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Suzanna Sherry

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## The Founders' Unwritten Constitution

*Suzanna Sherry*<sup>†</sup>

In seeking to understand and interpret our written Constitution, judges and scholars have often focused on two related issues: how did the founding generation understand the Constitution they created, and to what extent should that understanding be relevant to modern constitutional interpretation? This article will address the first of these questions, but in a manner that profoundly affects the second question as well. I will suggest that the founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law. The framers thus intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals. Like Jefferson Powell's recent scholarship suggesting that those who met in Philadelphia intended their own subjective intent to be irrelevant to later interpretation,<sup>1</sup> my conclusion makes clear that the framers intended something independent of their own intent to serve as a source of constitutional law.

In order to determine the role that the written Constitution played in the founders' vision of fundamental or higher law, I will

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<sup>†</sup> Associate Professor of Law, University of Minnesota. A.B. 1976, Middlebury College; J.D. 1979, University of Chicago. I would like to thank Daniel A. Farber, Philip P. Frickey, and H. Jefferson Powell for helpful comments on earlier drafts of this article.

<sup>1</sup> H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv.L.Rev.* 885 (1985).

focus primarily on their view of judicial review. Prior scholarship in this area has addressed largely the question of whether those who wrote and ratified the Constitution expected judges to review statutes and invalidate those inconsistent with the written Constitution.<sup>2</sup> That limited focus, while valuable—and a necessary precursor to this article—answers only the limited question of the extent to which the founding generation viewed the written Constitution as *one* source of higher law. I will address a somewhat different question: the extent to which the founding generation viewed the Constitution as the *only* source of higher law.

I will suggest in Part I that the traditions inherited from both English opposition theory and post-Revolutionary American practice held a written constitution to be only one aspect of the fundamental or higher law that might serve to invalidate legislative enactments. Then in Part II, I will show how the Constitutional Convention of 1787 reflected changing notions of the very nature of a written constitution, crystallizing and clarifying the justification for its status as higher law by defining it as a *sui generis* species of law: popularly enacted fundamental law. I will suggest in Part III, however, that despite these changes in the framers' vision of the nature of a written constitution, they never intended to displace the prior tradition of multiple sources of fundamental law. The summer in Philadelphia yielded a new view only of the nature, and not of the relative authority, of a written constitution.

## I. INHERITED TRADITIONS

When fifty-five men met in Philadelphia in May of 1787 to write a constitution, their efforts inevitably reflected their political heritage. They were all well and widely read, and many were educated in the law. By 1787, they could draw on a rich tradition of English and American notions of fundamental or higher law and the courts' role in applying such law. This section will first examine eighteenth century English and American theories of fundamental law, and then turn to how the newly independent states implemented these theories in practice.

### A. The Nature of Fundamental Law

The spirit of the English tradition of constitutionalism was

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<sup>2</sup> See, e.g., citations collected by George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court of The United States: Foundations of Power: John Marshall, 1801-18* at 182 n.2 (1981).

best exemplified for the Americans in the theories of Coke and Bolingbroke. These theories rested on three distinct premises: first, that some form of higher law—the British constitution—existed and operated to make void Acts of Parliament inconsistent with that fundamental law; second, that this fundamental law, or constitution, consisted of a mixture of custom, natural law, religious law, enacted law, and reason; and third, that judges might use that fundamental law to pronounce void inconsistent legislative or royal enactments. These ideas were those of the opposition party in England, and thus were never accepted by those who held power in that country. They were, however, tremendously influential upon the generation that framed the American constitution.<sup>3</sup>

The first and third premises translate easily into a written constitution enforceable by means of judicial review, and thus are familiar enough to need little further explication. The idea of a form of law superior to royal or parliamentary enactments began as a defense against royal invasion of cherished privileges. By the seventeenth century, appeal to “the ancient constitution,” which had existed since “time immemorial,” was a standard political argument against royal or parliamentary invasions of rights.<sup>4</sup> The colonies relied heavily on this English opposition rhetoric in their fight for independence, and the new states translated it into action with early instances of judicial invalidation of legislative acts.<sup>5</sup> It is thus unsurprising that in 1787 the men in Philadelphia could uniformly assume that the federal courts would exercise the power of judicial review, although a few disapproved of the practice.<sup>6</sup>

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<sup>3</sup> See generally Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* (1978); Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 89-95 (1971); James Thayer, *Cases on Constitutional Law* 48-53 (1895); Thomas C. Grey, *The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *Stan.L.Rev.* 843, 849-50 (1978). For the quintessential English rejection, see *City of London v. Wood*, 12 *Mod.Rep.* 669, 678 (1701) (“an act of parliament can do no wrong, though it may do several things that look pretty odd . . . An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B. but it may make the wife of A. to be the wife of B. and dissolve her marriage with A.”).

<sup>4</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* 16-18, 46 (1957). Pocock regards the appeal to the “ancient constitution” as an appeal to custom, not to immutable abstract political principles. See also Grey, 30 *Stan.L.Rev.* at 850-54 (cited in note 3).

<sup>5</sup> See generally Goebel, *History* at 50-142 (cited in note 3); Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* 82-83 (1986); Grey, 30 *Stan.L.Rev.* at 881-82 (cited in note 3).

<sup>6</sup> See James Madison, *Notes of Debates in the Federal Convention of 1787* 61, 336-43, 462-65 (Adrienne Koch ed. 1966) (“Madison’s Notes”).

A much less familiar ingredient in the English opposition ideology is the nature of the constitution or fundamental law. Neither a single written document nor a category of either natural or enacted law, the ancient constitution was an amorphous admixture of various sources of law. It was essentially custom mediated by reason.<sup>7</sup> Bolingbroke defined it as "that Assemblage of Laws, Institutions and Customs, derived from certain fix'd Principles of Reason, directed to certain fix'd Objects of publick Good, that compose the general System, according to which the Community hath agreed to be govern'd."<sup>8</sup> Coke described as void any Act of Parliament that is "against common right and reason, or repugnant, or impossible to be performed."<sup>9</sup> Rutherford, another English influence on the colonists,<sup>10</sup> held that "there does not seem to be any way of determining what form has been established in any particular nation, but by acquainting ourselves with the history and the customs of that nation. A knowledge of its present customs will inform us what constitution of government obtains now."<sup>11</sup> A *constitution* was simply the norms by which a people were *constituted* into a nation. Thus in the 1760s, an American revolutionary thinker could refer to "the constitution of things" and "the British constitution" with a clear relatedness of meaning.<sup>12</sup> This natural law tradition was also echoed in the thought of various continental influences on the Americans.<sup>13</sup>

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<sup>7</sup> For a general description of this form of English constitutionalism, see J. W. Gough, *Fundamental Law in English Constitutional History* (1961); O. Hood Phillips, *Constitutional and Administrative Law* (5th ed. 1973).

<sup>8</sup> Henry St. John Viscount Bolingbroke, *A Dissertation Upon Parties* (3d ed. 1735), quoted in Goebel, *History* at 89 (cited in note 3).

<sup>9</sup> *Dr. Bonham's Case*, 8 Coke Rep. 107, 118a (1610), quoted in Goebel, *History* at 92 (cited in note 3); see also James Harrington, *The Commonwealth of Oceana*, in *The Political Works of James Harrington* 171 (J.G.A. Pocock ed. 1977) (referring to "common right, law of nature, or interest of the whole" as animating a republic). Corwin makes clear that in referring to "common right and reason," Coke was referring to some form of higher, fundamental law. Edward S. Corwin, *The "Higher Law Background" of American Constitutional Law*, 42 *Harv.L.Rev.* 149, 365, 368-73 (1928).

<sup>10</sup> Grey, 30 *Stan.L.Rev.* at 860-61 (cited in note 3).

<sup>11</sup> Thomas Rutherford, *Institutes of Natural Law* 95 (1756). See also Pocock, *Ancient Constitution at 173* (describing the thought of Sir Matthew Hale, Chief Justice of the King's Bench: "To know English law, then, there is no other way but to learn what the English have at various times decided shall be law") (cited in note 4).

<sup>12</sup> Daniel Shute, *An Election Sermon* (1768), in Charles S. Hyneman and Donald S. Lutz, eds., *1 American Political Writing During the Founding Era, 1760-1805* 109, 116, 117, 128 (1983).

<sup>13</sup> See generally Charles Grove Haines, *The Revival of Natural Law Concepts* 50-57 (1930); Benjamin Fletcher Wright, Jr., *American Interpretations of Natural Law: A Study in the History of Political Thought* 1-123 (1931) (English conception of natural law); Daniel A. Farber and John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1

Creating fundamental law thus did not require a single, extraordinary, extra-legislative act of the people.<sup>14</sup> Fundamental law could be reflected in ordinary legislative enactments. Indeed, early American revolutionaries stressed that acquiescence to abhorrent Parliamentary actions was dangerous precisely because it threatened to ratify such actions as consistent with or part of fundamental law.<sup>15</sup> After the mid-1760s, this legislative strand of fundamental law began to lose importance as the implications of the superiority of fundamental law over legislative enactments were worked out.<sup>16</sup> The transition, however, was not complete by 1787. Nine of the eleven state constitutions adopted between 1776 and 1778 were enacted by ordinary legislative means, and the other two were drafted by specially elected conventions and implemented without popular ratification.<sup>17</sup> Of the five of these early constitutions that made any provision for amendments, three provided for amendment by the legislature.<sup>18</sup> Only two state constitutions adopted prior to the Federal Constitutional Convention in 1787—those of Massachusetts in 1780 and New Hampshire in 1784—were ratified by the people.<sup>19</sup> The idea that fundamental law, in order to be fundamental, needed the approbation of more

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Const.Comm. 235, 242-45 (1984); Grey, 30 *Stan.L.Rev.* 862-3 (cited in note 3); Walter F. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in M. Judd Harmon, ed., *Essays on the Constitution of the United States* 130, 139-140 (1978).

<sup>14</sup> As Thomas Grey recognizes, an enacted constitution was still a novel idea by 1760. Grey, 30 *Stan.L.Rev.* at 864 (cited in note 3).

<sup>15</sup> See *id.* at 878-79. Grey interprets the danger inherent in acquiescence as a possibility that "the claim of illegality [would be] waived." But the idea of waiver does not adequately capture the problem described in the passages from John Dickinson quoted by Grey. Dickinson worried not that the claim would be waived, but rather that the practice of acquiescence would create a "detestable precedent" unfavorable to the merits of the claim. *Id.*, quoting Paul L. Ford, ed., 1 *The Writings of John Dickinson* 202 (1895).

<sup>16</sup> See Bernard Bailyn, *The Ideological Origins of the American Revolution* 180-84 (1967).

<sup>17</sup> See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* at 63-86 (1980); R.R. Palmer, *The American Revolution: The People as Constituent Power*, in Jack P. Greene, ed., *The Reinterpretation of the American Revolution 1763-1789* 342-43 (1979).

<sup>18</sup> See Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 568 (*Del.Const.* of 1776 art. 30), 1701 (*Md.Const.* of 1776 art. LIX), 3257 (*S.C.Const.* of 1778 art. XLIV) (1909). The Constitutions of Georgia and Pennsylvania required the calling of conventions for amendments. See *id.* at 785 (*Ga.Const.* of 1777 art. LXIII), 3091-92 (*Pa.Const.* of 1776 § 47) (1909).

<sup>19</sup> Adams, *First American Constitutions* at 68-70, 86-93 (cited in note 17); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 149 (1985). Both these constitutions also required conventions for amendments. See Thorpe, *Federal and State Constitutions* at 1911 (*Mass.Const.* of 1780 ch. VI, art. X), 2470 (*N.H.Const.* of 1784)(cited in note 18).

than the elected legislature was thus still open to debate in 1787.<sup>20</sup>

The idea that certain fundamental rights could not be ceded away also colored the American view of fundamental law.<sup>21</sup> Fundamental rights were God-given, and were rights "which no creature can give, or hath a right to take away."<sup>22</sup> They were, in the language of the Declaration of Independence, "inalienable." Legislators could no more rewrite these laws of nature than they could the laws of physics.<sup>23</sup> The Cokean and continental notion of fundamental principles and the more Lockean idea of fundamental rights are two sides of the same coin:<sup>24</sup> both were grounded on unwritten natural law. The difference between the two visions—which the early Americans combined<sup>25</sup>—is largely that between republican communitarianism, which emphasizes the relations among members of the community, and liberal individualism, which stresses rights adhering to individual members of the polity.<sup>26</sup>

If these rights were thought to be inherent, what, then, was a legislature doing when it "enacted" enumerated and elaborate lists of fundamental rights and principles? It was merely *declaring* rights already in existence: the "*Magna Charta*, doth not give the privileges therein mentioned, nor doth our *Charters*, but must be considered as only declaratory of our rights, and in affirmance of them."<sup>27</sup> This separation of natural rights from positive law was more than mere rhetoric. Seven state constitutions explicitly di-

<sup>20</sup> See discussion of July 23 debates below. But see Gordon Wood, *The Creation of the American Republic 1776-1787* 306 (1969) ("Although the idea of a convention of the people existing outside of the legislature was far more important than the concept of higher law in indicating the direction American political thought was taking in the years after Independence, the two ideas were inextricably linked, and developed in tandem.")

<sup>21</sup> See generally Bailyn, *Ideological Origins* at 184-89 (cited in note 16).

<sup>22</sup> Silas Downer, *A Discourse at the Dedication of the Tree of Liberty* (1768), in Hyman and Lutz, *1 American Political Writing* at 97, 100 (cited in note 12).

<sup>23</sup> See Henry Steele Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* 234 (1977).

<sup>24</sup> See Murphy, *Art* at 140 (cited in note 13).

<sup>25</sup> One illustration of the pervasive influence of both schools of thought is Jefferson's commentary: he noted both that Coke's work was "the universal elementary book of law students, and a sounder Whig never wrote" and that Locke's work was "perfect as far as it goes." Thomas Jefferson to James Madison (Feb. 17, 1826), in Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* 726 (1944); Thomas Jefferson to Thomas Randolph, May 30, 1790, in *id.* at 497.

<sup>26</sup> See generally, Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va.L.Rev.* 543, 544-562 (1986).

<sup>27</sup> Downer, *Discourse* at 100 (cited in note 12); see also Wood, *Creation* at 271, 293-96 (cited in note 20); Murphy, *Art* at 140 ("It was not the function of government to confer such rights but to secure them.") (cited in note 13).



vided a "Declaration of Rights" from a "Frame of Government,"<sup>28</sup> suggesting that the former was declared and the latter enacted. Only four states mingled provisions protecting individual rights with provisions establishing a frame of government, and these protections were not as extensive as those contained in separate declarations of rights.<sup>29</sup> Since no evidence exists that the drafters of these four constitutions intended to cede the unlisted rights, their failure to include them suggests that the vast majority of rights were something apart from the frame of government.

