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# NATURAL LAW IN THE STATES

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## INTRODUCTION

Two of our most cherished constitutional myths are that we are, more or less, carrying on the constitutional traditions of the framers, and that the framers' most significant innovation was the invention of a written constitution. Neither belief is true. This article is the second in a series suggesting that our vision of the Constitution differs in a particular and important way from that of the framers: for us, it is the sole source of fundamental law, while for the framers it was only one source among many.<sup>1</sup>

Our faith in the written constitution begins, as many of our constitutional myths do, with John Marshall and *Marbury v. Madison*.<sup>2</sup> We read him to say that the Constitution's writtenness is what gives it its paramount authority.<sup>3</sup> As a result, constitutional scholars from John Marshall to John Ely have focused on and attached great significance to the fact that American constitutions are written documents. Indeed, as the Constitution progressed from a recent—and contingent—political artifact to a sacred symbol,<sup>4</sup> the written text became more and more central. Textualism is now the exclusive mode of constitutional interpretation: whatever sources may illuminate the meaning of the written text, that text—once interpreted—is itself the sole source of fundamental or higher law.<sup>5</sup>

This profoundly positivist attitude towards fundamental law, however, is a relatively modern invention. We tend to forget that the same John Marshall who wrote *Marbury* also wrote *Fletcher v. Peck*, in

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1. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). This first article suggests that the Constitution's framers inherited traditions which held a written Constitution to be only one aspect of the fundamental law that might serve to invalidate legislative enactments and that the framers never intended to displace the prior tradition of multiple sources of fundamental law. *Id.* Thus, the Constitutional Convention of 1787 "yielded a new view only of the nature, and not of the relative authority, of a written constitution." *Id.* at 1128.

2. 5 U.S. (1 Cranch) 137 (1803).

3. See *id.* at 176.

4. See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9-17 (1988) (analogizing Constitution to a sacred text and Supreme Court to a holy institution).

5. Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 52. I have taken the term "textualism" from Thomas Grey. See Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984); see also Sherry, *supra* note 1, at 1171 n.188 (describing a "textual constitutionalist" as "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").

which the written constitution vied with unwritten principles of natural law for pride of place among the sources of fundamental law.<sup>6</sup> Reading Marshall's opinion in *Fletcher* should remind us that the founding generation's conception of fundamental law was quite different from ours. That generation—which spans roughly forty years, from 1780 to 1820—viewed the written constitution as only one of several sources of fundamental law. Other sources, all unwritten, included the laws of God, the common law (largely derived incrementally from custom and tradition), the law of nature, and natural law.<sup>7</sup>

Recently, the role of unwritten or natural law has taken on new significance. Several scholars have recently suggested that the view that the founding generation believed in enforceable unwritten rights is mistaken.<sup>8</sup> Political events have also overtaken the scholarly debate over natural law. When the President nominated to the

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6. See 10 U.S. (6 Cranch) 87, 139 (1910).

7. "The law of nature" and "natural law" were related but distinguishable in the period I am discussing: the former was grounded in observation and human sentiment, while the latter was founded upon abstract reason. For purposes of this article, the differences among the various unwritten sources of higher law are irrelevant. Therefore, I will use "unwritten law," "natural law," and "law of nature" interchangeably. I will also use "natural rights" to refer to unwritten individual rights, although there is also a subtle distinction between "natural rights" and "natural law." See 3-4 G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 676-77 (1988); cf. JOHN P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 65-73, 90-95 (1986) (discussing different sources of extra-constitutional rights during Revolutionary period).

One scholar has suggested that the founding generation (as well as most 17th and 18th century legal thinkers in England and on the Continent) were hopelessly confused about the nature and sources of natural law, conflating deductive reason and inductive custom in a way that defies logic. James Q. Whitman, *Why Did Revolutionary Lawyers Confuse Custom and Reason?* 58 U. CHI. L. REV. 1321, 1322 (1991). To the extent that Whitman is correct that "[s]tudies that purport to explain the Founders' conception of the Constitution are thus doomed to mislead," it is appropriate to note that my argument is not that the founding generation necessarily had a single or coherent conception of the Constitution, but that the historical evidence indicated understandings that are *inconsistent* with our modern narrow textualism. *Id.* at 1367 (footnote omitted). The harder task of identifying exactly what they meant by natural law (or "constitution") may indeed prove impossible if Whitman is right, but that should not prevent us from identifying what they did *not* mean by "constitution."

8. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1226-27 (1990); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?* 69 N.C. L. REV. 421, 421 (1991). At least two other scholars have recently suggested that even *textual* judicial review was originally much narrower than it is today, a dispute peripherally related to the debate over natural law. See ROBERT L. CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW I* (1989); CHRISTOPHER WOLFE, *THE RISE OF MODERN CONSTITUTIONAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 4* (1986).

Supreme Court a man who had invoked natural law as a source of individual rights, opponents suggested that a belief in natural law was at least odd and perhaps outside the mainstream of American constitutionalism,<sup>9</sup> and the nominee ultimately recanted his views. Thus, the question whether the founders intended the written Constitution to serve as the sole source of individual rights has political as well as historical consequences.

In this article, I will examine further historical evidence in support of the conclusion that the founders expected judges to enforce unenumerated as well as enumerated rights. Part I will briefly address the concerns of the two most recent scholarly refutations of the natural law position.<sup>10</sup> Both authors attempt primarily to provide alternative interpretations of basically the same historical evidence that has been read to support a natural law conclusion, although both supplement that evidence with further illustrations of their own interpretations of eighteenth century political theory. The debate thus comes down to choosing, from among plausible alternatives, the best interpretation of a world-view that is fundamentally foreign to twentieth century observers.

The best evidence in support of a natural law heritage, then, is not what the founders (or the philosophers who influenced them) *said*, but what courts *did*. Thus, part II of this article will focus on further examples of judicial enforcement of unenumerated rights. Because one scholar explicitly relies on federalism and on the distinction between federal and state constitutions to justify his position against natural law,<sup>11</sup> I will examine how state courts made use of unenumerated rights. The bulk of this article thus examines cases in four states between 1788 and approximately 1830 to determine the extent to which the belief in enforceable unenumerated rights was widespread during that period.<sup>12</sup>

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9. Professor Laurence Tribe, for example, noted that nominee Clarence Thomas "is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation." Laurence Tribe, *Natural Law and the Nominee*, N.Y. TIMES, July 15, 1991, at A15. Dean Geoffrey Stone has said that Thomas's work is "further outside the mainstream of constitutional interpretation" than that of rejected nominee Robert Bork. Clarence Page, *Is Clarence Thomas in Imminent Danger of Getting Borked?* CHI. TRIB., July 10, 1991, at 11.

10. See *infra* notes 13-60 and accompanying text.

11. For a discussion of McAfee, see *infra* notes 43-60 and accompanying text.

12. See *infra* notes 64-340 and accompanying text.

## I. THE UNWRITTEN FEDERAL CONSTITUTION

A. *Natural Law*

Professor Helen K. Michael has directly challenged the thesis that the founding generation conceived of judicially enforceable unenumerated rights.<sup>13</sup> It seems to be fairly widely accepted that Edward Coke was one of the primary sources of the American institution of judicial review. Professor Michael's long article, however, carefully canvasses some of the other philosophical influences on the founders, including Locke, continental Enlightenment philosophers, radical English Whigs, and the Scottish Common Sense School.<sup>14</sup> She concludes that because these thinkers did not envision judicially enforceable unenumerated rights, the founders could not have done so.<sup>15</sup> Although the article provides an excellent summary of some aspects of these varied influences, they are not particularly relevant to the question of whether eighteenth century Americans believed in judicially enforceable natural rights.<sup>16</sup>

As Professor Michael notes, none of these sources—other than Coke—even conceived of the idea of judicial review.<sup>17</sup> Each of these

13. Michael, *supra* note 8, at 421.

14. *Id.* at 427-42.

15. *See id.* at 442-43.

16. Most of these schools of thought are also discussed in Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323, 323-28 (1988), but for reasons mentioned in the text, I did not find them relevant to my examination of natural law.

Professor Michael, moreover, fails to discuss the fact that while many of her sources never mentioned individual natural rights, they did accept the enforceability of unwritten law in the context of the law of nations, which was essentially natural law applied to nations. *See generally* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821 (1989) (providing an overview of way international law was treated in constitutional politics).

17. Michael, *supra* note 8, at 427-28.

[N]one of these theorists envisioned *any type* of judicial review. . . . Grotius . . . never conceived of the judiciary as an instrument to protect . . . rights. . . . Grotius failed to conceive of any check on sovereign misconduct. . . . Pufendorf . . . did not embrace Coke's suggestion that judges could pronounce void sovereign acts violating the express convention. . . . Burlamaquie also never suggested that the judiciary could control the sovereign's conduct by interpreting the written fundamental laws. . . . Vattel . . . also failed to assign judges any role in controlling the sovereign's conduct. . . . Montesquieu . . . failed to conceive of any power of judicial review. . . . Locke . . . would have found any form of judicial interpretation of legislation objectionable. . . . Country Whigs implicit[ly] reject[ed] . . . judicial review as a means of policing the people's compact with their governors. . . . Common Sense School's position is . . . inconsistent with the practice of judicial review." *Id.* at 427-31, 434, 436, 438, 442. *But see* CLINTON, *supra* note 8, at 21 (ascribing "rule that [judiciary] voids acts of a delegated authority that exceed its mandate" to Vattel).

thinkers was determined to protect the liberty of the people from the tyranny of rulers, and each had his own safeguards. Some of these safeguards were obviously and directly incorporated into the American Constitution, including separation of powers, a legislature whose powers far surpassed those of the other branches, a careful enumeration of the powers of government, and relatively frequent elections of at least one house. But the phenomenon of judicial review—not explicit in the Constitution but understood and practiced nevertheless—owes its existence to Coke alone.

Thus, Professor Michael's primary argument—that the unenumerated rights thesis relies too heavily on Coke and consequently overlooks other important influences on the founders<sup>18</sup>—is a non sequitur. Only Coke envisioned judicial review, and thus only Coke could envision its contours. Americans drew on different sources for different political inspirations, and Coke was the fountainhead for judicial review.<sup>19</sup>

Moreover, some of Professor Michael's evidence can be interpreted to support extra-textual judicial review. For example, she describes the Scottish Common Sense School as believing that "all men possess inherently equal moral faculties through which to perceive goodness, justice and charity."<sup>20</sup> From this she concludes that Americans influenced by the School would reject any form of judicial review.<sup>21</sup> However, although her description of the School's beliefs can be read as a direct challenge to Coke's notion that judges are particularly well suited for judging because of their training in the "artificial reason of the law," it also can be read to support extra-textual judicial review.

As Professor Shannon Stimson has recently shown, this very belief in the moral equality of all citizens transformed the jury from an English enforcer of law to an American declarer of law.<sup>22</sup> Americans, less certain than their English cousins of the content of the law, were able to look to new sources of legal authority, including both judges and juries. Judicial review was partly derived from this American notion that law was indeed natural: a reflection of the ordinary morality of the people. Thus, early American juries were

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18. Michael, *supra* note 8, at 442-43.

19. See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 992. Indeed, Coke was apparently more generally influential than were any of the other sources Professor Michael discusses. See *id.*

20. Michael, *supra* note 8, at 442.

21. See *id.*

22. SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* (1990); see also Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1191-95 (1991).

finders of law as well as fact.<sup>23</sup> Juries were frequently seen as arbiters of “an unwritten and unamendable natural constitution.”<sup>24</sup> Law need not be found solely in ponderous tomes—or written constitutions—accessible only to learned lawyers.<sup>25</sup>

As late as 1800, people distrusted the law as overly sophisticated and accessible only to educated and aristocratic lawyers. Describing this hostility after it had subsided, P.W. Grayson attributed to lawyers the belief that the law was “far too subtle, pure, intricate, and profound for the apprehensions of vulgar intellects.”<sup>26</sup> The “vulgar intellects” naturally resented this, and turned instead to a belief that law was natural and rational.<sup>27</sup>

In Virginia, for example, anti-legalist sentiments of the mid-eighteenth century had a renaissance during the first decade of the nineteenth century. That hostility often took the form of disputes between the professional lawyers and the county justices. “In the minds of the lawyers the purpose of the law was to facilitate the speedy and expeditious completion of business,” while the judges believed that “some semblances should exist between the laws of God and those of man.”<sup>28</sup> There was widespread distrust of law because people viewed it as being in conflict with justice, and as “a mysterious, unintelligible force that was capable of being ‘twisted’ to the advantage of those with ‘cunning,’ power and ambition.”<sup>29</sup>

Perry Miller has shown how the literature of the period also reflected the popular preference for reason and nature over textual-

23. See, e.g., Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299-300 (1966); William E. Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 917-18 (1978).

24. Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 297 (1990).

25. The mistrust of lawyers and legalism, and the perception that law was not accessible to the common people but should be, did not originate with Americans. See Michael K. Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENTARY 359, 359-61 (1991). Seventeenth century English Levellers first demanded that the law—written mostly in French or Latin—be translated into English and made accessible to all. *Id.* Interestingly, the Levellers, who were unsuccessful in their own country, also invented or rediscovered many of the rights that would later find their way into the American Bill of Rights. *Id.*

26. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 103 (1962) (quoting P.W. GRAYSON, *VICE UNMASKED* (1830)).

27. See *id.*

28. A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810*, at 106-07 (1981). For a discussion of the eighteenth century recurrence of anti-legalism, see *id.* at 230-52. Roeber discusses the disputes in “Court” and “Country” terms, but the discussion also lends itself to a natural law/positivist characterization. See *id.* at 106-08.

29. WHITE, *supra* note 7, at 77; see CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 12-18 (1981).

ism.<sup>30</sup> Davy Crockett's semi-fictional "Autobiography" stated that his judicial decisions were never reversed because he "gave [his] decisions on the principles of common justice and honesty between man and man, and relied on natural born sense, and not on law learning to guide [him]."<sup>31</sup> Especially in the back-country—to which large portions of the population were migrating and political power shifting<sup>32</sup>—there was a strong popular hostility towards law and legalism. Even some state court judges were explicitly hostile to the law as written. A New Hampshire Supreme Court Justice instructed a jury "to do justice between the parties not by any quirks of the law out of Coke or Blackstone—books that I have never read and never will—but by common sense as between man and man."<sup>33</sup>

Such hostility might tend to prevent the exercise of judicial review in the first place, as Michael implies.<sup>34</sup> Alternatively, however, hostility to the narrowness of legalism and textualism might induce judges who *did* engage in judicial review to tailor their decisions to the popular clamor for accessible, natural justice. Thus to the extent that eighteenth and early nineteenth century courts reviewed statutes for consistency with higher law, the climate of the day suggests that they might have been more likely to use unwritten than written law. And as Part II of this article will show, state court judges of the period did indeed engage in judicial review, and used natural law at least as often as they used written constitutional law to adjudicate individual rights.<sup>35</sup>

The historical perception that principles of natural justice are more generally accessible than technical legal learning is understandable. Robert Ferguson has noted that one hallmark of the transition from extra-textualism to textualism (and thus to positivism) is that "[t]echnical competence triumph[s] over general learning and philosophical discourse."<sup>36</sup> Lawyers cease to "search[h] for a declaration derived from common usage and consistent with nature," but instead think "in terms of the specific commands that so-

30. MILLER, *supra* note 26, at 102-03.

31. *Id.* at 102 (quoting AUTOBIOGRAPHY OF DAVEY CROCKETT).

