James Madison stressed the danger of enumerated rights: It has been objected also against a bill of rights, that, by

fear gave rise to the inclusion of the Privileges and Immunities Clause of the Ninth Amendment, but as we know after more than two-hundred years of jurisprudence, this Clause has hardly been a useful mechanism in resolving the controversy and clearing up the ambiguity surrounding unenumerated rights.

Judge Henry in *Kamper* also refers to certain rights that are *inherent* in the people, such as the right to a trial by jury, and the right to worship freely without the interference of government.[15] Henry notes that although under the British system of government the Parliament was omnipotent and that its powers were beyond control, the Constitution limits government's power, thereby making space for those inherent fundamental rights.[16]

Another important case from the 18th century that refers to fundamental rights is *Zylstra v. Corporation of the City of Charleston.*[17] *Zylstra* was decided in 1794 in the trial court of South Carolina. It examines the case of a chandler prosecuted and fined 100 pounds without the benefit of a jury trial by the Court of Wardens for violating a by-law, passed by the City Council, prohibiting the making of soap and candles within the city limits. Judge Burke voids the penalty on the grounds that the court acted without authority when it levied the fine without legislative mandate.[18]

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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." 1 The Debates and Proceedings in the Congress of the United States 456 (J. Gales & W. Seaton ed. 1834) (Speech of Rep. J. Madison).)

15 Kamper v. Hawkins, 1 Va. Cas. 47.

16 *Id.* at 47-48. ("There is a proposition which I take to be universally true in our constitution, which gentlemen whose ideas of parliament, and parliamentary powers, were formed under the former government, may not be always obvious; it is this -- We were taught that *Parliament* was *omnipotent*, and their powers beyond control; now this proposition, in our constitution, is limited, and certain rights are reserved as before observed."). Henry is not exaggerating on this score regarding the English view of the sovereignty of Parliament. Blackstone notes in his Commentaries: The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, '*Si antiquitatem, est vetustissima*; *si dignitatem*, *est honoratissima*; *si jurisdictionem*, *est capacissima'*. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. William Blackstone, Blackstone's Commentaries. (Philadelphia: William Young Burch, 1803), Book I, 160. This edition includes extensive commentary by St. George Tucker with notes of reference to the Federal and Virginia State Constitutions.

17 Zylstra v. Corporation of the City of Charleston, 1 Bay 382 (S.C. 1794).

18 *Id.* at 381-82 (J. Burke) ("Thus therefore, the bye-law under which Zylstra was prosecuted, was utterly void; for the Corporation [of the City of Charleston] was not vested with competent legislative authority; and they had as little judiciary power to try a cause and give judgment for 100l as they held as legislators: therefore, for the Court of Wardens to hear and determine such a cause, without the intervention of a jury, was

His fellow colleague, Judge Waites, states that even if such power were present, the conviction was void because it was contrary to the Constitution of the State of South Carolina, which guarantees to every freeman a trial "by the judgment of his peers, or by the law of the land" in every case in which he is in jeopardy of losing life, liberty, or property.[19]

Judge Waites then proceeds to offer a lengthy and interesting note on the meaning of *the law of the land* in the State Constitution, in the course of which he cites Dr. Francis Sullivan's Commentary on the Magna Carta.[20] He concludes that the jury can be dispensed with only in cases in which judgment without a jury was authorized under the courts of common law in England, such as the Court of Chancery, the Courts Ecclesiastical, Maritime, and Military.[21] In the case of South Carolina, only the courts of equivalent character and judicial power can dispense with a trial by jury, namely, the Court of Equity, the Court of Admiralty, the Courts Ordinary, Courts Martial, and the Courts of the Justices of the Peace.[22] In all other cases, including that of the Court of Wardens, a trial by jury is a fundamental right.[23]

Judge Waites then responds to the objection that the Court of Wardens was created prior to the making of the Constitution of South Carolina, and therefore can not be bound by it:

> If the constitution was the first acquisition of the rights of the people of this country; if then, for the first time, the trial by jury was ordained, and the right then commenced, there would be some ground for this conclusion. But the trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors in succession from that period to our own time.[24]

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what no Court in the State durst presume; it being repugnant to the genius and spirit of our laws, all of which recognize jury trial, which is also guaranteed to us expressly by our constitution.")

19 *Id.* at 383-84.

20 *Id.* at 383-85. (J. Waites) ("The words *the law of the land*, mean the *common law*, or parliament down to the time of Edw. 2d which are considered as part of the common law: vide *Hales's H.C.L.* 7 which doth not in all cases require a trial by peers." It will be sufficient to point out in general, the principle cases where this *lex terrae*, or, as Lord Coke calls it, the *due process of law*, superseded the trial *per pares*. "First then, if a man accused of a crime pleads guilty, so that there is no doubt of the fact, it would be absurd and useless delay to call on a jury to find what is already admitted; accordingly, *by the law of the land*, judgment is given on the confession. So in a civil action, if the defendant confesses the action, or makes default, (in a suit on a bond) no jury is requisite. So, if both parties plead all the matters material in a case, and a demurrer is joined, the Judges shall try the matter of right depending on the facts admitted, and give judgment *according to law*, without a jury." "The inflicting of punishment at the discretion of Courts for all contempts of their authority, is also part of *the law of the land*, being founded in the necessity of enforcing due respect and obedience to the courts of the justice, and supporting their dignity."

21 *Id.* at 384-85.

22 *Id.* at 386.

23 *Id.* at 388.

24 *Id.* at 388-389.

This passage is pregnant with meaning concerning the origin and import of fundamental rights. First of all, Waites states emphatically that the Constitution did not create this fundamental right - it existed before the creation of the Constitution. Its origin is in the *common law*, of which the people of America are direct descendants.

Furthermore, the common law is not only the law that existed at the time that the colonists revolted against their mother country, but is the law from time immemorial.Therefore, in order to ascertain the origin of fundamental rights - in this case the right to a trial by jury - Waites peers into the dawn of English history, and finds there the basis for the people's rights of his own time.

III. Fundamental Rights: 1800-1820

The use of the term "fundamental rights" was slow to proliferate in early American case law. In the entire first half of the 19th century the term was only used in twenty-seven court opinions, compared to 412 opinions in the latter half of the century.[25] Its first appearance in the 19th century comes in 1804 in the Supreme Court of New York in the celebrated case of *People v. Croswell*,[26] a criminal prosecution against one Harry Croswell for allegedly defaming the president, Thomas Jefferson, in a publication entitled "The Wasp."

Justice Kent, in his discussion regarding the freedom of the press, states:

> But, whatever may be our opinion on the English law, there is another and a very important view of the subject to be taken, and that is with respect to the true standard of freedom of the American press. In England, they have never taken notice of the press in any parliamentary recognition of the principles of the government, or of the rights of the subject, whereas

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[25] This count was accomplished after searching for the term "fundamental right" on Westlaw during the pertinent periods. Such a count would have been well-nigh impossible prior to a computerized database.

[26] People v. Croswell, 3 Johns. Cas. 337 (1804). This criminal prosecution was precipitated by the violent tempers still flaring as a result of the Federalist-sponsored Sedition Act of 1798 and the election of Republican President Thomas Jefferson in 1800. The printer, Croswell, published his four-page weekly in Hudson, New York and was largely responsible for the contents of the journal, which took as its motto "To lash the Rascals naked through the world." The name, "The Wasp", was taken in contradistinction to "The Bee", edited by Charles Holt, an ardent anti-Federalist who was convicted in 1800 for his attacks on Alexander Hamilton. One of the bases of indictment against Croswell was an article entitled: "A Few ‚Squally' Facts," printed in No. 4 of *The Wasp* (August 12, 1802). In it, he attacks Jefferson's conduct prior to becoming President, and accuses him of trampling the Constitution and rights of American citizens, by, for example, displacing "honest patriots of this country and appoint[ing] to succeed them foreigners and flatterers, who have always shewn themselves hostile to it, one of whom was prime agent, in raising an insurrection to oppose the constituted authorities." Coming to Croswell's defense was a team of lawyers, including William W. Van Ness, Elisha Williams, Jacob Rutsen Van Rensselaer, and later, Alexander Hamilton himself. *See,* Julius Goebel, Jr., The Law Practice of Alexander Hamilton 775-806, (1964).

