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THE EARLY VIRGINIA TRADITION OF EXTRA-TEXTUAL INTERPRETATION

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I. THE UNWRITTEN CONSTITUTION¹

As we search for a usable past, it is wise to avoid too “presentist” an approach: one should not necessarily expect a history of state protections of liberty to provide either a familiar or a genteel source from which to work. In the modern world, the search for state protections of liberty generally conjures up an image of state courts using state constitutions to prevent infringement of core civil liberties such as freedom of the press and security from unreasonable searches and seizures. Perusing the reports of judicial decisions from the late eighteenth and early nineteenth centuries, however, will not yield very many (if any) cases of that sort.

Nevertheless, the absence of reported modern civil liberties cases does not necessarily indicate that the past is barren, only that historians’ searches have been limited. This Article proposes to broaden the search in two ways. First, rather than using the modern language of civil liberties, the Article will discuss state court protection of what judges in the eighteenth and nineteenth centuries labelled “natural” or “inalienable” rights, or “natural justice.”

More importantly, the Article proposes to move from a textual to an extra-textual method of interpretation. Courts faced with the question whether a particular positive legislative enactment is consistent with higher or fundamental law can look to two broad types of fundamental law: the written constitution, or any of several categories of unwritten law.² Textual interpretation focuses on the written

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¹ What follows in this section is a very brief summary of my earlier work on state uses of natural law up to 1787, and federal uses of natural law up to 1820. See Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). For a similar and more detailed description of the multifarious sources of law used by the Supreme Court between 1815 and 1835, but reaching a somewhat different conclusion about the relative importance of textualism, see 3-4 G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, at 76-156, 595-740 (1988).

² The categories include the laws of God, the common law (largely derived incrementally from custom and tradition), the law of nature, and natural law. The latter two were, at least during the period of the early republic, rather distinct: the law of nature was grounded in observation and human sentiment, while natural law was founded upon abstract reason. I am grateful to

constitution (the text), and extra-textual interpretation considers sources outside the written constitution. Thus modern constitutional law is virtually exclusively textualist, insofar as courts invalidate only statutes that conflict with the written constitution—although interpretation of the written constitution, of course, often involves an examination of many sources of law and tradition not embodied in the text itself. Still, fundamental law must ultimately be tied to the written text. For example, today it would be considered an anomaly—as well as a judicial usurpation of legislative authority—for the United States Supreme Court to declare a law unconstitutional on the avowed ground that it conflicted with general principles of natural justice unassociated with the written text.³

Judges of the eighteenth and early nineteenth centuries were not so narrowly textualist. Indeed, the earliest state constitutions were largely viewed as merely committing to writing ancient and inalienable unwritten rights.⁴ A bill of rights was thought to be the renewed declaration, not the creation, of fundamental law. Only half of the states included a bill of rights at all, although there is no indication that in those states lacking a bill of rights the citizenry ceded any of the unwritten rights themselves.⁵ One part of these early state

Donald Lutz for suggesting to me the niceties of these distinctions. For the purposes of this Article, however, these categories need not be distinguished since the aim of this Article is to contrast the written with unwritten sources of law. Thus, the Article will refer to “unwritten law,” “natural law,” and “law of nature” interchangeably, and will group together cases and judges who may, in fact, have been referring to quite different unwritten sources of law. Finally, the essay will also use the term “natural rights” to refer to unwritten individual rights, although there was also a subtle distinction between “natural rights” and “natural law.” See 3-4 G. EDWARD WHITE, *supra* note 1, at 676-77 (noting that the “natural rights” theory referred to the creation of government “to protect the inalienable rights of man that existed anterior to the formation of society,” while the “natural law” theory referred to “abstract principles of justice, humanity, tolerance, and ‘civilized’ living that were ‘beyond dispute’ in any culture which considered itself enlightened”).

³ It should be obvious from this discussion that by “textualist” I mean something far broader than the most common jurisprudential meaning of one who focuses on the constitutional text to the exclusion of such things as history or intention. See Marshall, *Fighting the Words of The Eleventh Amendment*, 102 HARV. L. REV. 1342, 1343 n.9 (1989) (stating that “the textualist adheres to the plain meaning of the Constitution’s words to the extent that they are determinate”); Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 17-22 (1987) (discussing the meaning and limits of textualism). I use the term simply to indicate the tradition that judicial decisions must be anchored by the text, in contrast to the extra-textualist tradition of ignoring the text.

⁴ See Sherry, *supra* note 1, at 1132-33 (noting that legislatures were “declaring rights already in existence” in enacting “lists of fundamental rights and principles”).

⁵ Seven of the original thirteen states enacted separate bills or declarations of rights. DEL. DECLARATION OF RIGHTS (1776), reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 197-99 (W. Swindler ed. 1973); MD. DECLARATION OF RIGHTS AND CONST. (1776), reprinted in 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 372-83

constitutions, however, was meant as innovative: the provisions creating the framework of government.

The dual nature of the early written constitutions—as mere declarations of an older tradition of fundamental law and as new social compacts of government—was reflected in the fact that the seven original states with any significant textual protection of rights explicitly separated their constitutions into two distinct parts: a declaration of rights and a frame of government.⁶ The first was derived, often explicitly, from unwritten tradition; the second was a written creation of the “new science of politics.”⁷

Between 1776 and 1787, state judiciaries carried into practical effect this union of tradition and science. In seven cases during that period, state judges reviewed state statutes for consistency with fundamental law. Five statutes were invalidated,⁸ one was upheld,⁹ and one was given a questionable interpretation in order to avoid any conflict with higher law.¹⁰ In only two of the cases did the judges rely exclusively

(W. Swindler ed. 1975); MASS. CONST. OF 1780, part the first, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92-96 (W. Swindler ed. 1975); N.H. CONST. OF 1784, part I, *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 344-47 (W. Swindler, ed. 1976); N.C. CONST. OF 1776, Declaration of Rights, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 402-04 (W. Swindler ed. 1978); PA. CONST. OF 1776, Declaration of Rights of the Inhabitants of the State of Pennsylvania, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 278-79 (W. Swindler ed. 1979); VA. DECLARATION OF RIGHTS (1776), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48-50 (W. Swindler ed. 1979). By 1800, only eight of sixteen states had them. Vermont was the only additional state. VT. CONST. OF 1777, ch. I, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 489-90 (W. Swindler ed. 1979).

⁶ See *supra* note 5 (noting the seven original states which included a declaration of rights in their original constitutions).

⁷ The “new science of politics” refers to a scientific philosophy which recognized that the government should serve as a check on the violence and passion of human nature to achieve power while still stimulating the pursuit of passive self-interest. The theoretical result would be the control of violent human nature while permitting society to accomplish constructive private goals. See Schwartz, Book Review, 97 HARV. L. REV. 815, 828-34 (1983) (reviewing W. NELSON, *THE ROOTS OF AMERICAN DEMOCRACY, 1830-1900* (1982)); see also Moynihan, *The “New Science of Politics” and the Old Art of Government*, 1987 PUB. INTEREST 22 (discussing the influence of the “new science of politics” on colonial and present government).