32. See generally FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 142-50 (DaCapo Press 1971) (1930) (discussing regional influences in ante-bellum south); Jerome J. Nadelhaft, "The Snarls of Invidious Animals": The Democratization of Revolutionary South Carolina, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 62 (Ronald Hoffman & Peter J. Albert eds. 1981) (noting roots of political difference in pre-revolutionary era).

33. Gordon Wood, *The Origins of Judicial Review*, 22 SUFFOLK U. L. REV. 1293, 1301 (1988) (quoting Associate Justice John Duoley).

34. Michael, *supra* note 8, at 445-56.

35. See *infra* notes 62-340 and accompanying text.

36. ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 200 (1984).



ciety ha[s] placed upon itself.”<sup>37</sup> Textualist lawyers and judges no longer share their education and their sources with the general public: they have turned from reading literature and philosophy to reading cases. In effect, their status as members of the community is diminished, and with it their ability to speak for the community. At that point, but not before, textualism may become more attractive as a method of constraining judges who no longer share the natural rationality of the populace.<sup>38</sup> Thus, Professor Michael’s discussion of the Scottish Common Sense School can be read to support a thesis that Americans of the late eighteenth and early nineteenth centuries were committed to a regime of unwritten natural law, derived from custom, tradition, and the morality of the common people.<sup>39</sup>

Professor Michael also questions whether state courts practiced judicial review at all, much less extra-textual judicial review.<sup>40</sup> She argues that the “few cases” involving judicial review did not legitimize it—particularly given hostile public reaction—and that state constitutions “both failed to authorize judicial review and severely limited the judicial independence required for the growth of this practice.”<sup>41</sup> Professor Michael may be right in theory, but the evidence of state court practice contradicts her conclusion. After a brief discussion of another critique of natural rights jurisprudence, I will return to a discussion of how state courts engaged in extra-textual judicial review.<sup>42</sup>

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37. *Id.*

38. The textualist mistrust of judges as “other” persists today, on both the left and the right. Mark Tushnet explicitly rejects the notion that judges might be able to recognize and enforce our community values: “Attaching the general possessive *our* to the word *community* makes a false claim of fact. At most judges can interpret ‘their’ community’s values.” MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 144 (1988). Michael McConnell, a prominent theorist of the New Right, echoes that sentiment: “Rather than natural right, judges are more likely to impose upon us the prejudices of their class.” Michael McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 105 (1988).

The historical juristic response to this failure of community was to narrow the focus of law and claim for it a scientific method and a detachment from politics. See FERGUSON, *supra* note 36, at 201; WHITE, *supra* note 7, at 110-11; Nelson, *supra* note 23, at 932-36. Linda Hirshman suggests that this response has failed, and points to the popular hostility to Judge Bork as evidence. Linda R. Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 186-87 (1988). She contends that the citizenry rejected the moral relativism of Bork’s narrow textualist view in favor of a value-based theory of law. *Id.* at 187. Her recommended cure for the modern judicial malaise, incidentally, is consistent with its nineteenth century cause: judges and lawyers should read literature. *Id.* at 231.

39. See Michael, *supra* note 8, at 442.

40. See *id.* at 448.

41. *Id.* at 455-57, 490.

42. See *infra* notes 65-340 and accompanying text.

*B. The Ninth Amendment*

Directly related to the question of unenumerated rights is the current debate over the original meaning of the Ninth Amendment. Long neglected by historians as well as lawyers,<sup>43</sup> the Ninth Amendment is enjoying something of a resurgence. Its command that “[t]he enumeration of certain rights . . . shall not be construed to deny or disparage others retained by the people”<sup>44</sup> invites a natural law reading. Indeed, many scholars have recently read it to incorporate into the Constitution protection for unenumerated or natural rights.<sup>45</sup>

Professor Thomas McAfee denies this interpretation, and suggests instead that the Ninth Amendment is a guarantee of both federalism and the limited nature of the federal government.<sup>46</sup> The “rights . . . retained by the people” are simply the “residual” rights that are left when a government of limited power is restricted to the exercise of its enumerated powers. Although Professor McAfee recognizes that his interpretation of the Ninth Amendment “provide[s] no clear verdict” on the question of whether the founding generation envisioned rights beyond those listed or referred to in the Constitution<sup>47</sup>—since natural rights would have existed even without the Ninth Amendment—he also suggests that the evidence he examines undercuts a natural rights thesis.<sup>48</sup> In particular, he denies that the enactment of the Ninth Amendment itself can be used to support a natural rights thesis, and offers further evidence from the ratification debates in opposition to a claim that there was a consensus in favor of unwritten rights.<sup>49</sup>

Professor McAfee’s fascinating review of American notions of “rights” and “powers” is a useful addition to the history of the period. His basic argument is that “rights” and “powers” were two sides of the same coin, and that either an enumeration of rights or

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43. David Currie has commented that the Amendment was “[o]verwhelmingly ignored for most of its history.” DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 48 (1985).

44. U.S. CONST. amend. IX.

45. See, e.g., *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 *HASTINGS L.J.* 305 (1987); Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 *WIS. L. REV.* 1229; Symposium, *Interpreting the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 37 (1988); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?* 100 *YALE L.J.* 1073 (1991).

46. McAfee, *supra* note 8, at 1225-27.

47. *Id.* at 1227.

48. *Id.* at 1318-19.

49. *Id.* at 1222-23, 1287-93.

an enumeration of powers served the same underlying purpose of confining the new federal government to strictly enforced limits.<sup>50</sup>

Unfortunately, Professor McAfee's narrow thesis does not support his more generalized rejection either of unenumerated rights or of the Ninth Amendment as a reference to such rights. He attempts to draw a distinction between "reserved" or "residual" rights and "unenumerated" rights by suggesting that the former were limits on enumerated powers rather than independent rights.<sup>51</sup> In either case, however, the consequence is that citizens were protected against governmental abuse of its enumerated powers. The label does not matter: if citizens were protected in ways beyond those specifically listed in the Constitution, judges enforcing that protection had to look beyond the written Constitution. Thus, Professor McAfee's concession that the Ninth Amendment was intended to protect "reserved" rights and limit the government's enumerated powers gives away the game.

Indeed, many of his arguments, although phrased as a challenge to the natural law interpretation of the historical background of the Ninth Amendment, support a natural rights reading of that Amendment. For example, he disputes construing certain Federalist ratification-era statements as implying that a bill of rights would be dangerous because of the inability to construct an exhaustive list of existing rights.<sup>52</sup> Instead, argues Professor McAfee, "the true Federalist concern was that enumeration would undermine the system of reserved rights,"<sup>53</sup> and that the Federalists "feared the elimination of the rights secured by the system of enumerated powers."<sup>54</sup> The rights that were "reserved" or "secured," however, were necessarily unenumerated prior to the Bill of Rights, and Professor McAfee's thesis is that the Ninth Amendment was designed to ensure that such "reserved" or "secured" rights remained unaffected by the enactment of the Bill of Rights.<sup>55</sup> Again, the label seems irrelevant: Professor McAfee would agree, I think, that there were unspecified rights (or unspecified limits on governmental powers) and that the Ninth Amendment was designed to guard against the possibility that later generations would read into the Bill of Rights an intent to codify all of those limits.

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50. *See id.* at 1261-65.

51. *See id.* at 1249-77.

52. *Id.* at 1249.

53. *Id.*

54. *Id.* at 1250.

55. *Id.* at 1317.

Moreover, Professor McAfee's argument fails in another way. A lynchpin of his thesis is that a bill of rights has a different meaning depending on whether it is applied to a government of general powers or a government of limited powers.<sup>56</sup> He suggests that the founders were concerned *only* about the implications of a listing of rights in the *federal* Constitution, and thus that there was no generalized "fear of an unintended positivist inference against implied rights," but rather a fear of "the evisceration of the residual rights secured by the limited grants of power."<sup>57</sup> If Professor McAfee were correct, we would not expect to find the equivalent of the Ninth Amendment in state constitutions because it would serve no purpose. In fact, however, twelve states that adopted sixteen different constitutions up to the time of the Civil War incorporated either the exact language of the Ninth Amendment or a close variation on it.<sup>58</sup> According to Professor McAfee's theory, there is no reason to incorporate language protecting "reserved" rights in the constitution

56. *Id.* at 1249-51.

57. *Id.* at 1254.

58. See ALA. CONST. of 1819, art. I, § 30, *reprinted in* 1 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 98 (Francis N. Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS]; ARK. CONST. of 1836, art. II, § 24, *reprinted in* 1 STATE CONSTITUTIONS, *supra*, at 270; CAL. CONST. of 1849, art. I, § 21, *reprinted in* 1 STATE CONSTITUTIONS, *supra*, at 392; IOWA CONST. of 1857, art. I, § 25, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 1139; IOWA CONST. of 1846, art. I, § 24, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 1125; KAN. CONST. of 1859, Bill of Rights, § 20, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 1243; KAN. CONST. of 1857, Bill of Rights, § 24, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 1217; KAN. CONST. of 1855, art. I, § 22, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 1181; KAN. CONST. of 1855, art. I, § 21, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 1224; ME. CONST. of 1819, art. I, § 24, *reprinted in* 3 STATE CONSTITUTIONS, *supra*, at 1649; MD. CONST. of 1851, Declaration of Rights, art. 42, *reprinted in* 3 STATE CONSTITUTIONS, *supra*, at 1716; MINN. CONST. of 1857, art. I, § 16, *reprinted in* 4 STATE CONSTITUTIONS, *supra*, at 1993; N.J. CONST. of 1844, art. I, § 21, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 2600; OHIO CONST. of 1851, art. I, § 20, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 2915; OR. CONST. of 1857, art. I, § 34, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 3000; R.I. CONST. of 1842, art. I, § 23, *reprinted in* 6 STATE CONSTITUTIONS, *supra*, at 3224.

Another 12 states incorporated similar language into their constitutions after the Civil War. ALA. CONST. of 1865, art. I, § 36, *reprinted in* 1 STATE CONSTITUTIONS, *supra*, at 119; ARK. CONST. of 1864, art. II, § 24, *reprinted in* 1 STATE CONSTITUTIONS, *supra*, at 291; COLO. CONST. of 1876, art. II, § 28, *reprinted in* 1 STATE CONSTITUTIONS, *supra*, at 478; GA. CONST. of 1865, art. I, § 21, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 811; IDAHO CONST. of 1889, art. I, § 21, *reprinted in* 2 STATE CONSTITUTIONS, *supra*, at 920; MISS. CONST. of 1868, art. I, § 32, 4 STATE CONSTITUTIONS, *supra*, at 2071; MONT. CONST. of 1889, art. III, § 30, *reprinted in* 4 STATE CONSTITUTIONS, *supra*, at 2305; NEB. CONST. of 1866, art. I, § 20, *reprinted in* 4 STATE CONSTITUTIONS, *supra*, at 2351; NEV. CONST. of 1864, art. I, § 20, *reprinted in* 4 STATE CONSTITUTIONS, *supra*, at 2404; N.C. CONST. of 1868, art. I, § 37, *reprinted in* 5 STATE CONSTITUTIONS, *supra*, at 2803; UTAH CONST. of 1895, art. I, § 25, *reprinted in* 6 STATE CONSTITUTIONS, *supra*, at 3704; WYO. CONST. of 1889, art. I, § 36, *reprinted in* 7 STATE CONSTITUTIONS, *supra*, at 4120.

of a general government, such as a state government.<sup>59</sup> Because both the state constitutions and the federal constitution contain such language strongly suggests that the language was put in to safeguard unwritten inalienable rights.<sup>60</sup>

## II. UNWRITTEN STATE CONSTITUTIONS

The foregoing arguments notwithstanding, much of the theoretical debate over the uses of natural law comes down to which interpretation of various writings and statements one favors. Neither Professor Michael nor Professor McAfee provides any evidence about the actual practices of courts during the period at issue. In my earlier article, I examined the role of natural law in state courts up to 1787 and federal courts thereafter.<sup>61</sup> In the remainder of this article I will examine the decisions of courts in four states from 1788 through the first several decades of the nineteenth century for evidence that extra-textual constitutional interpretation was common throughout the founding period.

Textualism provided an obviously incomplete description of fundamental law from the very beginning of the constitutional era because written declarations of rights afforded only partial protection to citizens of the new United States. The notion of a written declaration of rights, familiar to modern observers from the federal constitution and the justly celebrated declarations of rights in the Massachusetts, Virginia, and Pennsylvania constitutions, was not universal in the early republic. In the late eighteenth and early nineteenth centuries, approximately half the states had no separate declaration of rights appended to their constitutions.<sup>62</sup> Those states without bills of rights often incorporated some protection of individual rights into the structural portions of the written constitution, but the protections were usually minimal and were especially inadequate to deal with the phenomenal commercial growth of the early nineteenth century.

States without a declaration of rights are a particularly fruitful source for investigating the influence of unwritten law on judicial decisions. Nevertheless, it is important to examine the decisions of states with a bill of rights as well; otherwise the most that can be

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59. McAfee, *supra* note 8, at 1254.

60. For another critique of and response to Professor McAfee's arguments, see Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 638-40 (1991); Rosen, *supra* note 45, at 1075.

61. Sherry, *supra* note 1, at 1134-46, 1166-76.

62. Seven of the thirteen original states enacted separate bills or declarations of rights. By 1800, only eight of sixteen states had them.

demonstrated is that judges used unwritten law in the absence of more direct written guidance. The distinct possibility that the South's legal culture and development differed from that of the North<sup>63</sup> suggests a further point of comparison. Only a small number of states, however, had more than one or two reported constitutional decisions during this period. Thus I have limited my examination to four states: Virginia (a southern state with a bill of rights); Massachusetts (a northern state with a bill of rights); New York (a northern state without a bill of rights); and South Carolina (a southern state without a bill of rights).<sup>64</sup>

#### A. Virginia<sup>65</sup>

The Virginia Constitution of 1776 was one of the earliest state constitutions; the drafting process began prior to the Declaration of Independence. The constitution was drafted and adopted by a specially constituted committee of the Virginia House of Burgesses (the lower chamber of the legislature), without popular ratification. It remained in effect until 1830.

The 1776 Constitution, like those of several other states, included a long and detailed Bill of Rights that appeared to be memorializing unwritten rights rather than enacting new ones. This natural law heritage was reflected in the very first section of the Bill of Rights, which began by declaring that "all men are by nature equally free

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63. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 77 (1985).

64. I have omitted any cases dealing with the possible conflict between slavery and natural law. The extreme political sensitivity of the slavery issue—culminating in the Civil War—makes the courts' dealings with that issue unrepresentative of their treatment of natural law generally. Indeed, as William Nelson has suggested, the controversy over slavery may have significantly contributed to the ultimate decline of natural law in the courts. William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 513 (1974). Therefore, I chose to focus on more ordinary and less controversial judicial decisionmaking.

It is well-established that neither the Supreme Court nor most state courts used principles of natural justice to abolish slavery. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 159-74 (1975) (outlining legal attacks on fugitive slave law); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 46-69 (1981) (discussing Pennsylvania judicial treatment of slavery cases); WHITE, *supra* note 7, at 675-703 (discussing Supreme Court's treatment of slavery cases). It is possible, however, to read at least the Virginia court's failure to do so as a conflict between two natural rights rather than as a triumph of positive over natural law. For an elaboration of this idea, see Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297, 316-26 (1989).