> the people of this country have always classed the freedom of the press among their fundamental rights.[27]

This passage is interesting because it acknowledges the right of the freedom of the press as a fundamental right of purely American origin, with no legal precedent in English law. This insight will be discussed later on when we show that the American fundamental rights tradition not only incorporates but develops beyond the English one.[28]However, one could argue that there was at least the germ of this freedom in English law, since, for example, the English Bill of Rights declares that: "The freedom of the speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament*,*"[29] thereby protecting the free flow of ideas, if not among the general public, at least within Parliament.

After declaring that the freedom of the press is a fundamental right, Kent goes on to illustrate by way of example:

> The first American congress, in 1774, in one of their public addresses, enumerates five invaluable rights, without which a people cannot be free and happy, and under the protecting and encouraging influence of which these colonies had hitherto to amazingly flourished and increased. One of these rights was the freedom of the press.[30]

Another interesting case from this era is the 1818 case *Juando v. Taylor*.[31] What is noteworthy about this case from our point of view, is that the opinion declares

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27 People v. Croswell, 3 Johns. Cas. 390-94 (1804). Although Kent considers the freedom of the press as a fundamental right, he also considers this right strongly circumscribed for the sake of the common good. For example, false and malicious writings published with intent to defame those who administer the government, or writings tending toward sedition, irreligion, and impurity are not protected under this right. Having such a wholly unregulated and unchecked right would be a "Pandora's box" and the "source of every evil." Rather, he proceeds, adopting the argument of defendant's council, Alexander Hamilton, "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals."

28 *See infra* Part VII.

29 English Bill of Rights, Article IX.

30 People v. Croswell, 3 Johns. Cas. 391 (1804). The public address he is referring to was directed to the people of Quebec and was essentially an apologia to explain the reasons for the success of the American Colonies and to encourage the people of Quebec to stand firm in demanding the same freedoms. Besides the freedom of the press, the Congress also listed as "grand" and "inviolable" rights the right to be represented by government; the right to a trial by jury; the right to petition for a writ of habeas corpus; and the right to hold lands by the tenure of easy rents. *See,* Journals of the Continental Congress, Vol. 1, 57.

31 Juando v. Taylor, 13 F. Cas. 1179 (1818. In this case, Commodore Thomas Taylor, formerly a citizen of the United States, claimed to have renounced his citizenship and sworn allegiance to the government of Buenos Aires. Therefore, he argued, he could not be placed in custody pending a legal suit against him regarding the capture of Spanish property on the open seas against whom Buenos Aires was at war. Judge Van Ness agreed and released him on bail.

expatriation, or the renouncing of one's American citizenship, to be a "fundamental right."[32] In other words, no man is forced to remain an American citizen against his will. Citizenship is a voluntary allegiance to the country. However, this unusual definition of a fundamental right is not found in any other early case law.

To round out this discussion of fundamental rights in this era we can briefly mention the 1802 case *Harris v. Huntington*.[33] The opinion summarizes the history of English law regarding the right to petition the King and Parliament for a redress of grievances.[34] It furthermore adds that the English Bill of Rights of 1689 declared fundamental rights inherent in Englishmen (of which this right was one of them).[35] The court then acknowledges that the American people, as descendants of Englishmen, reduced into writing the fundamental right of petitioning the government for the redress of grievances in the Declaration of Rights of the Vermont Constitution.[36]

A few interesting observations can be gathered from the use of the term "fundamental right" in this opinion. First of all, we see here an echo of what was said in *Zylstra*, namely, that a fundamental right is a common law right planted deep in the soil of English history. The rights enumerated in these two opinions - the right to a trial by jury and the right to petition for a redress of grievances - are both found in some form in the Magna Carta.[37] Here there is agreement between the two cases that great is the antiquity of certain fundamental rights which far precede temporally the creation of the United States and its Constitution.

IV Fundamental Rights: 1820-1829

The 1820s is the first decade that the U.S. Supreme Court uses the term "fundamental right." It comes about in a rather uneventful way in the case of *Green v. Biddle*,[38] decided in 1823, only a month prior to Supreme Court Justice Bushrod Washington's

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[32] *Id.* at 1181. Interestingly, Blackstone, while declaring that the right to remain in one's country absolute, in the same breath notes that the king can prohibit his subjects from traveling to foreign parts in times of necessity. St. George Tucker, the American commentator of Blackstone's 1803 American edition notes that, contrary to English law, the laws of Virginia "expressly admit the right of expatriation." *See,* Blackstone, *supra* note 16, at137.

[33] Harris v. Huntington, 2 Tyl.129, 1802 WL 777, (Vt.1802).

[34] *Id.* at 140-43. The court states: "Our English ancestors have ever held the privilege of petitioning the King and Parliament for redress of grievances as an inherent right; and their Courts of Law have ever, excepting in a solitary instance, discountenanced prosecutions declarative of such petitions as libels."

[35] *Id.* at 141.

[36] *Id.* at 143.

[37] *See,* A. E. Dick Howard, Magna Charta. Text and Commentary, clause 39: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." And clause 52: "If anyone has been disseised or deprived by Us, without the legal judgment of his peers, of lands, castles, liberties, or rights, We will immediately restore the same, and if any dispute shall arise thereupon, the matter shall be decided by judgment of the twenty-five barons mentioned below in the clause for securing the peace."

[38] Green v. Biddle, 21 U.S. 1 (1823).

famous decision in *Corfield v. Coryell*.[39] The Court held that the State of Kentucky had no power to substitute a trial by jury for trial by a Board of Commissioners in a United States court. It further remarked that this right was fundamental and was protected by the U.S. Constitution.[40]

However, the more important and interesting case from this era is *Corfield,* decided by Bushrod Washington, nephew of George Washington, while riding the circuit in the federal courts. This case has become an indispensable citation in discussions regarding the Privileges and Immunities Clause.[41] Just as important, however, is its utility in defining and better understanding fundamental rights in the American tradition. Indeed, judging from the passage above, it appears that Washington did not readily distinguish between privileges and immunities and fundamental rights, but saw them as essentially the same thing.

This case is justly famous for several reasons. For one, it is the first time that a Supreme Court justice addressed at length the significance of the Privileges and Immunities Clause.[42] Secondly, the opinion includes an extensive enumeration of fundamental rights that are not mentioned in the Bill of Rights, thereby offering a glimpse into what our judicial Fathers considered to be some of the unenumerated fundamental rights.

The case was about whether an act prohibiting non-residents of New Jersey from fishing and taking oysters within the State was a violation of the Privileges and Immunities Clause. Washington's reflection on the meaning of this clause, though often repeated, is worth reproducing here in full:

> What are the privileges and immunities of the citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of the citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the

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39 Corfield v Coryell, 4 Wash. C .C. 371 (1823).

40 Green v. Biddle, 21 U.S. 1106 (1823).

41 Bogen, *supra* note 1, 23-27 (noting that although Washington's enumeration of various privileges and immunities was dicta, his list "became the reference point for courts and congress for almost a century.").

42 David R. Upham, The Meaning of the "Privileges and Immunities of Citizens" on the Eve of the Civil War, 91 Notre Dame L. Rev. 1117 at 1127 (2016).

