

# Presumption of Nonauthority and Unenumerated Rights

by Jon Roland\*

The Ninth Amendment was authored originally by James Madison, as part of his commitment to seek amendments to the newly adopted Constitution that would define a “bill of rights”. They began as suggested amendments from each of the state ratifying conventions. Some of those found their way into the somewhat more explicit articles 3 through 10, which, because the first two were not ratified at the time, became the first eight amendments. But it should not be concluded that the suggested amendments that did not get adopted in something like their original form were rejected. Rather, it seems clear, Madison intended to consolidate them in what became the Ninth Amendment. Let us examine the final wording adopted:

## **Article the eleventh** [Amendment IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## **Article the twelfth** [Amendment X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Madison’s original proposed formulation of what became the Ninth Amendment is:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>1</sup>

What did Madison mean by “other rights”, which are sometimes called, and disparaged, as the “unenumerated rights”? Disparaged by some, because it is not obvious from the text of the Constitution what those rights might be, or where they could be found, if not in the text.<sup>2</sup> This article will seek to discover what those rights are, and argue that there are indeed clues in the text of the unamended Constitution, and in the other amendments, proposed and adopted, in state constitutions, as well as in the historical evidence leading to the ratification.<sup>3</sup>

One of the clues is found in the fact that some “rights” are expressed as declarations, and some as restrictions on delegated powers.<sup>4</sup> From this we can discern that in the Constitution and its amendments, public action is partitioned into delegated powers of government and rights against the positive acts of government. Constitutional rights are rights against public action by public officials. Therefore, we might more precisely call them “immunities”, as they are called in the 14<sup>th</sup> Amendment. Immunities are the complement of delegated powers: Every delegated power is a restriction on immunities, and every immunity is a restriction on delegated powers. Thus, a constitutional right, or immunity, can be expressed either as a declaration, or as a restriction on a power. The two modes of expression represent different ways of expressing the same concept.<sup>567</sup>

Justice Reed wrote in the 1947 case of *United Public Workers v. Mitchell*:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth

Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.<sup>8</sup>

In his remarks introducing the proposed amendments that included the Bill of Rights, James Madison said:

In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. In other instances, they lay down dogmatic maxims with respect to the construction of the Government; declaring that the Legislative, Executive, and Judicial branches shall be kept separate and distinct. Perhaps the best way of securing this in practice is, to provide such checks as will prevent the encroachment of the one upon the other.

But whatever may be the form which the several States have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the Executive power, sometimes against the Legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.<sup>9</sup>

So why, if this is so, do we need both the Ninth and Tenth Amendments?<sup>10</sup> The answer lies in the inherent ambiguity of the language available in which to express both rights and delegated powers. It is easy to construe written delegations of power more broadly than was intended by the framers of that language, and a right, expressed as either a declaration or a restriction on delegated power, may provide a convenient way to clarify the boundaries, from the opposite side. Legal language is not just *denotative*, with a semantic mapping to objects or concepts, but also *evocative*, reminding the reader of a complex web of ideas associated with historic events and the usage of the term, so that he may sometimes be more likely to clearly understand what is meant if the language is expressed in the terms of “rights”, than if expressed in the terms of powers, delegated or nondelegated.

Earlier in his remarks Madison explains:

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent; because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in

the Government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislatures, for fulfilling the more extended objects of those Governments. I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.<sup>11</sup>

He is saying that the delegations of power may seem to be broader than was intended, and declarations of rights may be needed to clarify the bounds on those delegations of power.

Madison further explained in a letter to George Washington:

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter to be secured by declaring that they shall not be abridged, or whether the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.<sup>12</sup>

From the amendments proposed by the ratifying conventions, and rights recognized in state constitutions, we can identify the following as some of what most people of the period would have recognized as among the “unenumerated rights”:<sup>13</sup>