⁸ *Symsbury Case*, 1 Kirby 444 (Conn. 1785); *The Ten Pound Act Cases* (N.H. 1786), *described in* 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 969-71 (1953); *Holmes v. Walton*, *described in* Scott, *Holmes v. Walton: The New Jersey President*, 4 AM. HIST. REV. 456, 456-60 (1899); *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787); *Trevett v. Weedon* (R.I. Super. Ct. 1786), *described in* J. VARNUM, *THE CASE, TREVETT AGAINST WEEDON: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE* (1787).

⁹ *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

¹⁰ *Rutgers v. Waddington* (N.Y. Mayor's Ct. 1784), *reprinted in* 1 J. GOEBEL, *THE LAW PRACTICE OF ALEXANDER HAMILTON* 317-419 (1964).

on the written constitution.¹¹ In the others, judges (and lawyers) relied on both the written constitution and unwritten fundamental law, citing such things as the "fundamental laws of England,"¹² the "law of nations,"¹³ Magna Carta,¹⁴ "common right and reason,"¹⁵ "unalienable rights,"¹⁶ and "natural justice."¹⁷

Moreover, these cases exhibit a pattern. In cases involving individual rights, the natural law component was usually dominant. In cases involving the structure of the government, however, the written constitution was often more decisive.¹⁸ The distinction between natural law and textualism as methods of discovering fundamental law thus followed the dichotomy between tradition and science.

After the establishment of the federal courts in 1789, those courts continued the same tradition of measuring positive law against both written and unwritten higher law. Early federal cases also exhibited the same correlation between textualism and governmental powers, as well as between natural law and individual rights. Even within a single case, a judge might have relied on the written text to decide a separation of powers question and on unwritten law to decide an individual rights question.

¹¹ *Bayard*, 1 N.C. (Mart.) at 7 (ruling "[t]hat by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. . . . But that was clear, that no act [the legislature] could pass, could by any means repeal or alter the constitution"); *Caton*, 8 Va. (4 Call) at 8 (Wythe, J., relying on the state constitutional separation of powers provision in order to "protect one branch of the legislative, and, consequently, the whole community, against the usurpations of the other"); see also Sherry, *supra* note 1, at 1142-46 (discussing *Bayard* and *Caton*).

¹² *Trevett v. Weedon* (R.I. Super. Ct. 1786), described in J. VARNUM, *supra* note 8, at 11, 15; see also Sherry, *supra* note 1, at 1140 (discussing *Trevett* and the court's application of the fundamental laws of England).

¹³ See *Rutgers v. Waddington* (N.Y. Mayor's Ct. 1784), reprinted in 1 J. GOEBEL, *supra* note 10, at 340-92 (briefs for defendant), 399-419 (opinion of the Mayor's Court); see also *Trevett v. Weedon* (R.I. Super. Ct. 1786), described in J. VARNUM, *supra* note 8, at 23 (describing the "general principles equally binding in all governments"); Sherry, *supra* note 1, at 1136-38 (discussing the use of the "laws of nations" in the opinion of the *Rutgers* court).

¹⁴ *Trevett v. Weedon* (R.I. Super. Ct. 1786), described in J. VARNUM, *supra* note 8, at 11, 15, 19; see also Sherry, *supra* note 1, at 1140 (discussing the *Trevett* court's use of Magna Carta).

¹⁵ *Trevett v. Weedon* (R.I. Super. Ct. 1786), described in J. VARNUM, *supra* note 8, at 30; see also Sherry, *supra* note 1, at 1141 (discussing the *Trevett* court's use of "common right and reason").

¹⁶ *Trevett v. Weedon* (R.I. Super. Ct. 1786), described in J. VARNUM, *supra* note 8, at 35; see also Sherry, *supra* note 1, at 1141 (discussing the *Trevett* court's use of "unalienable rights" in its decision).

¹⁷ See *Trevett v. Weedon* (R.I. Super. Ct. 1786), described in J. VARNUM, *supra* note 8, at 29-31 (the court referring to "the laws of nature," "the laws of God," and "the laws of superior nature"). In other cases, while not specifically referring to any unwritten law, there is a strong suggestion that fundamental law served as a basis for the court's decisions. See Sherry, *supra* note 1, at 1141-42 (discussing *The Ten Pound Act Cases* and the *Symsbury Case*).

¹⁸ See Sherry, *supra* note 1.

My purpose here is to continue the examination of the role of unwritten fundamental law by looking at state cases after the establishment of the federal republic. In particular, I will focus on Virginia during the last decade of the eighteenth century and the first three decades of the nineteenth. Because of its longstanding and well-developed court system, its plethora of outstanding judges and lawyers,¹⁹ and its systematic reporting of decisions of the state's highest court, early Virginia offers a wealth of cases through which to investigate the role of unwritten law. Virginia, moreover, had one of the earliest written constitutions, and because it included a substantial bill of rights, it affords one of the best opportunities for measuring the relative importance of written and unwritten law.

Two types of cases provide useful ground for testing the hypothesis that Virginia judges²⁰ had recourse to unwritten as well as written fundamental law. The question is raised directly in cases of judicial review—cases in which the court was reviewing the validity of a positive legislative enactment for its conformity with higher law. In those cases, it is possible to ask whether the judges seemed to measure the enactment against the written constitution (either exclusively or in preference to unwritten law), or whether they seemed indifferent regarding the written or unwritten character of the fundamental law.

The question of the influence of unwritten law is also raised, somewhat less directly, when a court was asked to rule on a statutory or common law dispute that implicated principles of natural law. In early nineteenth-century Virginia, the quintessential example of such a dispute was cases involving slavery. While few opinions directly challenged the institution of slavery as a violation of natural law,²¹ any case in which a slave sought a legal declaration of freedom—indeed, perhaps any case governed by the law of slavery—indirectly required the judges to determine the status of the institution. A judicial refusal to free the petitioning slave, and to some extent a refusal to use the case as an opportunity to declare the whole insti-

¹⁹ These included George Wythe, Spencer Roane, Edmund Pendleton and St. George Tucker on the bench, as well as Edmund Randolph and John Marshall at the bar.

²⁰ All cases cited in this Article are from the Virginia Supreme Court of Appeals (sometimes referred to as the court of appeals) unless otherwise noted.

²¹ Probably the only case that did so was Chancellor Wythe's opinion in *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806), which was disapproved by the Virginia Supreme Court of Appeals. Wythe's opinion, which has not been preserved, apparently freed the petitioning slaves on two alternative grounds: that they were not Negroes but Indians and thus were illegally enslaved, and that "freedom is the birthright of every human being." *Id.* Although the supreme court of appeals upheld Wythe's decree on the first ground, both appellate opinions explicitly disapproved of the second ground. *Id.* at 140-41, 144.

tution in violation of unwritten law, necessarily raises one of two preliminary inferences: either the institution was not in violation of unwritten fundamental law, or the judge failed, in that instance, to invalidate positive law that conflicted with unwritten fundamental law. Thus, an examination of the Virginia decisions on the law of freedom provides further illumination of the role of unwritten law in that state.

I turn first to extra-textual interpretation in cases of judicial review, and then to the role of unwritten law in cases of slaves petitioning for freedom.