65. A previous version of this section was published in Sherry, *supra* note 64, at 302-16.

and independent, and have certain inherent rights.”<sup>66</sup> Further evidence of the natural law influence on the 1776 Bill of Rights is found in some of its provisions that seem to reflect natural law precepts rather than injunctive limits on the government.<sup>67</sup> For example, section 15 states: “That no government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.”<sup>68</sup> Although the Virginia courts did occasionally refer to the admonition to recur to fundamental principles,<sup>69</sup> the remainder of section 15 does not appear to be directed at any particular governmental action. Language like this, scattered throughout the Virginia Bill of Rights, suggests again that the authors were merely committing to writing familiar ancient principles.

Some of the specific principles included a guarantee of freedom of the press and a right to jury trials, as well as religious toleration.<sup>70</sup> It is important to note, however, that the Virginia Bill of Rights included neither a prohibition against *ex post facto* or other retrospective laws nor a requirement of compensation when private property was taken for public purposes.<sup>71</sup> Nevertheless, Virginia judges in the early republic used unwritten or natural law to protect against both retrospective laws and uncompensated takings. Judges and lawyers also relied generally on unwritten natural law principles as much as on the written text, occasionally explicitly privileging the former over the latter.

The most suggestive endorsement of unwritten law is an 1809 retrospectivity case, *Currie’s Administrator v. Mutual Assurance Society*.<sup>72</sup> The legislature had incorporated an insurance company in 1794 and then had changed the charter in 1805.<sup>73</sup> Plaintiff was an insured whose risk had risen as a result of the later act, and he challenged it

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66. VA. CONST. of 1776, Bill of Rights, § 1, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 58, at 3813.

67. Robert Palmer made a similar observation about the 1776 Pennsylvania Declaration of Rights. Robert L. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 65-66 (William E. Nelson & Robert L. Palmer eds., 1987).

68. VA. CONST. of 1776, Bill of Rights, § 15, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 58, at 3814.

69. *See, e.g.*, The Case of the Judges, 8 Va. (4 Call) 135, 143 (1788). For a discussion of the case, see *infra* note 89-95 and accompanying text.

70. VA. CONST. of 1776, Bill of Rights, *reprinted in* 7 STATE CONSTITUTIONS, *supra* note 58, at 3812-14.

71. *See id.*

72. 14 Va. (4 Hen. & M.) 315 (1809).

73. *Id.*

as unconstitutionally retrospective.<sup>74</sup> The court upheld the 1805 statute: Judge Roane found that the act worked no injustice,<sup>75</sup> and Judge Fleming—in an opinion largely irrelevant to our concerns—that the original act reserved the right to change the charter.<sup>76</sup> Judge Roane, however, also delivered a stinging refutation of the defendant's attempt to limit the court to a textualist analysis.<sup>77</sup>

John Wickham,<sup>78</sup> counsel for the defendant, had argued that laws may be unjust, but still valid: "No doubt every government ought to keep in view the great principles of justice and moral right, but no authority is expressly given to the judiciary by the Constitution of *Virginia*, to declare a law void as being morally wrong or in violation of a contract."<sup>79</sup>

Judge Roane vehemently rejected that limit on the court's authority.<sup>80</sup> He wrote that the legislature's authority is limited "by the constitutions of the general and state governments; and limited also by considerations of *justice*."<sup>81</sup> He then directly denied the defendant's textualist assumption:

It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge *Blackstone* was scarcely hardy enough to contend for, under the doctrine of the boasted *omnipotence* of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?<sup>82</sup>

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74. *Id.* at 315-16.

75. *Id.* at 350.

76. *Id.* at 355 (Fleming, J., concurring).

77. *Id.* at 347-49.

78. John Wickham was a prominent Virginia lawyer who often collaborated with Edmund Randolph. In addition to the case in the text, Wickham and Randolph were co-counsel for the church parties in *Turpin v. Lockett*, 10 Va. (6 Call) 113 (1804), discussed *infra* at notes 118-131 and accompanying text. Their most famous collaborative effort was defending Aaron Burr. See DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809*, at 296, 310-11 (1974); JOHN J. REARDON, *EDMUND RANDOLPH: A BIOGRAPHY* 357-58 (1974); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR*, 267-68 (1966).

79. *Currie's Adm'r*, 14 Va. (4 Hen. & M.) at 341.

80. *Id.* at 347.

81. *Id.* at 346.

82. *Id.* at 346-47. Roane's (probably mistaken) insistence that even Blackstone would admit to natural justice limits on legislative power was strikingly similar to a statement by James Iredell over 20 years earlier: "Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as Parliament in Great Britain is held to be), and any act passed *not inconsistent with natural justice* (for that curb is vowed by judges even in England), would have been binding on the people."



Although he ultimately concluded that the statute did not deprive the plaintiff of any vested rights, Roane's outrage at the suggestion that he was confined to a textualist analysis is palpable.

Another fairly explicit reliance on unwritten natural law may be found in a 1793 case in the Virginia Court of Chancery. Chancellor George Wythe, an eminent Virginia jurist and the holder of the first Law Chair in the United States, decided in *Page v. Pendleton* that the Virginia legislature could not unilaterally discharge debts Virginians owed to British citizens.<sup>83</sup> He did so on the ground that a legislature could not bind one who was not a member of the society, because the requisite consent was lacking.<sup>84</sup>

In the course of his opinion, Wythe wrote several long footnotes explaining his holding. Two of these footnotes contained extensive discussions of natural law principles. To support his holding that "the right to money due to an enemy cannot be confiscated," Wythe explained in a footnote:

If this seem contrary to what is called authority, as perhaps it may seem to some men, the publisher of the opinion will be against the authority, when, in a question depending, like the present, on the law of nature, the authority is against reason, which is affirmed to be the case here.<sup>85</sup>

He then proceeded to explain why the "authority" was contrary to reason.

Later, in considering who might be bound by what laws, Wythe included an even more interesting footnote. He began:

The position in the sixth article of our bill of rights, namely, that men are not bound by laws to which they have not, by themselves, or by representatives of their election, assented, is not true of unwritten or common law, that is, of the law of nature, called common law, because it is common to all mankind. . . . They are laws which men, who did not ordain them, have not power to abrogate.<sup>86</sup>

He then explained how the disenfranchised and subsequent generations can nevertheless be held to have consented to the passage of positive laws in which they actually played no part.<sup>87</sup> Clearly, Wythe believed that fundamental law included natural, unwritten law,

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Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 172 (1857).

83. *Page v. Pendleton* (1793), in GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY 211, 213 (B.B. Minor ed. 1852).

84. *Id.* at 213-15.

85. *Id.* at 212 n.(b).

86. *Id.* at 216 n.(e).

87. *Id.* at 216 n.(e), 217.

although his ruling did not depend on much unwritten law. Nor is it important that Wythe was sitting in equity rather than in law, since his dicta were apparently meant more as treatise comments on law in general than as direct authority in the case before him.

These two cases are the most explicit examples of a pattern that began as early as 1788 and lasted for at least forty years. Virginia courts had been reviewing the validity of statutes since at least 1782, and perhaps earlier.<sup>88</sup> The reliance on natural law, however, was first apparent in 1788. In that year, the Virginia legislature passed an act directing sitting judges of the court of appeals to take on new duties as district court judges. No additional compensation was provided, and the judges argued that imposing additional duties without compensation was equivalent to a diminution of salary, and thus unconstitutional. Although no suit was instituted, the court of appeals nevertheless made its opinion known to the legislature. Four months after the act was passed, the judges delivered and sent to the legislature "The Respectful Remonstrance of the Court of Appeals."<sup>89</sup> In it, the judges declared an obligation to favor the written constitution over statutes inconsistent with it and found the 1788 act inconsistent.<sup>90</sup> Rather than invalidate the act, however, they simply refused to execute it and requested the legislature to repeal it.

Despite the overt references to the written constitution, the *Remonstrance* seemed to base its conclusions on both written and unwritten law. The *Remonstrance* first set out the facts, and then framed two questions: whether the 1788 act was unconstitutional, and if so, whether "it was their duty to declare that the act must yield to the

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88. See *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782). There have been persistent rumors of an earlier case, described by Thomas Jefferson in his reports of general court decisions prior to independence. *Robin v. Hardaway* (1772), in THOMAS JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA, FROM 1730 TO 1740 AND FROM 1768 TO 1772, 109, 113-18 (W.S. Hein 1981) (1829); see 1 HELEN T. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, 91-92 (Octagon Books 1968) (1926); COVER, *supra* note 64, at 19. No other record of this case exists, and Jefferson's report may be inaccurate. Moreover, although the plaintiffs, according to Jefferson, did contend that the statute at issue was void (as "contrary to natural right"), Jefferson's description suggests that the primary argument was that the statute had been repealed. *Robin v. Hardaway* (1772), in JEFFERSON, *supra*, at 109, 113-118. Later Virginia cases dealing with the same pair of statutes generally failed to cite *Robin* at all, suggesting that Jefferson's report may have been inaccurate. See, e.g., *Butt v. Rachel*, 18 Va. (4 Munf.) 209 (1813); *Pallas v. Hill*, 12 Va. (2 Hen. & M.) 149 (1807); *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (1806). The one case I am aware of that did cite *Robin* used it only to support the proposition that the earlier statute had been repealed. *Gregory v. Baugh*, 29 Va. (2 Leigh) 665, 681 (1831).

89. *The Case of the Judges*, 8 Va. (4 Call) 135, 141 (1788).

90. *Id.* at 145-46.

constitution.”<sup>91</sup> The judges began their analysis by noting that in “forming their judgment” on both questions “they had recourse to that article in the declaration of rights, that no free government, or the blessing of liberty can be preserved to any people but (among other things) by frequent recurrence to fundamental principles.”<sup>92</sup>

In discussing “fundamental principles” and their relationship to the constitution, the judges relied very clearly on unwritten law. They declared that “[t]he propriety and necessity of the independence of the judges is evident in reason and the nature of their office,” explaining that only an independent judiciary can mete out impartial justice to the rich and the poor, the government and the people.<sup>93</sup> Thus, the “fundamental principles” to which the constitution directed recurrence were the same principles of reason and justice that animated natural law doctrines. Moreover, although the *Remonstrance* later examined and relied upon specific provisions of the written constitution, it discussed “fundamental principles” first.<sup>94</sup>

One final aspect of the *Remonstrance* might confirm its natural law basis. Immediately after concluding that an independent judiciary is a fundamental principle, the judges considered “whether the people have secured, or departed from [this principle] in the constitution, or form of government.”<sup>95</sup> Because the *Remonstrance* ultimately concluded that the constitution did secure the independence of the judiciary, we cannot know what the judges might have done had they decided otherwise. The very asking of the question, however, tentatively suggests the possibility that the “fundamental principles” adverted to in the Bill of Rights (which, remember, merely declared ancient principles) were superior even to the written frame of government. It is quite possible that the judges were prepared to invalidate or ignore any part of the written constitution that directly conflicted with unwritten law.

Four years later, the Virginia court decided an actual case implicating the constitutionality of a statute. In *Turner v. Turner's Executor* the plaintiffs challenged the validity of a legislative enactment that changed the law of gifts of slaves, alleging that it was an unconstitutional *ex post facto* law.<sup>96</sup> Although President<sup>97</sup> Edmund Pendleton

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91. *Id.* at 141-42.

92. *Id.* at 142-43.

93. *Id.* at 143.

94. *Id.*

95. *Id.*

96. 8 Va. (4 Call) 234, 234-35 (1792).

97. In Virginia, President was the equivalent of Chief Justice.

ultimately upheld the law as prospective only, he suggested that a retrospective law would be invalid—despite the absence of any provision in the Virginia Constitution outlawing either *ex post facto* or retrospective laws.<sup>98</sup>

Pendleton noted that a law retrospectively affecting title to slaves would be “subject to every objection which lies to *ex post facto* laws, as it would destroy rights already acquired.”<sup>99</sup> The power to make such laws, he contended, was “oppressive and contrary to the principles of the constitution.”<sup>100</sup> Because the constitution did not contain any provision prohibiting retrospective laws,<sup>101</sup> Pendleton’s conclusion must rest either directly on unwritten principles of natural justice or on the integration of such principles into the “fundamental principles” language of the written constitution. The

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98. *Turner*, 8 Va. (4 Call) at 238. There was some debate during that time about the meaning of the term “*ex post facto*.” Some thought it referred only to retrospective criminal laws, and some believed that it encompassed retrospective civil laws as well. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 547, 640 (Adrienne Koch ed., 1966) (noting debates of Dickinson, August 29 and Mason, September 14). That dispute, however, is irrelevant to the discussion in the text; Virginia’s written constitution contained no bar to any type of retrospective law. See *supra* note 66-71 and accompanying text.

99. *Turner*, 8 Va. (4 Call) at 237.

100. *Id.* In 1797, an enterprising plaintiffs’ counsel acted upon Judge Pendleton’s suggestion that *ex post facto* laws were void, and added the idea that governmental taking of property required compensation. His arguments were to no avail: the court in *Carter v. Tyler* upheld a statute that converted all entailed estates into fee simple estates, thus depriving remaindermen of previously acquired contingent rights. 5 Va. (1 Call) 165, 186-87 (1797). Counsel for the plaintiff had argued primarily that the statute should not be construed to dock entails in existence prior to the passage of the act. *Id.* at 167. He also contended, however, although without much elaboration, that any other interpretation would render the act “unconstitutional and void; because it would be *ex post facto* in its operation, taking away private rights without any public necessity, and without making the injured parties any compensation for them.” *Id.* at 172. No authority was given for this proposition, nor could any textual support be provided. As noted, the Virginia Bill of Rights contained neither an *ex post facto* clause nor a just compensation clause. See *supra* note 70-71 and accompanying text.

Judge Pendleton construed the statute as operating retrospectively, but then did not discuss its constitutionality. *Carter*, 5 Va. (1 Call) at 187. This is especially puzzling since Pendleton had remarked during argument that “the defendant’s counsel are desired to confine themselves to the question, whether the act is void, as being unconstitutional.” *Id.* at 174. Defendant’s counsel apparently did not address the question, despite being enjoined to do so by the President. *Id.* at 174-79. Pendleton never returned to the question. See *id.* at 174-87. *Carter* therefore affords some support for the notion that lawyers used natural law principles in arguing cases, and no evidence at all on how courts received such arguments. In the early nineteenth century, however, and thus at least arguably in 1797, “arguments of counsel were regarded as themselves sources of law.” WHITE, *supra* note 7, at 291. Thus, counsel’s reliance on natural law in *Carter* provides some evidence that unwritten principles of natural law—whether or not incorporated into the written constitution—were considered dispositive.