> other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned are, strictly speaking privileges and immunities, and the enjoyment of them by the citizens of every state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of the confederation), the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.[43]

What can be inferred from this extensive discussion on fundamental rights? In order to do justice to this rich paragraph, it is necessary to analyze it from a number of different angles. Washington separates his enumeration of rights into two groups, one that is made up, as he puts it, of *general heads*, and another that consists of individual specific rights that are presumably derived from the first group. The general heads that Washington identifies are:

1. Protection by the Government
2. Enjoyment of Life and Liberty
3. Right to Acquire and Possess Property of Every Kind
4. Right to Pursue and Obtain Happiness and Safety

These rights are essentially an echo of the terms Life, Liberty, and the Pursuit of Happiness that are found in the Declaration of Independence. If any rights are fundamental, these are, and provide the cornerstones not only to the American legal tradition, but to the English one as well.[44] It therefore comes as no surprise that

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[43] Corfield v. Coryell, 4 Wash C.C. at 551-552 (1823).

[44] *See* Blackstone, *supra* note 16, 122-145. Blackstone, in his Commentaries on Laws of England, delineates a similar scheme in his chapter on "The Absolute Rights of Individuals." He begins by distinguishing absolute from relative rights of persons. Those rights are absolute "which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other." Furthermore, unlike other civil rights, absolute rights are intrinsic to man even in a primitive state, and regardless of whether he is a part of society or out of it. "And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property." Blackstone considers these rights rooted in the natural law, and belong to man as "one of the gifts of God to man at his creation, when he endued him with the faculty of free-will." Interestingly, however, he also declares these prerogatives as the "absolute rights of every Englishman" and thus enshrined in English statutes and common law. The fact that there is an overlap between the natural law and the law of England should come as no surprise, given that in Blackstone's time it was held that the civil law was a reflection and more particular application of natural principles established by God. Indeed, in Section the Third, of the Laws of England, Blackstone notes that a law contrary to reason or divine law, is not law at all and need not be followed, even when it has *stare decisis* in its favor. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that is it not the established custom of the realm, as has been erroneously determined."

Washington reiterated them when enumerating the fundamental rights of American citizens.

If Washington had merely recited the general rights already found in the Declaration of Independence, however, later courts would not have taken much notice. The fact that he was willing to expand on his idea of privileges and immunities and give them a specific content ensured that later courts and scholars would continually return to *Corfield* while discussing issues such as privileges and immunities and fundamental rights.[45]

Although Washington clearly states that his list is not exhaustive of those fundamental rights that exist, he does explicitly mention the following:

1. The right to travel and change residency
2. The right to the benefit of a writ of Habeas Corpus
3. The right of access to the courts
4. The right to own and manage private property
5. The right to equal protection with regard to taxation
6. The right to vote[46]

Following his enumeration of the three absolute rights, Blackstone proceeds to explain their contents and derivatives. For example, under the heading of the right to personal security, Blackstone notes that this includes the right to life and its sustenance thereof (including the right of necessary support for the poor), the right to be free of practices that compromise one's health, and the right to the security of one's reputation or good name. Under the heading of personal liberty, Blackstone includes the right of changing one's place of residence, the right to due process in criminal proceedings (including trial by one's peers), the right to petition for a writ of *habeas corpus*, and the right to be free from unreasonable arrest and excessive bail. Finally, under the heading of property, Blackstone includes the right to possess, use and dispose of one's possessions, the right to be fairly compensated for property appropriated by eminent domain, and the right to be taxed only at that rate established by one's own representatives. Beyond these three absolute rights and their derivatives, Blackstone adds a few more rights which he deems "auxiliary" because, without them, the absolute rights would be "dead letters" and unenforceable. These include: the established limits to the king's powers, the right to apply to the courts of justice for redress of injuries, the right to petition the government for a redress of grievances, and the right to bear arms. These many rights all fall under the umbrella of absolute and well summarize the content and theory of this article, encompassing, as they do, almost every single right raised by the early American courts to the level of fundamental. The courts are almost always unwilling to go beyond Blackstone. The rare exceptions are the right to freedom of the press and worship, the right to expatriate, and the right to vote, which are absent in Blackstone's chapter. The right to bear arms, while noted by Blackstone, was not explicitly mentioned as a fundamental right by any early American court, although it certainly appeared in numerous State Constitutions and of course the Federal Constitution.

45 *See, e.g.,* Slaughter-House Cases, 83 U.S. 36, 75 (1872); McCullough v. Brown, 41 S.C. 220, 480 (1894); State v. Palko, 122 Conn. 529, 325 (1937).

46 The one thing that Washington cannot claim in his enumeration of fundamental rights is originality. It is abundantly clear that most of these rights appear in Blackstone's commentary on the absolute rights of Englishmen. Only the right to equal protection with regard to taxation and the right to vote are absent, although even the former could be said to be quasi-enshrined in the right to be taxed by one's own representatives in Parliament. *See* Blackstone, *supra* note 43 and accompanying text.

After reviewing this list of rights, what is noteworthy about them is that only one of them, the right to a writ of Habeas Corpus, is found in the Constitution, and none of them are in the Bill of Rights. Was Washington's selection deliberate? Did he assume, perhaps, that every citizen could take for granted that the Bill of Rights was an enumeration of their fundamental rights, and therefore considered it redundant to repeat them here? Did he perhaps omit mention of the Bill of Rights because *Coryell* was a case concerning state law? Or was his intention, in drafting this opinion, to specifically identify and give some shape and form to those unenumerated rights of the American people, thereby trying to breathe life into a largely ignored Clause of the Constitution?

However the case may be, Washington was confident that fundamental rights did exist beyond the perimeter of the Constitution and was capable of defining some of them. In Washington's list, it is difficult not to see Blackstone at work, and in all likelihood Washington was trained in the law using Blackstone's text.[47] But Washington was not slavishly copying Blackstone. He was drawing from the well of the ancient Anglo-American legal tradition to which Blackstone himself was indebted.[48]

Washington's opinion is an important moment in the history of fundamental rights jurisprudence because it dispenses from any strictly positivist interpretation of such rights, and acknowledges a kind of American *lex non scripta*, which, in many ways, echoes the absolute rights jurisprudence of English law

V. Can the Government have Fundamental Rights?

Until now we have only read about fundamental rights vesting in the individual person, either by way of his citizenship or because of his intrinsic dignity as a member of the human race. One may be surprised to know that starting in the 1840s there are several cases that see fundamental rights vesting also in the government, which according to several opinions has the fundamental right to appropriate property by means of eminent domain.

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47 *See, infra* Part VI.

48 *See* Blackstone, *supra* note 16, 127-28. Blackstone considers the absolute rights deeply rooted in ancient English law, both *lex non scripta* (unwritten or common law) and *lex scripta* (written or statutory law). "First, by the great charter of liberties [the Magna Charta], which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry the third, his son. Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law." Following the Magna Carta, these rights were reiterated and further confirmed in the Petition of Right under King Charles I in 1628; by statutory laws, including the Habeas Corpus Act in 1689; by the English Bill of Rights under William and Mary of Orange in 1689; and lastly under the Act of Settlement in 1701 "whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate aera [sic], for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the antient doctrine of the common law."