II. JUDICIAL REVIEW OF STATUTES

In order to distinguish between textual and extra-textual interpretation, one must first know what the text says. 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 selected members 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 primarily to be memorializing unwritten rights rather than creating new ones.²² 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 and independent, and have certain inherent rights."²³ Further evidence of the natural law influence on the 1776 bill of rights is found in the fact that some of its provisions seemed to reflect natural law precepts rather than a concern with placing injunctive limits on government.²⁴ For example, section 15 stated: "That no free 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."²⁵ Although the Virginia courts did occasionally refer to the admonition

²² VA. DECLARATION OF RIGHTS (1776), *supra* note 5, at 48-50.

²³ *Id.* § 1, at 49.

²⁴ Robert Palmer has made a similar observation about the 1776 Pennsylvania Declaration of Rights, noting that rights were "principles and not . . . sovereign commands." Palmer, *Liberties as Constitutional Provisions: 1776-1791*, in *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 65 (1987).

²⁵ VA. DECLARATION OF RIGHTS § 15 (1776), *supra* note 5, at 50.

to recur to fundamental principles,²⁶ the remainder of section 15 did 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 in the Bill of Rights were a guarantee of freedom of the press,²⁷ a right to a jury trial,²⁸ and religious toleration.²⁹ For the purposes of this Article, it is important to note that the Virginia Bill of Rights included neither a prohibition against ex post facto laws nor a requirement of compensation when private property is taken for public purposes. Nevertheless, Virginia judges in the early days of the republic used unwritten or natural law to protect against both ex post facto laws and uncompensated takings.³⁰ Judges and lawyers also relied, generally, on unwritten natural law principles as much as on the written text, and, on occasion, explicitly preferred the unwritten principles.

Virginia courts had been reviewing the validity of statutes since at least 1782, and perhaps earlier.³¹ The reliance on natural law, however, first became 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 it was argued that additional duties without compensation was equivalent to a diminution in salary, and thus unconstitutional. Although no action was instituted, the court of appeals

²⁶ See, e.g., *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call) 135, 143 (1788).

²⁷ VA. DECLARATION OF RIGHTS § 12 (1776), *supra* note 5, at 50.

²⁸ *Id.* § 8, at 49.

²⁹ *Id.* § 16, at 50.

³⁰ See *infra* notes 31-101 and accompanying text.

³¹ See *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782). There have been persistent rumors of an earlier case, initially described by Thomas Jefferson in his reports of general court decisions prior to independence. *Robin v. Hardaway*, (Va. 1772), reported in JEFFERSON'S REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA 109, reprinted in Va. Rpts. Ann. (Jefferson) 58 (1903) [hereinafter Va. Rpts. Ann. (Jefferson)]; see also R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 19 (1975); 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 91-92 (H. Catterall ed. 1926). 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 plaintiffs' primary argument was that the statute had been repealed. See *Robin v. Hardaway* (1772), Va. Rpts. Ann. (Jefferson), *supra*, at 58, 60-62. 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. Wrights*, 11 Va. (1 Hen. & M.) 133 (1806). The one case I am aware of that did cite *Robin* used it only to support the proposition that the earlier statute tolerating Indian slavery had been repealed. *Gregory v. Baugh*, 29 Va. (2 Leigh) 665, 681 (1831).

nevertheless made its opinion known to the legislature. Four months after the act was passed, the judges delivered to the legislature *The Respectful Remonstrance of the Court of Appeals*.³² In it, they declared an obligation to favor the written constitution over statutes inconsistent with it, and found the 1788 act to be inconsistent with the text of the constitution.³³ Rather than invalidate the act, however, they simply refused to execute it, and requested the legislature to repeal it.³⁴

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 constitution."³⁵ The judges began their analysis by noting that in "forming their judgment on both the 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."³⁶

In discussing "fundamental principles" and their relationship to the constitution, the judges clearly relied 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," and went on to explain that only an independent judiciary can mete out impartial justice to the rich and the poor, as well as to the government and the people.³⁷ Thus the "fundamental principles" to which the constitution directed recurrence were, in fact, 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 first discussed "fundamental principles," suggesting that the judges believed such principles to be a primary basis by which they refused to execute the legislation.

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."³⁸ Since the *Remonstrance* ultimately con-

³² Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 140-47 (1788).

³³ *Id.* at 142.

³⁴ *Id.* at 146.

³⁵ *Id.* at 141-42.

³⁶ *Id.* at 142-43.

³⁷ *Id.* at 143.

³⁸ *Id.*

cluded that the constitution did in fact secure the independence of the judiciary, we cannot know what the judges might have done had they decided otherwise. However, the very asking of the question 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 had before it an actual case implicating the constitutionality of a statute. In *Turner v. Turner's Executor*,³⁹ the plaintiffs challenged the validity of a legislative enactment changing the law relating to gifts of slaves, alleging that it was an unconstitutional, *ex post facto* law. Although President⁴⁰ Edmund Pendleton ultimately upheld the law as being prospective only, he did suggest that a retrospective law would be invalid—despite the absence of any provision in the Virginia Constitution outlawing *ex post facto* laws.⁴¹

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."⁴² The power to make such laws, he contended, was "oppressive and contrary to the principles of the constitution."⁴³ Since the constitution did not contain any provision prohibiting retrospective laws, 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 inference of a direct reliance upon natural law is perhaps stronger for two reasons. First, Pendleton did not cite the "fundamental principles" provision in *Turner*, while

³⁹ 8 Va. (4 Call) 234 (1792).

⁴⁰ In Virginia, President was the equivalent of Chief Justice.

⁴¹ See *Turner v. Turner's Ex'r*, 8 Va. (4 Call) 234, 237 (1792). 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. Compare J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 625-26 (I.H. Scott ed. 1970) (1840) (statement of Dickenson, Aug. 29, 1787) (stating that *ex post facto* laws only apply to criminal cases) with *id.* at 727-28 (statement of Mason, Sept. 14, 1787) (stating that *ex post facto* laws most likely encompassed both civil and criminal laws). See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (illustrating, in three separate opinions, the scope of the civil-criminal debate regarding the correct definition and application of *ex post facto*); cf. *Dash v. Van Kleeck*, 7 Johns. 477, 505 (N.Y. Sup. Ct. 1811). That dispute, however, is irrelevant to the discussion in the text; Virginia's written constitution contained no bar to any type of retrospective law.

⁴² *Turner*, 8 Va. (4 Call) at 237.

⁴³ *Id.*

in the *Remonstrance*, written only four years earlier (with Pendleton's participation), the judges did take note of the "fundamental principles" provision. Second, Pendleton's own opinion in an 1802 *ex post facto* case directly attributes the invalidity of retrospective laws to "natural justice."⁴⁴

Although both the *Remonstrance* and *Turner* suggest that judges might have relied on unwritten higher law in addition to the written law, one 1793 case in the Virginia Court of Chancery provides intriguing evidence of the predominance of unwritten or natural law. Chancellor George Wythe, an eminent Virginia jurist and the holder of the first law chair in the United States, decided in *Page v. Pendleton*⁴⁵ that the Virginia legislature could not unilaterally discharge debts Virginians owed to British citizens. His decision was based on the premise that a legislature could not bind one who was not a member of the society, because the requisite consent was lacking.⁴⁶

In the course of his opinion, Wythe wrote several long footnotes explaining his holding. Two of these footnotes contain extensive discussions of natural law principles. To support his holding that "the right to money due to an enemy cannot be confiscated,"⁴⁷ 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.⁴⁸

He then proceeded to explain why the "authority" was contrary to reason.⁴⁹

⁴⁴ *Elliott's Ex'r v. Lyell*, 7 Va. (3 Call) 268 (1802); see *infra* text accompanying notes 62-77 (discussing *Lyell*).