101. See *supra* note 71 and accompanying text.

inference of direct reliance on natural law is perhaps stronger for two reasons. Pendleton did not cite the "fundamental principles" provision in *Turner*,<sup>102</sup> while in the *Remonstrance*, written only four years earlier (with Pendleton's participation), the judges did cite the "fundamental principles" provision.<sup>103</sup>

Moreover, Pendleton's own opinion in an 1802 case, *Elliot's Executor v. Lyell*, directly attributed the invalidity of retrospective laws to "natural justice."<sup>104</sup> *Lyell* involved a 1786 statute that changed the law of obligations as it related to joint obligors.<sup>105</sup> The question before the court was whether the statute applied to a contract entered into prior to the enactment of the statute.<sup>106</sup> Counsel for the appellant argued that a careful reading of the statute showed that the legislature had not intended the statute to apply to existing contracts.<sup>107</sup> He also contended that "perhaps" the legislature could not give the statute retrospective effect because it would then be acting in a judicial capacity by interpreting rather than making law.<sup>108</sup> This mingling of legislative and judicial functions would, he contended, violate the constitutional guarantee that the branches of government be kept distinct.<sup>109</sup> This oblique suggestion was the only argument the appellant made to suggest the invalidity of the statute; he relied primarily on the statutory construction arguments.<sup>110</sup> The opinion was unclear as to whether counsel was contending that the statute should be construed to make it constitutional, that the legislature could not have intended to enact an unconstitutional statute, or that the statute as enacted was unconstitutional. The statutory question was clearly thought to be more significant than the constitutional one.

Only Judge Roane, however, followed counsel's lead and confined himself to statutory interpretation. Noting that "[t]he question here is not whether the Legislature have power to pass a retrospective law,"<sup>111</sup> but whether they had done so, he concluded that the statute

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102. 8 Va. (4 Call) at 234-38.

103. *The Case of the Judges*, 8 Va. (4 Call) 135, 143 (1788).

104. 7 Va. (3 Call) 268, 285 (1802).

105. *Id.* at 269.

106. *Id.* at 277.

107. *Id.* at 272-73.

108. *Id.* at 274. Chancellor Kent of New York relied on the same argument a few years later to deny the validity of a retrospective law in *Dash v. Van Kleeck*, 7 Johns. 477, 508-09 (N.Y. Sup. Ct. 1811) (Kent, C.J., concurring). For a discussion of *Dash*, see *infra* notes 236-250 and accompanying text.

109. *Lyell*, 7 Va. (3 Call) at 274.

110. *Id.* at 274-75.

111. *Id.* at 277.

could not be read to have retrospective effect.<sup>112</sup> The other three judges agreed with his conclusion, but each indicated that the statutory interpretation was compelled by the fundamental principle against retrospective laws.

Judge Fleming held that the legislature could not be presumed to intend retrospective effect because “retrospective laws [are] odious in their nature.”<sup>113</sup> Moreover, he stated that construing the statute retrospectively, would “abolish the best established principles of justice.”<sup>114</sup> Similarly, Judge Lyons concluded that the legislature “ought not to be presumed to have willed injustice.”<sup>115</sup> He characterized retrospective laws as “unjust and improper” and “necessarily oppressive,” and noted that construing the law as retrospective in operation “would destroy the principles of natural justice.”<sup>116</sup> Both Fleming and Lyons thus avoided holding the law invalid, but did so under the canon that statutes should be construed so as to avoid doubts about their constitutionality. Although this does not demonstrate that either judge would have invalidated the statute if they could not construe it consistently with natural justice, it does suggest a strong relationship between unwritten law and judicial review.

Judge Pendleton, who had been hinting since 1782 that judges might strike down unconstitutional laws,<sup>117</sup> and who wrote an opinion invalidating a state statute only a year after *Lyell*,<sup>118</sup> took a rather disingenuous approach. He first declared that retrospective laws were “against the principles of natural justice”<sup>119</sup> and then deliberately avoided the consequences of that conclusion. Fleming and Lyons relied on natural law to guide their interpretation of the statute, thus suggesting that fundamental law—written or unwritten—does serve as a constraint on the legislature. After concluding that retrospective laws were invalid, however, Pendleton merely stated that he was “not obliged to give an opinion” on whether the judiciary might void an invalid act, and then proceeded to give what appeared to be an interpretation of the statute entirely unconstrained by any exter-

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112. *Id.* at 280.

113. *Id.* at 282 (Fleming, J., concurring).

114. *Id.* (Fleming, J., concurring).

115. *Id.* at 284 (Lyons, J., concurring).

116. *Id.* at 283 (Lyons, J., concurring).

117. See *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 17-18 (1782) (Pendleton, Pres., concurring).

118. Pendleton wrote an opinion in *Turpin v. Lockett* invalidating a Virginia statute requiring the sale of church lands, but he died the day before it was to be delivered. 10 Va. (6 Call) 113, 187 (1804); 2 DAVID J. MAYS, EDMUND PENDLETON, 1721-1803: A BIOGRAPHY 345 (1952).

119. *Lyell*, 7 Va. (3 Call) at 285 (Pendleton, Pres., concurring).

nal principles.<sup>120</sup> He thus again warmed his readers to the idea of judicial review; he virtually announced that he would invalidate a retrospective law; and he made it appear as if his interpretation of the statute as prospective was forced only by the words of the statute itself—thus proclaiming his intentions without having to act on them even to the extent that Lyons and Fleming did. Nevertheless, Pendleton's beliefs are clear: retrospective statutes are against natural justice and thus invalid. Pendleton further confirmed his adherence to the natural law tradition of his time by explaining the relevance of the Contract Clause of the federal Constitution: "although that [clause] is subsequent to the present act, I consider it as declaring a principle which always existed."<sup>121</sup>

Pendleton's fidelity to unwritten law as a significant source of higher law enforceable by the court was apparently carried on by his immediate successor, St. George Tucker (although to somewhat different effect). *Turpin v. Locket*<sup>122</sup> was argued in 1803 and the decision was to be announced on October 26 of that year. Had events not intervened, the court would have held three to one that a Virginia statute confiscating church glebe lands was unconstitutional. Judge Pendleton had already written an opinion invalidating the law, and Judges Carrington and Lyons agreed with him.<sup>123</sup> But Judge Pendleton died the night before he was to deliver his opinion, and Judge Tucker was appointed to replace him. The case was reargued and in 1804 Tucker's support of the law led to a tie vote, thus affirming Chancellor Wythe's refusal to enjoin the confiscation.<sup>124</sup>

Judge Roane found that the church had no vested right in the property and voted to affirm.<sup>125</sup> Judges Carrington and Lyons, in a brief joint opinion, found the confiscation law unconstitutional without much elaboration.<sup>126</sup> Judge Tucker, whose vote changed the original outcome, delivered a detailed opinion examining the church's rights in the property.<sup>127</sup> He found that the church lacked any vested right in the property, and that earlier statutes awarding church ministers the monies from glebe lands probably violated various specific sections of the written bill of rights.<sup>128</sup>

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120. *Id.* at 285-86 (Pendleton, Pres., concurring).

121. *Id.* at 285 (Pendleton, Pres., concurring).

122. 10 Va. (6 Call) at 187.

123. *See supra* note 118.

124. *Turpin*, 10 Va. (6 Call) at 186-87 (Carrington, J., and Lyons, Pres., dissenting).

125. *Id.* at 177-78 (Roane, J., concurring).

126. *Id.* at 186 (Carrington, J., and Lyons, Pres., dissenting).

127. *Id.* at 128-57.

128. *Id.* at 155-57.

He also noted, however, that any *incumbent* ministers, whom he later held did not exist, had acquired “a legal right” and also “a moral right” to the enjoyment of their estates.<sup>129</sup> “So far as any act of the legislature has operated for [the] purpose [of protecting those rights],” he wrote, “it may be considered as pursuing the injunctions of moral justice, and the first article of our bill of rights.”<sup>130</sup> Moreover, this was not an isolated reference to moral rights. Earlier in his opinion, Judge Tucker set out the procedure for dealing with conflicting state statutes: “If they cannot be reconciled to each other, it will be our duty to pronounce those to be valid, which are most easily reconcileable to the dictates of moral justice, and the principles of the constitution of this commonwealth.”<sup>131</sup> Thus Judge Tucker thrice coupled morality with positive law, suggesting either that moral rights were an additional source of fundamental law, or that the constitution necessarily reflected moral justice. Despite an apparent setback in the protection of what Pendleton might have considered natural rights, at least some judges continued to adhere to the doctrine of natural rights.

In two cases during this period, the Virginia court referred to natural law principles governing emigration. In both cases, the emigration question was peripheral, but the court’s language was nonetheless consistent with the unwritten rights analysis in the cases discussed so far. In 1811 in *Murray v. McCarty*, the court held, following Grotius, that emigration “is one of those ‘inherent rights, of which, when [persons] enter into a state of society, they cannot, by any compact, deprive or divest their posterity.’ ”<sup>132</sup> The court expanded on this principle in 1829, in *Hunter v. Fulcher*, noting that when a citizen of one state moves to another and subjects himself to the latter’s laws, he becomes a citizen of the latter “upon the principles of natural law, and the spirit of our institutions.”<sup>133</sup>

If the previously noted *Remonstrance* suggests that the Virginia court was influenced by natural law as early as 1788, *Crenshaw v. Slate River Co.*<sup>134</sup> demonstrates that the influence was still strong forty years later. Plaintiffs, who claimed river rights under a 1726 state grant, challenged an 1819 law requiring them to build and maintain locks to make the river navigable.<sup>135</sup> The court unanimously held

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129. *Id.* at 152.

130. *Id.*

131. *Id.* at 150 (Tucker, J., concurring).

132. 16 Va. (2 Munf.) 393, 397 (1811); see also *id.* at 405 (holding right of emigration is “of paramount authority, bestowed on us by the God of Nature.”).

133. 28 Va. (1 Leigh) 172, 181 (1829).

134. 27 Va. (6 Rand.) 245, 265 (1828).

135. *Id.* at 246-48.



that the plaintiffs held vested rights in their property, and that they could not be deprived of those rights without compensation.<sup>136</sup>

Recall that the Virginia Constitution of 1776, which was still in effect in 1828, contained no just compensation clause, and in fact provided only that persons could not be “deprived of their property for public uses, without their own consent, or that of their representatives so elected.”<sup>137</sup> Because the 1819 act was duly passed by the Virginia legislature, that clause was of no avail. Judge Green, with little elaboration, relied instead on Article 1 of the 1776 Bill of Rights, which protected the rights of “possessing property” and “enjoying liberty.”<sup>138</sup> The other judges apparently relied on unwritten law.

Judge Carr stated that the principle of compensation was “laid down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country.”<sup>139</sup> Although he never discussed the written constitution, he concluded that “whether we judge this law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void.”<sup>140</sup> Judge Coalter held that compensation was required, without citing any authority, whether written or unwritten.<sup>141</sup> Judge Cabell simply stated that he concurred with all the other judges.<sup>142</sup>

As in both the federal cases and the pre-1787 state cases, the Virginia courts did not depend entirely on unwritten natural law. In 1793, in *Kemper v. Hawkins*, the court relied exclusively on the written constitution to invalidate a statute giving district court judges equitable jurisdiction and powers.<sup>143</sup> All five judges held that the district judges had not been properly appointed to the chancery court as required by the constitution, and thus that they could not constitutionally exercise equitable jurisdiction.<sup>144</sup> All of the opinions are conspicuously textualist.

Several judges examined minutely the portion of the written constitution setting out the frame of government. Judge Nelson and Judge Tyler discussed judicial review in terms making clear that they

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136. *Id.* at 264-65.

137. VA. CONST. of 1776, Bill of Rights, § 6, reprinted in 7 STATE CONSTITUTIONS, *supra* note 58, at 3813.

138. *Crenshaw*, 27 Va. (6 Rand.) at 276 (Green, J., concurring).

139. *Id.* at 265.

140. *Id.*

141. *Id.* at 283 (Coalter, J., concurring).

142. *Id.* at 284 (Cabell, J., concurring).

143. 3 Va. (1 Va. Cas.) 20, 34-35 (1793).

144. *Id.*; *id.* at 42 (Roane, J., concurring); *id.* at 53 (Henry, J., concurring); *id.* at 64 (Tyler, J., concurring); *id.* at 97 (Tucker, J., concurring).

envisioned the written constitution as the fundamental law animating judicial review of statutes.<sup>145</sup> Judge Roane defined fundamental principles as:

those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but not the letter of the Constitution.<sup>146</sup>

Judge Tucker distinguished pre-Revolutionary America from Virginia under its written constitution. In the former, “[w]hat the constitution of any country was or rather was supposed to be, could only be collected from what the government had at any time done.”<sup>147</sup> In these more enlightened times, however, “the constitution is not ‘an ideal thing, but a real existence: it can be produced in a visible form:’ its principles can be ascertained from the living letter, not from obscure reasoning or deduction only.”<sup>148</sup>

*Kemper*, like the Virginia case of *Commonwealth v. Caton*<sup>149</sup> eleven years earlier, raised a pure structure of government question. Individual rights were not at stake. As in *Caton*, the judges in *Kemper* were surely aware of this: except for two offhand references to the bill of rights, the only part of the written constitution on which the judges relied was the structural portion, denominated “the constitution or form of government.”<sup>150</sup> This failure to import natural law into a decision on the structure of government is consistent with the pattern noted earlier. Unwritten law might define natural rights, but the particular form of government depended primarily or exclusively on the written constitution.<sup>151</sup>

The pattern in early republican Virginia is thus similar to the pattern in the pre-1787 state cases and in the federal cases at least up through the 1820s. Except for some clear governmental powers decisions, judges and lawyers resorted to unwritten law as well as to the written constitution. This provides some confirmation that unwritten law—including principles of natural justice—constituted an

145. *Id.* at 30-32, 61-62 (Tyler J., concurring).

146. *Id.* at 40 (Roane, J., concurring).

147. *Id.* at 78 (Tucker, J., concurring).

148. *Id.* (Tucker, J., concurring).

149. 8 Va. (4 Call) 5 (1782).

150. *Kemper*, 3 Va. (1 Va. Cas.) at 24.

151. See also *Case of the County Levy*, 9 Va. (5 Call) 139, 142 (date unknown) (interpreting the written text to allow courts as well as legislatures to assess levies to support courthouses, prisons, and like causes). For a discussion of the use of the written constitution primarily to resolve structure of government questions see Sherry, *supra* note 1, at 1143-45, 1169, 1173-74.

important source of the fundamental law by which positive enactments might be measured.<sup>152</sup>

### B. Massachusetts

The Massachusetts Constitution of 1780, as amended, is still effective today.<sup>153</sup> It contains an extensive Declaration of Rights followed by a Frame of Government.<sup>154</sup> The Declaration of Rights includes thirty separate articles, protecting everything from religious freedom to free elections to the right to instruct representatives.<sup>155</sup> Unlike the early Virginia constitution, the Massachusetts Constitution explicitly provides for compensation when private property is taken for public use (Article X), and prohibits *ex post facto* criminal laws (Article XXIV).<sup>156</sup> The very first article of the Massachusetts Declaration of Rights reflects its natural law heritage: "All men are born free and equal, and have certain natural, essential, and inalienable rights."<sup>157</sup>

Despite this extensive textual protection of individual rights, the Massachusetts courts also resorted to unwritten natural law in many cases. The most common constitutional question raised during the early eighteenth century was the validity of various laws that the challengers characterized as retrospective. Takings, whether compensated or not, do not appear to have figured prominently in early

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152. Two cases involving fines suggest that the early Virginia courts subscribed to the related idea that natural rights and written rights were coterminous. In *Jones v. Commonwealth*, the court overturned the imposition of joint fines on several defendants. 5 Va. (1 Call) 554, 557 (1799). Judge Roane noted that the principle against joint fines was "fortified not only by the principles of natural justice, . . . but, also, by the clause of the Bill of Rights, prohibiting excessive fines." *Id.* at 556. Judge Carrington held that the fines were invalid, "whether I consider the case upon principle, the doctrines of the common law, or the spirit of the Bill of Rights." *Id.* at 559 (Carrington, J., concurring). Judge Pendleton dissented, distinguishing the common law cases and not mentioning the written constitution. *Id.* at 559-60 (Pendleton, Pres., dissenting). In *Bullock v. Goodall*, two years later, however, Pendleton revealed his sympathy with his brethren's equivalence of the written and unwritten law. 7 Va. (3 Call) 44, 50 (1801). In overturning a fine, he wrote that it was "superlatively excessive, unconstitutional, oppressive, and against conscience." *Id.* at 49.