Moreover, the language of the various declarations of rights—from the English Bill of Rights of 1689 through the Declaration of Independence and the state Declarations of Rights of 1776-1778—indicates that the authors of those documents believed that they were merely declaring existing, inalienable rights. The Bill of Rights of 1689 "declared" the "true, ancient, and indubitable rights and liberties" of Englishmen. The Declaration of Independence "declared" "self-evident truths." Six state declarations of rights or constitutions explicitly referred to "natural," "inherent," "essential," or "inalienable" rights.<sup>30</sup> Another referred to "the common rights of mankind."<sup>31</sup> Three state constitutions specifically prohibited either amendment or violation of their declarations of rights.<sup>32</sup>

Fundamental law might evolve, but not to the extent of depriving citizens of natural rights. Legislative accretion might add to, or interpret, these natural rights, but could not deny them altogether. As Alexander Hamilton wrote in 1775:

<sup>28</sup> See Thorpe, *Federal and State Constitutions* at 562 (Del.Const. of 1776), 1686 & 1691 (Md.Declaration of Rights & Const. of 1776), 1889 & 1893 (Mass.Declaration of Rights & Const. of 1780), 2453 & 2458 (N.H.Declaration of Rights & Const. of 1784), 2787 & 2789 (N.C.Declaration of Rights & Const. of 1776), 3082 & 3084 (Pa.Declaration of Rights & Const. of 1776), 3812 & 3814 (Va.Declaration of Rights & Const. of 1776) (cited in note 18); Bernard Schwartz, *The Bill of Rights: A Documentary History* 234 (Va.Declaration of Rights of 1776), 276 (Del.Declaration of Rights of 1776) (1980).

<sup>29</sup> Thorpe, *Federal and State Constitutions* at 784-85 (Ga.Const. of 1777 arts. LVI, LVIII-LXII), 2597-98 (N.J.Const. of 1776 arts. XVI-XIX), 2635, 2636-37 (N.Y.Const. of 1777 arts. XXXIV, XXXVIII-XLI), 3257 (S.C.Const. of 1778 arts. XL-XLIII) (cited in note 18).

<sup>30</sup> See *id.* at 1889 (Mass.Declaration of Rights of 1780 art. I), 2453-54 (N.H.Declaration of Rights of 1784 arts. I-IV), 2625-26 (N.Y.Const. of 1777 preamble, quoting Declaration of Independence), 3082 (Pa.Const. of 1776 arts. I-II), 3813 (Va.Declaration of Rights of 1776 § 1); Schwartz, *Bill of Rights* at 277 (Del.Declaration of Rights of 1776 § 2) (cited in note 18).

<sup>31</sup> See Thorpe, *Federal and State Constitutions* at 777 (Ga.Const. of 1777 preamble) (cited in note 18).

<sup>32</sup> *Id.* at 568 (Del.Const. of 1776 art. 30), 2794 (N.C.Const. of 1776 art. XLIV), 3091 (Pa.Const. of 1776 § 46).

The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.<sup>33</sup>

There was thus a complementary relationship between the more inclusive body of fundamental law as the legal framework of the community, and the inherent natural rights which formed an integral and unalterable part of the broader fundamental law.<sup>34</sup>

To this combination of evolving fundamental law and inalienable rights, the newly independent states added a third idea: the constitution as a charter or form of government. Heavily influenced by the modern science of politics which envisioned a charter of government as a compact between a people and its rulers, but still clinging to the older tradition of fundamental law and inalienable rights, the new state constitutions reflected these three characteristics. The states declared natural rights, described with great precision the structure of the state government, and then incorporated by reference British and colonial tradition and common law.<sup>35</sup>

## B. Judicial Review

By the 1780s, then, the "constitution" of an American state consisted of its fundamental law (both positive and natural), the inherent and inalienable rights of man (whether declared or not), and the recipe for a governmental mixture that would best protect and preserve the fundamental law and natural rights. This theoretical, intellectual construction of a constitution, moreover, served as the basis for the practical exercise of judicial review. Long before

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<sup>33</sup> The Farmer Refuted &c., in Harold C. Syrett, ed., 1 The Papers of Alexander Hamilton 81, 122 (1961).

<sup>34</sup> This parallels (although it may or may not be derived from) the division between Coke and Hale in their respective developments of the idea of law as custom: Coke viewed it as "fixed, unchanging, immemorial" while Hale saw it as continually adaptive. See J.G.A. Pocock, *Ancient Constitution* at 173-74 (cited in note 4).

<sup>35</sup> See Thorpe, *Federal and State Constitutions* at 566-67 (Del.Const. of 1776 art. 25), 1686-87 (Md.Const. of 1776 art. III), 1910 (Mass.Const. of 1780 ch. VI, art. VI), 2469 (N.H.Const. of 1784), 2598 (N.J.Const. of 1776 art. XXII), 2635-36 (N.Y.Const. of 1777 art. XXXV)(cited in note 18). See generally Elizabeth Gaspar Brown, *British Statutes in American Law 1776-1836* (1964). Brown concludes that some early state legislatures adopted British statutory and common law somewhat indiscriminately, leaving courts to work out the detail of implementation. See *id.* at 23-33. Other states assumed a somewhat different tack, the revise-and-repeal approach, in which the legislatures attempted to make explicit which laws were or were not being adopted. See *id.* at 34-45.

*Marbury v. Madison*, state courts were passing on the validity of legislative enactments in light of some higher law. Because this practice of judicial review was still in an embryonic stage before 1787, and instances of actual review of state laws were localized and sporadic,<sup>36</sup> it is possible to examine virtually all of the pre-1787 cases in which a state court reviewed a state legislative enactment for consistency with fundamental law.

An examination of these earliest American instances of judicial review confirms the existence and character of the different aspects of a "constitution" as well as the widespread recognition of their diverse sources. With one exception, the only time the court paid careful and exclusive attention to the language, structure and meaning of the written constitution was where the question before the court involved some question of separation of powers. Where the allocation of power among parts of the government was not at issue, the court instead referred almost indiscriminately to the constitution or charter, natural law, ancient custom, inalienable rights, and so on. Thus the written constitution or charter served as the sole source of fundamental law for determining the government's internal structure, but not for describing its relationship to the citizenry.

In five of the seven pre-1787 instances of judicial review of legislative enactments,<sup>37</sup> the opinions or pleadings or both exhibit characteristic indifference to whether the fundamental law cited is

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<sup>36</sup> See William Winslow Crosskey, 2 *Politics and the Constitution in the History of the United States* 944-975 (1953); Goebel, *History* at 126-141 (cited in note 3); Grey, 30 *Stan.L.Rev.* at 881-82 (cited in note 3); Powell, 98 *Harv.L.Rev.* at 887 n.11 (cited in note 1). Crosskey canvassed the literature in 1953 and found only nine alleged instances of judicial review up to 1787, all of which he considers false precedents. I deal with all but two: a Virginia case where the constitutionality of the statute (a bill of attainder) was not at issue, because the statute was not yet operative when the criminal was apprehended and therefore became unnecessary, and a Massachusetts case that apparently did not exist. See Crosskey, 2 *Politics* at 944-48, 961-62. While Crosskey's interpretation is open to question, his list of cases has not been improved upon. The cited sources all examine the precedents for the light they shed on the existence of judicial review. Powell alone touches on the character of the fundamental law used to invalidate legislative enactments.

<sup>37</sup> *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in Julius Goebel, Jr., *The Law Practice of Alexander Hamilton: Documents and Commentary* 393-419 (1964); *Trevett v. Weeden*, described in James Mitchell Varnum, *The Case, Trevett Against Weeden: On Information and Complaint, for refusing Paper Bills in Payment for Butcher's Meat, in Market, at Par with Specie* (1787); *Holmes v. Walton*, described in Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 *Am.Hist.Rev.* 456, 456-460 (1899); *Symsbury Case*, 1 Kirby 444 (Conn.Super.Ct. 1785); and the "Ten-Pound Act" cases in New Hampshire, described in Crosskey, 2 *Politics* at 969-71 (cited in note 36). Scott's and Crosskey's descriptions suggest only that the courts were not clear in expressing their indifference to whether the fundamental law was the written Constitution or unwritten natural law.

the written constitution or the unwritten natural law. In the sixth case,<sup>38</sup> the opinion itself is confined to the written constitution, but commentary by James Iredell, a leading North Carolina lawyer and later a United States Supreme Court Justice, suggests a somewhat broader reading. Finally, the last case<sup>39</sup> clearly involves only issues of allocation of power within the state government, and there are indications in the opinions discussed below that this fact induced the judges to confine their analysis to the written constitution.

The case about which we have the most information is *Rutgers v. Waddington*,<sup>40</sup> a New York case decided in 1784. Elizabeth Rutgers brought a trespass action, under a 1783 New York statute, against Joshua Waddington, a British citizen who had occupied her New York City property during the British occupation of that city during the Revolutionary War. Alexander Hamilton, representing defendant Waddington, alleged two defenses: that holding Waddington liable for the trespass violated the law of nations, and that it violated the peace treaty between the United States and Great Britain.

The inconsistency with the law of nations was clearly the primary defense.<sup>41</sup> Hamilton made two separate and complicated arguments from the law of nations, and in the several extant sets of briefs and notes for argument he always put first the arguments relating to the law of nations. The treaty defense appears almost as an afterthought at some points:

CONSEQUENCE—The enemy having a right to the use of the Plaintiffs property & having exercised their right through the Defendant & for valuable consideration he cannot be made answerable to another without injustice and a violation of the law of Universal society. Further It cannot be done without a violation of the Treaty of peace.<sup>42</sup>

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<sup>38</sup> Bayard v. Singleton, 1 Martin 42 (N.C. 1787).

<sup>39</sup> Commonwealth v. Caton, 4 Call 5 (Va. 1782).

<sup>40</sup> The decision is unreported, but the decision and various briefs and other pleadings are reprinted in Goebel, *Law Practice* at 317-419 (cited in note 37). The opinion is also reprinted in Thayer, *Cases* at 63-72 (cited in note 3).

<sup>41</sup> Julius Goebel suggests that Hamilton's main object was to "move the obligation of observing treaties from . . . soft ground to the terra firma of legal imperative." Goebel, *Law Practice* at 289 (cited in note 37). As the discussion in the text suggests, however, Hamilton's primary emphasis throughout was on the law of nations. His subjective motivation—if there was one—appears not to have influenced his legal presentation.

<sup>42</sup> *Id.* at 373 (Defendant's Brief No. 6). Here and elsewhere in this article, I rely not only on judicial opinions, but also on the arguments made by lawyers. Although made in an adversary context, these advocates' positions provide evidence of the types of arguments considered legitimate and within the bounds of the legal culture of the period. In many

Hamilton's discussion of the substance of the law of nations and how it applies to *Rutgers*, moreover, suggests a general notion of the law of nations as part of unwritten but judicially enforceable fundamental law. The content of the law of nations, as "part of the law of the land," may be "collected from the principles laid down by writers on the subject and by the authorized practices of Nations at war."<sup>43</sup> Based on an examination of such authorities, Hamilton argued that the defendant's act of trespass, because authorized by the appropriate military authority, was in accord with the "laws customs and usages of nations in time of war."<sup>44</sup> Finally, Hamilton suggested that the law of nations was applicable in New York first because it "results from the relations of Universal society," and only second because "our constitution adopts the common law of which the *law of nations is a part*."<sup>45</sup> The failure to consider the written and ratified treaty as a more dispositive source of fundamental law than "the relations of Universal Society" clearly indicates that Hamilton considered multiple sources of fundamental law as equally valid and binding.

The court, in a maneuver worthy of John Marshall, upheld the statute but denied the plaintiff relief. The court concluded that the legislature, in enacting the trespass statute, could not have intended to enact a statute repugnant to the law of nations, at least not without a *non obstante* clause announcing its intention. The court thus interpreted the statute to prohibit the plaintiffs' suit, despite its clear language to the contrary.<sup>46</sup> The court relied solely on the law of nations, concluding that Hamilton's reliance on the treaty rested not on an express provision of the treaty but rather on an interpretation which was itself derived from the law of nations. The court therefore held that the treaty provided no more defense than did the law of nations, and was thus virtually irrelevant.<sup>47</sup> The court's judgment essentially operated to deny effect to a statute repugnant to the unwritten but fundamental law of nations.

Other factors also place *Rutgers v. Waddington* firmly within

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instances, the advocate's position was ultimately adopted by the court; examining the briefs and arguments further illuminates the court's own reasoning.

<sup>43</sup> Id. at 340 (Defendant's Brief No. 2).

<sup>44</sup> Id. at 322 (Defendant's Plea); see also id. at 325.

<sup>45</sup> Id. at 367-68 (Defendant's Brief No. 6) (emphasis by Hamilton); see also id. at 347-48 (Defendant's Brief No. 3).

<sup>46</sup> *Rutgers v. Waddington*, reprinted in Goebel, *Law Practice* at 393, 415-419 (cited in note 37).

<sup>47</sup> Id. at 417. Hamilton himself apparently never reached this conclusion, as he carefully separated all his arguments. His reliance on the law of nations thus was independent of the treaty.

the English opposition tradition. The court characterized Hamilton's defense as contending that "statutes against law and reason are void."<sup>48</sup> It equated the law of nations with the law of nature, holding that the "amiable precepts of the law of nature, are as obligatory on nations in their mutual intercourse, as they are on individuals in their conduct towards each other."<sup>49</sup> An earlier action by the New York Council of Revision—which consisted of the Governor and judges, and whose consent was necessary for any bill to become law—was very similar to the court's decision in *Rutgers*. The Council invalidated a law placing legal restrictions on English citizens residing in New York, because "it established a principle contradictory to the fundamental laws of every civilized nation, because it was contra[ry] to the law of nations, and because 'it contradict[ed] both the spirit and the letter of the provisional treaty with Great Britain.'"<sup>50</sup> Finally, the inevitable public and legislative uproar at the decision was directed not at the court's use of the law of nations, but at its exercise of judicial review at all.<sup>51</sup> In New York, then, the spirit of the English opposition vision of fundamental law was congenial to the courts, the Council, and the populace.

*Trevett v. Weeden*,<sup>52</sup> a 1786 Rhode Island case, similarly illustrates the eighteenth century reliance on multiple sources of fundamental law. The Rhode Island legislature, apparently aware that its statute requiring merchants to accept paper money was unpopular and might be nullified by juries, provided that prosecutions for violation of the act should be tried by special courts sitting without juries. Trevett, following the procedure set out in the statute, lodged information against Weeden in the Superior Court for the latter's refusal to accept paper money. One day after it heard arguments, the Court dismissed the case without issuing an opinion, unanimously concluding that "the information was not cogni-

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<sup>48</sup> *Id.* at 395.