⁴⁵ *Page v. Pendleton* (Va. 1793) reported in G. WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY WITH REMARKS UPON DECREES BY THE COURT OF APPEALS REVERSING SOME OF THESE DECISIONS 211 (1852), reprinted in Va. Rpts. Ann. (Wythe) 221 (1903).

⁴⁶ *Id.* at 214-16, Va. Rpts. Ann. (Wythe) at 232-33.

⁴⁷ *Id.* at 212, Va. Rpts. Ann. (Wythe) at 221.

⁴⁸ *Id.* at 212 n.(b), Va. Rpts. Ann. (Wythe) at 221 n.(b).

⁴⁹ *Id.* Wythe analogized his belief in the impropriety of a legislative commission for privateering, which many of his day felt to be justified, to the crime of piracy. Noting that both the Greeks and Barbarians of ancient times viewed piracy as a noble venture, Wythe pointed to a change in this philosophy over time, eventually leading to the conclusion that piracy was not noble at all, but rather a crime against mankind. Inherent in this belief, apparently, was the natural law philosophy that crimes against mankind exist whether or not a community believes they do. Likewise, Wythe felt that punishing members of an entire community by endorsing non-payment of the private debt owed to certain citizens "when, without their knowledge, some of their fellow-citizens or fellow-subjects act unjustly," violated an unannounced principle of law, despite the legislative condonation of such action.

Later, in considering the question of who might be bound by what laws, Wythe dropped an even more interesting footnote. He stated:

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.⁵⁰

He then went on to explain how the disenfranchised, and subsequent generations, could nevertheless be held to have consented to the passage of positive laws in which they actually played no part.⁵¹ It is clear from these footnotes that Wythe believed that fundamental law included natural, unwritten law, although his ruling did not in fact 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.

In 1797, an enterprising plaintiff's counsel acted upon Judge Pendleton's earlier 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*⁵² upheld a statute that converted all entailed estates into fee simple estates, thus depriving the remaindermen of previously acquired contingent rights. Counsel for the plaintiff primarily argued that the statute should not be construed to dock entails in existence prior to the passage of the act. 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."⁵³ No authority was given for this proposition, nor could any textual

⁵⁰ *Id.* at 214 n.(e), Va. Rpts. Ann. (Wythe) at 222 n.(e).

⁵¹ *Id.*, Va. Rpts. Ann. (Wythe) at 222-23 n.(e). Wythe's analysis initially confronts the problem of law binding those who have not directly consented to it by declaring society necessary to the continued existence of humanity, for "[w]ithout society, mankind . . . would be wretched." *Id.* Thus, since society is a necessary condition to survival, those within society must conform to some basic institutions and obligations necessary to make a group of individuals into a community. Society's structure is, in turn, provided by natural law, which is not formally consented to, but rather "devolves" upon humanity. *Id.* Therefore, individuals by their very formation of a society necessarily "consent" to being governed by certain principles which, if society is to continue, must be binding upon subsequent generations.

⁵² 5 Va. (1 Call) 165 (1797).

⁵³ *Id.* at 172.

support be provided. As noted, the Virginia Bill of Rights contained neither an ex post facto clause nor a just compensation clause.⁵⁴

Judge Pendleton construed the statute as operating retrospectively, but failed to discuss its constitutionality. This omission is especially puzzling in light of Pendleton's remark during argument that "the defendant's counsel are desired to confine themselves to the question, whether the act is void, as being unconstitutional."⁵⁵ Despite being enjoined to do so by the President, defendant's counsel apparently did not address the question and Pendleton never returned to it. *Carter*, therefore, affords some support for the notion that lawyers used natural law principles in arguing cases, but provides 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."⁵⁶ 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.

Two cases involving fines show that the early Virginia courts subscribed to the related idea that natural rights and written rights were at least coterminous. In *Jones v. Commonwealth*,⁵⁷ a 1799 case, the court overturned the imposition of joint fines on several defendants. Judge Spencer 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."⁵⁸ Judge Paul 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."⁵⁹ Judge Pendleton dissented, distinguishing the common law cases without mentioning the written constitution. However, two years later, in *Bullock v. Goodall*,⁶⁰ Pendleton revealed his sympathy with his brethren's equivalence of the written and unwritten law. In overturning a fine, he wrote that it was "superlatively excessive, unconstitutional, oppressive, and against conscience."⁶¹

In 1802, the court revisited the question of retrospective statutes and unwritten law. *Elliott's Executor v. Lyell*⁶² involved a 1786 statute

⁵⁴ See *supra* text accompanying note 30.

⁵⁵ *Carter*, 5 Va. (1 Call) at 174.

⁵⁶ 3-4 G. EDWARD WHITE, *supra* note 1, at 291.

⁵⁷ 5 Va. (1 Call) 555 (1799).

⁵⁸ *Id.* at 556.

⁵⁹ *Id.* at 559.

⁶⁰ 7 Va. (3 Call) 44 (1801).

⁶¹ *Id.* at 50.

⁶² 7 Va. (3 Call) 268 (1802).

that changed the law of obligations as it related to joint obligors. The question before the court was whether the statute applied to a contract entered into prior to the enactment of the statute. The court ultimately concluded that the statute could not be read to apply to the contract at issue. However, several of the judges reached that conclusion at least partly on the basis of their views about unwritten fundamental law.

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.⁶³ 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.⁶⁴ This mingling of legislative and judicial functions would, he contended, violate the constitutional guarantee that the branches of government be kept distinct.⁶⁵ 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. It is not even clear whether counsel meant 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 of more significance than the constitutional one.

Only Judge Roane followed counsel’s lead and confined himself to statutory interpretation. Roane noted that “[t]he question here, is not, whether the Legislature have power to pass a retrospective law” but rather whether they had done so.⁶⁶ Roane concluded that the statute could not be read to have retrospective effect.⁶⁷ 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 William Fleming held that the legislature could not be presumed to intend retrospective effect, because “retrospective laws [are] odious in their nature.”⁶⁸ Construing the statute retrospectively, moreover, would be “contrary to the general system of an enlightened

⁶³ See *id.* at 271.

⁶⁴ See *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 (N.Y. Sup. Ct. 1811) (stating that “the power that makes is not the power to construe a law”).

⁶⁵ *Lyell*, 7 Va. (3 Call) at 274.

⁶⁶ *Id.* at 277.

⁶⁷ *Id.* at 280-81.