In *Proprietors of the Cemetery of Spring Grove v. The Cincinnati, Hamilton, and Dayton Railroad Company*[49] the plaintiff sought an injunction barring the railroad from appropriating its land in order to build a railway, arguing that it had been specifically exempted by the legislature from any type of appropriation for public use. The Superior Court of Cincinnati held, however, that such an exemption was void by virtue of the fundamental and ancient law of eminent domain, which preceded any constitution, and which overshadowed all individual rights to private property. Not that the Court disregarded the individual's right to hold private property inviolate; rather, quoting the constitution of Ohio, it states: "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation be made to the owner."[50] It also notes that where there is sovereignty, "two great and fundamental rights exist. The right of eminent domain in all the people, and the right of private property in each. These great rights exist over and above, and independent of all human conventions, written or unwritten."[51] It then eloquently opines:

> I know of no limit to the right of eminent domain. In practice these matters should always be cautiously considered with reference to the wants of the public, as being of greater or less importance, to the nature of the property to be taken, as being of greater or less value. But when decided in the right forum, that the public welfare outweighs the private inconvenience, I know of no article of property so sacred, no rood of ground so holy, that it may not be swept away by the right of eminent domain.[52]

Another right that makes its appearance on the stage of American case law starting around this time is the right that each citizen have, as Judge Read of the Supreme Court of Ohio puts it, his "day in court."[53] This right was already alluded to in *Corfield*[54] (and indeed, is one of the auxiliary absolute rights in Blackstone's Commentaries).[55] It appears in two of Judge Read's dissents from the same year in which he declares that the loss of property without giving the owner the opportunity to appear in court violates a fundamental right.[56]

Similarly, in the 1859 case of *Phelps v. Rooney,*[57] decided in the Supreme Court of Wisconsin, Chief Justice Dixon echoes Judge Read's opinion in a dissent of his own, in which he states, quoting the Wisconsin constitution, that "every person is entitled to a certain remedy in the laws, for all injuries or wrong which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and

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49 Proprietors of the Cemetery of Spring Grove v. The Cincinnati, Hamilton, and Dayton Company, 1 Ohio Dec.Reprint 316 (1849).
50 *Id.* at 321 (quoting Ohio Constitution, 4th section, Article 8).
51 *Id.* at 320-321.
52 *Id.* at 321.
53 Robb v. Irwin's Lessee, 15 Ohio 689, 711 (1846).
54 *Corfield,* 4 Wash. C.C. at 552.
55 *See,* Blackstone, *supra* note 16, 141-142.
56 *Id.* and Doe ex dem. Heighway v. Pendleton, 15 Ohio 735, 769 (1846).
57 Phelps v. Rooney, 9 Wis. 70 (1859).

without delay, conformably to the always."[58] The Chief Justice declares that this is a fundamental right. He is speaking in this case of the right of the creditor to obtain relief by means of the courts on a debtor's debts and takes issue with the homestead exemptions then in force which incidentally placed certain of the debtor's property outside of the creditor's reach.

Chief Justice Bartley of the Supreme Court of Ohio, in his own dissent in *State ex rel. Evans v. Dudley*,[59] agrees with Judge Read and Chief Justice Dixon with regard to access to the courts, but he adds two other fundamental rights. He states: "The right of suffrage, the right of representation in the General Assembly of the state, and the right to the use of the judicial tribunals for the administration of justice, are fundamental rights guaranteed by the constitution to all the citizens of the state."[60] The right to vote is also mentioned in *Barker v. People*[61] as a fundamental right (along with the right to worship freely and the right to a trial by jury) and was one of the enumerated privileges and immunities in *Corfield*.[62]

VI. Fundamental Rights and Natural Law

Having discussed some of the enumerated fundamental rights of this era, some of which we had already been familiar, and some which appear to be voiced for the first time in a court opinion, we turn to the question that we introduced at the beginning of this article: what do the courts consider to be the origin of fundamental rights? As we saw earlier, the judges from the early days of our Republic did not shy away from addressing this topic.[63] In a similar manner, some fifty years later, the judges are still willing to proffer an opinion as to the source of fundamental rights.

In the case of *Stokes v. County of Scott,*[64] decided by the Supreme Court of Iowa in 1859, the court addressed the question of whether the counties of Iowa have the constitutional power to subscribe aid for the construction of railroads in the counties. The court declares that allowing the majority to tax the minority for a purpose that is unrelated to the direct ends of government (i.e. welfare and safety of the public) would violate their fundamental rights "which are secured to us by the natural law, and which no legislation can take from us."[65]

What is most interesting about this case is the court's reliance on natural law as the basis of a fundamental right.[66] Although mention of the natural law in connection

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58 *Id.* at 701 (quoting Wisconsin Constitution, Section 9, Article I.). *See* Magna Carta, *supra* note 37, clause 40. "To no one will we sell, to no one deny or delay right or justice." Sir Edward Coke, commenting on this clause, states that: "any subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the court of law, and have justice and right for the injury done to him, freely without sale, fully without denial, and speedily without delay." Coke, 2 Inst. 55. Also, *see infra* note 118.

59 State ex rel Evans v. Dudley, 1 Ohio St. 437 (1853).

60 *Id.* at 452.

61 Barker v. People, 3 Cow. 686, 706 (1824).

62 *Corfield,* 4 Wash C.C. at 551-552 (1823).

63 *See, e.g., supra* note 24 and note 34.

64 Stokes v. County of Scott, 10 Iowa 166 (1859).

65 *Id.* at 172.

66 The idea of a natural law or a law of nature is as ancient as Western Civilization itself. Edwin S. Corwin. *The "Higher Law" Background of American Constitutional Law.* 42

to fundamental rights in case law is not unheard of, neither is it common, and it is helpful to note that well into the 19th century, courts still referred to the natural law as a source of man's fundamental rights and were willing to apply that law in their judicial opinions.[67]

The Ohio Supreme Court in 1853 expands upon the notion of the natural law being the foundation upon which fundamental rights are built. In *The Bank of Toledo v. City of Toledo*[68] it philosophizes about the origin of the right to private property, stating that:

> The right of private property is an original and fundamental right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are derivative, - mere incidents to the political institutions of the country...Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection -the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property.[69]

Harv. L. Rev. 149, 155 (1928). "Building on Socrates' analysis of Sophistic teaching and Plato's theory of Ideas, Aristotle advanced in his *Ethics* the concept of "natural justice."" It was, however, the writings of Cicero that codified the concept of natural law as a part of the West's permanent legal heritage and in which form it was transmitted to the Medieval schoolmen. *See, Id.* at 157-158; J. M. Kelly, A Short History of Western Legal Theory 60-61, (1992). Following the intellectual syntheses of the Middle Ages, the West suffered the trauma of intellectual disunity as a result of the division of Christendom. However, even following the Protestant Reformation the idea of natural law was retained, albeit subjected to widely different interpretations. For example, the Protestant jurists Hugo Grotius and Samuel Pufendorf, uncoupled the natural law from its theological underpinnings and conceived of it as a purely secular law. This prompted Grotius to famously state that even if God did not exist, the natural law would still exist by virtue of man's nature. By the time the United States was founded, the ideas circulating regarding natural law were so splintered that one cannot be sure that two men writing about the natural law meant the same thing at all. Yet despite its varying interpretations, most jurists, and indeed the Founding Fathers themselves, found it expedient to invoke the authority of natural law in order to justify their laws and their acts. *See, e.g.,* Jeffrey D. Jackson. *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*. 62 Okla. L. Rev. 167, 179-180 (2010) (in which he states that Lockean ideas regarding the natural law were influential in Thomas Jefferson's drafting of the Declaration of Independence). By the 19th century, although appeal to natural law was on the wane it was still applied from time to time in court opinions. *See, infra*, note 65. John Norton Pomeroy, an American jurist and author of "An Introduction to Municipal Law" published in 1864 acknowledges natural law as one of the sources of municipal law. *See,* Smith, *supra* note 1, 230. Interestingly, however, and indicative of this positivistic age, Pomeroy bifurcates natural and municipal law and plainly states that the two, while ideally ought to coincide, in practice never do. He then comes to the astonishing conclusion that when the natural law and municipal law contradict one another, the natural law must give way in favor of the municipal law. *Id.* at 274. Pomeroy thus accomplishes a perfect about-face of the Medieval notion of the supremacy of the natural law!

67 *See, e.g.,* Banse v. Muhme, 7 Ohio C.D. 224 (1897); Hopkins v. Oxley Stave Co., 83 F.912, 929 (1897); Clark v. City of Elizabeth, 61 N.J.L. 565, 623 (1898).