153. The 1780 Constitution has been amended, and in 1916 it was "rearranged." The Supreme Judicial Court, however, has held that any substantive changes in the 1916 rearrangement are ineffective: only the 1780 Constitution and its amendments are the fundamental law of Massachusetts. *Loring v. Young*, 132 N.E. 65, 76 (Mass. 1921).

154. MASS. CONST. of 1780, pts. I, II, reprinted in 3 STATE CONSTITUTIONS, *supra* note 58, at 1889, 1893.

155. MASS. CONST. of 1780, pt. I, art. I-XXX, reprinted in 3 STATE CONSTITUTIONS, *supra* note 58, at 1889-93.

156. MASS. CONST. of 1780, pt. I, art. X, XXIV, reprinted in 3 STATE CONSTITUTIONS, *supra* note 58, at 1891, 1892.

157. MASS. CONST. of 1780, pt. I, reprinted in 3 STATE CONSTITUTIONS, *supra* note 58, at 1889.

Massachusetts legal history. Whether this is due to the explicit provision in the Massachusetts Constitution, or to the long-established practice in that state of paying compensation,<sup>158</sup> we do not know.

Several textual or quasi-textual avenues were available to those who challenged retrospective laws. The *ex post facto* clauses in both the state and federal constitutions were often discussed; even though the clauses were confined to criminal laws, lawyers and judges might sometimes extend the principle to civil laws. The Contract Clause of the United States Constitution<sup>159</sup> was often held to prohibit retrospective civil laws. In fact, in the Massachusetts cases, most lawyers raised, and most judges considered, all of these arguments. They also often considered natural rights arguments.

In 1799, in *Derby v. Blake*,<sup>160</sup> the Massachusetts Supreme Judicial Court considered the validity of the same Georgia statute that was eventually overturned by the United States Supreme Court in *Fletcher v. Peck*.<sup>161</sup> In the course of deciding an action on a promissory note used to purchase some of the disputed Georgia land, the Massachusetts court held that the Georgia repealer statute was void.<sup>162</sup> The court apparently made its decision on the basis of both written and unwritten law, and considered the unwritten law first. The reporter stated that the court considered the repealer act "a mere nullity—as a flagrant, outrageous violation of the first and fundamental principles of social compacts."<sup>163</sup> Presaging Justice Marshall's protestations, the court then noted that "[t]he vociferations of the Georgia Legislature . . . about fraud and circumvention, could not be admitted in a Judiciary of *Massachusetts*, as evidence of the real

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158. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63 (1977); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 695 & n.5 (1985).

159. U.S. CONST. art. I, § 10, cl. 8.

160. The case was not officially reported, but was described in a newspaper article that was later published at 226 *Mass.* 618 (1917).

161. *Id.* at 621.

162. *Id.* at 624. According to the newspaper report, the jury found for the plaintiff, who had argued that the Georgia law was void. *Id.* at 625. No reasons were given. *Id.* It is not clear what the judges decided, as the newspaper report purportedly described only the facts and the arguments of counsel. *Id.* at 622, 624-25. The description of the plaintiff's argument, however, began: "But on the other hand, Mr. Lowell, for the plaintiff contended, and was supported by the *clear and decided opinion of the Court* . . ." *Id.* at 624. Later in the plaintiff's argument the reporter noted that "[i]t was also decidedly the *opinion of the Court* that . . ." *Id.* Finally, the reporter noted that "the Court expressed a clear and decided opinion" that title passed with the original grant. *Id.* at 624-25. In the text, I have described these passages by attributing them to the court.

163. *Id.* at 624.

existence of such facts.”<sup>164</sup> Only then did the court turn to the textual basis for its decision, almost as an afterthought: “The Repealing Act of *Georgia* was moreover declared void, because it was considered directly repugnant to Article 1st. Sec. 10, of the United States Constitution . . . .”<sup>165</sup> Thus, despite its finding of a clear textual provision invalidating the statute at issue, the Massachusetts court in 1799 relied in part—perhaps in greater part—on natural law principles.<sup>166</sup>

In 1815, in *Portland Bank v. Apthorp*, the Massachusetts court rejected a challenge to a retrospective law without very much detailed discussion of either constitutional or natural law limitations.<sup>167</sup> Most of the opinion involved an analysis of the constitutional provision granting the legislature power to impose general taxes, and thus fits the pre-1789 pattern. Several statements in the opinion, however, confirm the standing of unwritten natural rights as a limit on legislative power.

The law challenged in *Apthorp* imposed a tax on banks and was challenged by a bank whose charter pre-dated the statute.<sup>168</sup> Chief Judge Parker described the court’s task as determining whether the statute conflicted with “the general principles, or any positive provisions of the constitution.”<sup>169</sup> He concluded that it did not, but rather that it was consistent “with that instrument, with the rights of the corporation which complains, and with the usages and practise of the country under the constitution.”<sup>170</sup> This tripartite measure of conformity suggests both that the corporation’s rights might be independent from those granted by the constitution, and that “usages and practise” can determine the content of fundamental law. Both these inferences are fully consistent with the cases and theories I have already discussed.

The court’s discussion of the significance of unbroken practice is also interesting. After noting that it was “unsafe generally” to infer governmental power from governmental practice, Judge Parker declared the inference valid “in questions touching the powers of government under a written constitution, not affecting the essential

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164. *Id.*

165. *Id.*

166. *Id.* *Derby* may be explained partly on the ground that it involved a refusal to enforce a foreign (non-Massachusetts) statute. Nevertheless, the case’s natural law language is suggestive.

167. 12 Mass. 252, 258 (1815).

168. *Id.* at 253.

169. *Id.* at 254.

170. *Id.*

rights of the citizen.”<sup>171</sup> Again, this strongly suggests that there are rights beyond those listed in the written constitution, and also confirms the distinction noted earlier between governmental powers questions and individual rights questions. The court ultimately concluded that in incorporating the bank and granting it a charter, the legislature implicitly reserved future rights to tax the bank, and the new law was thus not retrospective.<sup>172</sup>

Judge Parker reached a similar conclusion with regard to another banking statute four years later in *Foster v. Essex Bank*.<sup>173</sup> The statute challenged in *Foster* required banks and other corporations to continue in corporate status for three years after the expiration of their charters, to wind up business and prosecute and defend suits.<sup>174</sup> As in *Apthorp*, it was challenged as retrospective by a bank whose charter pre-dated the act.<sup>175</sup> The court upheld the statute on the ground that it was “not retrospective in the proper sense of that term,” because it did not “infringe or interfere with any of the privileges secured by the charter.”<sup>176</sup>

Before reaching that conclusion, however, Judge Parker indulged in a long dissertation on the nature of fundamental law. He began by stating the basic principle of judicial review, that laws that “manifestly infringe some of the provisions of the constitution, or violate the rights of the subject” must be invalidated by the judiciary.<sup>177</sup> As an example of the first type of statute, he cited a legislative declaration that a citizen was guilty of treason.<sup>178</sup> The Massachusetts Declaration of Rights (article XXV) specifically provides that “no subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.”<sup>179</sup>

Judge Parker’s second amplification of the basic principle of judicial review is more interesting for our purposes. He described acts “destroy[ing] or impair[ing] the legal force of contracts” by discharging debtors or allowing them to pay a lesser or different amount.<sup>180</sup> “[S]uch acts,” he continued, “would be unconstitu-

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171. *Id.* at 257.

172. *Id.* at 258.

173. 16 Mass. 245, 274 (1819).

174. *Id.* at 246.

175. *Id.* at 247.

176. *Id.* at 272-73.

177. *Id.* at 270.

178. *Id.*

179. MASS. CONST. of 1780, pt. I, art. XXV, reprinted in 3 STATE CONSTITUTIONS, *supra* note 58, at 1892. Judge Parker in fact did not cite this or any other written constitutional provision, but the congruence between his hypothetical and article XXV is too striking to admit any other conclusion. See *Foster*, 16 Mass. at 270.

180. *Foster*, 16 Mass. at 270-71.

tional, although not expressly prohibited; because, by the fundamental principles of legislation, the law must operate prospectively only."<sup>181</sup> He thus illustrated the difference between the two types of invalid statutes described at the beginning of his opinion: those inconsistent with the written constitution, and those inconsistent with unwritten fundamental principles. Both types were to be invalidated by the judiciary.

An examination of counsel's arguments in *Foster* further confirms the common use of natural law during this period. Counsel for the bank argued that "[r]etrospective laws are repugnant to natural justice."<sup>182</sup> Counsel for the plaintiff suggested the particularized nature of natural law: "different societies of men, where the written constitution is silent, will have more or fewer implied exceptions to the general principle, according to the habits, laws, and usages, which they may have derived from their ancestors."<sup>183</sup> He argued a little later that limitations on the power of enacting retrospective laws "must be learned from the habits and principles of the particular people who compose any such community."<sup>184</sup>

The early history of Massachusetts decisions on retrospective laws thus provides evidence that even in states with a written bill of rights, the court frequently turned to unwritten law as well. Two other cases during this period, not involving retrospective laws, also exhibited a reliance on natural law.

*Holden v. James*, decided in 1814, invalidated a statute purporting to extend the statute of limitations in a particular case only.<sup>185</sup> Judge Jackson decided that although the written constitution gave the legislature the power to suspend laws, the provision was originally meant as a *limitation* on royal power, and therefore should not be interpreted "to bestow, by implication, on the general court one of the most odious and oppressive prerogatives of the ancient kings of England."<sup>186</sup>

Having disposed of the argument that the written constitution specifically authorized the law in question, Judge Jackson turned to whether the law was prohibited. He did not even look at the written bill of rights, although it contained an arguably relevant provision (Article VI) that prohibited the granting of "particular and exclusive privileges." Instead he wrote: "It is manifestly contrary to the first

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181. *Id.* at 271.

182. *Id.* at 252.

183. *Id.* at 257.

184. *Id.* at 262.

185. 11 Mass. 396, 406 (1814).

186. *Id.* at 404-05.

principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages, which are denied to all others under like circumstances."<sup>187</sup> He therefore held the plaintiff's suit was barred under the ordinary statute of limitations.<sup>188</sup>

In the 1817 case of *Wetherbee v. Johnson*, customs officers who had lost a trespass action against them in the state trial court attempted to appeal to the United States Circuit Court under a federal statute authorizing such appeals in cases involving customs officers.<sup>189</sup> The Massachusetts Supreme Judicial Court denied the right of appeal, on textual grounds, although counsel opposing the appeal had made both textual and natural law arguments.<sup>190</sup>

Counsel argued that the federal statute violated the United States Constitution in two particulars: the case was beyond the scope of federal jurisdiction as specified in Article III, and the appeal would allow a fact tried to a jury to be re-examined in contravention to the Seventh Amendment.<sup>191</sup> He also argued, however, that the statute "interfere[d] with the private rights of citizens," and was "in derogation of the common rights of the citizens."<sup>192</sup> Chief Judge Parker's opinion for the court rested on yet another ground: that the distinctions set up in Article III between the Supreme Court and inferior courts meant that "none but the Supreme Court of the United States could entertain jurisdiction by way of appeal, from the judgments of the state courts."<sup>193</sup> *Wetherbee* thus offers only very tentative support for the use of natural law principles during the period, but counsel's argument is at least suggestive.<sup>194</sup>

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187. *Id.* at 405.

188. *Id.* at 406.

189. 14 Mass. 412, 413 (1817).

190. *Id.* at 421. Why the Massachusetts court had jurisdiction over the issue was unclear.

191. *Id.* at 413-14.

192. *Id.* at 414.

193. *Id.* at 419.

194. *Wetherbee* is also interesting for the light it sheds on a contemporaneous legal dispute. Judge Parker noted that the federal statute provided two alternative methods of bringing federal questions before the federal courts: removal to a circuit court from state court, or appeal to the United States Supreme Court after judgment in the state court. *Id.* at 416-17. The first alternative, he stated, was constitutional, and would have saved "much doubt and difficulty" had it been the only method. *Id.* at 417. As to the appeal to the Supreme Court, however, he noted that it "has been a question of much doubt and argument: and the power claimed by the Supreme Court of the United States, under this section of the law, has been denied by the highest court of law in *Virginia*." *Id.* Although he concluded that it was unnecessary for him to decide "whether the court of the United States, or the court of *Virginia*, are right on this important question," he devoted a short paragraph to justifying the actions of the Virginia court. *Id.* at 417-18.



During the first two decades of the nineteenth century, the Massachusetts court also decided two retrospectivity cases without looking to unwritten law. In *Call v. Hagger* in 1812, the court held that a retrospective shortening of the statute of limitations would not violate the Contract Clause of the federal Constitution, although for unspecified reasons it construed the statute at issue as purely prospective in nature.<sup>195</sup> The one page opinion contained no reference to natural law, and virtually no textual analysis. In *Blanchard v. Russell* in 1816, the court held that a retrospective insolvency law would violate the Contract Clause, but concluded that the statute at issue was enacted prior to the debt arising between the parties.<sup>196</sup>

In both cases, the interpretation of either the facts or the statute eliminated the need to reach the question of the validity of the statute, although in both cases the court did so.<sup>197</sup> There is no indication in either opinion—contrary to the tenor of many of the contemporaneous cases—that the court felt constrained to construe the statute so as to make it constitutional. The tone of the opinion in each case suggests that the dictum was almost a boilerplate acknowledgement of counsel's constitutional arguments, without any real sympathy for the principles.<sup>198</sup> Even if these two cases represent a purely textualist approach, moreover, it is clear from the examination of the other cases that as late as 1819, the use of natural law was at least as common in Massachusetts as the use of pure textualism—and probably more so.<sup>199</sup>

Indeed, Massachusetts Chief Justice Lemuel Shaw apparently adhered to natural law principles as late as 1827, when he delivered a speech to the Suffolk County Bar. In that speech, he noted that “no law can stand the test of strict inquiry which palpably violates the dictates of natural justice.”<sup>200</sup> He also explained the unique nature of constitutional law—“a title hardly known in any other system of

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195. 8 Mass. 423, 430 (1812).

196. 13 Mass. 1, 15-17 (1816).

197. *Blanchard*, 13 Mass. at 16; *Call*, 8 Mass. at 430.

198. *Blanchard*, 13 Mass. at 12-13; *Call*, 8 Mass. at 430.

199. Between 1813 and 1817, the Massachusetts Supreme Judicial Court also decided a series of cases interpreting the constitutional language regarding qualifications of electors. See *Bridge v. Lincoln*, 14 Mass. 367, 372-74 (1817); *Williams v. Whiting*, 11 Mass. 424, 432-35 (1814); *Putnam v. Johnson*, 10 Mass. 488, 502 (1813). In those cases, the real issue was whether the social compact granted to particular individuals the right to vote. *Bridge*, 14 Mass. at 372-73; *Williams*, 11 Mass. at 432-35; *Putnam*, 10 Mass. at 502. Thus, the court used common law principles to elucidate the meaning of the constitutional language, but did not refer to natural law. See CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860*, at 168, 198 (1960).