⁶⁸ *Id.* at 282.

jurisprudence.”⁶⁹ Judge Peter Lyons similarly concluded that the legislature “ought not to be presumed to have willed injustice.”⁷⁰ 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.”⁷¹ Both Fleming and Lyons thus avoided actually holding the law invalid, but did so under the canon that statutes should be construed so as to avoid doubts about their constitutionality. Although these opinions do not demonstrate that either judge would have invalidated the statute if they could not construe it consistently with natural justice, they do suggest the strong relationship between unwritten law and judicial review.

Judge Pendleton, who had been hinting since 1782 that judges might strike down unconstitutional laws,⁷² and who would write an opinion invalidating a state statute only a year after *Lyell*,⁷³ took a rather disingenuous approach. He first declared that retrospective laws were “against the principles of natural justice”⁷⁴ 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.⁷⁵ He then proceeded to interpret the statute as Fleming and Lyons had, but made his interpretation appear entirely unconstrained by any external principles.⁷⁶ Thus, Pendleton 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—thereby proclaiming his intentions without having to act on them, unlike Lyons and Fleming. Nevertheless, Pendleton’s beliefs are clear: retrospective

⁶⁹ *Id.*

⁷⁰ *Id.* at 284.

⁷¹ *Id.* at 283.

⁷² See *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 17-18 (1782).

⁷³ Pendleton wrote an opinion in *Turpin v. Lockett*, 10 Va. (6 Call) 113 (1804), invalidating a Virginia statute requiring the sale of church lands, *id.* at 187, but he died the day before it was to be delivered. See 2 J. MAYS, EDMUND PENDLETON, 1721-1803: A BIOGRAPHY 345 (1952); see also *infra* notes 78-80 and accompanying text.

⁷⁴ *Lyell*, 7 Va. (3 Call) at 285.

⁷⁵ *Id.* at 286.

⁷⁶ See *id.* at 286-88 (reasoning that the words of the statute indicated no intent on the part of the legislature to pass a retrospective act).

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."⁷⁷

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*⁷⁸ 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.⁷⁹ Judge Pendleton, however, died the night before he was to deliver his opinion,⁸⁰ 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.

Judge Roane found that the church had no vested right in the property and voted to affirm.⁸¹ Judges Carrington and Lyons, in a brief joint opinion, found the confiscation law unconstitutional without much elaboration.⁸² Judge Tucker, whose vote changed the final outcome, delivered a detailed opinion examining the church's rights in the property. He found both 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.⁸³

Tucker 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.⁸⁴ He wrote: "So far

⁷⁷ *Id.* at 285.

⁷⁸ 10 Va. (6 Call) 113 (1804).

⁷⁹ See *infra* note 82 and accompanying text.

⁸⁰ See *supra* note 73.

⁸¹ *Turpin*, 10 Va. (6 Call) at 158.

⁸² *Id.* at 186.

⁸³ Tucker held that a grant of state monies to a specific denomination violated section 4 of the Virginia Bill of Rights, which provided: "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public service . . ." VA. DECLARATION OF RIGHTS § 4 (1776), *supra* note 5, at 49. According to Tucker, after the Revolution "the promulgation of the religious doctrines of any religious sect ceased to be a common benefit to the community" and thus ministers were not entitled to community payment. *Turpin*, 10 Va. (6 Call) at 152.

⁸⁴ *Turpin*, 10 Va. (6 Call) at 152.

as any act of the legislature has operated for [the] purpose [of protecting those rights], it may be considered as pursuing the injunctions of moral justice, and of the first article of our bill of rights.”⁸⁵ This was not, however, 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 reconcilable to the dictates of moral justice, and the principles of the constitution of this commonwealth.”⁸⁶ 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, some judges continued to adhere to the doctrine of natural rights.

Indeed, the most suggestive endorsement of unwritten law is an 1809 retrospectivity case, *Currie’s Administrators v. Mutual Assurance Society*.⁸⁷ The legislature had incorporated an insurance company in 1794, and then had changed the charter in 1805. Plaintiff was an insured whose risk had risen as a result of the later act, and he challenged it as unconstitutionally retrospective. The court upheld the 1805 statute: Judge Roane found that the act worked no injustice,⁸⁸ and Judge Fleming—in an opinion largely irrelevant to our concerns—held that the original act reserved the right to change the charter.⁸⁹ Judge Roane, however, also delivered a stinging refutation of the defendant’s attempt to limit the court to a textualist analysis.

John Wickham,⁹⁰ 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

⁸⁵ *Id.*

⁸⁶ *Id.* at 150.

⁸⁷ 14 Va. (4 Hen. & M.) 315 (1809).

⁸⁸ *See id.* at 349-50.

⁸⁹ *Id.* at 355-56.

⁹⁰ 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 *supra* at notes 78-86, and represented the slave owners in *Pleasants v. Pleasants*, 6 Va. (2 Call) 319 (1800), discussed *infra* at notes 165-67. Their most famous collaborative effort was defending Aaron Burr. *See* D. MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809*, at 296, 310-11 (1974); J. REARDON, *EDMUND RANDOLPH: A BIOGRAPHY* 350-52, 357-58 (1974); C. WARREN, *A HISTORY OF THE AMERICAN BAR* 267-68 (1911).

of a contract.”⁹¹

Judge Roane vehemently rejected that limit on the court’s authority. 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.”⁹² 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 of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?⁹³

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.

If the previously noted *Remonstrance*⁹⁴ suggests that the Virginia court was influenced by natural law as early as 1788, *Crenshaw v. Slate River Co.*⁹⁵ 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. The court unanimously held that the plaintiffs held vested rights in their property, and that they could not be deprived of those rights without compensation.

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.”⁹⁶ Since the 1819 act was duly passed by the Virginia legislature, that clause was of no avail. Judge Green, with little elaboration, relied instead on section 1 of the 1776 Bill of Rights, which protected the rights of “possessing property” and “enjoying liberty.”⁹⁷ The other judges apparently relied on unwritten law.

Judge Carr stated that the principle of compensation was “laid

⁹¹ *Currie's Adm'r*, 14 Va. (4 Hen. & M.) at 341.

⁹² *Id.* at 346.

⁹³ *Id.* at 346-47.

⁹⁴ See *supra* notes 32-38 and accompanying text (discussing the *Remonstrance*).

⁹⁵ 27 Va. (6 Rand.) 245 (1828).

⁹⁶ VA. DECLARATION OF RIGHTS § 6 (1776), *supra* note 5, at 49.

⁹⁷ *Crenshaw*, 27 Va. (6 Rand.) at 276.

down by the writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country.”⁹⁸ 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.”⁹⁹ Judge Coalter held that compensation was required without citing any written or unwritten authority.¹⁰⁰ Judge Cabell simply stated that he concurred with all the other judges.¹⁰¹

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, the court in *Murray v. M’Carty*¹⁰² 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.’”¹⁰³ The court expanded on this principle in 1829, 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.”¹⁰⁴

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, the court in *Kemper v. Hawkins*¹⁰⁵ relied exclusively on the written constitution to invalidate a statute giving district court judges equitable jurisdiction and powers. 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. All of the opinions are conspicuously textualist.

Several judges minutely examined 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 envisioned the written constitution as the fundamental law animating judicial review of statutes.¹⁰⁶ Judge Roane defined fundamental prin-

⁹⁸ *Id.* at 265.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 283.

