

subtopic

## The Bill of Rights

### NATURAL LAW THEORY and the BILL of RIGHTS

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Our [Bill of Rights](#) is the product of the great debate that was waged in 1787–88 over the ratification of the Constitution. It was the opponents of ratification, the “Anti-Federalists,” who strenuously argued for a bill of rights, and who led state ratifying conventions to pass resolutions demanding specific bills of rights as amendments. These efforts were staunchly opposed by the Federalists, under the intellectual leadership of James Madison, [James Wilson](#), and Alexander Hamilton (see *Federalist* No. 84 for their key arguments). The Federalists correctly saw the agitation for a bill of rights as part of a strategy aiming at a substantially revised [Constitution](#) that would drastically limit the powers of the national government. In the end, however, the Federalists, led by Madison in the First Congress, shrewdly engineered a co-optation and radical re-design of the proposed bill of rights, so as to craft amendments that wound up strengthening rather than weakening the new national government. This judo-throw was made possible by the deep if not perfect agreement on fundamental principles that underlay the debate over ratification.

The core of this shared foundation becomes most apparent when one contrasts the distinctly modern republican principles which predominate in the Bill of Rights with the profoundly contrasting principles of classical and Christian republicanism.

The Bill of Rights is rooted in the idea of the primacy of egalitarian, autonomous, individual “natural rights” (plural)—to “life, liberty, and the pursuit of happiness,” especially through limitless, competitive acquisitiveness. From these self-regarding rights, and their mortally competitive spontaneous expression (the “state of nature”), reason deduces prudential, artificial rules, honorifically if misleadingly given the hallowed term “natural laws.” By following these rules, centered on the idea of contract, the natural rights are tamed so as to foster peacefully competitive commercial societies that shrewdly maximize collective and individual self-interest, above all through de-legitimizing the political cultivation of spiritual fulfillment.

The great tradition of classical and Christian republicanism upholds, on the contrary, the idea of a political life dedicated to communal spiritual fulfillment, through regulation by natural law or natural righteousness (“natural right”—singular) conceived as an innate, high standard, existing prior to and directive of all practical calculation. This canon dictates the primacy of obedience to self-transcending civic duties and moral as well as intellectual virtues, expressing humanity’s naturally unequal capacity to share in the soul’s flourishing through the life of the mind and devoted public service. Such service often if not always requires self-sacrifice, and entails severe moral restrictions on commerce and material acquisition.

In the Bill of Rights we find predominating the influence of a total transformation of these classic norms, through a vast cultural revolution (the “Enlightenment”) whose grounds were laid in the seventeenth and eighteenth centuries, above all in the new natural rights theorizing of [Thomas Hobbes](#), Benedict Spinoza, [John Locke](#), and [Montesquieu](#)—popularized by such major secondary thinkers as the authors of [Cato’s Letters](#) ([Trenchard and Gordon](#)) and [William Blackstone](#).

1. The texts assembled under our first rubric—from [Aristotle](#), [Cicero](#), and [Plutarch](#)—provide a vivid introduction to classical, Greco-Roman, natural right republicanism. These were all texts that were well-known to the American founders, and important in their education; but their substance was of secondary influence, only tincturing and qualifying—and illuminating by way of contrast—the founders’

commitment to modern, individualistic and rights-centered, republicanism.

2. In our second rubric are assembled texts that show how classical republicanism and its natural right and natural law framework was appropriated by Christian political theology, reaching its highpoint in [St. Thomas Aquinas](#). His political thought became and remains the foundation of orthodox Christian political theory in the West, [Protestant](#) as well as Roman Catholic. Thomas contends that the Mosaic law elaborated in the Pentateuch not only supplements drastically, with revealed divine law, the natural law (known to un-assisted reason), but also provides crucial clarification of the natural law. Thomas insists that the natural law consists, at the most basic level, of categorical imperatives, brooking no exceptions (the natural laws as articulated in the ten commandments “admit of no dispensation whatever”). The excerpts here bring out Thomas’s stress on the legislation of morality, or the coercive cultivation of the virtues, as the chief aim of human law, in its implementation of the natural law. The classic call for a legally enforced establishment of a unifying religion receives a Christian transformation. Thomas replaces the [Lycurgan](#) model of the best republic with the political regime elaborated by Moses in the Pentateuch. Following Moses, Thomas makes more absolute than had Aristotle the moral prohibition on lending money at interest, and hence the immorality of a capitalist or commercial system. Calvin’s political theory does not decisively alter the Thomistic framework.<sup>[1]</sup> The application of the Christian version of classical republicanism to colonial America is illustrated in the excerpt from William Penn. It could readily be supplemented by such major documents of American Puritan political theorizing as the Mayflower Compact, or the Fundamental Articles of New Haven (1639), or the New England Confederation of 1643. The intensely communal, religious, and virtue-oriented character of original American republicanism, later to be stressed by Tocqueville, is eloquently situated within the classical framework by Montesquieu, in the excerpts from his *Spirit of the Laws* that begin our third rubric.