200. Lemuel Shaw, *Profession of the Law in the United States*, 7 *AM. JURIST & L.* 56, 68 (1932).

jurisprudence”—as involving questions of “the principles of social duty [and] of natural and conventional obligation” and requiring “a thorough and intimate acquaintance with the philosophy of the mind.”<sup>201</sup> This suggests that one of the most influential jurists in Massachusetts thought that judges ought to look beyond the written constitution when determining the validity of legislative enactments, and confirms the pervasiveness of natural law ideas.

### C. New York

The earliest New York constitution lacked a separate bill of rights.<sup>202</sup> Indeed, the 1777 New York Constitution accorded individual rights very little protection. The 1777 New York Constitution, in effect until 1821, contained a “law of the land” clause, but one that was quite limited: it protected only against disenfranchisement or deprivation of “the rights or privileges secured to the subjects of this State by this constitution.”<sup>203</sup> The rights actually secured by the constitution were also limited: there was a provision guaranteeing jury trials and prohibiting bills of attainder,<sup>204</sup> and a religious toleration clause.<sup>205</sup> These minimal individual rights provisions were fully integrated into the body of the constitution.<sup>206</sup> The reason for New York’s failure to include a detailed bill of rights was similar to the objections raised against a federal bill of rights: according to a New York court, “[t]he enumeration was designedly omitted, because unnecessary, and tending to weaken, if not endanger those unnoticed.”<sup>207</sup>

In 1821, New York enacted a new constitution. Better organized and more detailed than the 1777 Constitution, the new constitution also afforded greater protection of individual rights. Criminal defendants gained many of the rights listed in the Fifth Amendment to the United States Constitution.<sup>208</sup> Suspension of habeas corpus was

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201. *Id.* at 64.

202. N.Y. CONST. of 1777, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2623-38.

203. N.Y. CONST. of 1777, § XIII, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2632.

204. N.Y. CONST. of 1777, § XLI, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2637.

205. N.Y. CONST. of 1777, § XXXVIII, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2636-37.

206. N.Y. CONST. of 1777, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2632, 2636-37.

207. *People v. Morris*, 13 Wend. 325, 328 (N.Y. Sup. Ct. 1835).

208. N.Y. CONST. of 1821, art. VII, § 7, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2648.

prohibited except where necessary because of rebellion.<sup>209</sup> A provision guaranteeing freedom of speech was added.<sup>210</sup> Finally, and most important, the 1821 New York Constitution provided that “[no person shall be] deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.”<sup>211</sup> Thus, it was not until 1821 that New York’s written constitution required compensation for public takings. Moreover, the limited nature of New York’s “law of the land” clause suggests that there was no written protection of private property at all until 1821.

As in other states, however, the New York courts used unwritten natural law to protect individual rights—especially property rights—from state infringement. In particular, a series of three cases established compensation for the taking of private property as an unwritten right, enforceable despite the absence of a written constitutional provision.

In 1816, Chancellor James Kent used the eighteenth century language of natural rights and fundamental principles to prohibit the village of Newburgh from diverting a stream without paying compensation to a downstream owner.<sup>212</sup> The Chancellor held, in *Gardner v. Village of Newburgh*, that “to render the exercise of the power [to take private property for public purposes] valid, a fair compensation must, in all cases, be previously made to the individuals affected.”<sup>213</sup> Because no constitutional or statutory provision supported this principle, Kent cited Grotius, Pufendorf, “natural equity,” and the “deep and universal sense of [the principle’s] justice,” which led “all temperate and civilized governments” to adopt it.<sup>214</sup> To deprive an owner of his property without compensation, he said, “would be unjust, and contrary to the first principles of government.”<sup>215</sup> The absence of written protection of this fundamental right did not, for Kent, make it any less fundamental or enforceable.

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209. N.Y. CONST. of 1821, art. VII, § 6, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2648.

210. N.Y. CONST. of 1821, art. VII, § 8, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2648.

211. N.Y. CONST. of 1821, art. VII, § 7, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2648.

212. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 167-68 (N.Y. Ch. 1816). In his 1826 *Commentaries*, Kent similarly noted that certain rights (including the right to enjoy property) “have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable.” 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (Charles M. Barnes ed., 13th ed. 1884).

213. *Gardner*, 2 Johns. Ch. at 166.

214. *Id.*

215. *Id.*

The relationship between written and unwritten fundamental law is also illustrated by Kent's use of other written constitutions as evidence for the necessity of the principle of compensation. He noted that the principle of compensation "has frequently been made the subject of an express and fundamental article of right in the constitution of governments," citing the constitutions of Pennsylvania, Ohio, Delaware, and the United States.<sup>216</sup> The presence of a compensation provision in the United States Constitution, he reasoned, was "absolutely decisive of the sense of the people of this country."<sup>217</sup> Kent's failure to make any distinction between those state constitutions and his own strongly suggests both that written and unwritten fundamental law are of equal stature, and that written bills of rights were mere codifications or declarations of inherent rights that exist independent of their inclusion in the written document. His reliance on the United States Constitution as "decisive of the sense of the people" further suggests that natural rights are to some extent customary and evolving. These inferences from Kent's reasoning are consistent with the late eighteenth century view of natural law, and suggest that in New York, at least, it extended well into the nineteenth century.

That conclusion is reinforced by two cases decided in the 1820s. Moreover, although *Gardner* was a case in equity, the two following cases were at law, which demonstrates that the concept of enforceable natural rights was not simply an equitable notion.

In *Bradshaw v. Rodgers*, a New York intermediate appellate court judge made explicit the reliance on non-binding written law as declaratory of unwritten fundamental law.<sup>218</sup> In *Bradshaw*, an 1822 case, the plaintiff's land had been taken as part of a canal-building project.<sup>219</sup> Chief Justice Spencer of the New York Supreme Court held that the taking was unauthorized by statute, and also that the land could not be taken without compensation.<sup>220</sup> He cited the United States Constitution and the 1821 New York Constitution in support of his insistence on compensation, but denied reliance on either: "The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative."<sup>221</sup> He used them, he said, because "they

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216. *Id.* at 167.

217. *Id.*

218. 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822), *rev'd on other grounds*, 20 Johns. 735 (N.Y. 1823).

219. *Id.* at 103.

220. *Id.* at 105-06.

221. *Id.* at 106.

are both declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice."<sup>222</sup> A clearer statement of the early nineteenth century relationship between written and unwritten rights would be hard to find.<sup>223</sup>

After 1822, the 1821 Constitution guaranteed compensation,<sup>224</sup> but that did not prevent the New York courts from relying on unwritten law as well. As late as 1827, in *Coates v. The Mayor*, a New York appellate court slighted counsel's reliance on the compensation clause of the 1821 Constitution and turned in addition to natural law.<sup>225</sup> In *Coates*, plaintiffs challenged an 1823 New York City ordinance prohibiting cemeteries from the southernmost part of the city.<sup>226</sup> Plaintiffs had operated the Trinity Church cemetery—located within the prohibited area—since 1697, when the King had granted letters patent conferring a perpetual right to operate the church-yard and cemetery.<sup>227</sup>

The plaintiffs argued that the recently enacted ordinance interfered with the vested rights granted by the 1697 letters patent.<sup>228</sup> They thus contended that the ordinance violated the Contracts Clause of the federal Constitution, and the Just Compensation Clauses of both the federal and state constitutions.<sup>229</sup> Almost as an afterthought, they also contended that "[t]he most celebrated writers" agree "that such a measure is contrary to the fundamental principles of civil society."<sup>230</sup> Defendants challenged plaintiffs'

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222. *Id.*

223. The New York Court for the Correction of Errors reversed the lower court's statutory interpretation, holding that a state statute authorized the taking *and* provided compensation. *Rodgers v. Bradshaw*, 20 Johns. 735, 740-41 (N.Y. 1823). There was no discussion in the appellate court of the constitutional issue. *Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. Sup. Ct. 1822).

224. N.Y. CONST. of 1821, art. VII, § 7, reprinted in 5 STATE CONSTITUTIONS, *supra* note 58, at 2648.

225. 7 Cow. 585, 606 (N.Y. Sup. Ct. 1827).

226. *Id.* at 585-87.

227. *Id.* at 586.

228. *Id.* at 588-89.

229. *Id.* at 590.

230. *Id.* The plaintiffs also argued that the state statute conferring authority on the city to regulate cemeteries required a finding of public necessity before cemeteries could be prohibited. *Id.* at 588. Defendants responded that the word "necessary" in the authorizing statute was "synonymous with convenient or useful." *Id.* at 589. They cited 5 Wheat. 413 in support of that argument, illustrating either the unreliability of lawyers' citations (or reporters' printing) or the inaccessibility of reporters. The case at 5 Wheat. 413 (*United States v. Holmes*, 5 Wheat. 412 (1820)) is a completely irrelevant maritime case. Defendants apparently meant to cite 4 Wheat. 413 (*McCulloch v. Maryland*, 4 Wheat. 316 (1819)).

interpretation of the constitutional clauses at issue, and did not mention natural law.<sup>231</sup>

The court found for the defendants, upholding the city ordinance.<sup>232</sup> The most interesting aspect of the decision, however, is that the court apparently felt that conformity with the written constitution was insufficient to validate the law. The court held that "this by-law is not void, either as being unconstitutional, or as conflicting with what we acknowledge as a fundamental principle of civilized society, that private property shall not be taken even for public use, without just compensation."<sup>233</sup> No citation followed. The reference to fundamental principles seems totally unnecessary, as the written constitution then in effect guaranteed the same right of just compensation. The combination of the apparently unnecessary reference, the use of the disjunctive, and the placement of the comma after "unconstitutional" together suggest that the court might have felt itself bound to test laws for their conformity with unwritten natural law as well as with the written constitution. Thus, the court apparently believed that a conflict with a "fundamental principle of civilized society" might void an otherwise constitutional law.

Similarly, in *In re Albany Street* in 1834, the New York Supreme Court limited the takings power to takings for public purposes.<sup>234</sup> Any other reading of the 1821 compensation clause, the court declared, "is in violation of natural rights, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported."<sup>235</sup>

The requirement of just compensation was not the only judicially enforceable natural right in New York. *Dash v. Van Kleeck*, an 1811 case at law, involved a change in the statutory law governing the liability of law enforcement officers for the escape of a prisoner.<sup>236</sup> The court held that a law enacted after an escape could not be applied to limit the plaintiff's recovery for the escape.<sup>237</sup>

Chancellor Kent wrote the most careful opinion. He noted that applying the later law could only be accomplished in one of two ways: by applying the law retrospectively, or by construing it as a new interpretation of the old statute.<sup>238</sup> He concluded easily that

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231. *Coates*, 7 Cow. at 592. Defendants argued that "a mere regulation," as opposed to a physical taking, neither required compensation nor impaired any contract. *Id.*

232. *Id.* at 607-08.

233. *Id.* at 606.

234. 11 Wend. 150, 151-52 (N.Y. Sup. Ct. 1834).

235. *Id.* at 151.

236. 7 Johns. 477, 479 (N.Y. Sup. Ct. 1811).

237. *Id.* at 513.

238. *Id.* at 501 (Kent, C.J., concurring).

the latter would violate the constitution by conflating the legislative and judicial branches.<sup>239</sup>

In denying that a civil law might be retrospectively applied, however, the Chancellor had a problem. The 1777 New York Constitution did not prohibit *ex post facto* laws, and the prohibition against them in the United States Constitution had recently and authoritatively been interpreted as limited to *criminal* laws.<sup>240</sup> Kent met the challenge head on, admitting that “[i]t is not pretended that we have any express constitutional provision on this subject.”<sup>241</sup> He noted that although “numerous other rights dear alike to freedom and justice” were unprotected by the written constitution, the courts were nevertheless constrained to follow “justice” and “fundamental principles.”<sup>242</sup> Rather than invalidate the statute before him, however, he interpreted it to apply only prospectively.<sup>243</sup> He tacitly admitted that such an interpretation was essentially a fiction to allow him to uphold the statute, noting that “the courts were bound to give such a construction to a statute as was consistent with justice, though contrary to the letter of it.”<sup>244</sup>

Two of the four other judges apparently agreed with the Chancellor’s use of unwritten law. Thompson examined the statute’s language carefully to conclude that it was not meant to apply retrospectively, but also noted that any other construction would be “repugnant to the first principles of justice, and the equal and permanent security of rights.”<sup>245</sup> Van Ness agreed with Kent without opinion.<sup>246</sup>

The other two judges, who constituted a minority in favor of denying liability, did not specifically deny that natural law might invalidate a statute, and it is possible to read their opinions as sidestepping the question. Yates, in a very short opinion, ignored

239. *Id.* (Kent, C.J., concurring). Interestingly, he reached this conclusion through a very non-literalist interpretative method. He noted that several constitutions, including those of Massachusetts and Virginia, *explicitly* prohibited the mingling of powers among the branches. *Id.* at 508 (Kent, C.J., concurring). He then continued: “[I]f it be not found in our own constitution, in terms, it exists there in substance; in the organization and distribution of the powers of the departments, and in the declaration that the ‘supreme legislative power’ shall be vested in the senate and assembly.” *Id.* at 509 (Kent, C.J., concurring).

240. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798). *Calder*, of course, was itself based as much on natural law principles as on the written constitution. See Sherry, *supra* note 1, at 1172-73.

241. *Dash*, 7 Johns. at 505 (Kent, C.J., concurring).

242. *Id.* (Kent, C.J., concurring).

243. *Id.* at 509 (Kent, C.J. concurring).

244. *Id.* at 502 (Kent, C.J., concurring).

245. *Id.* at 493-94 (Thompson, J., concurring).

246. *Id.* at 513 (Van Ness, J., concurring).

natural law and concluded that because nothing in either the state or federal constitutions prohibited the new statute, it was valid.<sup>247</sup> He specifically noted, however, that he did not need to consider whether a retroactive statute would be valid, because the statute at issue was simply a reinterpretation of a pre-existing statute, which had been incorrectly construed by the judiciary.<sup>248</sup> Thus, the new statute simply confirmed the legislative meaning of the older statute, and, according to Yates, was the only true meaning of the older statute.<sup>249</sup> Spencer stated that he agreed with Yates, but he too specifically relied on the new statute as a reinterpretation of the older statute and thus did not reach the *ex post facto* question which so lent itself to a natural law analysis.<sup>250</sup>

During the first three decades of the nineteenth century, then, the New York courts, like the courts of other states, were protecting unwritten rights. At the same time, however, they were also deciding some cases on purely textual grounds. In three cases prior to *Bradshaw v. Rodgers*, Chief Justice Spencer—who wrote the heavily non-textualist opinion in *Bradshaw*—relied exclusively on textual provisions. These cases might be puzzling were it not for peculiar circumstances in each of the cases.

The easiest of the three to explain is *People v. Platt*, an 1819 case involving a state law that prohibited dams obstructing salmon from running upstream.<sup>251</sup> Prior to the passage of the statute, the state had granted to the defendant full title to a portion of the Saranac River and the land on both banks, subject only to reservation of mining and navigation rights.<sup>252</sup> The river turned out not to be navigable, and the defendant then proceeded to build a dam across

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247. *Id.* at 483-84 (Yates, J., dissenting).