¹⁰¹ *Id.* at 284.

¹⁰² 16 Va. (2 Munf.) 393 (1811).

¹⁰³ *Id.* at 397; see also *id.* at 405 (Judge Roane stating that the right of emigration is “of paramount authority, bestowed on us by the God of Nature”).

¹⁰⁴ *Hunter v. Fulcher*, 28 Va. (1 Leigh) 172, 181 (1829).

¹⁰⁵ 3 Va. (1 Va. Cas.) 20 (1793).

¹⁰⁶ See *id.* at 31-34, 59-60.

ciples 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 land-marks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.¹⁰⁷

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.”¹⁰⁸ 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 deductions only.”¹⁰⁹

Kemper, like the Virginia case of *Commonwealth v. Caton*¹¹⁰ eleven years earlier, raised a pure structure of government question.¹¹¹ 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.”¹¹² Unwritten law might define natural rights, but the particular form of government depended primarily or exclusively on the written constitution.¹¹³

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 through the 1820s.¹¹⁴ 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

¹⁰⁷ *Id.* at 40.

¹⁰⁸ *Id.* at 78.

¹⁰⁹ *Id.*

¹¹⁰ 8 Va. (4 Call) 5 (1782).

¹¹¹ 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.

¹¹² VA. CONST. OF 1776, reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 51-56 (W. Swindler ed. 1979).

¹¹³ See also *Case of the County Levy*, 9 Va. (5 Call) 139 (date unknown). In *Levy*, Judge Pendleton interpreted the written text to allow courts as well as legislatures to assess levies to support courthouses, prisons and the like.

¹¹⁴ It is also similar to the pattern between 1789 and 1830 in several other states, including New York, Massachusetts, and South Carolina. See Sherry, *Courts of Justice and Courts of Law* (forthcoming).

important source of the fundamental law by which positive enactments might be measured.

III. SLAVERY

During this same period, however, the Virginia courts failed to use principles of natural justice to condemn what might be considered the most flagrant violation of natural rights, the enslavement of the black race. This failure seems inconsistent with the strong natural law reasoning invoked by the court in the cases previously discussed. Indeed, many citizens of the early republic—including such Virginia judges as George Wythe, St. George Tucker and Spencer Roane—were personally convinced that slavery violated principles of natural justice.¹¹⁵ A number of northern states, whose constitutions contained language much like Virginia's to the effect that "all men are by nature equally free and independent," construed that language to prohibit slavery.¹¹⁶ Abolitionists, especially in the decade preceding the Civil War, stressed the antipathy between the law of nature and slavery.¹¹⁷

Why then did the Virginia judges fail to enforce unwritten natural law where it might do the most good? Several scholars have suggested one plausible explanation: that the values of natural law and the values of positive law—or results produced by the application of the

¹¹⁵ See I. BROWN, *AMERICAN ARISTEDES: A BIOGRAPHY OF GEORGE WYTHE* 266-67 (1981) (discussing Wythe's abhorrence of slavery); R. COVER, *supra* note 31, at 205-06 (discussing Tucker's and Roane's antislavery sentiments); 3-4 G. EDWARD WHITE, *supra* note 1, at 683 (reprinting Tucker's note, "On the State of Slavery in Virginia," in which Tucker stated that slavery was the abolishment of both "personal liberty" and the "right to private property"); Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 *VAND. L. REV.* 7, 127-28 (1979) (discussing Tucker's belief that "[m]anumission [had] a 'benevolent design'").

¹¹⁶ Vermont did so explicitly in its 1777 Constitution, immediately following the general language of natural equality. *VT. CONST. OF 1777*, ch. 1, § 1, *supra* note 5, at 489. Massachusetts did so through judicial construction of the general language articulated in the "free and equal clause" of the state constitution. See P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 41 (1981); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 45-48 (1977). With the Massachusetts example, contrast *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824) (stating that "there is nothing in the Constitution or Bill of Rights, repugnant to the power which the Legislature has exercised in the punishment of [being condemned or resold as a slave for a grand larceny offense]").

¹¹⁷ See R. COVER, *supra* note 31, at 154-58; D. FARBER & S. SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* (1990); W. WIECEK, *supra* note 116, at 249-60; Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *HARV. L. REV.* 513, 528-38 (1974).

latter values—tugged southern judges in opposite directions.¹¹⁸ This thesis rests on the theory that written enactments were held superior to unwritten fundamental law; a theory that is undermined—at least outside the context of slavery—by many of the cases discussed in the previous section.

In fact, however, many of the slave cases in early Virginia reflect an even deeper conflict than that between natural and positive law: a conflict between two unwritten natural rights—the right to liberty and the right to property. In particular, suits by slaves seeking their freedom often tended to put judges in the untenable position of divesting one party of a supposedly “inalienable” right.

An examination of several dozen cases¹¹⁹ in which slaves petitioned the courts for freedom confirms that the Virginia courts did view the question more as a conflict between natural rights than as a conflict between natural law and positive law. This conflict is reflected in the cases in two ways. First, the result in many of the cases turned on whether the party opposing freedom had what was recognized as an unforfeited vested property right in the slave. While each case might have superficially depended on a particular and isolated rule of law,¹²⁰

¹¹⁸ Different scholars describe the attraction of the positive law in different ways, but all share the idea that natural rights could be “trumped” by some other value. Cover describes judges as torn between the substantive antislavery value and “fidelity to the formal system.” R. COVER, *supra* note 31, at 197. Finkelman concludes that judges were committed to “preserving the integrity of the law.” P. FINKELMAN, *supra* note 116, at 182. Nash explains that the Virginia court in particular was caught between “procedural self-restraint and pro-freedom results.” Nash, *supra* note 115, at 158; *cf.* 3-4 G. EDWARD WHITE, *supra* note 1, at 674-703 (making a similar argument about Supreme Court treatment of natural law, positive law, and slavery). For Virginia cases making explicit the conflict between natural rights and proslavery positive law, see *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827); *Butt v. Rachel*, 18 Va. (4 Munf.) 209, 212-13 (1813) (argument of counsel).

These theories illustrate the modern tendency to draw what Morton Horwitz has identified as a “stark jurisprudential dichotomy between natural law and positive law.” Horwitz, *History and Theory*, 96 *YALE L.J.* 1825, 1834 (1987). Indeed, Cover has gone even further and suggested that at least where positive law governing procedure is at issue, it *ought* to triumph over remedying even the most blatant violations of natural rights. See Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718, 722-23 (1975).

¹¹⁹ I have tried to locate and examine every published case between 1787 and 1831 in which the Virginia Supreme Court ruled on a slave’s petition for freedom. I am sure that I have missed a few, but I believe the cases discussed in the text are a representative sample, if not the majority, of the cases actually decided.