	<i>Right</i>	<i>Source</i>
1	<b>Writs in the name of the People.</b> Rights to the prerogative writs such as <i>quo warranto</i> , <i>habeas corpus</i> , <i>mandamus</i> , <i>prohibito</i> , <i>procedendo</i> , and <i>certiorari</i> , which any person has the right to prosecute on behalf of anyone else. <sup>14</sup>	New York Proposed Amendments <sup>15</sup>
2	<b>Habeas Corpus.</b> Right of the petitioner, the person held, and the respondent.	Virginia Convention Bill of Rights <sup>16</sup> ; New York Ratification Declaration <sup>17</sup> ; North Carolina Declaration of Rights <sup>18</sup>
3	<b>Correction of Errors.</b> Writ of <i>certiorari</i> .	New York Proposed Amendments <sup>19</sup>
4	<b>Appeals &amp; Error.</b> Writ of <i>certiorari</i> .	New York Ratification Declaration <sup>20</sup>
5	<b>Suspending Habeas Corpus.</b> Clarifying and restricting conditions for suspension.	New York Proposed Amendments <sup>21</sup>
6	<b>Right to Remedy.</b> Not just right to petition, but to have	Virginia Convention Bill of Rights <sup>22</sup> ;

	<b><i>Right</i></b>	<b><i>Source</i></b>
	demurrer,oyer and terminer.	North Carolina Declaration of Rights <sup>23</sup>
7	<b>Natural Rights.</b> Reference to rights recognized in common law and equity, and by the political philosophers.	Virginia Convention Bill of Rights <sup>24</sup> ; North Carolina Declaration of Rights <sup>25</sup>
8	<b>Challenging Jury.</b> Right to strike biased jurors in <i>voir dire</i> .	Virginia Convention Proposed Amendments <sup>26</sup> ; North Carolina Proposed Amendments <sup>27</sup>
9	<b>No Titles of Nobility.</b> Not only not grant special powers , privileges, or protections to the disadvantage of others, but prohibit them to citizens from any source.	Massachusetts Convention Proposed Amendments <sup>28</sup> ; New Hampshire Convention; New York Proposed Amendments <sup>29</sup>
10	<b>Ex Post Facto Laws.</b> Clarification and expansion of prohibitions in Art. I, Sec. 9 (and 10).	New York Ratification Declaration <sup>30</sup>
11	<b>Publish Journals.</b> Right to recordation of public acts and disclosure of records. (Don't just leave it to private publishers.)	Virginia Convention Proposed Amendments <sup>31</sup> ; North Carolina Proposed Amendments <sup>32</sup>
12	<b>Publish Accounts.</b> Right to complete and accurate reports of revenues and expenditures.	Virginia Convention Proposed Amendments <sup>33</sup> ; New York Proposed Amendments <sup>34</sup> ; North Carolina Proposed Amendments <sup>35</sup> .
13	<b>Emigrate.</b> Right to leave (and return).	Pennsylvania Constitution of 1776. <sup>36</sup>

The above is only a partial list, and a more complete list can be found in examining the other proposed amendments and bills of rights of the states ratifying conventions, which are the ultimate authority for what the provisions of the U.S. Constitution meant when it was ratified, and the constitutions of the states at that time.

It is the thesis of this article that all of the rights recognized in the declarations of rights or proposed amendments of the state ratifying conventions, and in the state constitutions, can be presumed to have been generally recognized as rights throughout the thirteen states, and any that were not explicitly made one of the other amendments to the U.S. Constitution must be considered as being included in the unenumerated rights of the Ninth Amendment.

From these we can discern several key ideas:

1. The common law prerogative writs, not limited to habeas corpus, are matters of fundamental right, and not just privileges established by statute, or susceptible to statutory restriction or disablement.
2. Individuals have a right to prosecute a public right, for such prerogative writs, and for declaratory, injunctive, and performance relief.<sup>37</sup>
3. The essence of these rights is the right to a presumption of nonauthority. People have a right to challenge the authority of officials, and the burden of proof is on the officials that they have authority to do what they are doing or propose to do.
4. The right to the presumption of nonauthority does not depend on the support of a court, but

defaults to a finding of nonauthority even if a court declines to grantoyer and terminer. All that is necessary is to file or notice the court, notice the respondant, and wait the customary 3-20 days for the response. It is the respondant official who has the right to oyer and terminer in such a case, to support his claim of authority if he has such authority.