248. *Id.* at 483 (Yates, J., dissenting).

249. *Id.* (Yates, J., dissenting). This reasoning, of course, still raises retrospectivity questions, but Yates apparently did not see them.

250. *Id.* at 488-89, 492-93 (Spencer, J., dissenting). Spencer's analysis of whether the legislature had power to alter the construction of the laws was aided by what he characterized as the existence of conflicting U.S. Supreme Court decisions, "if we may confide in the accuracy of the reporters who have published the decisions of that court." *Id.* at 491 (Spencer, J., dissenting). Again, the accessibility of lawyers and judges to opinions of other courts seemed minimal. In some cases, the judges could not even locate prior decisions of their own court. In the 1820 South Carolina case of *Singleton v. Commissioners*, Justice Huger lamented that he had been "unable to find the decision referred to [by counsel], from the difficulty of searching the massy [messy? massive?] volumes of manuscript reports, in which all the decisions of this court, prior to 1818, are buried, and from which they may never arise, unless aided by a regularly appointed reporter." 11 S.C.L. (2 Nott & McC.) 526, 528 (1820). For a discussion of *Singleton*, see *infra* notes 296-298 and accompanying text.

251. 17 Johns. 195, 196 (N.Y. Sup. Ct. 1819).

252. *Id.* at 197.



it.<sup>253</sup> Without the dam, the property would have been useless to the defendant. The court thus easily held, on the authority of *Fletcher v. Peck*, that the later-enacted statute purporting to regulate the dam could not pass muster under the Contract Clause of the United States Constitution.<sup>254</sup> No recourse to natural law was necessary to find for the defendant.<sup>255</sup> In *Coates*, the court looked to natural law before it upheld a statute,<sup>256</sup> suggesting that it might have reached a different result if the written constitution and the unwritten law conflicted. In *Platt*, any reference to natural law would simply have been an alternative ground for the same decision, and thus the failure to consider unwritten law suggests at best that written law was preferable where it mirrored unwritten law.<sup>257</sup> The fact that Judge Spencer cited *Platt* in *Bradshaw*, as “somewhat illustrat[ing]” the “all important and essential principle” against takings without compensation,<sup>258</sup> further suggests that Spencer’s failure to use natural law in *Platt* was not significant. Like the South Carolina case of *White v. Kendrick*,<sup>259</sup> *Platt* neither supports nor undermines the proposition that state courts enforced unwritten rights.

Another 1819 Contracts Clause decision by Spencer is somewhat more difficult to reconcile with the natural law emphasis in *Bradshaw* and the other cases. In *Mather v. Bush*, Spencer held that an 1811 New York insolvency statute could be used to discharge an 1816 contract, notwithstanding the Contract Clause of the United States Constitution.<sup>260</sup> Again, it was an easy case for a textualist: because the insolvency law pre-dated the contract, and because contracts necessarily incorporate the law of the jurisdiction, the court held that the insolvency law was part of the contract itself and thus could not be deemed to impair it.<sup>261</sup> Justice Spencer’s failure to measure the law against natural rights principles as well as against the written constitution—as the court did in upholding the statute in *Coates*—is

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253. *Id.*

254. *Id.* at 215.

255. As in several of the other cases of this era, the court in fact interpreted the statute to exempt the defendant rather than invalidating it. *Id.*

256. 7 Cow. 585, 606 (N.Y. Sup. Ct. 1827).

257. Another explanation might be that the United States Constitution was considered a higher source of authority than both the written and unwritten law of New York. That does not explain why in both *Bradshaw* and *Dash* the courts did not discuss whether the limited nature of federal constitutional protection preempted state natural law. The explanation suggested in the text is more consistent with those cases.

258. *Bradshaw v. Rodgers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822) (citing *Platt*, 117 Johns. at 215).

259. 3 S.C.L. (1 Brev.) 469 (1805); see *infra* note 340 and accompanying text.

260. 16 Johns. 233, 251-52 (N.Y. Sup. Ct. 1819).

261. *Id.* at 252-53.

somewhat puzzling, however. Perhaps it may be explained by the obviousness of the result; it would be a strange natural right indeed that allowed a party to enter into an illegal contract and then claim that the contract invalidated the law. Moreover, none of the formidable eighteenth century inalienable rights—of conscience, of jury trial, of security of private property, or of reliance on reasonable and non-arbitrary laws—were involved in the case.

The final purely textualist New York case of the period was *People v. Foot*,<sup>262</sup> decided in 1821. In that case, Chief Justice Spencer held that the state legislature could not direct the council of appointment (a body created by the state constitution) to accept or reject the resignation of a county commissioner.<sup>263</sup> The 1777 Constitution gave the council discretion in appointing and terminating most state officers, and “[t]he legislature, therefore, cannot prescribe to the council the mode or manner of executing the constitutional trust reposed in them.”<sup>264</sup> There are two possible explanations for Spencer’s reliance on purely textual analysis. First, as in *Platt*, natural law principles would not have altered the result (which involved the liability of a former commissioner). Moreover, as I noted in the first section of this paper, the other early cases reveal a pattern in which text is more important in structure of government cases and unwritten law is more important in individual rights cases. *Foot* is clearly a case in the former category, and the reliance on text is thus unsurprising.

In New York, the ultimate rejection of extra-textualism came in 1856 in *Wynehamer v. People*. Judge Comstock, sitting on New York’s highest bench, cited several early cases as authority for the proposition that “laws which, although not specially prohibited by written constitutions, are repugnant to reason, and subvert clearly vested rights, are invalid, and must be declared so by the judiciary.”<sup>265</sup> He nevertheless limited his consideration to the written constitution, on the ground that early jurists were insufficiently aware of the dangers of extra-textual judicial review:

[T]he danger was less apparent then than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly

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262. 19 Johns. 58 (N.Y. Sup. Ct. 1821).

263. *Id.* at 59.

264. *Id.*

265. 13 N.Y. 378, 390 (1856).

among the least of the perils to which our institutions are exposed.<sup>266</sup>

Implicit in this rejection of natural rights is a very modern notion that the government should not be overly restricted by limits not explicitly set out in the Constitution. Nevertheless, Comstock's opinion confirms the prevalence of natural law concepts during the first few decades of the nineteenth century.

#### D. South Carolina

South Carolina drafted three different constitutions before 1800.<sup>267</sup> None had a separate bill of rights, but each provided greater protection for individual rights than the last. The 1776 Constitution, designed to be temporary, included only structural provisions necessary to implement a new and independent government.<sup>268</sup> In 1778, that first effort was replaced by a constitution that integrated structural provisions with minimal protection of individual rights. Both some religious toleration<sup>269</sup> and liberty of the press<sup>270</sup> were mandated, although the 1778 Constitution also established Protestantism as the state religion. The only other protection of individual rights in the 1778 Constitution was a version of a clause found in many state constitutions of the period: a "law of the land" clause, derived from the Magna Carta: "That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land."<sup>271</sup> As we shall see, "law of the land" was a rather ambiguous phrase, but was most commonly interpreted to protect ancient and traditional rights. The clause is of particular contemporary relevance because "law of the land" may be a direct predecessor of "due process of law."<sup>272</sup>

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266. *Id.* at 391-92.

267. South Carolina did not rewrite its Constitution again until the beginning of the Civil War (and then did so again after the war). Several amendments were added in the first half of the nineteenth century, but all dealt with structural matters.

268. S.C. CONST. of 1776, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3241-48.

269. S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3255-57.

270. S.C. CONST. of 1778, art. XLIII, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3257.

271. S.C. CONST. of 1778, art. XLI, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3257.

272. *See Zylstra v. Corporation of Charleston*, 1 S.C.L. (1 Bay) 382, 391 (1794) (citing Coke as equating "law of the land" with "due process of law"); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 71-72 (1985); Frank R. Strong, *Law of the Land*, in 3

The 1790 Constitution retained the “law of the land” clause (as well as the press and religion clauses), and added to it prohibitions against bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. Obviously heavily influenced by the federal Bill of Rights, which the South Carolina legislature had just voted to ratify,<sup>273</sup> the 1790 Constitution also prohibited “cruel punishments,” “excessive” bail or fines, and titles of nobility.<sup>274</sup> Trial by jury “as heretofore used in this State” was to be inviolably preserved.<sup>275</sup> It is important to note that the 1790 Constitution did *not* contain any requirement of compensation for the taking of private land for public purposes.

The structure of the 1790 Constitution mimicked that of the federal Constitution, but only as to governmental powers provisions. Unlike the earlier constitutions, whose organization was rather haphazard, the 1790 Constitution was divided into logically coherent articles. Articles I through III were devoted to the legislature, executive, and judiciary respectively.<sup>276</sup> Several miscellaneous structural articles followed, then an article devoted solely to religious freedom, an article containing all of the other individual rights, a further structural article, and finally an article setting out the process for amendments.<sup>277</sup> Thus, unlike Massachusetts or Virginia, South Carolina during this period lacked a bill of rights separate and distinct from the rest of its constitution.

As might be expected in a growing state, many of the early constitutional cases in South Carolina involved the taking of private property, usually for road building. In almost all of the cases, either the lawyers or the judges or both relied wholly or partly on unwritten natural law. In two cases, the written constitution was not mentioned at all, and the arguments and decisions rested solely on unwritten law.<sup>278</sup> In two more cases, the grounds for the decision were

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ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1130-31 (Leonard W. Levy et al. eds., 1990); J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 81-83 (1931); Riggs, *supra* note 19, at 947. Professor Riggs uses historical evidence to link “law of the land” clauses with *substantive* due process, a notion that in practice is clearly kindred to natural or unwritten rights. *Id.* at 958.

273. South Carolina voted to ratify the Bill of Rights on January 19, 1790. The 1790 Constitution was framed and adopted by a convention that completed its work on June 3, 1790.

274. S.C. CONST. of 1790, art. IX, § 4, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3264.

275. S.C. CONST. of 1790, art. IX, § 5, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3264.

276. S.C. CONST. of 1790, *reprinted in* 6 STATE CONSTITUTIONS, *supra* note 58, at 3258-69.

277. *Id.* at 3258-63.

278. *See infra* notes 282-95 and accompanying text.

unclear, but strong language in the opinions suggests the validity of unwritten law as a basis for protecting individual rights.<sup>279</sup> In three cases, unwritten law was imported into the written constitution by the “law of the land” clause.<sup>280</sup> In only one case—one of only two involving trial by jury rather than property rights—did the South Carolina Constitutional Court rely solely on the written constitution itself.<sup>281</sup>

The judicial enforceability of natural law in South Carolina is best illustrated by two early cases. *Ham v. M'Claws*, in 1789, involved a statute that restricted the importation of slaves to citizens of sister states.<sup>282</sup> The plaintiffs in *Ham* were British citizens in Honduras who brought their slaves with them to settle in South Carolina.<sup>283</sup> After they set sail for South Carolina, but before they arrived, the South Carolina legislature changed the law regarding slave importation.<sup>284</sup> Whereas prior law allowed all settlers to bring into the state their own personal slaves, the new law restricted importation privileges to citizens of the United States, resident within the country on the day the new statute was ratified.<sup>285</sup> The statute itself contained no other exceptions to the ban on importation.<sup>286</sup> Nevertheless, the court interpreted the new law to exempt slaves in transit at the time of its passage.<sup>287</sup>

Thus, the court construed the statute against its obvious import to make it consistent with what the court (and plaintiffs' counsel) labelled “common right,” “common reason,” and “justice, and the dictates of natural reason.” The court noted that any statute incon-

279. See *infra* notes 296-98 and accompanying text.

280. See *infra* notes 299-339 and accompanying text.

281. See *infra* note 340 and accompanying text.

282. 1 S.C.L. (1 Bay) 93, 98 (1789).

283. *Id.* at 94-95.

284. *Id.* at 95-96.

285. *Id.* at 94.

286. *Id.* at 94-95. The reporter quoted the 1788 statute as follows:

That no negro or other slave shall be imported or brought into this state, either by land or water, on or before the first day of January, A.D. 1793, under the penalty of forfeiting every such slave or slaves, to any person who will sue or inform for the same; and under the further penalty of paying 100 l. to the use of the state, for every such negro or slave so imported or brought in. Provided, that nothing in this prohibition contained, shall extend to such slave, as are now the property of citizens of the United States, and at the time of passing this act shall be within the limits of the United States.

*Id.* at 94.

287. *Id.* The court construed the statute—despite clear language to the contrary—not to apply to those who brought slaves into South Carolina “under the sanction of a former act, before it was possible for the party apprized of the subsequent one.” *Id.* at 97.

sistent with those principles was “absolutely null and void,” and thus held itself bound to construe the statute in a way that was “contrary to the strict letter of the law” but consistent with natural reason.<sup>288</sup> No mention was made of the 1778 Constitution then in force, by either the lawyers or the court.

In fact, the court might have found it difficult to interpret the “law of the land” clause to protect the plaintiffs in *Ham*. Because the plaintiffs were not citizens of South Carolina, it is not clear whether they were protected by the “law of the land” clause, which applied only to “free[men] of this State.” Moreover, it is doubtful whether a right to bring property into the state would have been considered liberty or property protected by the clause. Thus, not only did the court’s decision in favor of the plaintiff rest squarely on unwritten law, it probably could not have rested on the written constitution.

Three years later, in *Bowman v. Middleton*, the court went further and actually invalidated a statute on the basis of unwritten law.<sup>289</sup> *Bowman* involved a 1712 act transferring property from one owner to another.<sup>290</sup> The defendant had agreed to purchase from the plaintiffs a tract of land inherited from the beneficiary of the 1712 act.<sup>291</sup> The purchaser refused to close the contract, arguing that some of this land was in fact not the plaintiffs’ to sell, but belonged instead to the heirs of the original owner.<sup>292</sup> The plaintiffs interposed the 1712 act as legally conferring title on them.<sup>293</sup> The court ruled for the defendant, holding the 1712 act void on the ground that “it was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another.”<sup>294</sup> Again, neither counsel nor the court mentioned the new 1790 Constitution, although in this case the “law of the land” clause was almost certainly applicable since an owner had been deprived of his freehold.<sup>295</sup>

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288. *Id.* The reporter similarly described the case as standing for the propositions that “[s]tatutes against the plain and obvious principles of common right and common reason, are null and void,” and “Judges are bound to give such a construction to acts of the legislature, as is consistent with the justice and the dictates of natural reason, although contrary to the letter of the law.” *Id.* at 93.

289. 1 S.C.L. (1 Bay) 252, 254-55 (1792).

290. *Id.* at 253-54.

291. *Id.* at 252-54.

292. *Id.* at 252.

293. *Id.* at 252-54.

294. *Id.* at 254-55.

295. *Id.* at 252-55. The court’s citation of *magna charta* further confirms the likelihood that the “law of the land clause” (derived from *magna charta*) was applicable. *Id.* at 254-55.

Two later cases, in 1818 and 1820, also involved property deprivations; both were takings for public purposes. In both cases, *Singleton v. Commissioners*<sup>296</sup> and *Stark v. M'Gowen*,<sup>297</sup> the court reached conclusions that made a ruling on the validity of the taking unnecessary. In both, however, the court's opinion suggested that the power of eminent domain was governed by the constitution, *magna charta*, and "fundamental principles of government."<sup>298</sup> Except for one 1805 case, discussed below, I have found no cases between *Bowman* in 1792 and *Singleton* in 1820 to suggest that South Carolina moved toward textualism. Thus, the oblique references in the later cases may plausibly be read as a continuation of the views expressed in more detail in the very early cases.