¹²⁰ Some of the rules involved were statutory, and some were common law. In all the cases, however, the rule was either ambiguous or commonly interpreted in a way that would have defeated the slave’s claim. Occasionally, judges explicitly refused to apply a general rule of law in slave cases if it would defeat the slave’s claim to freedom. For example, Judge Carrington held that the rule against perpetuities was specifically inapplicable to testamentary provisions conferring freedom on slaves. *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 347 (1800); *accord* *Peggy v. Legg*, 20 Va. (6 Munf.) 229 (1818). More often, however, the court simply interpreted an ambiguous rule; my contention is that in doing so, they were influenced by the conflict between two natural rights.

or peculiarity of facts, taken together the cases suggest a strong pattern: the courts granted petitions for freedom unless doing so would deprive an innocent property owner of vested rights. Second, the language in many of the cases reflected the judges' dilemma when faced with an inherent conflict between two principles of natural justice. I will deal first with the pattern of decisions, and then with the language of individual cases.

A. *Pattern of Decisions*

One common question involved testamentary manumissions. Despite technical and substantive problems with many of the attempted manumissions (some of which were illegal when the will was written or when the testator died), the courts generally upheld such manumissions where no creditors or third-party purchasers were involved.¹²¹

Moreover, where creditors were involved, the court tried to avoid a conflict between their rights and the rights of the slaves. In *Patty v. Colin*,¹²² the manumitting testator died in debt, and his creditors sought to satisfy their claims by taking the slaves. Even there, the court directed that the slaves be used to satisfy the claims only as a "last resort, and after every possible source of redemption should be found to have failed."¹²³ The court ordered that the testator's lands be sold and the proceeds applied to the debt; if the debt was satisfied, the slaves were to go free. If the sale yielded an insufficient amount, then the slaves were to be "sold for such term of years as may be sufficient to raise the adequate fund."¹²⁴ Only if that too proved insufficient would the slaves' petition for freedom be denied.¹²⁵

Thus heirs, who had no vested property right in the decedent's estate, were distinguished from creditors or purchasers, who did. Where the testamentary manumission was opposed by an heir, no conflict between natural rights arose, and the petition for freedom

¹²¹ See, e.g., *Isaac v. West's Ex'r*, 27 Va. (6 Rand.) 652 (1828); *Spotts v. Gillaspie*, 27 Va. (6 Rand.) 566 (1828); *President & Professors of William & Mary College v. Hodgson*, 20 Va. (6 Munf.) 163 (1818); *Charles v. Hunnicutt*, 9 Va. (5 Call) 311 (1804); *Pleasants v. Pleasants*, 6 Va. (2 Call) 319 (1800); cf. *Talbert v. Jenny*, 27 Va. (6 Rand.) 159 (1828) (manumission by deed upheld against the manumittor's son, who claimed under an earlier deed).

¹²² 11 Va. (1 Hen. & M.) 519 (1807).

¹²³ *Id.* at 529 (Roane, J., concurring).

¹²⁴ *Id.* at 528 (Tucker, J., writing for a unanimous court).

¹²⁵ *Id.*; accord *Dunn v. Amey*, 28 Va. (1 Leigh) 465, 472 (1829) ("the right to emancipate slaves is subordinate to the obligation to pay debts previously contracted"); *Woodley v. Abby*, 9 Va. (5 Call) 336, 342 (1805) (Judge Tucker ruling that emancipated slaves were subject to the debts made by their owner prior to the will granting emancipation).

was granted. Where creditors could be satisfied with nonslave property, again a conflict was avoided and the petition was granted. At least one judge even held that creditors who slept on their rights to slaves had forfeited those rights, and again no conflict existed.¹²⁶ In general, at least until the 1830s, only when the conflict between a manumitted slave's right to liberty and an innocent creditor's vested right to property was unavoidable did the courts deny a petition based on testamentary manumission.¹²⁷

An analogous pattern is evidenced in cases in which a slave who claimed manumission by deed was opposed by a person who claimed ownership of the slave by deed or sale. In *Ben v. Peete*,¹²⁸ for example, the defendant claimed ownership by virtue of a bill of sale which pre-dated the deed of manumission. Because there was insufficient evidence to support the claim of a prior sale, the court did not need to reach the harder question of conflicting natural rights. Ben gained his freedom because Peete could not produce an authenticated bill of sale to prove prior ownership.¹²⁹ In *Kitty v. Fitzhugh*,¹³⁰ by contrast, there was evidence of an attempt by Kitty's original master to commit fraud upon his divorced wife, through whom the defendant claimed. The court thus held the original master's attempt at emancipation—which occurred some ten years after his ex-wife should have come into possession of the slave—ineffective, in a suit itself brought ten years after the purported emancipation.¹³¹ Similarly, in *Moses v. Denigree*,¹³² the deed of emancipation under which the slave claimed freedom specified that the slave would become free only fifteen years

¹²⁶ See *Woodley*, 9 Va. (5 Call) at 349 (Carrington, J., dissenting).

¹²⁷ In several fairly late cases, the court refused to implement a testamentary manumission even in the absence of creditors. See *Winn v. Bob*, 30 Va. (3 Leigh) 140 (1831); *Rucker's Adm'r v. Gilbert*, 30 Va. (3 Leigh) 8 (1831); *Walthall's Ex'r v. Robertson*, 29 Va. (2 Leigh) 189 (1830); *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228 (1824). Several scholars have noted that by the early 1830s the courts were becoming less willing to uphold slaves' right to freedom, and these cases may exemplify that trend. See, e.g., R. COVER, *supra* note 31, at 74-75; P. FINKLEMAN, *supra* note 116, at 181-82; see also *Gregory v. Baugh*, 29 Va. (2 Leigh) 665, 680 (1831) (ruling against the slave and commenting that "all who have examined the earlier cases in our books, must admit, that our judges (from the purest motives, I am sure) did, in favorem libertatis, sometimes relax, rather too much, the rules of law").

However, in both *Maria* and *Rucker's Administrator*, the testator's intentions were quite unclear; it is possible to read both wills as not being intended to free the petitioning slaves. In *Walthall's Executor*, Judge Carr dissented, and Judge Cabell—who had often voted in favor of freedom—was absent. Thus, these few cases do not significantly undermine the thesis in the text.

¹²⁸ 23 Va. (2 Rand.) 539 (1824).

¹²⁹ *Id.* at 547-48.

¹³⁰ 25 Va. (4 Rand.) 600 (1827).

¹³¹ *Id.* at 609-10.

¹³² 27 Va. (6 Rand.) 561 (1828).

later. In the meantime, the manumittor died, and his daughter inherited the slave. Shortly after he should have been freed, he was sold to a stranger. He brought suit some twenty years later, and the court denied his petition for freedom.¹³³ As in the cases involving testamentary manumissions, these cases suggest that the court tried to avoid a conflict between the slaves' right to liberty and third-party rights of property, ruling in favor of the latter only when a conflict was unavoidable.

One case raised an intriguing variation of this situation. In *Thrift v. Hannah*,¹³⁴ the party opposing the petition for freedom was the husband of the manumittor. Before she married, Hannah's owner executed an *in futuro* deed of manumission. The deed was not proved or recorded, and the husband was unaware of it. Hannah stayed with her mistress past the date she should have been emancipated, and sued for freedom only after her mistress' death. If one views the rights acquired by the husband upon his marriage as intermediate between the paramount rights of a creditor and the nonvested rights of an heir, this case raises a difficult question. Indeed, the court split three to two against the petition for freedom.