3. But Montesquieu’s treatise as a whole takes the reader through an ever intensifying critique of the unnaturalness of the classical framework; and that critique forms the basis for a self-conscious embrace of the new commercial and individualist vision. As the texts from Locke and Blackstone make clear, the new natural rights foundation is laid by carrying out a revealing thought experiment. We are asked to uncover mankind’s core permanent nature by envisioning in our mind’s eye humans denuded of their historically constructed social bonds and civil constraints. The picture that results, the famous “State of Nature,” reveals humans to be at their permanent core dis-associated individuals, lacking either fixed or shared fulfilling goals, but all alike desperately seeking to flee the pains of hunger and death in an environment of scarcity—and therefore driven to seek power through striving to dominate and to exploit one another. The result is a mutually life-threatening anti-social sociability. In Locke’s mordant words: “Principles of Actions indeed there are lodged in Men’s Appetites, but these are so far from being innate Moral principles, that if they were left to their full swing, they would carry Men to the overturning of all Morality.”<sup>[2]</sup>

Yet humans have the natural potential to employ reason to serve their passions, by guiding, and even by modifying, those passions in their spontaneous expressions. The true foundation of morals is hedonism: things are “Good and Evil,” Locke contends, “only in reference to Pleasure and Pain”; and we “have opportunity to examine, view, and judge, of the good or evil of what we are going to do; and when, upon due *Examination*, we have judged, we have done our duty, all that we can, or ought to do, in pursuit of our happiness.” Humans can thus discover that a hedonistic basis for objective norms is to be found in the most fundamental needs that all humans share equally: the needs for “comfortable preservation,” and for the liberty to act in ways that maximize such preservation—especially, through the economic liberty to labor and to trade in order to accumulate ceaselessly the power to dispose of useful material possessions.<sup>[3]</sup>

The fulcrum of the new prudential “natural law” is the imperative to regard oneself as having entered into the great “Social Compact.” This is a solemn agreement, by which each is presumed to have laid down his natural right to provide for his security as he sees fit, in return for a similar promise from his partners. All in unison authorize a representative, sovereign government to employ the united force of all to enforce peace, and to guarantee security, through the rule of laws equally applicable to all. To insure that government does not abuse its terrifying police powers, “natural law” in its Lockean form

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dictates specific limits on the scope of government, including “no taxation without representation” and structural separation of legislative from executive powers, or checks and balances within government. The new outlook is summarized in our excerpts from Locke and Blackstone.

4. In our fourth rubric of documents, the re-articulation of this philosophic basis for the Bill of Rights by the American founders themselves is illustrated through key selections from the State Declarations of Rights that were articulated during the Revolution, from the bills of rights proposed as amendments in the ratifying conventions, from the greatest theoretical writing of the Anti-Federalists, and from a key Federalist statement of the philosophic foundation of the Constitution. In these documents we do catch glimmers and echoes of the classic tradition, but these limn only more starkly the basically modernist meaning of our Bill of Rights.

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[1] For an introduction, see especially Calvin’s *Institutes of the Christian Religion*, Bk. 4, chap. 20, secs. 1, 3-6, 9, 22-25.

[2] John Locke, *An Essay Concerning Human Understanding* 1.3.3, 13.

[3] Ibid., 2.20.2; 2.21.47, 51-52; 2.28.5; *Two Treatises of Government* [1.86-87](#).

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