5. One of the common law rights included is the right of demurrer, to challenge the authority of a prosecution at the outset, before trial is commenced, and this is also fundamental, and not subject to statutory restriction or disablement.
6. The unenumerated rights are not limited to the right to a presumption of nonauthority, which is the basis for the prerogative writs, but also include rights to the positive duty of officials to report and disclose their activities, and not resist such disclosure without strong justification. They include the derivative rights to be assisted or facilitated in prosecuting rights, or to have the means to do so.
7. The natural rights are those that arise out of the laws of nature, and include the right to have official acts be logical, reasonable, and rational. One may not be required to do the impossible.
8. Delegations of power are never plenary, but are further constrained, beyond their subject matter, to what is reasonable and pursuant to a legitimate public purpose.
9. It is a matter of common right to engage in any occupation, not subject to licensure or taxation, but only that acts committed in the course of such occupation not be violations of law.
10. There is a right not to be subjected to laws or official acts that are unknown, unknowable, incomprehensible, or too vague to allow for easy interpretation, or to have the rules governing one's behavior change adversely between the contemplation of an action and the enforcement of the law or application of the due process.
11. There is a right not only not to have one's rights legislatively impaired, disabled, or disfavored, but also not to have some accorded special privileges or protections that favor them over the rest of the people, in ways not essential to the performance of public duties. This means official immunity for damages extends only to each act under color or law for which an official has authority and that is not an abuse of discretion, not to everything an official might do while on the job.
12. There must always be an effective remedy available for any infringement of a right, one that is not made so time-consuming, expensive or difficult to obtain as to make the right meaningless as a practical matter. All fundamental rights must have judicial remedies, not just political remedies, because the political process is often inadequate to protect the rights of individuals or minorities.
13. There is a right not to be subject to laws one does not have the right, with the consent of a grand jury, to prosecute or help prosecute.
14. There is a right to do one's duty, and a duty to defend the rights of others, as militia, as jurors, or in any similar capacity. That means each has a duty to independently decide what is what is not lawful, and to resolve conflicts of laws, in any situation with which one may be confronted. This duty is inalienable, and may not be relinquished to others. The exercise if judicial review by a judge in cases before him is nothing more than the exercise of the general duty of constitutional review which everyone has in situations they encounter.
15. Part of the right to trial by jury is the right to have the jury review the decisions of the bench on issues of law before the court, in reaching a general verdict. That means a right to have all issues of law argued in the presence of the jury, and to enable them to read all pleadings and

laws involved in the case.

16. There is a right not to have officials take actions, under color of delegated authority, that may be convenient or that may tend to achieve the outcome sought by the exercise of a delegated authority, but only to make the reasonable effort such a delegation authorizes, which need not be sufficient to attain the ends.
17. There is a right to have delegated powers construed narrowly, and complementary rights or immunities construed broadly, and when in doubt, the decision must always be in favor of the claimed right against an action of government over the claimed power of an official to so act.

One can recognize in these precepts the principles of natural right and justice that most of us take for granted, or that are embedded in our public processes, but which are not always made explicit or stated as positive rights. That is what the Ninth and Tenth Amendments do, each in its own way.

We must also recognize, however, that access to remedies for these rights have undergone a substantial erosion over the last two centuries. This article is not to provide a thorough review of all the ways this has occurred. That would take many volumes. It is to provide an introduction to the evidence of what the Founders meant by the unenumerated rights, and how the most fundamental of them, the right to a presumption of nonauthority, is the foundation for the entire system of Anglo-American law and constitutional government.<sup>38</sup>

### Presumption of Nonauthority

A search of the literature will not find the phrase “presumption of nonauthority”, except in writings that trace back to the author of this article. However, a search on phrases used in law that begin with “presumption” yields several words that are synonyms of nonauthority. Consider the following:

1. *Of Liberty*. Nonconstraint by government officials<sup>39</sup>
2. *Of Innocence*. Burden of proof is on the prosecutor.
3. *In favor of the Defendant*. Burden of proof is on the plaintiff.
4. *Of Assent*. If one has due notice and a duty to object and fails to do so within a specified period of time.
5. *Of Public Access*. For a roadway or place where the public has had access for a long period of time.
6. *Of Ownership*. If the person has long unchallenged possession of a thing.
7. *Of Intent*. If the evidence offers no plausible theory that the subject did not have intent.