68 The Bank of Toledo v. City of Toledo, 1 Ohio St. 622 (1853).

69 *Id.* at 632. The court's idea that government is a necessary burden placed upon man for the protection of his fundamental rights is highly reminiscent of Blackstone's own

This short passage includes a number of ideas of interest, such as: fundamental rights exist anterior to civil government; they are not bestowed by the government; the purpose of the government (and by extension the U.S. Constitution), is to secure and protect those rights; and finally, the general substance of these rights are the rights of personal security, liberty, and property.

The court employs several different terms in discussing fundamental rights. It calls the right of private property an *original right*. It refers to *common rights* and *natural justice*. Finally, it quotes with approval a speech made by the Irish Member of Parliament Edmund Burke on the occasion of an introduction of a bill by Charles James Fox for the purpose of repealing the charter of the East India Company:

> The rights of MEN, that is to say, the natural rights of mankind, are indeed sacred things; and if any public measure is proved mischievously to affect them, the object ought to be fatal to that measure, even if no charter at all could be set up against it...The charters, which we call by distinction great, are public instruments of this nature; I mean the charters of King John and King Henry the Third. The things secured by these instruments may, without any deceitful ambiguity, be very fitly called the chartered rights of men. These charters have made the very name of a charter dear to the heart of every Englishman.[70]

Notice the allusion, again, to the Magna Carta, the reference to the natural rights of men, and to the rights of Englishmen.

Aside from opinions that the natural law is an origin of fundamental rights, another prevalent notion in early case law is that the English common law is the source and guarantor of such rights. Thus, as we saw in *Zylstra*, Judge Waites refers to the trial by jury as a common law right.[71] Again, in the case *Harris,* we saw that the court declared that the right to petition for a redress of grievances was a fundamental right, based on the common law of England, and codified first by English Parliament and later by the law of Vermont.[72] Finally, in *People v. Goodwin*[73] the Supreme Court of New York, treating of the principle of double jeopardy, refers to it as "a fundamental one of the common law" and notes that Blackstone grounds this universal maxim in the common law of England.[74]

This notion of the common law as a source of ancient rights was popular among the generation in which the Constitution was framed.[75] It was likewise shared by our

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philosophical theory concerning the origin of government. *See* Blackstone *infra*, note 83.

70 *Id.* at 634-635 (From speech made by Edmund Burke to Parliament, 1783).

71 *Zylstra,* 1 S.C.L. at 388-389. (1794)….

72 *Harris,* 2 Tyl.129, 1802 WL 777 at 143 (Vt.1802).

73 People v. Goodwin, 1 Wheeler C.C. 470, 18 Johns. 187. N.Y. Sup. 1820.

74 *See* Blackstone, *supra* note 16, IV, 335.

75 *See, e.g.,* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev at 170 (noting that Thomas Jefferson quaintly theorized that the American constitutional system only restored to mankind the long lost polity of Anglo-Saxon England); Jeffrey D. Jackson, *Blackstone's* Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, 62 Okla. L. Rev. 167 (noting that many of the proposed rights that would later find their way into the American Bill of Rights had a long pedigree in English law).

English counterparts, who considered the common law as having a transcendental quality.[76] John Neville Figgis well summarized the veneration afforded the common law in his book *The Divine Right of Kings*:

> The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the Law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law which men set up as an object of worship. They regard it as the symbol of ordered life and disciplined activities, which are to replace the license and violence of the evil times now passed away. ... The Common Law is the perfect ideal of Law; for it is natural reason developed and expounded by a collected wisdom of many generations... Based on long usage and almost supernatural wisdom, its authority is above, rather than below that of Acts of Parliament or royal ordinances which owe their fleeting existence to the caprice of the King or to the pleasure of councilors, which have a merely material sanction and may be repealed at any moment.[77]

The understanding of the English common law shared by the Founding Fathers and early jurists was primarily obtained from two sources: Sir Edward Coke's Institute of the Laws of England and Sir William Blackstone's Commentaries on the Laws of England.[78] These authors personified to the Founding Fathers that ancient English legal tradition that was the basis and origin of the American legal system. Coke and Blackstone were assiduously studied by law student and lawyer alike in 18th century America and as a result were inextricably intertwined with the DNA of the American legal tradition.[79]

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[76] Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 Harv. L. Rev. at 171 (stating that the notion that the common law embodied decisions based upon right reason by wise judges furnished its chief claim to be regarded as higher law and eventually gave rise to the principle of *stare decisis* in the English common law system). The idea that the common law is an unerring guide for dealing with legal questions is due to the immense respect the English showed to their judges, believing as it were that these judges poured all of their erudition and contemplation into their decisions. As Blackstone notes: How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes* [twenty years of burning of the midnight oil]," which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principle and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. *See* Blackstone, *supra* note 16, 69.

[77] John Neville Figgis, The Divine Right of Kings 228-30 (2d ed. 1914) (1896)..

[78] Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. at 200.

[79] *Id.* at 201-203. *See also, infra* notes 116 and 118 (in which it is shown that a clause in the Wisconsin Constitution is essentially an exact reproduction of a passage in Sir Edward Coke's Institutes).

This review of early American case law yields two answers to our question regarding what sources the courts turned to in order to discover and articulate fundamental rights. The first that we encountered was the natural law. As stated earlier, however, pinning down the exact contours and philosophical bases of this law in early American thought is a protean battle. The unitary concept of natural law present in the ancient and medieval worlds was largely shattered by the modern era and did not carry the same *gravitas* for judicial lawmaking in the 19th century as it had in earlier centuries.[80]

The second source of fundamental rights that we encountered was the English Common Law, as especially understood through the writings of Sir Edward Coke and Sir William Blackstone. To this can be added the Magna Carta, as well as a flurry of other documents that sought to protect certain fundamental rights and were integrated into the common law. These include: the Petition of Rights of 1628, the Habeas Corpus Act of 1679, the English Bill of Rights of 1689, the Toleration and Mutiny Acts of 1689, and the Settlement Act of 1701.[81] Some of the fundamental rights mentioned in these documents were enshrined in the American Bill of Rights and 1791 and have been the bulwark fundamental rights in our country ever since.[82]

It would be a mistake, however, to view these two sources of fundamental rights as mutually exclusive of one another. Blackstone sees natural rights as begetting and supporting the common law. In his treatment of the Absolute Rights of Individuals he begins by explaining that:

> By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.[83]

These rights are, therefore, instilled in man by nature, and are antecedent to society and government. They are, indeed, one of the gifts of God, as he explains:

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[80] *See, e.g.,* Thomas Paine, The Rights of Man (1791). Writing in the 18th century, Paine's argument for the transformation of the world order rests upon the natural rights of man. Posing the question as to how man came by these rights, he answers: The error of those who reason by precedents drawn from antiquity, respecting the rights of man, is, that they do not go far enough into antiquity. They do not go the whole way. They stop in some of the intermediate stages of an hundred or a thousand years, and produce what was then done, as a rule for the present day. This is no authority at all. If we travel still farther into antiquity, we shall find a direct contrary opinion and practice prevailing; and if antiquity is to be authority, a thousand such authorities may be produced, successively contradicting each other: But if we proceed on, we shall at last come out right; we shall come to the time when man came from the hand of his Maker. What was he then? Man. Man was his high and only title, and a higher cannot be given him...We are now got at the origin of man, and at the origin of his rights.

[81] *See,* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. 305 n.76.

[82] *See, generally* F. Mcdonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 9-55 (1985); H. Taylor, The Origin and Growth of the American Constitution 230-43, (1911).

[83] *See* BLACKSTONE, *supra* note 16, 123.