<sup>49</sup> *Id.* at 400; see also *id.* at 404 ("The *primary* law of nations . . . is no other than the *law of nature*, so far as it is applicable to them.") (emphasis in original).

<sup>50</sup> Goebel, *Law Practice* at 288, quoting Alfred Billings Street, *The Council of Revision of the State of New York* 246-7 (1859) (cited in note 37).

<sup>51</sup> See Goebel, *Law Practice* at 312-15.

<sup>52</sup> The case—decided by the Superior Court of Judicature of the City of Newport in 1786—is unreported, but the case and its aftermath are meticulously detailed by James Mitchell Varnum, counsel for defendant Weeden, in Varnum, *The Case* (cited in note 37). All citations will be to pages in his pamphlet. It is noteworthy that Varnum's pamphlet was available for sale in Philadelphia during the Constitutional Convention. See Andrew C. McLaughlin, *The Court the Constitution and Parties* 44-45 (1912).

zable before them."<sup>53</sup> Newspapers reported that three of the judges had declared the act unconstitutional, one had found the court without jurisdiction, and one had remained silent on his reasons.<sup>54</sup> While we thus cannot be certain what motivated the Court to refuse to enforce the statute—the judges were in fact later called before the legislature to explain their actions, but refused to do so on the ground that they were answerable only to God<sup>55</sup>—we do have a detailed record of the oral argument of counsel for the defendant. It is reasonable to assume that this argument is representative of legal analysis of the day, especially since it is so conformable to the other cases of pre-Revolutionary judicial review.

James Varnum, counsel for the defendant, made three arguments to support dismissal of the case. He contended first, that the statute itself had expired by its own terms; second, that the special court lacked jurisdiction because it was not subject to control by the Supreme Judicial Court of Rhode Island; and third, "that the Court is not, by said act, authorized and empowered to impanel a jury to try the facts charged in the information; and so the same is unconstitutional and void."<sup>56</sup> This last argument was alleged to be "by far the most important."<sup>57</sup> Varnum's strategy on this argument consisted of demonstrating that trial by jury was "a fundamental right, a part of our legal constitution,"<sup>58</sup> that the legislature was not empowered to alter the constitution, and that the Court had an obligation to invalidate any law violative of the constitution.

For purposes of demonstrating Varnum's conception of the character and content of the constitution, the first of Varnum's premises—that trial by jury is protected by the constitution—is obviously most important. The Rhode Island Charter of 1663, which was still in effect, contained no guarantee of trial by jury.<sup>59</sup> Varnum therefore demonstrated the existence of such a right by a historical review designed to show that Englishmen had possessed a right to trial by jury since "time out of mind."<sup>60</sup> He began with Blackstone's discussion of the Magna Carta, quoting copiously

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<sup>53</sup> Varnum, *The Case* at 1, 38-39 (cited in note 37).

<sup>54</sup> See Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 *Harv.L.Rev.* 30, 66 (1926).

<sup>55</sup> Varnum, *The Case* at 38-43 (cited in note 37).

<sup>56</sup> *Id.* at 2-3.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.*

<sup>59</sup> See Thorpe, *Federal and State Constitutions* at 3211 (cited in note 18).

<sup>60</sup> Varnum, *The Case* at 12 (cited in note 37), quoting William Blackstone, 1 *Commentaries* at \*127-28.

from the *Commentaries* and concluding:

From these passages in Judge Blackstone's *Commentaries*, from the variety of authorities to which he refers, and from many others of the greatest reputation, it most clearly appears, that the trial by jury was ever esteemed a first, a fundamental, and a most essential principle, in the English constitution. From England this sacred right was transferred to this country, and hath continued, through all the changes in our government, the firm basis of our liberty, the fairest inheritance transmitted by our ancestors!<sup>61</sup>

He appealed virtually indiscriminately to "the fundamental laws of England,"<sup>62</sup> to Blackstone's *Commentaries*,<sup>63</sup> to "the English constitution,"<sup>64</sup> to the Rhode Island Charter,<sup>65</sup> to the Magna Carta,<sup>66</sup> to acts of the Rhode Island legislature—which he described as "not creative of a new law, but declaratory of the rights of all the people"<sup>67</sup>—and to the 1774 Declaration of Rights enacted by the first Congress.<sup>68</sup> He concluded this portion of his argument by suggesting that his historical evidence proved that trial by jury was a fundamental right:

If the first act of the English Parliament now upon record, containing the great charter of the privileges of subjects:—If the exercise of those privileges for ages:—If the settlement of a new world to preserve them:—If the first solemn compact of the people of this State:—If the sacred declarations of the Legislature at different periods, and upon the most important occasions:—If the solemn appeal to heaven of the United States:—In short, if the torrents of blood that have been shed in defence of our invaded rights, are proofs, then have we triumphed in the cause of humanity, then have we shewn that the trial by jury is the birthright of the people!<sup>69</sup>

Varnum then went on to ask whether the legislature should be permitted to "deprive citizens of their constitutional right, the trial

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<sup>61</sup> Varnum, *The Case* at 13-14.

<sup>62</sup> *Id.* at 11, 15.

<sup>63</sup> *Id.* at 11-13.

<sup>64</sup> *Id.* at 14.

<sup>65</sup> *Id.* at 14-15.

<sup>66</sup> *Id.* at 11, 15.

<sup>67</sup> *Id.* at 15-16.

<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Id.* at 17-18.



by jury,"<sup>70</sup> easily concluding that it should not be. Even this portion of the argument is replete with references to natural law, suggesting that "[t]here are certain general principles that are equally binding in all governments,"<sup>71</sup> and appealing again to the law of nature, the laws of God, "common right," and "reason," and "unalienable rights."<sup>72</sup>

He summarized his argument by stating that he had "attempted to shew . . . That the trial by jury is a fundamental, a constitutional right—ever claimed as such—ever ratified as such—ever held most dear and sacred."<sup>73</sup> The whole tenor of Varnum's argument is clearly an appeal to unwritten fundamental law, derived from multiple and diverse sources.

Considerably less is known about a 1780 New Jersey case, *Holmes v. Walton*.<sup>74</sup> The case involved another transgression on the right to trial by jury, this time a New Jersey statute that allowed conviction for trading with the enemy by a jury of only six men. A convicted defendant took an appeal to the state supreme court, which reversed the conviction and ordered a new trial. No record of the court's opinion has been found, but the supreme court minutes do describe the arguments made by defendant's counsel. He argued that the trial by a six-man jury was "contrary to law," "contrary to the constitution of New Jersey," and "contrary to the constitution, practices, and laws of the land."<sup>75</sup> The New Jersey Constitution of 1776 did provide for trial by jury, but without any further elaboration as to the nature of the jury.<sup>76</sup> The "laws of the land" thus most likely referred to various charters and legislative enactments.<sup>77</sup> Standing alone, this sparse information about *Holmes v. Walton* might not prove much, but in the context of the other state cases, it suggests that in New Jersey, as in other states, fundamental law was derived from more than the written constitution.

Several minor cases, one in Connecticut and a series of related cases in New Hampshire, deserve brief comment as consistent with

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<sup>70</sup> Id. at 20.

<sup>71</sup> Id. at 23.

<sup>72</sup> Id. at 29-31, 35.

<sup>73</sup> Id. at 35.

<sup>74</sup> The case is unreported, and no written record of the decision itself exists. The arguments of counsel and other surrounding circumstances, however, are described in Scott, 4 Am.Hist.Rev. 456 (cited in note 37). All citations are to that work.

<sup>75</sup> Quoted in id. at 458.

<sup>76</sup> Thorpe, Federal and State Constitutions at 2598 (N.J.Const. of 1776 art. XXII)(cited in note 18).

<sup>77</sup> Scott, 4 Am.Hist.Rev. at 458-59 (cited in note 37).

the cases in the other states. The *Symsbury Case*,<sup>78</sup> a 1785 Connecticut case, resolved a land ownership dispute between parties claiming under different legislative grants. The court ruled in favor of the earlier grantees, on the ground that “[t]he act of the general assembly [granting title to the later grantees] . . . could not legally operate to curtail the land before granted to the [earlier grantees], without their consent.”<sup>79</sup> The dissent agreed that the earlier grantees “could not have their grant taken from them, or curtailed, even by the general assembly, without their consent,” but found the requisite consent.<sup>80</sup> Neither opinion referred to any fundamental law in support of this conclusion. However, the 1662 Charter of Connecticut, which had been reconfirmed in 1776,<sup>81</sup> did not contain any provisions that might have protected property rights in this way,<sup>82</sup> which strongly suggests that the judges in *Symsbury* were relying on the unwritten rights of man.

The 1786 New Hampshire cases are unreported, but were described in Philadelphia newspapers.<sup>83</sup> Judges in New Hampshire refused to follow a legislative enactment depriving creditors in small cases of a trial by jury, because the 1784 New Hampshire Constitution guaranteed the right to trial by jury.<sup>84</sup> The legislature then considered and rejected a motion to impeach the judges of one of the defiant courts, the Inferior Court of Common Pleas of Rockingham County. The legislature instead ultimately voted to repeal the offensive law. The Philadelphia Independent Gazette and the Pennsylvania Packet reported this last development as “justif[ying] the conduct of the Justices of the Inferior Court who ha[d] uniformly opposed [the act] as *unconstitutional and unjust*.”<sup>85</sup> This suggests that either the judges, the legislature, or the author of the newspaper article recognized a legally significant relationship between a law’s unconstitutionality and its injustice. Again, this is consistent with the tradition of inherent rights.

In two cases from this period, the judges confined themselves

<sup>78</sup> 1 Kirby 444 (Conn.Super.Ct. 1785).

<sup>79</sup> *Id.* at 447.

<sup>80</sup> *Id.* at 452.

<sup>81</sup> Adams, *First American Constitutions* at 66 and n.7 (cited in note 17).

<sup>82</sup> See Charter of Connecticut of 1662, reprinted in Thorpe, *Federal and State Constitutions* at 529-536 (cited in note 18).

<sup>83</sup> I am relying on Crosskey’s description of the case although I reject his conclusions. See Crosskey, *2 Politics* at 969-971 (cited in note 36).

<sup>84</sup> See N.H.Const. art. XX, in Thorpe, *Federal and State Constitutions* at 2456 (cited in note 18).

<sup>85</sup> Quoted in Crosskey, *2 Politics* at 970-71 (emphasis added) (cited in note 36).

to the written constitution. One is *Bayard v. Singleton*,<sup>86</sup> a 1787 North Carolina case. The case involved an act that authorized a judge, acting without a jury, to quiet title in some situations by dismissing a plaintiff's suit for ejectment. In a very short opinion denying the defendant's motion to dismiss such a suit, the court in *Bayard* unanimously held that "by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury," and that "no act [the legislature] could pass, could by any means repeal or alter the constitution."<sup>87</sup>

Two factors suggest that *Bayard's* apparent exclusive reliance on the written constitution was not a true deviation from the observed pattern. First, reliance on a clear written protection of rights does not indicate the appropriate grounds of decision when the written document contains no such provision. Second, one leading commentator suggested at the time that judicial review was not limited to scrutiny of the written constitution. On August 12, 1787, Richard Dobbs Spaight, a North Carolina delegate to the Federal Convention in Philadelphia at the time, wrote to James Iredell, criticizing *Bayard*.<sup>88</sup> Iredell responded on August 26 with a long letter defending the practice of judicial review. In the course of that letter, Iredell made clear that the written constitution was not the sole source of fundamental law:

Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed *not inconsistent with natural justice* (for that curb is avowed by the judges even in England), would have been binding on the people.<sup>89</sup>

In 1787, Iredell clearly viewed a written constitution as supplementing natural law rather than as replacing it with a single instrument.

The other case apparently departing from the usual pattern of judicial review is *Commonwealth v. Caton*,<sup>90</sup> a 1782 Virginia case

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<sup>86</sup> 1 Martin 42 (N.C. 1787).

<sup>87</sup> Id. at 45. The North Carolina Constitution of 1776 did in fact contain a guarantee of trial by jury. See N.C.Const. of 1776 art. XIV, in Thorpe, *Federal and State Constitutions* at 2788 (cited in note 18).

<sup>88</sup> Richard Dobb Spaight to James Iredell (Aug. 12, 1787), in Griffith J. McRee, *2 Life and Correspondence of James Iredell 168-170* (1857).

<sup>89</sup> Iredell to Spaight (Aug. 26, 1787), in id. at 172 (emphasis in original letter).

<sup>90</sup> 4 Call 5 (Va. 1782). The case was not actually reported until 1827, after the institution of judicial review had become more widely known. That the case was reconstructed 45 years after it occurred has led to some dispute about its authenticity. Crosskey suggests that

which is the first reported case in the United States in which a court reviewed a statute for constitutionality. Caton and others had been sentenced to death for treason under a 1776 statute that, in addition to defining the treason, removed the pardon power from the executive to the legislature. The lower house of the legislature (the House of Delegates) passed a resolution pardoning the prisoners, but the Senate refused to concur. When the attorney general moved the court for authority to execute the prisoners, Caton and his fellows responded that the 1776 statute must either be interpreted to grant pardon power to the House of Delegates alone or be held unconstitutional.<sup>91</sup> The Virginia Court of Appeals, to which the case was sent by the trial court because of its novelty and difficulty, found the statute constitutional and held the single-house attempt at pardon ineffective.

As was the custom, the judges delivered their opinions seriatim, unanimously concluding both that they had the power to exercise constitutional review over legislative enactments and that the 1776 statute was constitutional. Only two of the eight judges considered the constitutional question in any detail. Judge Wythe, whose opinion was the most extensive, characterized the power of judicial review as that of declaring the law “when those, who hold the purse and the sword [differ] as to the powers which each may exercise.”<sup>92</sup> He viewed his duty as “protect[ing] one branch of the legislature, and, consequently, the whole community, against the usurpations of the other.”<sup>93</sup> He thus clearly recognized that only a single aspect of judicial review was at issue in *Caton*: mediating between the different branches of the government.<sup>94</sup> As might be

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the reporter, Daniel Call, fabricated parts of it to make a strong case for judicial review. See Crosskey, 2 *Politics* at 952-53 (cited in note 36). Judge Pendleton's biographer, on the other hand, uses Pendleton's own contemporaneous notes of the case to support Call's reporting. See David John Mays, 2 *Edmund Pendleton 1721-1803: A Biography* 187-202 (1952). Additionally, the late publication date suggests, if anything, a tendency to conform to the more narrow reliance on the written constitution that developed later. To the extent that the report is untrustworthy, then, it probably serves to strengthen rather than weaken the thesis that judges during this period relied on unwritten as well as written fundamental law.