Now consider some presumptions with opposite meaning:

1. *Of Constitutionality*. When courts defer to the constitutional judgment of legislatures.
2. *Of Legitimacy*. When courts defer to the actions of public officials.
3. *Of Validity*. Documented public acts of officials, especially in other states or nations.

These contrary presumptions are not supported by the historical evidence we are presenting.

Some Latin legal maxims shed some light on this question:<sup>40</sup>

1. *Potestas stricte interpretatur*. A power is strictly interpreted.
2. *In dubiis, non præsimitur pro potentia*. In cases of doubt, the presumption is not in favor of a power.

3. *Delegata potestas non potest delegari*. A delegated power cannot be delegated.<sup>41</sup>

4. *Ubi jus ibi remedium*. There is no right without a remedy.

These maxims indicate the ancient heritage of the principles being discussed in this article.

If we accept that powers are to be construed as narrowly as the text permits, and rights are the complement of powers, then it follows that rights are to be construed as broadly as the text permits, and in the event of any doubt, the decision must always be against a claimed power and in favor of a claimed right against the exercise of the claimed power. This means that “strict construction” means *narrow* for powers and *broad* for rights, not narrow for both.

It also follows that it is never constitutional for any branch or official to defer to the judgment of other branches or officials, to presume the constitutionality or legitimacy of their acts, other than the specific exception made for the “full faith and credit” of the judicial acts of one state by another. Acts of the legislature must always be deemed unconstitutional unless or until proved otherwise. Likewise the acts of administrative or executive branch officials, or even of other courts, other than, perhaps, courts superior in the appeals hierarchy, for the same case involving the same parties and issues. This means that the only form of *stare decisis* that is compatible with the written Constitution is the weak form of *persuasive* precedent, rather than the strong form of *binding* precedent, such that a court might very well find a dissenting opinion more persuasive than a majority opinion. The number of votes a legal position gets on a multi-judge panel might be enough for that panel to decide a case, but not for anyone else. A judicial panel is not a legislative body, and its decisions are not enactments of law, only practices, which may or may not be consistent with the Constitution.

Some confusion has arisen from the practice of the courts to make decisions not only as interpretations of a constitution or statutes, but as *prudential* or *equity* decisions, and to frame those prudential or equity decisions in ways that make them appear to be constitutional interpretations. Many court justices have advocated that people reduce their tendency to look to politically weak courts to protect their rights, and to refocus their efforts on getting protection through the “political branches”, legislative and executive. Many of the decisions of the courts that have seemed like contractions of rights have actually not been constitutional interpretations but “prudential” decisions, for the convenience of the court, intended to push back on the tendency of the political branches to relinquish responsibility for constitutional compliance protection onto the courts, and to force people to seek redress through the political process rather than through litigation. Unfortunately, this practice becomes deference by the courts to the political branches, which can have the practical effect of allowing the delegation of both legislative and judicial authority to administrative officials, and be interpreted by the political branches, and eventually the courts themselves, as restrictions on constitutional rights. When officials of all three branches try to evade their duty to enforce the Constitution, by trying to push the duty off onto other branches, the enduring result is less likely to be activation of effective public demand for protection of their rights than expansion of the powers of petty tyrants too numerous, well organized, and well-funded to be readily overcome by diffuse public pressure.

### Information needed to make public decisions

A second major category of fundamental rights is the right to receive the information needed to make public decisions. Government officials are the agents of the people, and the people have a right to the information they need to be able to supervise them. As John Adams proclaimed:

Liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, they have a right,

an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge; I mean, of the characters and conduct of their rulers.<sup>42</sup>

One subright within this category is found in Art. I Sec. 5 Cl. 3:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Virginia and North Carolina did not consider this sufficient, and demanded the keeping of records and disclosure and publication of all public acts, including those of the executive and judicial branches, as a service of government, not just by private parties. They did allow for nondisclosure of unspecified national secrets, mainly those related to defense. They would not have accepted cover-ups of wrongdoing.

Another is found in Art. I Sec. 9 Cl. 7:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Virginia, North Carolina, and New York did not consider this sufficient, and demanded disclosure and publication of all public receipts and expenditures, including those of the executive and judicial branches, also as a service of government. Note that there is no exception for defense budgets.