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will.[84]

Blackstone, however, considers this natural liberty to be in a vulnerable state without the protection of government, and therefore observes:

> But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.[85]

In this last passage, Blackstone betrays a Rousseauian impulse, seeing society as taking away a part of man's natural liberty as the price for bestowing its benefits. Thomas Paine, in his *Rights of Man*, expresses similar sentiments, but is less willing than Blackstone to compromise those natural rights of man as the price of better protection. He writes:

> Man did not enter into society to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights. But in order to pursue this distinction with more precision, it will be necessary to mark the different qualities of natural and civil rights. A few words will explain this. Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. - Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection. From this short review, it will be easy to distinguish between that class of natural rights which man retains after entering into society, and those which he throws into the common stock as a member of society. The natural rights which he retains, are all those in which the *power* to execute is as perfect in the individual as the right itself. Among this class, as is before mentioned, are all the intellectual rights, or rights of the mind: consequently, religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. They answer not his purpose. A man, by

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84 *Id.* at 125.
85 *Id.*

> natural right, has a right to judge in his own cause; and so far as the right of mind is concerned, he never surrenders it: But what availeth it him to judge, if he has not the power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right.[86]

Blackstone, therefore, like Paine, finds the bases of absolute rights in the natural law as endowed by the Creator of the Universe. However, he does not end his discussion there, but proceeds to explain the role of the English common law in articulating and securing these rights:

> The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject.[87]

Blackstone then contrasts the "nearly perfect" English system of law and government with the arbitrary and despotic power of Continental Europe, which tramples upon the fundamental rights of human beings.[88] He then explains that:

> The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. Sometimes we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.[89]

Therefore, for Blackstone it is not a question of whether fundamental rights proceed from the natural law or the common law. Both laws taken together form the

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86 *See* Paine, *supra* note 78.

87 *See* Blackstone, *supra* note 16, 126-127.

88 *Id.* at 127. "Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of imperial law; which in general are calculated to vest and arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees."

89 *Id.*

backbone of the absolute rights of Englishmen. While the natural law endows man with fundamental rights, the English common law protects those rights and gives them legal effect. Without the common law, the natural rights would still exist, but there would be no way of securing them in practice or arbitrating them. In order to properly understand the thinking of the early American courts when it comes to fundamental rights, it is necessary to appreciate this rich texture of legal thought that Blackstone articulates so well in this section of the Commentaries and which most likely comprises the intellectual milieu in which the early judges of America were situated.

VII. The Statistical Frequency of Specific Rights

In this next part we will step back a moment from the individual cases that we have reviewed and look at the specific enumerated fundamental rights mentioned by the courts, their frequency, and their correlation, if any, to the great Anglo-American legal documents: the Magna Carta, the English Bill of Rights, and the American Bill of

Rights. We will also note whether the fundamental rights mentioned in American case law were deemed absolute rights in Blackstone's Commentaries.

First, it would be helpful to conduct a statistical analysis of early American case law in order to better understand the general layout of the terrain between the period of *Kamper v. Hawkins* in 1793 (the first mention of the term fundamental right), and the latest case that we reviewed, *Stokes v. Scott County* in 1859, just two years prior to the Civil War. The following chart shows the frequency per decade in which the term "fundamental right" appears in a court opinion:[90]

1790-1799: 3
1800-1809: 4
1810-1819: 3
1820-1829: 7
1830-1839: 5
1840-1849: 8
1850-1859: 18
1860-1869: 29
1870-1879: 65
1880-1889: 110
1890-1899: 190

As can be deduced from reviewing the chart, the term was very scarce during the first 60 years of American jurisprudence. During the 1850s it began to pick up

[90] These statistics have been generated by searching for the exact term "fundamental right" in the Westlaw database between the relevant years. Such a calculation prior to computerized databases would have been well-nigh impossible.

some steam, and after the Civil War it was not infrequently mentioned. As might be guessed, the term continued on its path of increasing popularity, and in the 1990s was mentioned an astounding 11,308 times. This makes the current endeavor somewhat challenging given the paucity of fundamental rights language. However, the rarity of the term is somewhat balanced out by the privileged place that early American case law should hold in legal theory.

The mentions of fundamental rights in the U.S. Supreme Court opinions of the first half of the 19th century are scarcer still, with only one occurrence, excluding *Corfield*.[91] Most of the cases that directly address fundamental rights are at the state level, with New York, Kentucky, Pennsylvania, and Ohio being those states with the most frequent mention between 1789-1859. As for the most frequently mentioned specific fundamental rights, they are: private property (6);[92] access to the courts (5);[93] the right to a trial by jury (4);[94] the right to vote (3);[95] freedom of religion (1);[96] the right to petition for redress of grievances (1);[97] freedom of the press (1);[98] expatriation (1);[99] the government's right to exercise eminent domain (1);[100] the right of representation (1);[101] the right to sell goods (1);[102] the right to personally file suit for a distinct claim (1);[103]the right to travel and change residency (1);[104] the right to petition for Writ of Habeas Corpus (1);[105] equal protection with regard to taxation (1);[106] and the right to assemble (1).[107] The general fundamental rights of life, liberty, or security, are also mentioned a few times.

Conspicuously absent in this list is mention of the right to bear arms, the right against unreasonable searches and seizures, the right not to be subjected to cruel or unusual punishments, and the right to privacy. We can say conspicuously because the first three are explicitly enumerated in the Bill of Rights, and the last one is pervasive in late 20th century case law. We can now look and see which of the fundamental rights mentioned above are found in some form in the Magna

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91 *Green*, 21 U.S. 1 (1823).

92 *Corfield,* 4 Wash C.C. 371; Eakin v. Raub, 1825 WL 1913 (1825); *Spring Grove,* 1 Ohio Dec.Reprint 316 (1849); *Stokes,* 10 Iowa 166 (1859); Robinson v. New York & E.R. Co., 27 Barb. 512 (1858); *Bank of Toledo,* 1 Ohio St. 622 (1853).

93 *Corfield,* 4 Wash C.C. 371; *Robb,* 15 Ohio 689 (1846); *Heighway*, 15 Ohio 735 (1846); *Phelps,* 9 Wis. 70 (1859); *Evans,* 1 Ohio St. 437 (1853).

94 Frost v. Brown, 2 Bay 133 (1798); *Zylstra,* 1 Bay 382 (S.C. 1794); *Green,* 21 U.S. 1 (1823); *Barker,* 3 Cow. 686 (1824).

95 *Corfield,* 4 Wash C.C. 371; *Barker,* 3 Cow. 686 (1824); *Evans,* 1 Ohio St. 437 (1853).

96 *Barker,* 3 Cow. 686 (1824).

97 *Harris,* 1802 WL 777 (1802).

98 *Croswell,* 3 Johns. Cas. 337 (1804).

99 *Juando,* 13 F. Cas. 1179 (1818).

100 *Spring Grove,* 1 Ohio Dec.Reprint 316 (1849).

101 *Evans,* 1 Ohio St. 437 (1853).

102 Wynehamer v. People, 2 Parker Crim. Rep. 490 (1856).

103 Merrill v. Lake, 16 Ohio 373 (1847).

104 *Corfield,* 4 Wash.C.C. 371 (1823).

105 *Id.*

106 *Id.*

107 State v. Walker, 8 West. L.J. 145 (1850).

Carta or English or American Bill of Rights.[108] In order to better visualize these correspondences, it may help the reader to refer to Table A.