<sup>91</sup> The argument was that the Virginia Constitution gave the House of Delegates sole pardon authority in those cases—such as impeachments—where it stripped the executive of pardon power; Caton thus argued that in all instances where the executive lacked authority to pardon, the power lay solely with the House of Delegates.

<sup>92</sup> Caton, 4 Call at 7.

<sup>93</sup> *Id.* at 8.

<sup>94</sup> It is quite clear that Judge Wythe recognized the court's duty to exercise another aspect of judicial review. He noted that if the *whole* legislature (both houses) “attempt[ed] to overleap the bounds, prescribed to them by the people, [he], pointing to the constitution, [would] say, to them, here is the limit of your authority.” *Id.* Since he was not in fact con-

expected in a society in which a written constitution was viewed as the sole prescription for the form of government, Judge Wythe then upheld the 1776 act by examining carefully the language, structure, and purpose of the Virginia constitutional provisions relating to separation of powers. Judge Wythe's opinion, however, indicates nothing about whether he thought the written constitution should play the same paramount role in a dispute not involving the structure of government.

Judge Pendleton also upheld the 1776 act, spending relatively little time on the question of judicial review and more on a careful exegesis of the constitutional clause most directly relevant. Judge Pendleton, however, did frame the former issue in a most telling manner. He declared that the first of the "two great points" before the court was "whether, if the constitution of government and the act declaring what shall be treason are at variance on this subject, which shall prevail and be the rule of judgment?"<sup>95</sup> The phrase "constitution of government" seems to be referring quite specifically to a document *constituting* or forming or setting up the government. He thus used "constitution" in its older sense, as the noun formed from the verb "to constitute." This is consistent both with Judge Wythe's framing of the issue and with the Revolutionary era use of the terms, and suggests that Judge Pendleton might have viewed the written constitution as most relevant in cases involving the structure of government.<sup>96</sup>

These cases suggest that for American judges in the late eighteenth century, the sources of fundamental law were as open-ended as they were in English opposition theory. The colonists inherited a tradition that provided not only a justification for judicial review but also guidelines for its exercise. As Bolingbroke proposed in theory and the new American states translated into action, judges were to look to natural law and the inherent rights of man, as well as to the written constitution, in determining the validity of a statute. Where the written constitution affirmatively addressed a problem—most often in governmental structure cases such as *Caton*, but even in cases, such as *Bayard*, where the constitution provided clear protection of individual rights—it was dis-

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cerned with such an overleaping of bounds by the whole legislature but rather with relations between the two houses, the case gives no indication of what types of argument he might have used to define the constitutional limits.

<sup>95</sup> Id. at 17. The second point he identified was whether the constitution and statute were in fact at variance.

<sup>96</sup> The rest of the judges, in a single paragraph that added nothing, agreed with the earlier expressed opinions of Judges Wythe and Pendleton. Id. at 20.

positive, but in other cases, judges looked outside the written constitution.

## II. INVENTING THE CONSTITUTION

By 1787, then, Americans had a clear vision of the nature of a constitution as a species of fundamental law. Like natural law and laws or traditions that had existed since time immemorial, it could be used to invalidate positive law, but again like natural law and those long-established laws and traditions, a constitution was not itself seen as positive, enacted law but rather as a declaration of first principles. Moreover, because of the constitution's character as largely a declaration of indubitable truths and time-tested customs, its fundamentality did not depend on popular origin or approbation. The only exception to the non-positive nature of the constitution lay in its function as a charter of government or allocation of powers among parts of the government. As this section will suggest, even that exception was hazy in the minds of those in Philadelphia in the summer of 1787.

The first drafts and early debates in the Convention suggest that most delegates still held these views of the character of a constitution. The Constitution they were drafting was, at the beginning, neither positive law nor popularly grounded. As the summer progressed, the delegates began to formulate and understand two concepts crucial to understanding the Constitution as a *sui generis* form of positive law: self-referential enforceability and extra-legislative origin. By self-referential enforceability I mean the notion that the Constitution declared itself to be fundamental law, thus suggesting that positive enactment rather than inherent nature made a written constitution fundamental. By extra-legislative origin, I mean the notion that legislatures lacked power to enact fundamental law. Both of these concepts were in direct conflict with the English vision of a constitution as inherently fundamental and accretionally derived from natural law and unchallenged legislative acts.<sup>97</sup>

Comparing the delegates' views at the beginning and end of the Convention on each of these concepts illustrates how the Convention invented the idea of the Constitution. The contrasting vi-

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<sup>97</sup> Corwin similarly suggested that the modern view of the Constitution involves two ideas: "One is the so-called 'positive' conception of law as a general expression merely for the particular commands of a human lawgiver, as a series of acts of human will; the other is that the highest possible source of such commands, because the highest possible embodiment of human will, is 'the people.'" Corwin, 42 Harv.L.Rev. at 151 (cited in note 9).

sions of the positive and self-referentially enforceable nature of the Constitution are most obvious in the history of the Supremacy Clause. The contrasting visions of the source of the Constitution's authority are most clearly framed by the Convention debates about methods of ratification. I will compare early and late views on each of these questions in turn, and then examine in detail a crucial midsummer discussion that marked a turning point in the Convention's progress.

### A. The Constitution as Positive Law

Like the Articles of Confederation, the first draft of the Constitution—Edmund Randolph's Virginia Plan—lacked any explicit mechanism by which its terms could be judicially enforced against recalcitrant states. The sole method by which the federal government might defend itself against state encroachments lay in Resolution 6: "that the National Legislature ought to be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union."<sup>98</sup> Madison admitted that he knew of no other mechanism to prevent state aggrandizement at the expense of the national government; should Resolution 6 fail to pass, "the only remedy [would] lie in an appeal to coercion."<sup>99</sup> As an enacted frame of government—one choice of framework among many—the Constitution might not have been viewed as judicially enforceable fundamental law apart from pre-existing natural law. Unlike the acts of the national legislature, however, it was not yet seen as a species of positive law.

The first to envision the potentially positive nature of the Constitution was Alexander Hamilton. In his rambling speech on June 18, Hamilton proposed a version of the supremacy clause. His version, however, was a hybrid. It provided *both* that "[a]ll laws of the particular States contrary to the Constitution or laws of the United States [shall] be utterly void," and that the national legislature would have a negative over state laws.<sup>100</sup> While Hamilton was thus the first to suggest that the Constitution might specify its own legal effect independent of the action of the national legislature, he was apparently unwilling to trust its enforceability. Almost a month into the Convention, even Hamilton failed to recognize that the Constitution, like statutes, could give positive instructions

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<sup>98</sup> Madison's Notes at 31 (May 29)(cited in note 6).

<sup>99</sup> *Id.* at 88 (June 8).

<sup>100</sup> *Id.* at 139 (June 18).

to judges on its own authority. Hamilton's ideas, moreover, were largely ignored at the time: one commentator has suggested that the Convention reacted to the June 18 speech "rather as if they had taken a day off to attend the opera."<sup>101</sup>

A month later, Luther Martin finally introduced the provision that became the supremacy clause. On July 17, the Convention voted against allowing the national legislature to veto state laws. Martin immediately moved instead "that the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all Treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States."<sup>102</sup> The delegates agreed to Martin's resolution without opposition,<sup>103</sup> so we may assume that this formulation represented the sentiment of the Convention at the time. Substituting a provision in the Constitution for a power of Congress evidenced a recognition that the Constitution had inherent force, but the delegates at this point still had a very limited conception of the positive nature of the Constitution. Martin's version of the supremacy clause, which made only statutes and not the Constitution itself supreme, did not contemplate a constitution any different from the existing written constitutions: it specified how the powers of government were to be allocated, without any suggestion of where it derived its own authority.

As late as August 14 the delegates still could not envision the Constitution as positive law. In a discussion of whether federal legislators ought to be eligible for other offices, John Francis Mercer explicitly distinguished between federal legislation and the Constitution:

It is a great mistake to suppose that the paper we are to propose will govern the U. States? It is The men whom it will bring into the Govern't and interest in maintaining it that is to govern them. The paper will only mark out the mode & the form.<sup>104</sup>

Mercer seems here to be viewing the Constitution only as a specific

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<sup>101</sup> John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 *Am.Pol.Sci.Rev.* 799, 807 (1961).

<sup>102</sup> Madison's Notes at 305-06 (July 17)(cited in note 6).

<sup>103</sup> *Id.* at 306. The delegates clearly recognized that Martin's supremacy clause was an alternative to the legislative veto over state laws. When Charles Pinckney tried to revive the national veto, on August 23, Roger Sherman responded that such a provision was unnecessary, because "the laws of the General Government [are] Supreme & paramount to the State laws according to the plan, as it now stands." *Id.* at 518 (Aug. 23).

<sup>104</sup> *Id.* at 455 (Aug. 14).



charter of government. Although both Wilson and Gouverneur Morris immediately responded to Mercer, they responded only on the substantive question of eligibility; apparently no delegate saw need to question the nature of the Constitution as Mercer had outlined it.

One intermediate development deserves mention. The delegates apparently grasped the possibility that *state* constitutions might be considered analogous to legislative enactments earlier than they reached a similar conclusion regarding the federal Constitution. The Committee of Detail's draft added to the partially formed supremacy clause the provision that national laws were to be superior to state constitutions as well as to state statutes.<sup>105</sup> This change does not require envisioning state constitutions as enacted law, much less envisioning the federal Constitution as enacted law, but it does suggest that state constitutions are in the same category as enacted law. It is significant that the Committee of Detail began meeting only four days after the crucial exchange on July 23, discussed below, in which the Convention seemed for the first time to regard the Constitution they were drafting as a positive enactment of the people.

It was not until the last weeks of the Convention, however, that the concept of the federal Constitution as positive law crystallized enough to find its way into the document. First, on August 23, John Rutledge moved to add the words "This Constitution" to the Supremacy Clause, which was accepted without opposition.<sup>106</sup> Four days later, William Samuel Johnson moved to add to the article defining federal jurisdiction, cases arising under the Constitution. After a brief dispute about limiting federal jurisdiction generally to "cases of a Judiciary nature," the delegates also agreed to Johnson's amendment without opposition.<sup>107</sup> Each of these uncon-

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<sup>105</sup> Id. at 390 (Aug. 6)(art. VIII of Committee of Detail draft). The Resolutions submitted to the Committee of Detail provided only that federal laws shall be supreme, "any thing in the respective laws of the individual states to the contrary, notwithstanding." Id. at 381 (July 17)(Resolution VII). The draft that came out of the Committee kept most of Resolution VII (renumbered as Article VIII) intact, but made federal law supreme, "any thing in the Constitutions or laws of the several States to the contrary notwithstanding." There apparently is no evidence of the reasoning or deliberations behind this change.

<sup>106</sup> Madison's Notes at 517 (Aug. 23).

<sup>107</sup> Id. at 538-39 (Aug. 27). Goebel concludes that both these uncontroversial additions merely confirm the general consensus that *judges* were to serve as "the watch and ward over the Constitution." Goebel, *History* at 238, 241 (cited in note 3). The practical transition from inherent invalidation of unconstitutional statutes to judicial invalidation of such statutes, however, had already taken place in the states, and the Convention from the beginning assumed that federal judges would exercise such power. It is therefore unlikely that the delegates waited until the last weeks of the Convention to add to the Constitution a doc-

troversial amendments marks an identical recognition that the Constitution could, by enactment rather than by nature, become part of the body of laws, and that it could specify its own status as fundamental law. The sense of the Convention had altered: the idea of the Constitution as positive law had taken hold.

## B. The Constitution Enacted By the People

The Virginia Plan also failed to provide any theoretically cohesive doctrine of the relationship between constitution and populace. Resolution 15 provided that the Convention's proposed amendments to the Articles of Confederation should be submitted first to Congress for its "approbation" and then to "an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people."<sup>108</sup> Labelling the Convention's product as "amendments" to the existing Articles of Confederation was a transparent and unsuccessful attempt to hide the Convention's lack of authority to adopt resolutions which so differed from the existing Articles.<sup>109</sup> What is more significant is the proposed mode of ratification, which suggests that the drafters of the Virginia Plan still did not envision the constitution as wholly extra-legislative in origin. First, the submission of the proposed articles to Congress indicated that the state legislatures there represented were to have a role in deciding on the form of the new government.<sup>110</sup>

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trine that was so well-accepted from the beginning. The explanation in the text is therefore much more likely.

<sup>108</sup> Madison's Notes at 33 (May 29).

<sup>109</sup> Antifederalist delegates commented on the subterfuge on the very first day Randolph's plan was discussed, General Pinkney expressing "doubt" whether either Congress or the state legislatures had "authorise[d] a discussion of a System founded on different principles from the federal Constitution." Madison's Notes at 35 (May 30). This debate over the Convention's lack of authority continued throughout the debates. For an interesting discussion of the implications of the illegality of the Constitution, see Richard S. Kay, *The Illegality of the Constitution*, 4 Const.Comm. 57 (1987).

<sup>110</sup> See Kay, 4 Const.Comm. at 68. The delegates clearly recognized that submission to Congress was tantamount to conditioning ratification on the approval of the state legislatures. See Madison's Notes at 611-14 (Sept. 10). The nationalists objected to the requirement of Congressional approbation on the same two principles that governed their rejection of state legislative ratification: the unlikelihood of passage and the want of power. See, e.g., id. at 611 (Fitzsimons: "the words 'for their approbation' had been struck out in order to save Congress from the necessity of an Act inconsistent with the Articles of Confederation under which they held their authority"); id. at 613 (Wilson: "can it be safe to make the assent of Congress necessary"). By this point in the Convention, the popular basis of sovereignty was increasingly well established. The resolution on August 31 which removed the requirement of Congressional approbation passed by a margin of eight to three. The first motion made on September 10 to re-require Congressional approval failed by a margin of

Second, and more important, the debates reveal that at this time, the primary motivation for suggesting popular rather than legislative ratification was practical: the state legislatures could not be expected to approve a document which divested them of a considerable part of their powers. In response to antifederalist objections to the proposed popular ratification, Madison replied that two reasons supported popular over legislative ratification. He argued that legislative ratification would put the Constitution and the federal government at a practical disadvantage in subsequent disputes with state statutes, and that the Articles of Confederation had already been breached and thus the Articles' requirement of legislative ratification was no longer in force.<sup>111</sup> Rufus King put the matter more bluntly: "The [state] Legislatures also being to lose power, will be most likely to raise objections."<sup>112</sup>

By August 31, the tenor of the discussion had changed significantly. When Gouverneur Morris moved to strike out the requirement of ratification by conventions of the people, some of the delegates, including King, reiterated their practical objections to legislative ratification. Both Madison and King, however, added another argument in favor of popular ratification. Madison noted: "The people were, in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights, that first principles might be resorted to."<sup>113</sup> King added that "[t]he State[s] must have contemplated a recurrence to first principles before they sent deputies to this Convention."<sup>114</sup> Those in favor of popular ratification had grasped a crucial and ultimately successful theory to justify what began as a purely practical mechanism.