Under pressure from reformers Congress did adopt the Freedom of Information Act, and many states have adopted similar acts, often called "Open Records" acts. However, severe impediments are often imposed, such as requiring the requester to specify exactly what records he wants, or high copying fees. In some jurisdictions people have been allowed to search through the records themselves, but theft, destruction, or alternation of records by members of the public has led some jurisdictions to require the research be done by staff, which raises the costs. In recent times many jurisdictions are requiring that all records be digitized and made available online, but most have not yet completed doing that for older records.

Litigation to obtain such information and documentation generally cites the legislative acts rather than one of the unenumerated rights, and thus accepts the restrictions of the legislation, but it would be appropriate to cite the unenumerated right, which would override the legislated restrictions.

### Access to remedies

A third major category of fundamental rights is making it convenient to effectively seek nonviolent remedies. There may be no right without a remedy, and for every right there might exist several remedies in principle, but if it is made too difficult for ordinary people to access those remedies, the effect is the same as denial of the right.

Thus, although it may be a privilege stemming from government to be able to vote in an election, perhaps restricted to adults who have resided in the jurisdiction for a certain period of time, there are rights for those thus privileged to have polling places conveniently located, to be able to vote in secret, to have a preprinted ballot that is easily understood, to be able to vote for anyone constitutionally qualified, and to have one's votes accurately counted and reported within a fairly short period of time. Congress may have pre-emptive power to regulate congressional elections, but that power is not



plenary. Like all delegations of power, it is constrained to be reasonable and for a proper public purpose, and it would be unconstitutional for Congress to exercise its power contrary to such rights.

Similarly, it is a right for any person, especially those who can't afford an attorney, to seek redress for grievances, whether in a court, or in a legislative or administrative process, and to have a fair chance to actually get redress if his cause has merit. The courts must not become games in which only lawyers may play, because then only lawyers can win.

## Conclusion

Far from being Robert Bork's "ink blot", there is a clear historical record that can enable us to identify unenumerated rights. Moreover, we can identify several broad categories or *superrights* into which those rights fall as *subrights*, enabling us to identify rights that were not specifically identified in the legacy of the Founders, but which can be reasonably inferred from them.