Not only did most eighteenth and early nineteenth century American lawyers believe that natural law was judicially enforceable, they also viewed constitutions themselves as merely reflective of natural law. In keeping with this prevalent view of constitutional rights as merely confirming natural rights, the South Carolina courts interpreted the "law of the land" clause as recognizing traditional rights, rather than creating new ones. The most extensive discussion of this clause is found in *Zylstra v. Corporation of Charleston*,<sup>299</sup> a 1794 case, and *Lindsay v. Commissioners*,<sup>300</sup> a 1796 case.

In *Zylstra*, the plaintiff was convicted of keeping a tallow-chandler's shop within the city limits, in violation of a city bylaw.<sup>301</sup> He challenged his conviction primarily on the ground that a fine over twenty pounds (he was fined 100 pounds) could not be imposed without a jury trial.<sup>302</sup> The court unanimously reversed his conviction.<sup>303</sup>

Judge Waties's opinion, which was the most extensive, drew on both the written constitution and unwritten law. His first task was to reconcile the "law of the land" clause with the jury trial clause of the 1790 Constitution. Did the former mean, the judge asked, that "any law . . . may be passed, directing a different mode of trial?"<sup>304</sup> The answer rested on the definition and derivation of "law of the land," which Judge Waties, quoting Lord Coke, interpreted as "the com-

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296. 11 S.C.L. (2 Nott & McC.) 526, 527 (1820).

297. 10 S.C.L. (1 Nott & McC.) 387, 387 (1818).

298. *Singleton*, 11 S.C.L. (2 Nott & McC.) at 528; *Stark*, 10 S.C.L. (1 Nott & McC.) at 393.

299. 1 S.C.L. (1 Bay) 382, 391-92 (1794).

300. 2 S.C.L. (2 Bay) 38, 38 (1796).

301. 1 S.C.L. (1 Bay) at 382.

302. *Id.* at 383.

303. *Id.* at 387-97.

304. *Id.* at 391.

mon law or acts of parliament, down to the time of Edw. II which are considered as part of the common law.”<sup>305</sup> Thus, the “law of the land” clause authorized a non-jury trial only in those cases in which it had been permitted under the common law.<sup>306</sup> Zylstra’s conviction by the city wardens for violating a city bylaw did not come within that definition.<sup>307</sup>

Having concluded that the “law of the land” clause did not conflict with the jury trial clause, Judge Waties faced his second question.<sup>308</sup> Counsel for the city had argued that “it is now too late to question the authority of the court of wardens, because it was created before the making of the constitution, and is therefore confirmed by it.”<sup>309</sup> Judge Waties suggested that that might be true if “the constitution was the first acquisition of the rights of the people of this country.”<sup>310</sup> Trial by jury, however, was an ancient and inalienable right and existed long before the constitution.<sup>311</sup> The constitution recognized but did not create the right:

But the trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors, in succession, from that period to our own time; having never been departed from, except in the instances before mentioned. This right, then is as much out of the reach of law as the property of the citizen.<sup>312</sup>

Thus, Judge Waties used the concept of natural rights to interpret the meaning of the constitutional provision, and reaffirmed the common belief that enforceable rights existed independent of the written constitution. Moreover, according to the court reporter, “[t]he city ordinance in question was afterwards repealed, and no attempt was ever after made to exercise so unwarrantable a jurisdiction.”<sup>313</sup>

The relationship between the constitutional “law of the land” language and natural rights was further illuminated in *Lindsay*. The Commissioners of the city of Charleston took a piece of Lindsay’s

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305. *Id.*

306. *Id.* at 392.

307. *See id.* at 397-98.

308. *Id.* at 394-95.

309. *Id.* at 395.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 398.



land to build a road.<sup>314</sup> Lindsay argued that the taking of his land with neither compensation nor trial by jury was “unconstitutional and unjust,” citing the “law of the land” clause and the jury trial clause of the 1790 Constitution.<sup>315</sup> There was thus considerable discussion among both counsel and the court as to the exact meaning of the “law of the land” clause.<sup>316</sup> All seemed to agree that the “law of the land” predated the written constitution, that it drew on the common law which in turn represented natural law or reason, and that the written constitution merely reaffirmed these more ancient rights and laws rather than creating new law.<sup>317</sup>

The city recorder argued that although the taking of A’s land to give to B might violate “both *magna charta* and our own constitution,” the taking of land for public purposes “was the law of the land long before *magna charta* was ever thought of, or our constitution promulgated.”<sup>318</sup> The right of the state to take land for public roads was “coeval with civil society,” and “part of the ancient law of the land.”<sup>319</sup> The South Carolina Attorney General, also arguing on behalf of the city, similarly argued that taking land for public roads was “a fundamental and inherent right, which the supreme authority of every state possessed.”<sup>320</sup>

The Attorney General demonstrated that eminent domain was a fundamental right by canvassing respected authorities such as Vattel and Rousseau.<sup>321</sup> He then concluded:

From the foregoing principles of eminent civilians and writers upon public law and national rights, and the early, long and uninterrupted adoption and use of them by our legislatures, . . . and the ready acquiescence in them by the citizens, this important right has become a part of the *common law of South Carolina*.<sup>322</sup>

Common law, he continued, was “nothing more than natural truths, founded on the nature and reason of things.”<sup>323</sup> It was derived from “usages and customs” rather than from written documentation.<sup>324</sup> The Attorney General’s suggestion that usage might create law accorded with some dicta in the *Zylstra* case: there Judge Waties

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314. *Lindsay*, 2 S.C.L. (2 Bay) 38, 38 (1796).

315. *Id.* at 40.

316. *Id.* at 40-56.

317. *Id.*

318. *Id.* at 42.

319. *Id.*

320. *Id.* at 45.

321. *Id.* at 45-47.

322. *Id.* at 50.

323. *Id.*

324. *Id.* at 51.

justified one type of non-jury courts as within the "lex terrae" on the ground that "they are sanctioned by long use."<sup>325</sup>

The city recorder in *Lindsay* also echoed earlier cases in suggesting that the right of eminent domain was an ancient right, "recognized by *magna charta* and confirmed to the state by our own constitution."<sup>326</sup> Thus, even constitutional provisions not protecting individual rights were sometimes mere declarations of natural law.<sup>327</sup> Tradition, not writing, gave the state its constitutional power of eminent domain.

The court was evenly divided on Lindsay's motion for an order enjoining the city from taking the land without compensation.<sup>328</sup> The injunction (called a "prohibition") was therefore not granted.<sup>329</sup>

Although the four judges disagreed on whether the plaintiff deserved compensation for the taking of his land, they agreed that the source of both the state's and the plaintiff's rights was tradition and natural law. Judges Grimke and Bay considered the taking "authorized by the fundamental principles of society."<sup>330</sup> They reiterated the standard view of the constitution, and especially the "law of the land" clause, as merely declarative of pre-existing rights:

[The taking] was neither against *magna charta*, nor the state constitution, but part of the *lex terrae*, which both meant to defend and protect. The so much celebrated *magna charta* of Great Britain, was not a concession of rights and privileges, which had no previous existence; but a restoration, and confirmation of those, which had been usurped, or had fallen into disuse. It was therefore only declaratory of the well known and established laws of the kingdom.

So, in like manner the 2d section of the 9th article of our state constitution [the "law of the land" clause], confirms all the before-mentioned principles. It was not declaratory of any new law, but confirmed all the ancient rights and principles.<sup>331</sup>

As in *Zylstra*, these judges relied on the written constitution only as a written declaration of the ancient unwritten constitution.

Judge Waties, with whom Judge Burke agreed, thought that Lindsay was entitled to compensation for the land taken by the city.<sup>332</sup>

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325. 1 S.C.L. at 393.

326. *Lindsay*, 2 S.C.L. (2 Bay) at 42.

327. *Id.*

328. *Id.* at 56-62.

329. *Id.* at 62.

330. *Id.* at 56.

331. *Id.* at 57.

332. *Id.* at 58.

Like his brethren, Judge Waties found that the “law of the land” meant the ancient common law rather than “any law which the legislature might pass.”<sup>333</sup> Citing only a brief quotation from Blackstone and an anecdote about the sultan Mustapha of Turkey and a mosque in Constantinople, Waties concluded that a taking without compensation “has not complied with the terms of the common law, and is not conformable to the constitution.”<sup>334</sup> Compensation for a taking was, moreover, “deeply founded in natural justice.”<sup>335</sup>

The definition of the “law of the land” as ancient and customary law was reaffirmed by Judge Waties sitting in equity in 1811. In *Byrne v. Stewart*, he held that a law prohibiting “ordinaries” (roughly equivalent to justices of the peace) from also practicing law did not violate the “law of the land” clause.<sup>336</sup> He defined the “lex terrae” as “the common law . . . [and] all acts of force at the time of making the constitution.”<sup>337</sup>

Finally, as late as 1824, the court still found natural law principles useful in an eminent domain case. In dicta in *Dunn v. City Council*, the court limited the power of eminent domain to the taking of land necessary for the particular public purpose.<sup>338</sup> Despite Justice Nott’s disclaimer that the court had no authority to strike down unjust laws, but only unconstitutional ones, he tied the written and unwritten fundamental law together. “[T]o take the property of one man, and give it to another,” he wrote, “would . . . be contrary to those immutable principles of justice and common law, which have been consecrated by universal consent from time immemorial, and which are secured to us by the plain and unequivocal language of the constitution.”<sup>339</sup>

Thus, between 1792 and 1824, South Carolina courts interpreted and reviewed state statutes—occasionally invalidating them—ac-

333. *Id.* at 59.

334. *Id.* at 58.

335. *Id.* at 60.

336. 3 S.C. Eq. (3 Des.) 466, 480 (1811).

337. *Id.* at 478. An 1818 case in the U.S. Supreme Court echoed the South Carolina definition of the “law of the land.” *Bank of Columbia v. Okely*, 18 U.S. (4 Wheat.) 235, 244 (1818). Interpreting Maryland’s “law of the land” clause (identical to South Carolina’s), Justice Johnson held that it was “intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice.” *Id.*

338. 16 S.C.L. (Harp.) 189, 199-200 (1824).

339. *Id.* at 200. He went on to note that “judges would . . . be authorized to declare [any statute permitting such a taking] inoperative and void.” *Id.*

Counsel for plaintiffs had made an even stronger argument, suggesting that “[t]he rights of the citizens of this country are guarded not by the constitution alone, but by the general and universally recognized principles of right and wrong.” *Id.* at 193.

ording to the dictates of justice and natural reason, as well as the language of the written constitution. The constitution itself was in fact held to reflect and codify pre-existing natural law. Fundamental rights that did not appear in the written constitution were enforced nonetheless, and sometimes provisions of the written constitution were ignored in favor of unwritten law.

Only once during this period did the court rely solely on the written constitution. In 1805, in *White v. Kendrick*, the court invalidated an 1801 act extending the jurisdiction of justices of the peace to cases involving up to thirty dollars.<sup>340</sup> The court concluded that the act violated the provision of the constitution guaranteeing a jury trial "as heretofore used."<sup>341</sup> Judge Wilds, writing for a majority of the court, noted: "The constitution, in the clause alluded to, has established an epoch, from which legislative innovation on the trial by jury shall cease."<sup>342</sup> A careful analysis of jury trials up to the adoption of the 1790 Constitution led him to conclude that magistrates sitting alone could not take cognizance of any case worth more than twenty dollars.<sup>343</sup> It is unclear, of course, whether the court would have found a similar guarantee even in the absence of a specific provision of the written constitution; the earlier cases suggest that it might have done so. In any case, *White* neither supports nor undermines the other cases' reliance on natural law.

### E. Epilogue

State court judges, at least in these representative states, apparently appealed to natural law concepts for a considerably longer period of time than did their federal counterparts.<sup>344</sup> But the idea of

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340. 3 S.C.L. (1 Brev.) 469, 473 (1805).

341. *Id.* at 470.

342. *Id.* at 471.

343. *Id.* at 472-73.

344. There are a number of possible explanations for this discrepancy. The greater heterogeneity of the federal sphere may have produced a faster degeneration of popular consensus, which might have made it more difficult for courts to maintain that natural law decisions were consistent with popular sovereignty. See Nelson, *supra* note 23, at 928-32; H. Jefferson Powell, *Reaching the Limits of Traditional Constitutional Scholarship*, 80 Nw. U. L. REV. 1128, 1139 (1986) (reviewing LAURENCE H. TRIBE, *A REVIEW OF CONSTITUTIONAL CHOICES* (1985)). There may have been less need for federal recourse to natural law after Marshall packed many natural law concepts into various clauses of the written Constitution during the first two decades of the nineteenth century. See WHITE, *supra* note 7, at 602-628; cf. GARY JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986) (suggesting that Court used written text infused with natural law rather than directly appealing to natural law); Leslie F. Goldstein, *Popular Sovereignty, The Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51 (1986) (suggesting that Supreme Court did not appeal directly to natural law, but instead combined natural law with written law); Gary J. Jacobson, *E.T.:*

enforceable natural rights continued to influence American law and politics even later than these cases would indicate. The ante-bellum debate over slavery had a strong natural rights flavor,<sup>345</sup> and Congressional debates over the Reconstruction Amendments similarly relied on various conceptions of natural law.<sup>346</sup> Indeed, American infatuation with and judicial use of natural law concepts continued well into the second half of the nineteenth century.<sup>347</sup> Today, one might argue, natural rights have not disappeared, but have rather gone underground and re-emerged in the guise of privacy, due process, or other phrases of great majesty and little specific content—much like the phrases used by the nineteenth century courts surveyed in this article.

### CONCLUSION

I hope I have illuminated our constitutional past enough to shatter the myths with which I began this essay. Textualism is not an inevitable concomitant of a written constitution, and it is not a reflection of our earliest national heritage. Nevertheless, it is undeniably our self-professed modern understanding of the constitution. What we do not know—and what these cases cannot tell us—is whether a judiciary animated by principles of natural right is necessarily incompatible with either diversity or popular sovereignty. Can justice still matter to judges in a society in which justice is controversial and “natural law” lacks credibility? Our next question must be whether we can reconcile our natural law past with our textualist present—and whether we even want to.

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*The Extra-Textual in Constitutional Interpretation*, 1 CONST. COMMENTARY 21 (1984) (noting that Court's use of written constitution allowed for influx of natural law into decisions).

345. See, e.g., DANIEL FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 258-71 (1990) (tracing antislavery Republicans' use of natural law to support view that slavery was immoral); Earl Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (arguing antebellum thought to be based on core set of basic rights) (1988); Nelson, *supra* note 64, at 525 (discussing antislavery jurisprudence).

346. FARBER & SHERRY, *supra* note 345, at 298-300; see also MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 53-54 (1986) (reviewing various Congressional Republicans' views on constitutional protections).

347. See generally CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) (tracing development of natural law doctrines in American and European law); BENJAMIN F. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* (1931) (tracing development of natural law doctrines in American and European law); Emily F. Hartigan, *Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions*, 6 J. L. & RELIGION 225 (1988) (discussing state courts' use of natural law in late 19th century).