### C. The Turning Point

The contrast between the first and last weeks of the Convention is thus quite stark. The clearest illustration of the turning point for both concepts is a debate on July 23 over ratification procedures. The last two delegates had finally arrived that morning from New Hampshire, and the Convention was nearing the end of its detailed consideration of the Randolph Plan. They had settled

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ten to one; the second was disagreed to without dissent.

<sup>111</sup> Madison's Notes at 70 (June 5).

<sup>112</sup> *Id.* at 71 (June 5). See also Kay, 4 *Const.Comm.* at 66-67, 71 (cited in note 109).

<sup>113</sup> Madison's Notes at 564 (Aug. 31).

<sup>114</sup> *Id.*

on a basic structure that was to change very little; only the executive branch remained inchoate. Having essentially finished debate over the first eighteen of the resolutions adopted by the Committee of the Whole, the Convention turned to the last resolution:

Resolved. that the amendments which shall be offered to the confederation by the Convention, ought at a proper time or times, after the approbation of Congress to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the People to consider and decide thereon.<sup>115</sup>

Oliver Ellsworth and William Paterson immediately moved that the new Constitution be submitted to the state legislatures instead.<sup>116</sup> Ironically, George Mason of Virginia, who ultimately refused to sign the Constitution, took the lead in refuting this renewed antifederalist call for legislative ratification. His eloquent defense of popular ratification provides the first clear picture of the Constitution as popularly enacted law.

Mason made three interrelated arguments. He denied that the state legislatures had power to ratify the new Constitution, arguing that they were “mere creatures of the State Constitutions,” and could not act outside the authority conferred on them by their constitutions. Moreover, even assuming that some legislatures had authority to ratify the new Constitution, “it would be wrong to refer the plan to them, because succeeding Legislatures having equal authority could undo the acts of their predecessors.” Finally, he identified the people as the source of all power, suggesting both that they retained power not delegated to the state legislatures and that some state governments were “not derived from the clear & undisputed authority of the people” and thus were a shaky foundation on which to rest the federal Constitution.<sup>117</sup>

Mason’s arguments clearly suggest that the Constitution is popularly based, but they also suggest, somewhat more subtly, that the Constitution is enacted law. By equating the possible source of legislative power to ratify the Constitution with the source of other legislative powers (in arguing that such a power was not conferred by state constitutions), Mason drew an implicit analogy between

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<sup>115</sup> *Id.* at 151 (June 19) (“State of the resolutions submitted to the consideration of the House by the honorable Mr. Randolph, as altered, amended, and agreed to, in a Committee of the whole House”).

<sup>116</sup> *Id.* at 348 (July 23).

<sup>117</sup> *Id.*

legitimately enacted laws and an enacted—albeit unsuccessfully enacted—Constitution. Mason also equated the effect of legislative ratification of the Constitution with the effect of ordinary legislative enactments (in arguing that subsequent legislatures could undo the act), further suggesting that he viewed the Constitution as a species of enacted law.

After some desultory discussion of the practical impediments to legislative ratification, which did not seem to convince the anti-federalists, other delegates began to continue Mason's theme. Gouverneur Morris suggested that a Constitution ratified by less than all thirteen state legislatures would "clearly not be valid" and "[t]he Judges would consider [it] as null & void."<sup>118</sup> In discussions two days earlier, virtually all the delegates had assumed that the federal courts would have power to nullify statutes inconsistent with the federal constitution.<sup>119</sup> Thus Morris's argument is also premised on a view of the Constitution as equivalent to other positively enacted law. Morris also contrasted ineffective legislative ratification with popular ratification, arguing that because the people are the "supreme authority, the federal compact may be altered by a *majority of them*."<sup>120</sup> Morris, perhaps because persuaded by Mason's earlier argument, here endorsed the same redefinition of the Constitution as popularly enacted law that Mason had articulated.

Even Madison, who had until then relied solely on practical arguments to support popular ratification, picked up the theoretical justifications. He echoed Mason's contention of legislative incompetence, noting that "it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence."<sup>121</sup> Ever quick to synthesize and to restate with rhetorical flourish arguments he agreed with, he then caught the essence of the Convention's new invention:

He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *Constitution*. The former in point of *moral obligation* might be as inviolable as the latter. [However, a] law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law

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<sup>118</sup> Id. at 351 (July 23).

<sup>119</sup> See id. at 336-343 (July 21).

<sup>120</sup> Id. at 351 (July 23)(emphasis in original).

<sup>121</sup> Id. at 352 (July 23).

violating a constitution established by the people themselves, would be considered by the Judges as null & void.<sup>122</sup>

This speech illustrates the contrast between a written constitution that is part of judicially enforceable fundamental law specifically because it has been enacted by the people and the earlier view of a written constitution as merely a frame of government, to be enforced only where the framers have the requisite sovereignty.<sup>123</sup>

The antifederalist response to Mason also illustrates the contrast between Mason's insight and the older view of a Constitution as merely a compact—a recipe for confederated government, rather than a law. Ellsworth found Mason's fear of subsequent legislative repeals unfounded, since “[a]n Act to which the States by their Legislatures, make themselves parties, becomes a compact from which no one of the parties can recede of itself.”<sup>124</sup> This is a view of the constitution not as fundamental law reduced to writing, but as merely a structure arrived at by contractual agreement.

The theoretical arguments were persuasive: only three states voted in favor of the Ellsworth motion to submit the Constitution to the state legislatures, and only Delaware then voted against Resolution 19 as it stood unamended.<sup>125</sup> This seems to have been the crucial debate in the evolution of the delegates' vision of the Constitution they were creating. The next attempt to reinstate legislative ratification was quickly and easily rebuffed,<sup>126</sup> and the rest of the proposed Constitution was amended, with little or no opposition, to conform to the idea of a positive law enacted by the people.

The framers have been credited with the innovative achievement of

identify[ing] ‘the Constitution’ with a single normative document instead of a historical tradition, and thus . . . creat[ing]

<sup>122</sup> *Id.* at 352-53 (July 23)(emphasis in original).

<sup>123</sup> The lack of sovereignty might derive, for example, from the interplay between state and federal governments, or—in the British system—from the failure of Parliament to enact into positive law a treaty negotiated and executed by the Crown.

<sup>124</sup> Madison's Notes at 350 (July 23). Ellsworth's argument was ultimately internally inconsistent. In addition to the argument outlined in the text, he refuted the common belief that some state legislatures would refuse to ratify a Constitution that deprived them of so much power, by arguing that the Constitution could legitimately be a “partial compact” if only some legislatures consented. *Id.* at 351. Since the existing compact, the Articles of Confederation, required unanimous consent for amendments, allowing some states to withdraw from the existing compact and form a new “partial compact” seems inconsistent with his earlier argument that state legislatures could not unilaterally withdraw from a compact.

<sup>125</sup> *Id.* at 353 (July 23).

<sup>126</sup> See *id.* at 563-64 (Aug. 31).

the possibility of treating constitutional interpretation as an exercise in the traditional legal activity of construing a written instrument.<sup>127</sup>

A review of the historical context and the debates themselves suggests that this gives the framers both too much and too little credit for their inventions. Parts I and II of this article have suggested that the framers did more than embody fundamental law in a single document; they recognized that such fundamental law might be positively enacted by the people, rather than simply memorialized.<sup>128</sup> On the other hand, Part III will suggest that they did not intend to embody all of fundamental law in a "single normative document." The effect of these innovations on the nature of interpretation of a culture's fundamental law is thus somewhat more complex than the shift from construing a common law tradition to interpreting a written instrument.

### III. THE INVENTED CONSTITUTION AND INHERITED TRADITIONS

In creating the notion of the Constitution as popularly enacted positive law, the framers had invented an idea that perfectly suited their liberal needs. As one scholar has noted, the difference between prior constitutions and the framers' new invention was the difference between government by consensus and government by command.<sup>129</sup> The Constitution, although derived originally from the people, thus became a source of law to be imposed from above rather than dependent on the continuing support of the population. This transition, in turn, coincides with the transition from a unified "regime," where law and morality are intertwined and formulated by the community, to a more limited "government," which separates law (imposed on the community) from morality.<sup>130</sup> This difference is the classic identifier of the transition from a

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<sup>127</sup> Powell, 98 Harv.L.Rev. at 902 (cited at note 1); see also Oscar Handlin and Mary Handlin, *The Dimensions of Liberty* at 55 (1961) ("In the New World the term, constitution, no longer referred to the actual organization of power developed through custom, prescription, and precedent. Instead it had come to mean a written frame of government setting fixed limits on the use of power"); Melvin Yazawa, *From Colonies to Commonwealth: Familial Ideology and the Beginnings of the American Republic* at 112-13 (1985) (The American constitution "unlike the English constitution, was not a living and growing body of customs, statutes, and institutions [but rather] solemn embodiments of the sovereign will of the people.").

<sup>128</sup> Gordon Wood called this achievement "an extraordinary invention", and "the most distinctive institutional contribution . . . the American Revolutionaries made to Western politics." Wood, *Creation* at 342 (cited in note 20).

<sup>129</sup> Powell, 98 Harv.L.Rev. at 909 (cited in note 1).

<sup>130</sup> Jacobsohn, *Supreme Court* at 31-32 (cited in note 5).

classical republican outlook to a modern liberal one.

Had the framers intended their new Constitution to displace prior fundamental law, the transition would have been complete.<sup>131</sup> This section will suggest, however, that the notion of the Constitution as popularly enacted positive law did not serve to replace the earlier idea of fundamental law as inherent and declared rather than enacted, but instead merely complemented the older tradition.<sup>132</sup> The architects of our constitutional system assumed that appeals to natural law would continue despite the existence of a written Constitution. This hypothesis can be established by juxtaposing the evidence (from Part II) of the framers' dawning recognition that fundamental law could be enacted if the enacting authority were the people, against contemporaneous or subsequent discussions of the status of natural rights.

As Part II suggests, the American invention of the Constitution was well underway by July 23, and was largely complete by the end of the Convention in September. This invention consisted of the transition from envisioning a written constitution as merely a declaration of—and against a background of—older fundamental law, to recognizing the framing of the Constitution as an act creating fundamental law. If the invented Constitution is viewed as a substitute for natural law, this transition appears temporary. On July 21, and again on August 22, the debates in the Convention seem to move backward, reverting to earlier natural law concepts. Then in 1789, during legislative debates on the Bill of Rights, the same apparent reversion seems to occur. Finally, in a series of seminal Supreme Court cases between 1789 and 1819, the Constitution is once again relegated to merely a part of a broader fundamental law. This section will examine each of these examples in turn, and will suggest that rather than representing a view inconsistent with the Convention's invented Constitution, these examples indicate

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<sup>131</sup> One author, for example, argues that there can be no "higher law" or unwritten Constitution precisely because the framers intended to incorporate or embody natural law in the written Constitution itself. Jacobson, *Supreme Court at chap. 5* generally, especially at 75 (appeals "to higher law" useful to explicate text)(cited in note 5); see also Thomas C. Grey, *The Constitution as Scripture*, 37 *Stan.L.Rev.* 1, 16 (1984)(the Constitution enacts "the web of society's basic institutions and ideals, its 'unwritten constitution'"); Murphy, *Art at 140-155* (the Constitution has been interpreted to include natural rights as part of its "spirit")(cited in note 13).

<sup>132</sup> Any conflict between popular sovereignty and natural law was, at least until the mid-1790s, more apparent than real, since "the Revolutionary generation, believing in the people's inherent goodness, simply assumed that all laws made by the people would be consistent with fundamental rights." William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 *Mich.L.Rev.* 893, 928 (1978).



that the invented Constitution was intended merely to complement, not to replace, the earlier tradition. The innovation of the summer of 1787 was to explain why a written constitution was a part of fundamental law, not to redefine the whole of fundamental law.

#### A. The Convention and Fundamental Law

On August 22, a month after the crucial discussion over ratification, and one day before the supremacy clause took on its final uncontroversial phraseology, the delegates engaged in a debate that seems to undermine the vision of the Constitution as positively enacted fundamental law. Elbridge Gerry and James McHenry moved to prohibit the federal legislature from enacting bills of attainder or ex post facto laws. The first part of the motion, prohibiting bills of attainder, was agreed to without debate or dissent.<sup>133</sup> Since bills of attainder were common at that time,<sup>134</sup> the delegates probably viewed the clause as effectively altering the status quo; rather than declaring a natural right, the clause enacted a positive right.

The debate over the ex post facto portion of the motion, however, reveals interesting assumptions regarding natural rights. All the delegates who spoke explicitly or implicitly regarded an ex post facto law as a violation of natural law, and most of them therefore thought it unnecessary to include such a basic natural law principle in the written constitution:

Mr. GOV'R MORRIS thought the precaution as to ex post fact laws unnecessary; but essential as to bills of attainder.

Mr. ELSEWORTH contended that there was no lawyer, no civilian who would not say that ex post facto laws are void of themselves. It can not then be necessary to prohibit them.

Mr. WILSON was against inserting any thing in the Constitution as to ex post facto laws. It will bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so . . . .

Doc'r JOHNSON thought the clause unnecessary, and imply-

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<sup>133</sup> Madison's Notes at 510-511 (Aug. 22).

<sup>134</sup> See, e.g., *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800).

ing an improper suspicion of the National Legislature.<sup>135</sup>

Those who defended the clause—and only three delegates did so, one of whom Madison simply reported as being “in favor of the clause”—did so on the ground that it might do some good, since state legislatures had in fact enacted *ex post facto* laws, and the existence of the clause might give judges something to “take hold of.”<sup>136</sup> They did not seem to deny that the clause was not strictly necessary to make *ex post facto* laws void. There was thus an apparent consensus on this point, a conclusion further supported by the fact that members of both the nationalist and anti-nationalist factions spoke against the clause.

This exchange strongly suggests that the delegates, who by this time understood that they were enacting fundamental law, did not intend to enact positively all existing fundamental law, instead relying on unwritten natural rights to supplement the enacted Constitution. They apparently contemplated that laws not prohibited by the Constitution might still be invalid as contrary to natural law.<sup>137</sup> This view is quite consistent with the contemporaneous cases of judicial review discussed in Part I, and suggests that while the framers may have discovered a new reason for a constitution’s status as fundamental law, they did not change its relationship to

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<sup>135</sup> Madison’s Notes at 510-511 (Aug. 22).