First, we begin by looking at one of the most commonly cited fundamental rights in early American case law, the right to a trial by jury. Cited four times by court in the first 70 years, it has proven to be one of the most commonly researched and cited rights in the American legal system.[109] Corwin, noting the presence of this right in the Magna Carta, says that "for the history of American constitutional law and theory no part of the Magna Carta can compare in importance with clause twenty-nine."[110] That clause reads:

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.[111]

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[108] Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. at 380. "From...the Magna Carta, through the English Declaration and Bill of Rights of 1688 and 1689, to the Bill of Rights of our early American constitutions the line of descent is direct." The Magna Carta, or great Charter, has almost a mythical grandeur in Anglo-American legal history. *Id.* at 175 (stating that the constitutional fathers regarded the Magna Carta as having been from the first a muniment of English liberties, largely owing to the revival of respect for the Magna Carta initiated by Sir Edward Coke). Coke states in his Institutes of the Laws of England: "It is called Magna Charta, not that it is great in quantity, for there be many voluminous charters commonly passed, specially in these later times, longer then this is; nor comparatively in respect that it is greater than Charta de Foresta, but in respect of the great importance, and weightiness of the matter." Coke, Inst., 2nd Part. Although the Magna Carta was originally somewhat limited in scope, "the range of classes and interests brought under its protection widened, its quality as higher Law binding in some sense upon government in all its phases steadily strengthened until it [became] possible to look upon it in the fourteenth century as something very like a written constitution in the modern understanding." Corwin, *supra* note 108, at 177. "Thus the vague concept of "common right and reason" is replaced with a "law fundamental" of definite content and traceable back to one particular document of ancient and glorious origin." *Id.* at 378. The English Bill of Rights, passed by Parliament in 1689 and laid down to protect English liberties (or more accurately Protestant English liberties), also stands as a foundational document in Anglo-American constitutional law. The document was not perceived to have created new rights, but rather to have reinstated rights native to Englishmen and purportedly lost temporarily under the reign of the Catholic sovereign James II. *See* Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. at 176-177. As Blackstone notes, the Bill ended with these words: "and they do claim, demand, and insist upon, all and singular the rights and liberties asserted and claimed in the said declaration to be the true, antient, and indubitable rights of the people of this kingdom." *See* Blackstone, *supra* note 16, 128. Finally, we come to the American Bill of Rights of 1791, obviously the most important document in American jurisprudence pertaining to fundamental rights. As has been noted by scholars, however, this document is not wholly original, and echoes in many ways the English Bill of Rights of a hundred years earlier. *See, e.g.,* Jackson, *id*. at 192-193 (noting that many of the rights included in the American Bill of Rights were also included in the English Bill of Rights, such as the right to petition for redress of grievances and the right to bear arms). Therefore, it is reasonable to conclude that the American Bill of Rights was partially modeled on and developed from its English predecessor.

[109] A search under the term "jury trial" in the Harvard Libraries turns up 2,412 titles, compared with 1,793 for "right to privacy", 960 for "bear arms", and 330 for "right of worship."

[110] Corwin, *supra* note 108, at 176. (1928).

[111] *See* Magna Carta, *supra* note 37, clause 39. This famous clause is known variously as

This cherished right, though absent in the English Bill of Rights, appears three times in the U.S. Constitution. First in Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.[112]

In the Fifth Amendment of the Bill of Rights:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[113]

And in the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[114]

James Madison finds the origin of this right in the positive rather than the natural law, but nevertheless states that the right to a trial by jury is "as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[115] And as we saw above, the early courts of America were by no means ignorant of the fundamental nature of this right and its ancient pedigree in Anglo-American law.[116]

Another fundamental right commonly cited in early American case law is the right to have free access to the courts, both to seek redress of wrongs and to defend oneself from criminal or civil accusation. This right was cited six times in the 70 year period that we covered and appeared also in Bushrod Washington's list of fundamental rights in *Corfield*.[117] For example, Chief Justice Dixon on a motion for rehearing which was denied in the case *Phelps v. Rooney*, filed a dissenting opinion citing the Wisconsin state constitution:

> The constitution itself [declares] as a fundamental right that "every person is entitled to a certain remedy in the laws, for all injuries or wrongs which

clause 29 or clause 39 depending on which version of the Magna Carta is being referred to. The original Magna Carta published in 1215 had this law as clause 39, but later version has it as clause 29.

112 U.S. Const. art. III, §2.

113 *Id.,* Amendment V.

114 *Id.,* Amendment Vii.

115 Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. Footnote 47, Quoting 1 Annals of Cong. 454 (J. Gales & W. Seaton ed. 1836) (remarks by Elbridge Gerry).

116 *See, e.g.,*1 S.C.L. at 388-89. (1794).

117 *Corfield,* 4 Wash. C. C. 371 at 552 (1823).

> he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and with delay, conformably to the laws."[118]

This is, in essence, an elaboration on the very brief, but fundamental clause in the Magna Carta which reads: To no one will We sell, to none will We deny or delay, right or justice.[119] This right, unlike that of a right to a jury trial, is not explicitly mentioned in the American Constitution. Nonetheless, it appears to be a mainstay of Anglo-American fundamental law, and Blackstone even takes notice of it in his Commentaries when he refers to it as one of the subordinate rights without which the absolute rights of Englishmen would be dead letters.[120]

Next is a right akin to the free access of the courts, that is the right to petition the government for a redress of grievances, a fundamental right which, significantly, appears in every single document reviewed in this section. It is also in Blackstone's commentaries.[121] It appears in a rudimentary form in clause 52 of the Magna Carta:

> If anyone has been disseised or deprived by Us, without the legal judgment of his peers, of lands, castles, liberties, or rights, We will immediately restore the same, and if any dispute shall arise thereupon, the matter shall be decided by judgment of the twenty-five barons mentioned below in the clause for securing the peace.[122]

The right is repeated in a more succinct form in the English Bill of Rights which reads:

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[118] *Phelps,* 9 Wis. 70 (1859). In the former edition this opinion was published in the 12th volume of Reports, pages 699 to 715 inclusive. This passage is from page 701 and cites the Wisconsin Constitution Sec. 9, Art. I. The language of this section in Wisconsin's Constitution does not seem to be directly modeled on that of the Magna Carta, but rather on Sir Edward Coke's Institutes. *See infra* note 118.

[119] *See,* Magna Carta, *supra* note 37, clause 40.

[120] "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "and therefore, ever subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." *See,* Blackstone, *supra* note 16, 141 (Citing Coke, 2 Inst. 55.).

[121] "If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house or parliament, for the redress of grievances." *See* Blackstone, *supra* note 16, 143.

[122] *See,* Magna Carta, *supra* note 37, clause 52.

> It is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.[123]

And again, in the First Amendment of the American Bill of Rights:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[124]

Finally, as we saw above, early American case law pays tribute to this fundamental right,as when the court in *Harris* proclaimed:

Our *English* ancestors have ever held the privilege of petitioning the King and Parliament for redress of grievances as an inherent right.[125]

Not every right in the Magna Carta or the English and American Bill of Rights is mentioned as a fundamental right in early American case law. Contrariwise, not every right deemed fundamental in early case law appears explicitly in these three documents. For example, the Magna Carta and the English and American Bill of Rights include provisions barring excessive punishment.[126] However, there are no explicit declarations in early American case law addressing this fundamental right. Likewise, the right to bear arms appears in the English and American Bill of Rights, and even in Blackstone's Commentaries, but is not spoken of in the first 70 years of American case law as a fundamental right.[127] Not too much ought to be read into these omissions, since as we saw earlier, early case law is relatively scant regarding explicit fundamental rights, and it is unlikely that the early courts would have had occasion to review and decide upon every possible fundamental right of the Anglo-American tradition.

Similarly, there are a number of fundamental rights mentioned in early case law that do not appear in one or more of these monumental documents. For example,

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123 English Bill Of Rights, Article 5.

124 U.S. Const. amend. I.

125 *Harris,* 2 Tyl.129, 1802 WL 777, 140-141 (Vt.1802).