- \* Founder and President, Constitution Society. <http://www.constitution.org>
- 1 1 Annals of Cong. 454 (J. Gales & W. Seaton eds. 1834) (Speech of Rep. J. Madison).  
[http://www.constitution.org/ac/001/r01-1/bill\\_of\\_rights\\_hr1789.htm](http://www.constitution.org/ac/001/r01-1/bill_of_rights_hr1789.htm)
  - 2 The Lost Jurisprudence of the Ninth Amendment, by Kurt Lash, Professor of Law and W. Joseph Ford Fellow, Loyola Law School, Los Angeles, *Texas Law Review*, Vol. 83, February 2005.  
[http://www.constitution.org/911/schol/kurt\\_lash\\_juris\\_9th.htm](http://www.constitution.org/911/schol/kurt_lash_juris_9th.htm)
  - 3 Documentary History of the Bill of Rights. <http://www.constitution.org/dhbr.htm>
  - 4 James Madison, in remarks on introducing the proposed Bill of Rights in the House of Representatives, June 8, 1789, *Annals* 1:424-50. [http://www.constitution.org/ac/001/r01-1/bill\\_of\\_rights\\_hr1789.htm](http://www.constitution.org/ac/001/r01-1/bill_of_rights_hr1789.htm)
  - 5 The Lost Original Meaning of the Ninth Amendment, by Kurt Lash, Professor of Law and W. Joseph Ford Fellow, Loyola Law School, Los Angeles, *Texas Law Review*, Vol. 83, No. 2, December 2004.  
[http://www.constitution.org/911/schol/kurt\\_lash\\_lost\\_9th.htm](http://www.constitution.org/911/schol/kurt_lash_lost_9th.htm)
  - 6 Raoul Berger, The Ninth Amendment, 66 *Cornell L. Rev.* 1 (1980).
  - 7 Cooper, Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons, 4 *J. Law & Pol.* 63 (1987). "A ninth amendment claim against federal action ... is determined by the extent of the federal government's enumerated powers...."
  - 8 330 U.S. 75, 95-96 (1947).
  - 9 *Annals of Congress*, 1:424-50, 8 June 1789. [http://www.constitution.org/ac/001/r01-1/bill\\_of\\_rights\\_hr1789.htm](http://www.constitution.org/ac/001/r01-1/bill_of_rights_hr1789.htm)
  - 10 Randy Barnett discusses this in "Two Conceptions of the Ninth Amendment", <http://randybarnett.com/12harvijl29.htm>
  - 11 Madison *ibid*.
  - 12 Letter of James Madison to George Washington (Dec. 5, 1789), reprinted in Schwartz,, *The Bill of Rights: A Documentary History* 432 (1971).
  - 13 See table at <http://www.constitution.org/bor/sources.htm>
  - 14 Common Law Writs. <http://www.constitution.org/writ/writs.htm>
  - 15 "Provided, That all commissions, writs, and processes, shall run in the name of the people of the United States, and be tested in the name of the President of the United States, or the person holding his place for the time being, or the first judge of the court out of which the same shall issue." New York Ratification Debates,  
[http://www.constitution.org/rc/rat\\_ny.htm](http://www.constitution.org/rc/rat_ny.htm)
  - 16 "10th. That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed." Virginia Convention Bill of Rights, [http://www.constitution.org/rc/rat\\_va\\_23.htm](http://www.constitution.org/rc/rat_va_23.htm)
  - 17 "That every Person restrained of his Liberty is entitled to an enquiry into the lawfulness of such restraint, and to a removal thereof if unlawful, and that such enquiry and removal ought not to be denied or delayed, except when on account of Public Danger the Congress shall suspend the privilege of the Writ of Habeas Corpus." "That the Privilege of the *Habeas Corpus* shall not by any Law be suspended for a longer term than six Months, or until twenty days after the Meeting of the Congress next following the passing of the Act for such suspension." New York Ratification Declaration, [http://www.constitution.org/rc/rat\\_decl-ny.htm](http://www.constitution.org/rc/rat_decl-ny.htm)
  - 18 "10. That every freeman, restrained of his liberty, is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful; and that such remedy ought not to be denied nor delayed." North Carolina Declaration of Rights, [http://www.constitution.org/rc/rat\\_nc.htm](http://www.constitution.org/rc/rat_nc.htm)
  - 19 "Resolved, as the opinion of this committee, that all appeals from any courts in this state, proceeding according to the course of the common law, are to be by writ of error, and not otherwise." New York Ratification Debates,  
[http://www.constitution.org/rc/rat\\_ny.htm](http://www.constitution.org/rc/rat_ny.htm)
  - 20 "That all Appeals in Causes determinable according to the course of the common Law, ought to be by Writ of Error and not otherwise." New York Ratification Declaration, [http://www.constitution.org/rc/rat\\_decl-ny.htm](http://www.constitution.org/rc/rat_decl-ny.htm)
  - 21 "Provided, That, whenever the privilege of *habeas corpus* shall be suspended, such suspension shall in no case exceed the term of six months, or until the next meeting of the Congress." New York Ratification Debates,  
[http://www.constitution.org/rc/rat\\_ny.htm](http://www.constitution.org/rc/rat_ny.htm)
  - 22 "12th. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely, without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust." Virginia Convention Bill of Rights, [http://www.constitution.org/rc/rat\\_va\\_23.htm](http://www.constitution.org/rc/rat_va_23.htm)
  - 23 "12. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character; he ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust." North Carolina Declaration of Rights, [http://www.constitution.org/rc/rat\\_nc.htm](http://www.constitution.org/rc/rat_nc.htm)
  - 24 "1st. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting

- property, and pursuing and obtaining happiness and safety.” Virginia Convention Bill of Rights, [http://www.constitution.org/rc/rat\\_va\\_23.htm](http://www.constitution.org/rc/rat_va_23.htm)
- 25 "1. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” North Carolina Declaration of Rights, [http://www.constitution.org/rc/rat\\_nc.htm](http://www.constitution.org/rc/rat_nc.htm)
- 26 "15th, That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury.” Virginia Convention Proposed Amendments, [http://www.constitution.org/rc/rat\\_va\\_23.htm](http://www.constitution.org/rc/rat_va_23.htm)
- 27 "16. That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury.” North Carolina Proposed Amendments, [http://www.constitution.org/rc/rat\\_nc.htm](http://www.constitution.org/rc/rat_nc.htm)
- 28 “Ninthly. Congress shall at no time consent that any person holding an office of trust or profit, under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.” Massachusetts Convention Proposed Amendments, [http://www.constitution.org/rc/rat\\_ma.htm](http://www.constitution.org/rc/rat_ma.htm)
- 29 “Resolved, as the opinion of this committee, that the Congress shall at no time consent that any person, holding any office of profit or trust in or under the United States, shall accept of any title of nobility from any king, prince, or foreign state.” New York Ratification Debates, [http://www.constitution.org/rc/rat\\_ny.htm](http://www.constitution.org/rc/rat_ny.htm)
- 30 “That the Prohibition contained in the said Constitution against *ex post facto* Laws, extends only to Laws concerning Crimes.” New York Ratification Declaration, [http://www.constitution.org/rc/rat\\_decl-ny.htm](http://www.constitution.org/rc/rat_decl-ny.htm)
- 31 "5th. That the journals of the proceedings of the Senate and House of Representatives shall be published at least once in every year. except such {660} parts thereof, relating to treaties, alliances, or military operations, as, in their judgment, require secrecy.” Virginia Convention Proposed Amendments, [http://www.constitution.org/rc/rat\\_va\\_23.htm](http://www.constitution.org/rc/rat_va_23.htm)
- 32 "5. That the Journals of the proceedings of the Senate and House of Representatives shall be published at least once in every year, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy.” North Carolina Proposed Amendments, [http://www.constitution.org/rc/rat\\_nc.htm](http://www.constitution.org/rc/rat_nc.htm)
- 33 "6th. That a regular statement and account of the receipts and expenditures of public money shall be published at least once a year.” Virginia Convention Proposed Amendments, [http://www.constitution.org/rc/rat\\_va\\_23.htm](http://www.constitution.org/rc/rat_va_23.htm)
- 34 “Provided, That. the words *from time to time* shall be so construed, as that the receipts and expenditures of public money shall be published at least once in every year, and be transmitted to the executives of the several states, to be laid before the legislatures thereof.” New York Ratification Debates, [http://www.constitution.org/rc/rat\\_ny.htm](http://www.constitution.org/rc/rat_ny.htm)
- 35 "6. That a regular statement and account of receipts and expenditures of all public moneys shall be published at least once in every year.” North Carolina Proposed Amendments, [http://www.constitution.org/rc/rat\\_nc.htm](http://www.constitution.org/rc/rat_nc.htm)
- 36 “XV. That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness.” Pennsylvania Constitution of 1776, [http://www.constitution.org/cons/pa/pa\\_1776.htm](http://www.constitution.org/cons/pa/pa_1776.htm)
- 37 This is contrary to the precedent in *Frothingham v. Mellon*, 262 U.S. 447 (1923). Discussed by Steven Winter in “The Metaphor of Standing and the Problem of Self-Governance”, 40 Stan. L. Rev. 1371. [http://www.constitution.org/duopr/standing/winter\\_standing.htm](http://www.constitution.org/duopr/standing/winter_standing.htm)
- 38 This is brought out in the 1786 English case, *The Trial at Large, ... In the Nature of a Quo Warranto, Against Mr. Thomas Amery, ... of the City of Chester*. <http://www.constitution.org/trials/amery1786/amery1786.htm> Submitted to verdict by a jury.
- 39 Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press (December 15, 2003).
- 40 Jon Roland, Principles of Constitution Interpretation. [http://www.constitution.org/cons/prin\\_cons.htm](http://www.constitution.org/cons/prin_cons.htm)
- 41 Coke, 9 Inst. 597. <http://www.constitution.org/coke/coke9th.htm>
- 42 John Adams, Dissertation on Canon and Feudal Law, 1765, From: *Our Sacred Honor*, Bennett, 253.