<sup>136</sup> *Id.* at 511 (Aug. 22).

<sup>137</sup> The perceived inherent flaw in *ex post facto* laws might have been a violation of natural rights of the individual, or it might have been a violation of more general fundamental law such as the principles of “common right and reason.” In either case, the argument in the text indicates that some form of unwritten law could serve to invalidate even legislation not prohibited by the written constitution.

Additionally, enacting *ex post facto* laws might have been seen as simply outside the proper scope of legislative power. If viewed as extra-legislative, the question of *ex post facto* laws might raise separation of powers principles, thus blurring the dichotomy suggested by my analysis of both the pre-1787 state cases and the early Supreme Court cases. The other evidence of the general existence and pervasiveness of that dichotomy, however, may indicate that the framers viewed *ex post facto* laws as a violation of individual rights rather than as a violation of separation of powers principles, especially in light of the still amorphous state of the notion of separation of powers. In other words, the dichotomy may shed light on how to interpret the discussion on *ex post facto* laws. It is unsurprising, moreover, that a distinction between individual rights and separation of powers should be blurry at the edges, since the purpose of the latter was largely to safeguard the former.

Considered by itself, the discussion regarding *ex post facto* laws might also be seen as reflecting merely a disagreement concerning how to interpret the written document. Natural rights may have the same place in construing the written Constitution as “good faith” and trade usage have in construing contracts: they are not necessarily independent sources of obligation but they provide a very strong guide to interpreting the document. This interpretation of the framers’ view of natural law, however, does not fit well with the other evidence, especially the judicial opinions, which quite clearly use natural law as an independent source of law and not merely a lens through which to view the written Constitution.

other sources of fundamental law. Written and unwritten sources of fundamental law might still be of equal importance.

A discussion earlier in the summer can plausibly be read as suggesting this same philosophy. In one of the interminable debates over whether to include the Supreme Court in a Council of Revision with veto power over legislative enactments, several delegates contended that the Council of Revision was unwise and unnecessary, since the judges would be able, in their judicial capacity, to pass on the constitutionality of the laws.

The responses to this argument reveal a very traditional vision of what made a law unconstitutional. James Wilson noted that the Council of Revision was necessary because "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect."<sup>138</sup> This language, which sounds so odd to modern ears (how can a statute be just a little bit unconstitutional?), suggests a continuum of unconstitutionality coinciding with a continuum of injustice, lack of wisdom, dangerousness, and destructiveness. Whatever Wilson thought about the level of unconstitutionality necessary before judges could hold a statute invalid, it is clear that he thought a statute might be "unconstitutional" as a result of flaws other than just a conflict with the written constitution. He seemed to be using "constitution" in its older meaning, as including the entire body of fundamental law.<sup>139</sup>

Madison also seemed to suggest a relationship between injustice and unconstitutionality. He argued that the Council of Revision would be useful "as an additional check [against] a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities."<sup>140</sup> Whether Madison agreed with Wilson about the relationship between unconstitutionality and injustice depends on what he thought the Council's check would be "additional" to. If he thought the check additional to judicial review,

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<sup>138</sup> Madison's Notes at 337 (July 21).

<sup>139</sup> Goebel reaches the opposite conclusion from Wilson's choice of language, contending that Wilson's comments embodied a consensus that "judgment on the policy of the laws did not inhere in this power [of judicial review]." Goebel, *History* at 238 (cited in note 3). If Wilson had said that a statute might be unwise (etc.) but not unconstitutional, Goebel's interpretation would be accurate. Wilson, however, stated that an unwise (etc.) statute might not be unconstitutional *enough* to be invalid. What is the import when one says that an item has characteristics A through D, never says it has *any* of characteristic E, but jumps directly to the question whether it has a *sufficient* amount of characteristic E? Such a progression strongly suggests that the presence of at least some of the characteristic E is related to the presence of characteristics A through D.

<sup>140</sup> Madison's Notes at 337 (July 21).

and thus that the Council would be invalidating statutes because of their unconstitutionality, the link between unconstitutionality and injustice is clear. If, on the other hand, he was merely referring to the Council's role in his system of checks and balances generally, there is no necessary connection between unconstitutionality and injustice. Since the entire discussion concerned judicial review and the judges' role in keeping the country on a constitutional course, it is more likely that he thought the check additional to judicial review.<sup>141</sup> Thus in both their judicial capacity and as members of the Council, Madison expected judges to determine the constitutionality of statutes at least in part by looking to whether they were just; this suggests again that laws consistent with the written constitution but inconsistent with other sources of fundamental law might be held invalid.<sup>142</sup>

These two discussions indicate that at least some of the delegates to the Federal Convention did not view their task as reducing to writing the entire body of fundamental law. Instead, they drafted a Constitution they hoped would coexist with and complement other sources of fundamental law. This vision of the Constitution is even more clearly evident in the debates two years later in

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<sup>141</sup> The specific context of the statement does not help in uncovering its meaning, as Madison seemed to be making a series of rather unrelated points, and the quoted portion of his speech forms a separate sentence:

Mr. MADISON considered the object of the motion as of great importance to the mediated [mediated?] Constitution. It would be useful to the Judiciary department by giving it an additional opportunity of defending itself agst Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check agst a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities. If any solid objection could be urged agst the motion, it must be on the supposition that it tended to give too much strength either to the Executive or Judiciary. He did not think there was the least ground for this apprehension. [He then gives reasons for lack of apprehension.]

Madison's Notes at 337-38 (July 21).

<sup>142</sup> Mason may also have agreed with Wilson, both on the existence of a continuum of unconstitutionality and on its correlation with injustice. Mason's statement is more oblique, and can be read either way: "[The judges] could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course." Madison's Notes at 341 (July 21). He might have meant to indicate that unjust laws could *not* be invalidated unless they were also in plain conflict with the Constitution, or he might have meant that laws might be unconstitutional but not plainly so, even if they were unjust. Since he was supporting Wilson's motion, it is reasonable to suppose that he was merely restating Wilson's own defense.

the House of Representatives, when that body considered the first set of amendments to the new Constitution.<sup>143</sup>

## B. The Congress and Fundamental Law

The clamor for a written bill of rights in the federal Constitution began at the very end of the Federal Convention itself,<sup>144</sup> and gathered sufficient momentum during the ratification debates that five states submitted proposed amendments to the Constitution along with their ratifications.<sup>145</sup> The Federalists had consistently maintained that a federal bill of rights was unnecessary in a government of limited powers, and might in fact be dangerous because it would furnish support for interpreting federal powers more broadly.<sup>146</sup> They had also argued that the citizens of states lacking written bills of rights were no less free than citizens of those states that had them, and thus that the lack of a federal bill of rights was unimportant.<sup>147</sup> However, when Rhode Island and North Carolina refused to ratify, and Virginia and then New York submitted calls for a second convention, the Federalists were forced to take seriously the demands for a bill of rights, and James Madison took on the task of pushing a bill of rights through Congress.<sup>148</sup>

Madison faced two major obstacles. First, some of the Antifed-

<sup>143</sup> The debates over ratification of the new Constitution are essentially irrelevant to this question. To the extent that the antifederalists were simply anti-nationalists, the primary issue was allocation of power between federal and state governments. The source of limitations on either government was not particularly at issue. To the extent that they were classical republicans, the antifederalists might be thought to reject individual rights in favor of individual sacrifice for the good of the polity. See generally Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* 1-50, 201-212 (1980); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 462-552 (1975). Their repeated calls for a federal bill of rights, however, belie that conclusion, and suggest that their fight with the federalists turned on issues entirely apart from any dispute over the sources of fundamental rights.

<sup>144</sup> See, e.g., Madison's Notes at 486 (Aug. 20), 630 (Sept. 12), 640 (Sept. 14), 652 (Sept. 15) (cited in note 6).

<sup>145</sup> See Clinton Rossiter, *1787: The Grand Convention* at 274-98 (1966). For the text of the various proposed amendments, see Schwartz, *Bill of Rights* at 679-80 (Massachusetts), 756-57 (South Carolina), 760-61 (New Hampshire), 842-45 (Virginia), 911-914 (New York) (cited in note 28).

<sup>146</sup> See, e.g., Madison's Notes at 640 (Sept. 14) (liberty of the press); Federalist 84 (Hamilton); James Wilson, *An Address To a Meeting of the Citizens of Philadelphia*, 1787, in Schwartz, *Bill of Rights* at 528, 528-29 (cited in note 28); Robert Allen Rutland, *The Birth of the Bill of Rights, 1776-1791* 142 (1955).

<sup>147</sup> See, e.g., James Wilson, *Speech to Pennsylvania Ratifying Convention*, in Schwartz, *Bill of Rights* at 630, 631 (cited in note 28). Only seven states in fact had bills of rights.

<sup>148</sup> Madison in fact announced his intention to bring the amendments before the House one day before Virginia's call arrived and two days before New York's. Rutland, *Birth of the Bill of Rights* at 198-99 (cited in note 146).

eralists now opposed adding a bill of rights, hoping for a second convention instead.<sup>149</sup> The House of Representatives thus spent more time debating whether it had time to consider his amendments, and on the best procedural formula for considering them, than it did on the amendments themselves.<sup>150</sup>

Second, and more important, some of the original opponents of a bill of rights—including Madison himself—had based their objections partly on the impossibility of enumerating all the rights of mankind. A limited enumeration, they argued, would inaccurately imply that the rights themselves were limited to those enumerated. James Wilson argued against a bill of rights on this ground before the Pennsylvania ratifying convention:

In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers reserved*. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.<sup>151</sup>

James Iredell used the same argument—unsuccessfully, as it turned out—in the North Carolina ratifying convention:

<sup>149</sup> Edward Dumbauld, *The Bill of Rights and What It Means Today* 34 (1957); Rositer, *Grand Convention* at 304 (cited in note 145); Rutland, *Birth of the Bill of Rights* at 199-200 (cited in note 146).

<sup>150</sup> See 1 *Annals of Cong.* 441-448 [424-431], 460-466 [442-449] (June 8, 1789), 686-691 [660-665] (July 21, 1789), 732-746 [705-719] (Aug. 13-14, 1789). Two printings of the first two volumes of the *Annals of Congress* exist. They are identical except for pagination, running page titles, and back titles. The printing with the running page title "History of Congress" conforms to the remaining volumes of the series while the printing with the running page title "Gales & Seaton's History of Debates in Congress" is unique. Checklist of United States Public Documents 1789-1909 1463 (3d ed. 1911). The initial citations in this article are to the "Gales & Seaton's History of Debates in Congress" version; the citations in brackets are to the "History of Congress" version.

It has also recently been shown that the *Annals of Congress* may not be a particularly accurate account of debates in the House. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex.L.Rev.* 1, 35-39 (1986). The *Annals* are, however, the only extant report of the debates; to the extent that the intent of those who drafted the Bill of Rights should guide modern interpretation of the amendments, the *Annals* are still the most important source of information on that intent.

<sup>151</sup> Jonathan Elliot, ed., 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* 436 (1836) (October 28, 1787) ("Elliot's Debates"). Wilson had evidenced his belief in natural rights as early as 1770, when he authored a pamphlet (published in 1774) on the subject. See Wright, *American Interpretations* at 84-85 (cited in note 13).

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the stongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.<sup>152</sup>

Madison made the same argument to the Virginia ratifying convention, suggesting that a declaration of rights would be "dangerous, because an enumeration which is not complete is not safe."<sup>153</sup> He noted the objection again when he introduced his proposed amendments to the House of Representatives:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.<sup>154</sup>

Madison agreed that this was "one of the most plausible arguments [he had] ever heard against the admission of a bill of rights into this system."<sup>155</sup>

As Madison noted, the enumeration of rights might imply that

<sup>152</sup> 4 Elliot's Debates at 167 (July 29, 1788).

<sup>153</sup> 3 Elliot's Debates at 626 (June 24, 1788)(cited in note 151). The fear that an enumeration of rights would be construed to limit unenumerated rights is not the same as the fear that it would be construed to grant unenumerated powers to the federal government. See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup.Ct.Rev. 119, 151-54 (1965)(although Kelly mistakenly identifies Wilson as concerned only with the latter).

<sup>154</sup> 1 Annals of Cong. at 456 [439] (June 8, 1789) (cited in note 150).

<sup>155</sup> *Id.* He had also suggested the same thing somewhat more obliquely in 1788 in a letter to Thomas Jefferson. He was concerned, he said, that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained with the requisite latitude." James Madison to Thomas Jefferson, October 17, 1788, in Saul K. Padover, ed., *The Forging of American Federalism: Selected Writings of James Madison* 253 (1953). His example—the limiting of religious tolerance—however, suggests that he was at that time more worried about limited language of specific rights than the limiting effect of enumerating rights. By 1789, he had apparently reached the broader conclusion as well. Jefferson's response, interestingly, did not disagree with the basic premise, but maintained that: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." Thomas Jefferson to James Madison, March 15, 1789, in *Life and Selected Writings of Thomas Jefferson* at 463 (cited in note 25). Nothing in Jefferson's outlook suggests that he felt the unsecured rights would be lost. Rather, he assumed that certain rights would simply be better anchored than others.

rights not enumerated were not protected. The House solved that problem by including what became the ninth amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>156</sup> The purpose of this language was quite clearly to avoid the negative implication from an enumeration of rights. Madison's original language stressed that purpose:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so 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>157</sup>

There was virtually no discussion of either Madison's original language or the Select Committee's draft. Gerry moved unsuccessfully to substitute "deny or impair" for "deny or disparage," on the theory that "disparage" was "not of plain import," but was not seconded.<sup>158</sup> There was no further discussion of this amendment in either the House or the Senate.

The inherent rights of the people, moreover, were not thought to be static. Edmund Pendleton suggested in 1788 that the "danger" of an enumeration of rights was that "in the progress of things, [we may] discover some great and Important [right], which we don't now think of."<sup>159</sup> Wilson wrote in his law lectures:

It is the glorious destiny of man to be always progressive. . . . Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. . . . In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the cotemporary [*sic*] degree but will be calculated to produce, in future, a still higher degree of perfection.<sup>160</sup>

All of these men clearly thought that certain rights existed whether or not they were declared. A number of influential men of

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<sup>156</sup> U.S.Const. amend. IX. The Select Committee's original language was virtually identical, differing only in speaking of rights enumerated in "this constitution" rather than "the Constitution". 1 Annals of Cong. at 783 [754] (Aug. 17, 1789)(cited in note 150).