126 "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy."*See,* Magna Carta, *supra* note 37, clause 20. "Excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." English Bill of Rights, Article 10. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

127 That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." English Bill of Rights, Article 7. "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 fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2, and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *See* Blackstone, *supra* note 16, 143-144.

the right to vote is mentioned as a fundamental right in *Barker v. People,*[128] *State ex rel. Evans v. Dudley,*[129] and *Corfield v. Coryell,*[130] but is not found in the Magna Carta or the English Bill of Rights. Also, the right to religious freedom is mentioned as fundamental in *Barker* and is in the U.S. Constitution, but is conspicuously absent in the great English documents.[131] Neither of these omissions in the English documents are surprising. The right to vote is the cornerstone of the American system of government. It distinguished the American democracy from the British monarchy. Likewise, English law did not appreciate the freedom of religion until much later.[132]

Therefore, it can truly be said, fundamental rights law in early America, though deeply rooted in the Anglo-American legal tradition was not identical to this ancient inheritance. The rights protected by the Magna Carta and English common law were also rights protected by the American courts and Constitution, but they were not exhaustive of American's fundamental rights. The American Bill of Rights, in particular, not only *added* to the Anglo-American tradition, but in some ways even *altered* it.[133] It would be going too far to simply say that American fundamental rights law is the logical development of English fundamental law; there were some aspects of the ancient English laws incompatible with the American Constitution. It would be more accurate to say that the establishment of the United States of America marked a decisive watershed moment in the English legal tradition, a moment in which our country adopted the English fundamental law tradition, but then spun it in a distinct direction. Therefore, when it comes to interpreting fundamental rights already present in the ancient English legal tradition, utilization of this tradition is helpful in better understanding the origin and intended breadth and purpose of these rights. On the other hand, when attempting to interpret rights entirely unknown to this tradition, such as the right to the freedom of worship, a different sort of approach needs to be used.

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128 *Barker,* 3 Cow. 686 at 706 (1824).

129 *Evans,* 1 Ohio St. 437 at 452 (1853).

130 *Corfield,* 4 Wash. C. C. 371 at 552 (1823).

131 *Barker,* 3 Cow. 686 at 706 (1824).

132 Catholics, for example, were highly disfavored under the law until the Catholic Relief Act of 1829 and even to this day a Catholic is forbidden from assuming the royal throne.

133 Even during Blackstone's time, the Freedom of Religion was not recognized as a fundamental right under English law. For example, in his chapter on Public Wrongs he comments upon the restrictive religious laws of England, both old and new. He explains that although non-conformity to the worship of the Established Church need not be rigorously prosecuted, nevertheless "care must be taken not to carry this indulgence into such extremes, as may endanger the national church." *See* Blackstone, *supra* note 16, IV, 51-52. Nevertheless, he shows much greater intolerance towards Roman Catholics, who he labels "Papists", and of whom he remarks that as long as they acknowledge the Pope as the Head of the Church, the laws laid upon them will be enforced with rigor. *Id. at* 54. This includes being prohibited from holding office or employment; keeping arms in their houses; coming within ten miles of London on pain of a 100 l. fine; bringing any action at law or suit in equity; traveling above five miles from home, unless by license, upon pain of forfeiting their goods; and coming to court under pain of a 100l. fine. *Id.* at 55.

VIII. Conclusion

A voyage through early American fundamental rights case law is both illuminative and rewarding. Although practically none of these decisions are of consequence for establishing the present-day state of law, they are invaluable resources for getting to know the mental processes of our early courts and to connect the dots between our fundamental rights law and that of the ancient Anglo-American legal tradition. It is difficult to arrive at any hard and fast conclusions simply from the few cases covered here, but there is enough consistency and cohesion among them that I do not think it is untoward to at least propose a few affirmations.

For one thing, it is abundantly clear that the early American courts were not working in a vacuum of political and legal thought. As mentioned earlier, many of them were well acquainted with Sir Edward Coke and Sir William Blackstone, and many times consciously adopted their thinking and even their exact words into their own judicial decisions. The fundamental or absolute rights delineated by these two towering figures played no small role, not only in the early court system, but in the drafting and promulgation of the Declaration of Independence and U.S. Constitution. In looking at the Constitution we behold not just the creative product of late 18th century colonial philosophers and statesmen, but an accumulation of sundry rights gleaned from nearly a millennium of English experience. This experience was the foundation that gave shape and form to the Constitution.

From this first assertion, a second one can be deduced, namely, the early American courts considered fundamental rights law to be bounded and defined by something beyond themselves. The judges were extremely conscious of being a part of the great Anglo-American legal tradition, and when the legal question presented before them entailed some issue of fundamental importance, they easily and without hesitation turned to the Magna Carta, the English or American Bill of Rights, Coke, Blackstone, or anything else they deemed representative of this tradition to support and guide their opinion. Additionally, some judges were perfectly comfortable invoking the natural law when devising their opinions, and recognized this higher law as a sure basis for elucidating certain rights that belonged to all men. No court considered itself the dispenser of these rights and no court apparently felt itself authorized to make up new fundamental rights.

This leads us to a final point. Although Bushrod Washington states that the fundamental rights are more tedious than difficult to enumerate, it is quite clear that such rights can not be multiplied *ad infinitum*. Even Washington's list itself is fairly uncreative and for the most part adopts those rights already well known to exist in English law. So what are these rights? Are they established once and for all, or is it possible to develop new rights from the preexisting ones? Or is it perhaps possible to create entirely new rights, without precedent, simply by appealing to the "spirit" of the Anglo-American tradition. It is useful at this juncture to point out three things.

First, the fundamental rights of Americans must be *finite in number*. If everything becomes a fundamental right, then the sense of the word "fundamental" loses its meaning altogether. Judging from early case law and the great Anglo-American documents, the fundamental rights are relatively few and appear to revolve in one way or another around the general rights of life, liberty, and property.

Second, these rights are *discoverable* from the ancient sources. Fundamental rights are not rights that lie dormant for centuries only to surprisingly and spontaneously appear at a convenient moment of social upheaval or controversy.

Therefore, any scholar or judge interested in the question of fundamental rights would do well to become acquainted with the ancient tradition of Anglo-American fundamental law, and when interpreting the Constitution must not lose sight of the fact that this document is only one in a tradition of similar documents, and can only rightly be understood when placed within this context.

Third, fundamental rights are *nameable*. This may seem like an obvious observation, but if conjoined with the two assertions above, it leads one to the recognition that early fundamental rights case law is relatively modest in its ambitions. The fact that fundamental rights can be named, defined, and applied, and furthermore, that the same rights are usually revisited time and again, leads one to the conclusion that fundamental rights law must not become a nebulous field of ambiguous formulas and tests and hollow speculations. Compared to the vast and complicated morass of modern fundamental rights jurisprudence, the ancient Anglo-American legal tradition's view of fundamental rights is fairly cut and dry. This tradition sees the Magna Carta and English common law as the fount of these rights. It considers the American Bill of Rights as an indispensable supplement. Finally, it may look to the natural law from time to time to better understand the exact contours of this tradition. However, even though many are the sources that one may consult to better understand what these fundamental rights consist of, the actual rights remain easily identifiable by a cursory look at the monumental documents of Anglo-American law: the right to trial by jury, access to the courts, the freedom of religion, due process, the right to petition for grievances, the right to have punishment proportionate to the crime, and several more which can be found on the table. The early American courts rarely venture beyond these, and if they do, it is usually a right already present in Blackstone or some other facet of the ancient common law.

A modest ambition is the best way to describe early American fundamental rights law. Compared to the ever-burgeoning fundamental rights litigation in contemporary courts, the Founding Fathers, and the early courts that interpreted them, were far more limited in their scope. The individual States, like the ancient Sovereign of England, were given great leeway in enacting laws and regulating the lives of their citizens. It was bounded by natural law and the great protections of the Anglo-American legal tradition. These protections may be variously qualified as fundamental rights, absolute rights, or privileges and immunities. The specific content of these rights did not change a great deal from age to age. Beginning with the Magna Carta, until the founding of the American Republic, their scope, though deemed absolute, was relatively narrow. With the passage of the American Bill of Rights their application was somewhat widened, but hardly overturned or left as an open book. If anything is discoverable, it is discoverable because it is already couched in this tradition. The early case law confirms this, and lends credence to the theory that fundamental rights law must tend towards *originalism* in its interpretation, meaning, it must look to the origins of American fundamental rights in order to properly interpret its meaning for today. This task, though perhaps a laborious one, has the advantage that it is in conformity with the path initially struck by the early fathers of our judicial system.