<sup>157</sup> 1 Annals of Cong. at 452 [435] (June 8, 1789)(cited in note 150).

<sup>158</sup> *Id.* at 783 [754] (Aug. 17, 1789).

<sup>159</sup> Edmund Pendleton to Richard Henry Lee, June 14, 1788, in David John Mays, ed., 2 The Letters and Papers of Edmund Pendleton, 1734-1803 532-33 (1967).

<sup>160</sup> James DeWitt Andrews, ed., 1 Works of James Wilson 126-27 (1896).



the founding generation thus envisioned a source of fundamental rights beyond the written document, suggesting again that the Constitution was not intended to reduce to writing all of fundamental law.

This recognition of the existence of fundamental rights not incorporated into the written document is also apparent in the debates in the House over Madison's proposed amendments. The drafting committee itself proceeded on the principle that "these rights belonged to the people; they conceived them to be inherent."<sup>161</sup> This sentiment was echoed repeatedly, as various Representatives argued either that a particular clause, while stating an indubitable truth, was unnecessary in the written constitution, or that a clause should be excluded because it protected something that was not a natural right. In a discussion about amending the preamble to state that "Government being intended for the benefit of the people, and the rightful establishment thereof being derived from their authority alone,"<sup>162</sup> John Page of Virginia said that "[h]e did not doubt the truth of the proposition brought forward by the committee, but he doubted its necessity in this place."<sup>163</sup> In denying the necessity of the clause protecting freedom of assembly, Theodore Sedgwick of Massachusetts stated that the right of assembly was "a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question."<sup>164</sup> Egbert Benson of New York opposed a clause giving those with religious scruples protection against being compelled to bear arms, because, he said, the indulgence "may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government."<sup>165</sup>

The House simply did not see much need for particularized enumeration of even the most unquestioned rights, because such rights clearly existed whether or not they were enumerated. Sedgwick ridiculed the possibility that a complete enumeration might be made, suggesting that various unenumerated rights still existed. He argued that had the committee proceeded on the principle of complete enumeration,

they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a

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<sup>161</sup> 1 Annals of Cong. at 759 [732] (Aug. 15, 1789)(cited in note 150).

<sup>162</sup> Id. at 734 [707] (Aug. 13, 1789).

<sup>163</sup> Id. at 746 [718] (Aug. 14, 1789).

<sup>164</sup> Id. at 759 [731] (Aug. 15, 1789).

<sup>165</sup> Id. at 780 [751] (Aug. 17, 1789).

right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights.<sup>166</sup>

The House apparently viewed the Bill of Rights mainly as a public relations device: the Representatives themselves recognized that enumeration of rights made little or no difference to the legal efficacy of such rights, but wanted the people to be, as Elbridge Gerry of Massachusetts put it, "secure in the peaceable enjoyment of [their] privilege[s]."<sup>167</sup>

The Representatives not only worried about what might be left out of the enumeration, they also worried that the act of listing might trivialize or limit even the enumerated rights. During the discussion on freedom of assembly, Sedgwick made clear that implied rights might also exist:

[H]e feared [this amendment] would tend to make them appear trifling in the eyes of their constituents; what, said he, shall we secure the freedom of speech, and think it necessary, at the same time, to allow the right of assembling? If people freely converse together, they must assemble for that purpose; . . . it is derogatory to the dignity of the House to descend to such minutiae.<sup>168</sup>

Thus the Congress apparently viewed the Bill of Rights as neither an exhaustive list nor a definitive description of the inherent rights of mankind.

Consideration of the sparse legislative history of the ninth amendment together with the debates over the rest of the Bill of Rights, however, suggests two related conclusions. First, both the ninth amendment itself and the debates over other amendments confirm that the founding generation envisioned natural rights beyond those protected by the first eight amendments. Second, the framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law. Both of these conclusions are consistent with the pre-1787 natural law tradition, and, as the next section will show, both are consistent with early Su-

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<sup>166</sup> Id. at 759-60 [732] (Aug. 15, 1789).

<sup>167</sup> Id.; see also id. at 444 [427] (Madison); 445 [428] (White); 446 [429] (Page); 448 [431] (Madison) (June 8, 1789); 760 [732] (Vining); 760 [732-33] (Hartley) (August 15, 1789); 786-87 [758-59] (Tucker) (August 18, 1789) (all urging passage of the amendments to pacify constituents).

<sup>168</sup> Id. at 759 [731] (Aug. 15, 1789).

preme Court interpretations of the Constitution.

### C. The Courts and Fundamental Law

Under a natural reading—even disregarding its natural law heritage—the ninth amendment lends itself to a traditional inherent rights interpretation. It might, therefore, have been used by judges interested in protecting inherent rights as a textual anchor for their decisions. In fact, in Supreme Court decisions during the first three decades after the adoption of the Constitution, most justices found some legislative enactments invalid by relying on natural law and related principles expressly, without resort to the mediating language of the ninth amendment. Although other scholars have noticed what they often describe as isolated references to natural law, the “orthodox legal view” is that “there is no case in which the courts have held an act invalid or refused to enforce a law because regarded as contrary to natural law, except when such a law was in conflict with an express constitutional provision.”<sup>169</sup> This section will suggest that it might be more appropriate to turn this conventional wisdom on its head: there is no case during this period in which the courts have upheld an act contrary to natural law on the ground that the law was not in conflict with any constitutional provision.<sup>170</sup>

A careful examination of the first three decades of Supreme Court constitutional jurisprudence suggests that the deeper pattern is consistent with the pattern observed in pre-1787 cases of

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<sup>169</sup> Haines, *Revival* at 75 (cited in note 13). Haines suggests, without much detail, that natural rights played a somewhat larger role in early decisions. *Id.* at 86-94. For recent scholarship taking the “orthodox” approach of denying the importance of natural law doctrines, see, e.g., David P. Currie, *The Constitution in the Supreme Court: State and Congressional Power, 1801-1835*, 49 *U.Chi.L.Rev.* 887, 892-94, 902 (1982) (“Currie II”); David P. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 *U.Chi.L.Rev.* 819, 832-33 (1981) (“Currie I”). But see William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *Harv.L.Rev.* 513, 530-32 (1974).

<sup>170</sup> Modern constitutional doctrine, by contrast, frequently explicitly denies the Court’s right even to examine the potential injustice of a law unless there is an inconsistency with the written Constitution. See, e.g., *Bowers v. Hardwick*, 106 S.Ct. 2841, 2846 (1986) (“There should be . . . great resistance to expand the substantive reach of [the due process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.”); John Hart Ely, *The Wages of Crying Wolf: A Comment On Roe v. Wade*, 82 *Yale L.J.* 920, 949 (1973) (“A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a Constitutional principle and the Court has no business imposing it.”).

judicial review. While individual Justices differed in the frequency with which they cited principles of natural law, most of the Justices tended to rely on the written Constitution primarily in deciding allocation of power questions and on unwritten law in deciding the rights of individuals.<sup>171</sup>

Chief Justice Marshall provides perhaps the best known example of early reliance on natural law. Even before he came to the bench, he showed an unwillingness to confine the limits on the legislature to the written Constitution. In *Ware v. Hylton*,<sup>172</sup> which involved a complicated question of whether the Jay Treaty invalidated a Virginia statute confiscating property and thereby extinguishing a debt, Marshall argued the case for the defendant debtor, seeking to uphold the Virginia statute. In arguing that Virginia had a right to confiscate the creditor's property, he naturally contended that "[t]he legislative authority of any country can only be restrained by its own municipal constitution."<sup>173</sup> He refused, however, to stop with this unequivocal rejection of natural law. He suggested that legislative acts which "evidently . . . violate any of the laws of God" might be treated differently, but noted that since "property is the creature of civil society," it was subject to civil control.<sup>174</sup> These combined contentions suggest that Marshall

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<sup>171</sup> William Nelson finds an analogous pattern in Chief Justice John Marshall's opinions: Nelson suggests that Marshall separated law from politics, resolving questions of law by consensus and leaving politics to popular will. Nelson, 76 Mich.L.Rev. at 935-47 (cited in note 133). Nelson's description of cases involving politics is similar to, although not perfectly congruent with, my identification of questions of allocation of power. See also Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 Harv.L.Rev. 340 (1982)(noting a similar dichotomy).

<sup>172</sup> 3 U.S. (3 Dall.) 199 (1796). This is apparently the only case Marshall ever argued before the Supreme Court. Charles Warren, 1 *The Supreme Court In United States History* 145 (1922).

<sup>173</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 211 (1796).

<sup>174</sup> *Id.* Marshall's exclusion of certain property rights from the category of natural rights is consistent with the eighteenth century pre-liberal vision of the relationship between the individual and the community, which changed for both Marshall and the country over the next few decades. See Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985).

Marshall had earlier hinted at his adherence to principles of natural law. In defending the proposed Constitution to the Virginia ratifying conventions (where he spoke only three times), he began a lengthy rebuttal of the arguments of Henry and Mason by referring to "the favorite maxims of democracy:" "A strict observance of justice and public faith, and a steady adherence to virtue." 3 *Elliot's Debates* at 223 (June 10, 1788) (cited in note 151). Since the Constitution he supported did not explicitly refer to any of these principles, and since he did not tie together his introductory remarks and the substance of his refutation of antifederalist sentiment, this rather oblique reference is somewhat hard to interpret. It is plausible to read his comments as suggesting that the Constitution is consistent with principles of natural justice.

viewed the case as an isolated question of federalism (whether the United States could, by treaty, limit the actions of Virginia), without implicating any natural rights. Thus a written constitution is the only limit on legislative power except where individual rights are concerned; this approach is similar to the approach taken in the pre-1787 state cases.

Marshall's early constitutional opinions also rely partly on principles of natural law and partly on the written constitution. *Marbury v. Madison*<sup>175</sup> provides a perfect illustration of the differing weight accorded to the written constitution depending on the nature of the question presented. In Marshall's own description, the case raised three questions: whether Marbury had a right to his commission, whether there was a remedy available to him, and whether that remedy was a writ of mandamus issuing from the Supreme Court. The first question raised only common law and statutory issues relating to appointments, ministerial functions, and the like, and Marshall unsurprisingly relied on common law and statutory doctrines.

It is in Marshall's treatment of the second and third questions in *Marbury* that the contrast between individual rights and allocation of power issues becomes most apparent. Marshall held, of course, that for every violation of right there exists a legal remedy. What is most interesting is that he supported this holding on only two bases: fundamental principles of natural law and Blackstone's *Commentaries*. He reasoned that legal remedies for violations of rights are "the very essence of civil liberty" and that providing such remedies is "[o]ne of the first duties of government."<sup>176</sup> He then confirmed this by a brief quotation from Blackstone to the same effect.<sup>177</sup> He made no mention of either the United States Constitution or the Judiciary Act of 1789, two potential positive sources of Marbury's right to a remedy. Individual rights, for Marshall, were derived not solely from positive enactments, but from unwritten fundamental law.<sup>178</sup> When he turned to the third question, however, to decide whether the legislature could impel the judiciary to act in a particular manner, Marshall relied almost solely on the written Constitution, using reason only as a means of

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<sup>175</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>176</sup> *Id.* at 162-63.

<sup>177</sup> *Id.* at 163.

<sup>178</sup> Contrast with this the modern doctrine that rights may often exist without remedies if the legislature chooses not to provide a right of action. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

elucidating the nature of a written constitution. Again, there is a clear distinction between the Constitution as a blueprint for government and unwritten fundamental law as a guarantor of individual rights.

Two years later, Marshall also indicated an inclination toward principles of natural law in a slightly different context in *United States v. Fisher*.<sup>179</sup> That case involved another question of individual rights: whether a federal statute should be construed to give the United States priority over other creditors in a bankruptcy proceeding. The defendant creditor contended both that the statute did not contemplate such a result, and that if it did so it was unconstitutional. The United States countered that the Court could not declare the statute unconstitutional merely because of its "inconvenience, inexpediency, or impolicy."<sup>180</sup> Marshall ultimately upheld that statute, interpreting it to confer priority on the United States, by relying on the necessary and proper clause, without much discussion. He did not respond to the arguments about inexpediency, since he found the statute expedient. In construing the statute, however, he implicated natural law: He suggested that "[w]here rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness."<sup>181</sup> In this early version of the doctrine that statutes should be construed so as to make them constitutional, then, Marshall apparently equated constitutionality with conformity to fundamental principles.

For Marshall, as for the Court and the country, reliance on natural law principles gradually gave way to a vision of the written Constitution as the sole source of fundamental law.<sup>182</sup> By 1810, Marshall had begun the transition that would culminate in 1819 in the *Dartmouth College* case. His opinion in *Fletcher v. Peck*<sup>183</sup> is described by David Currie—an avowed skeptic of the role of natural law in Supreme Court decisions<sup>184</sup>—as "bristl[ing] with references suggesting unwritten limitations derived from natural

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<sup>179</sup> 6 U.S. (2 Cranch) 358 (1805).

<sup>180</sup> *Id.* at 384.

<sup>181</sup> *Id.* at 390. Marshall did not explain what should happen in the event that the legislature did clearly express its intent to violate such fundamental principles.

<sup>182</sup> For general reviews of this transition and suggested causal factors, see, e.g., Haines, *Revival* at 97 (cited in note 13); Wright, *American Interpretations* at 174-79 (cited in note 13); Nelson, 87 *Harv.L.Rev.* at 528-32 (cited in note 169).

<sup>183</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>184</sup> See note 169 (Currie takes "orthodox" view).

law."<sup>185</sup> Marshall ultimately relied on some unfathomable combination of unwritten law and the written Constitution. While scholars might dispute which ground was of more dispositive relevance,<sup>186</sup> I would suggest that, in the context of earlier and later cases, the presence of both types of argument signals a mind in transition. A similar phenomenon is observable in *McCulloch v. Maryland*;<sup>187</sup> there the balance is more heavily weighted in favor of textual constitutionalism<sup>188</sup> as a result of the intervening nine years since *Fletcher v. Peck*.<sup>189</sup> Even in 1819, however, Marshall in *McCulloch* twice relied first on principles of general reasoning before noting that the Constitution did not leave the conclusion to

<sup>185</sup> Currie II at 892 (cited in note 169). For a full description of these references, see id. at 892-94.

<sup>186</sup> Compare Currie II at 892-94 (cited in note 169), and Warren, 1 The Supreme Court at 396 (cited in note 172) with Laurence Tribe, *Constitutional Law* § 8-1 (1978).

<sup>187</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>188</sup> I am using the term "textual constitutionalist" to describe any judge who relies on the written Constitution as the sole source of fundamental law, whatever method of interpretation is used to elucidate that most impenetrable document. The term thus encompasses most modern theories of constitutional interpretation. As Thomas Grey has suggested, the more interesting question is not whether or to what extent extra-textual sources may be used to *illuminate* the written text, but rather whether such sources *supplement* the written text. Grey, 37 *Stan.L.Rev.* 1 (cited in note 131). Both interpretivists and non-interpretivists (except for an occasional eccentric interpretivist) concede that extra-textual sources are relevant to interpretation, and (except for an occasional eccentric non-interpretivist) that the written text is the sole source of fundamental law. They are therefore all what Grey calls "constitutional textualists" and what I call "textual constitutionalists". I have deliberately reversed the order of the two terms—"textual" and "constitutional"—to emphasize that there are two types of constitutional or fundamental law: that derived from the text alone (hence "textual constitutionalism"), and that derived from a multiplicity of sources (which might be called "natural or extra-textual constitutionalism" if the term "natural law" did not already exist and serve). Grey calls those who favor the latter interpretation of fundamental law "supplementers;" those who insist that "tradition did not merely interpret revelation but constituted part of it." Id. at 6.

<sup>189</sup> A less well known Circuit Court opinion in 1815 shows a similar ambiguity. In *Meade v. Deputy Marshal*, 16 *Fed.Cases* 1291 (C.C.D.Va. 1815), Marshall invalidated a sentence imposed by a Virginia court martial. He relied on three independent grounds: (1) in the absence of Congressional delegation, courts martial are under federal, not state, control; (2) even if properly under state control, the court martial acted improperly under Virginia law; and (3) even if Congressional action had authorized the action (imposing a fine on a private not actually in service) despite state law, the court had proceeded without notice. The first two issues were purely statutory. As to the last, Marshall found:

It is a principle of natural justice, which the courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without the opportunity of being heard. There is no law authorizing courts martial to proceed against any person, without notice. Consequently, such proceeding is entirely unlawful.

Id. at 1293. This appears to be a movement away from the Cokean notion that natural law supersedes positive law, and toward a more Blackstonian vision of legislative supremacy. Natural law still plays a role, however, where positive law is silent.

general reasoning, but instead contained a clause directly relevant to the issue at hand.<sup>190</sup> By later that term, in *Trustees of Dartmouth College v. Woodward*,<sup>191</sup> all traces of references to natural law had disappeared from Marshall's opinion, despite Daniel Webster's eloquent defense of fundamental rights at oral argument.<sup>192</sup>

Marshall, because of his long tenure, best illustrates the transition from using multiple sources of fundamental law to the modern textual constitutionalists' use of the single written source. However, the same early reliance on unwritten fundamental law (especially in cases involving individual rights) may be seen in the opinions of other Justices. Justice Chase's justly celebrated opinion in *Calder v. Bull*<sup>193</sup> contains numerous references to principles of natural law. Chase ultimately upheld the statute challenged in *Calder*, which retroactively changed the effect of a will. The basis for his decision is unclear but apparently rested on two independent grounds, one natural and one textual constitutionalist: the statute did not infringe plaintiff's vested rights, and a civil law, even if retroactive, was not proscribed by the ex post facto clause of the federal Constitution.<sup>194</sup> Despite his rejection of the plaintiff's challenge, his opinion is replete with suggestions of natural rights limitations on legislatures, beyond the limits prescribed by the written Constitution. He stated that he "[could not] subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state."<sup>195</sup> He maintained that there are "certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law."<sup>196</sup> In language reminiscent of Coke, he concluded that "[a]n act of the legislature (for I cannot call it a law),

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<sup>190</sup> *McCulloch v. Maryland*, 17 U.S. at 405-06 (supremacy clause), 411-12 (necessary and proper clause).

<sup>191</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>192</sup> *Id.* at 558.

<sup>193</sup> 3 U.S. (3 Dall.) 386 (1798). Even Currie agrees that Chase probably asserted power to invalidate laws inconsistent with natural justice. Currie I at 871-74 (cited in note 169). Goebel, however, insists that the *Calder* opinion is simply an example of a "collateral inquiry" into "local and common law usage" necessary to the primary question of the "literal meaning" of the Constitution. Goebel, *History* at 792 (cited in note 3).

<sup>194</sup> Chase's opinion is open to different readings. See Currie I at 866-75 (cited in note 169).

<sup>195</sup> *Calder v. Bull*, 3 U.S. at 387-88.

<sup>196</sup> *Id.* at 388.



contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."<sup>197</sup> Finally, Justice Iredell apparently interpreted Chase's opinion as imposing natural law as an unwritten limitation on the legislature, for he wrote a concurring opinion denying the judicial enforceability of natural law, relying in part on Blackstone.<sup>198</sup>

Interpreting Chase's opinion in *Calder* as within the pre-1787 tradition of judicial review is also consistent with his opinion in *Ware v. Hylton*<sup>199</sup> two years earlier. As noted above, that case involved a question of whether Virginia had a right to confiscate the property of a British subject, notwithstanding the Jay Treaty. In first concluding that Virginia had a right to confiscate the property in the absence of a treaty, Chase simply noted that the legislature could enact any law "not . . . repugnant to the constitution or fundamental law."<sup>200</sup> It is not clear whether "the constitution or fundamental law" referred to the same or different things. More revealing is Chase's discussion of whether Virginia's confiscation violated the law of nations, which, as seen earlier, is simply a version of natural law. Chase, like Hamilton in *Rutgers v. Waddington*, divided the law of nations into three categories: general, conventional, and customary. Law of the latter two types rested on consent (express consent in conventional law, tacit consent in customary law), and bound only consenting parties. The general law of nations, however, was "universal, or established by the general consent of mankind, and [bound] all nations."<sup>201</sup> Thus in the context of elucidating the law of nations, a close cousin of the law of nature, Chase recognized room for both written (or otherwise agreed to) and unwritten paramount law. Again, Iredell took the contrary position, suggesting that the legislature may pass any law not inconsistent with the written constitution.<sup>202</sup>

In contrast to *Calder* and *Ware*, Chase's opinion in the con-

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 398-99. Iredell may have been less narrowly textual constitutionalist than his opinion in *Calder* may indicate at first blush. Perhaps he may have meant only that "natural justice" ought not be enforced since there is disagreement over its content, without implying that other unwritten limitations (those of custom, tradition, or unalienable rights) are similarly unenforceable. Moreover, his position as expressed in his letter regarding *Bayard v. Singleton* and in the North Carolina ratifying convention suggests that he had already recognized the existence of extra-textual limits on legislatures. I am indebted to Jeff Powell for suggesting the alternative interpretation of Iredell's language.

<sup>199</sup> 3 U.S. (3 Dall.) 199 (1796).

<sup>200</sup> *Id.* at 223.

<sup>201</sup> *Id.* at 227.

<sup>202</sup> *Id.* at 266.

temporaneous case of *Hylton v. United States*<sup>203</sup> relies solely on a careful exegesis of the language and purpose of the federal Constitution. Nevertheless, *Hylton* adheres to the pre-1787 pattern: unlike *Calder* and *Ware*, *Hylton* raised only a question of federalism. Whether the United States could tax carriages without apportioning the tax among the states was certainly of more interest to the state of Virginia than it was to Daniel Hylton; in fact the latter dropped out of the case (which was probably collusive) before it reached the Supreme Court, Virginia took it over, and the United States paid the legal fees.<sup>204</sup>

Even more insistently than Chase or Marshall, Justices Johnson and Paterson wrote opinions resting squarely on extra-textual grounds. In *Ware*, Paterson spoke of nations confiscating property in time of war as “incompatible with the principles of justice and policy” and “the dictates of the moral sense,” “right reason and natural equity.”<sup>205</sup> In *Calder*, Paterson essentially agreed with Chase, but added that since “[t]he constitution of Connecticut is made up of usages” the way to determine the statute’s constitutionality was to look to past practices.<sup>206</sup> This, too, is consistent with the English tradition of identifying the contents of a constitution by factual inquiry into legal norms. Johnson, who was not appointed to the bench until 1804, well after *Calder* and *Ware*, wrote separate, natural law concurrences in both *Fletcher v. Peck* and *Martin v. Hunter’s Lessee*.<sup>207</sup> In *Fletcher*, he relied on “a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”<sup>208</sup> He stated, moreover, that he had written a separate opinion specifically in order to “have it distinctly understood, that [his] opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.”<sup>209</sup> In *Hunter’s Lessee*, where Justice Story looked only to the written Constitution to answer the federalism question of whether United States Supreme Court decisions were valid and binding against Virginia courts, Johnson also concurred, mostly to take an even stronger nationalist position than did Story. In the course of his concur-

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<sup>203</sup> 3 U.S. (3 Dall.) 171 (1796).

<sup>204</sup> See Suzanna Sherry, Perspectives: Law in the Grand Manner, 2 Const.Comm. 9 (1984).

<sup>205</sup> *Ware v. Hylton*, 3 U.S. at 255.

<sup>206</sup> *Calder v. Bull*, 3 U.S. at 395.

<sup>207</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>208</sup> 10 U.S. at 143.

<sup>209</sup> *Id.* at 144.

rence, however, he defined the federal Constitution as a contract between the people, the states and the United States; this again is consistent with older traditions.

Even Justice Story, who was appointed in 1811 and perhaps came to represent best the textual constitutionalist strand of the first half of the nineteenth century,<sup>210</sup> originally envisioned natural law limits to legislative authority. In *Terrett v. Taylor*<sup>211</sup> in 1815, Story invalidated a Virginia attempt to revoke legislatively an earlier legislative grant of land to the plaintiffs. Throughout his opinion, Story referred indiscriminately to the federal and state constitutions, to "public principles,"<sup>212</sup> to "the common law,"<sup>213</sup> to "the common sense of mankind and the maxims of eternal justice,"<sup>214</sup> to "a great and fundamental principle of a republican government"<sup>215</sup> and to "the principles of civil right."<sup>216</sup> He concluded by declaring that the decision invalidating the statute "[stood] upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals."<sup>217</sup> This resort to multiple sources of fundamental law is almost identical to the technique of judicial review used in *Trevett v. Weeden* almost thirty years earlier.

From 1789 until almost 1820, then, the Supreme Court continued the traditions of Bolingbroke and the early state courts: looking to natural justice as well as to written constitutions.<sup>218</sup> All of the influential or significant Supreme Court Justices, except Iredell, wrote opinions that contained at least some references to extra-textual principles, not merely as a method of interpreting the written constitution itself, but in order to judge the legality of the

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<sup>210</sup> See, e.g., R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic 191-92* (1985); H. Jefferson Powell, Book Review, 94 *Yale L.J.* 1285, 1307-14 (1985). See also Joseph Story, 1 *Commentaries on the Constitution of the United States* 388-89 (1833) ("Nothing but the text itself was adopted by the people").

<sup>211</sup> 13 U.S. (9 Cranch) 43 (1815).

<sup>212</sup> *Id.* at 50.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 50-51.

<sup>216</sup> *Id.* at 51.

<sup>217</sup> *Id.* at 52. Currie concludes that Story's reliance on extra-constitutional principles was "at most . . . an alternative holding" to the primary constitutional holding; he then chastises Story for not giving any reasons for holding the statute unconstitutional. Currie II at 902-03 (cited in note 169).

<sup>218</sup> An interesting variant on this practice is also found in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), where several Justices cited the preamble to the Constitution as authoritative fundamental law.

challenged statute or other governmental action.<sup>219</sup> As in the pre-1787 state cases, references to principles of natural law are more frequently found in cases involving individual rights, and a careful examination of the written constitution is more often found in cases involving allocation of powers.<sup>220</sup>

By approximately 1820, however, the reliance on natural law was waning, disappearing entirely within a few years. It is this nineteenth century rejection of the notions of natural rights that has most influenced modern constitutional law. After two brief flirtations with decisionmaking on the basis of natural law,<sup>221</sup> the Supreme Court since 1937 has made a consistent and at least partially successful attempt to link all of its decisions to specific clauses of the Constitution, even when doing so stretches the language to the limits of credibility.

### CONCLUSION

The formal analysis of modern constitutional law is pervaded by the legacy of legal positivism, which has all but eradicated notions of any link between constitutional law and natural law.<sup>222</sup> The Supreme Court is careful to ground every constitutional decision on the written Constitution, at whatever cost. Especially in the cases furthest from the constitutional language, this tacit preference for textual constitutionalism over natural law concepts undermines the Court's decision by allowing critics to attack the decision using the Court's own criteria of decision making.<sup>223</sup>

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<sup>219</sup> Justices Wilson and Jay both wrote natural law opinions in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Cushing and Blair, both minor figures, seemed textual constitutionalist, to the extent that any characterization can be made of them, but neither wrote much. See *Chisolm*, 2 U.S. at 450-453, 466-469; *Ware v. Hylton*, 3 U.S. at 282-84; *Calder v. Bull*, 3 U.S. at 400. John Rutledge (1789-1791; 1795); Thomas Johnson (1791-93), Oliver Ellsworth (1796-1800), Alfred Moore (1799-1804), Henry Brockholst Livingston (1806-1823), Thomas Todd (1807-1826) and Gabriel Duvall (1811-1835) did not write opinions in any of the pre-1820 judicial review cases. Bushrod Washington (1798-1829) wrote a textual constitutionalist opinion in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), but did not write opinions in any of the earlier judicial review cases.

<sup>220</sup> State courts also continued to rely on unwritten fundamental law. See Bryant Smith, *Retroactive Laws and Vested Limits*, 5 *Tex.L.Rev.* 231, 237 (1927).

<sup>221</sup> The first return to a natural law approach came before the Civil War. See generally Haines, *Revival* at 97-101 (cited in note 13); Nelson, 87 *Harv.L.Rev.* at 514-523, 528, 532 (cited in note 169); Farber and Muench, 1 *Const.Comm.* at 235 (cited in note 13). The second occurred during the *Lochner* era, approximately the first third of the twentieth century.

<sup>222</sup> See Murphy, *Art* at 138-39 (cited in note 13).

<sup>223</sup> The modern case perhaps most subject to criticism as lacking a constitutional foundation is probably *Roe v. Wade*, 410 U.S. 113 (1973). See, e.g., Ely, 82 *Yale L.J.* at 920 (cited in note 170); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 *Sup.Ct.Rev.* 159.

A careful examination of the historical context of the Constitution, however, suggests that it was never intended to displace natural law; the modern Court's insistence on textual constitutionalism as the sole technique of judicial review is thus inconsistent with the intent of the founding generation. The founding generation—from a few years before the Revolution to almost thirty years after the creation of the new government—instead expected the judiciary to keep legislatures from transgressing the natural rights of mankind, whether or not those rights found their way into the written Constitution.