The various opinions indicate that the judges were aware of the peculiar character of a husband's property rights, and that their views on his rights were intertwined with their views on Hannah's petition. Judge Green would have upheld Hannah's claim to freedom, and his opinion provides the strongest evidence of such a linkage:

[Allowing Hannah and others like her to sue for freedom so late] could prejudice no stranger to the transaction, if it was not allowed to extend (as I think it ought not) to affect the creditors of or

¹³³ The court relied on the invalidity of the emancipation deed under positive law. *Id.* at 564. The overall pattern of the cases, however, suggests that the court was influenced by the presence of an innocent third party. See *supra* note 121; see also *Peggy v. Legg*, 20 Va. (6 Munf.) 229 (1818) (petition denied where the slave who was conditionally manumitted by will had already been sold by the heir to a third party); *Givens v. Manns*, 20 Va. (6 Munf.) 191 (1818) (the facts being unclear, it appears that slaves who claimed manumission by their former master, made subsequent to the purchase by another, were not freed when at the time of the suit they were held by an apparently uninvolved third master). One case appears to break this pattern. In *Whiting v. Daniel*, 11 Va. (1 Hen. & M.) 390 (1807), the testator's nephew (Whiting) claimed that his aunt had deeded him the slaves several years before she wrote a will emancipating them. No other parties were involved. The court nevertheless upheld Whiting's claim to the slaves in a brief and uninformative opinion. Whiting's counsel, however, suggested that Whiting had sustained considerable hardship in acquiring the slaves, perhaps in order to make him look more like an innocent creditor. Whiting had agreed to support and take care of his aunt in her waning years. Counsel stressed both that the aunt had given him the slaves for this valuable consideration, and that she was an exceptionally difficult woman to live with (one relative had turned her out, and no others would take her in). *Id.* at 392-93.

¹³⁴ 29 Va. (2 Leigh) 300 (1830).

purchasers from either the wife or husband. But there is none such in this case. A husband is not a purchaser of his wife's property by the marriage.¹³⁵

Judge Brooke, by contrast, held that the husband's claim was good: his "marital rights . . . had attached upon the property in her slaves," and thus "[h]is will and not her's [sic] was to be consulted."¹³⁶ The results—and the opinions—in *Thrift v. Hannah* are exactly what might be expected in a case involving a claimant who was in some sense midway between creditor and heir.

Another common fact pattern allowed judges to conclude, in essence, that there was no conflict between natural rights because the slave-owner had somehow forfeited his property right. The court held as early as 1811 that while legislatures may not deprive citizens of an "inherent" right, "they may regulate the manner . . . of its exercise."¹³⁷ One such regulation was a 1792 law requiring anyone bringing slaves into the state to swear an oath that the slaves were not brought in for the purpose of sale. Moreover, only citizens of other states were permitted even this grace; Virginia citizens were absolutely prohibited from importing slaves. Slaves brought into Virginia in derogation of the 1792 act, and remaining there for a year, were legally entitled to freedom. Between 1805 and 1829, the Virginia court freed slaves in six cases involving transportation into or out of Virginia.¹³⁸ In only two cases during this period, both in 1821, did the court deny petitions for freedom in this context.¹³⁹

In several cases, the slave-owner's failure to comply with the law in every technical particular led the court to grant petitions for freedom. In *Murray v. M'Carty*,¹⁴⁰ a Virginian resettled in Maryland, purchased a slave there, and eventually returned permanently to Virginia (with the slave) and took the prescribed oath. The court nevertheless granted the slave's petition for freedom. The court reasoned that importation was permitted only by citizens of other states, and that the defendant had never sufficiently renounced his Virginia

¹³⁵ *Id.* at 316.

¹³⁶ *Id.* at 320; see also *id.* at 318 (Judge Cabell stating: "By the marriage of Rachel Magruder, in this case, she ceased to be the owner of the slaves, which thereby became the property of her husband.")

¹³⁷ 16 Va. (2 Munf.) 394, 397 (1811).

¹³⁸ *Hunter v. Fulcher*, 28 Va. (1 Leigh) 172 (1829); *M'Michen v. Amos*, 25 Va. (4 Rand.) 134 (1826); *Griffith v. Fanny*, 21 Va. (Gilmer) 143 (1820); *Garnett v. Sam*, 19 Va. (5 Munf.) 542 (1817); *Murray v. M'Carty*, 16 Va. (2 Munf.) 394 (1811); *Wilson v. Isbell*, 9 Va. (5 Call) 425 (1805).

¹³⁹ *Lewis v. Fullerson*, 22 Va. (1 Rand.) 15 (1821); *Barnett v. Sam*, 21 Va. (Gilmer) 232 (1821).

¹⁴⁰ 16 Va. (2 Munf.) 394 (1811).

citizenship to qualify.¹⁴¹ In *M'Michen v. Amos*,¹⁴² a Maryland citizen brought his slaves with him to Virginia. He, however, failed to take the oath: his wife took it instead. The court held that insufficient, and granted the slaves' petitions for freedom.¹⁴³ In *Garnett v. Sam*,¹⁴⁴ the court freed two slaves because their erstwhile owner could not prove that he had taken the oath when he had brought them into the state almost thirty years earlier.¹⁴⁵ While in none of these cases did the court frame the issue as a forfeiture of otherwise vested property rights, an argument can be made that that potential characterization colored their views and allowed them to free the slaves without depriving their owners of any vested property rights.

A similar argument can be made about two cases involving slaves purchased in or taken to free states. An owner who attempted to take his property into a state which put him on notice that if he did so the property would be confiscated, was often said to have forfeited all rights in the property. Thus, in *Hunter v. Fulcher*¹⁴⁶ the Virginia court freed a slave who had been taken by his Virginia master to reside in Maryland for twelve years, and then returned with him to Virginia. Maryland law at the time freed all imported slaves. Judge Green noted that the master had "voluntarily becom[e] a permanent member of [the Maryland] community, and submitt[ed] himself and his property to the full force of the laws of Maryland."¹⁴⁷ He thus

¹⁴¹ *Id.* at 398. Similarly, in *Wilson*, 9 Va. (5 Call) 425, a Virginian who moved to Maryland sold a slave (who had come with him from Virginia) to another Virginian; the latter took her back to his home in Virginia. The court granted the slave's petition for freedom because the new owner was not a citizen of another state. *Id.* at 429. Ironically, the original owner also returned to Virginia. As the court noted, had he not sold Isbell to Wilson, he would have been entitled to bring her back with him. *Id.* The statute explicitly exempted slaves who were owned by Virginians at the time of enactment, allowing those owners to remove them from the state and then bring them back.

¹⁴² 25 Va. (4 Rand.) 134 (1826).

¹⁴³ The court considered this a very easy question. The jury had found the facts as described in the text, but had left to the judge to determine whether "the law be for the defendant," and if so "then they find for the defendant." *Id.* Counsel for the defendant on appeal had suggested that the jury could not possibly be suggesting that the wife's taking the oath might be legally sufficient: "[T]his question is so plain that [the court] cannot presume the parties intended to submit it: that no lawyer would have made it, nor would the Judge have suffered it to be put upon the record." *Id.* at 138-39. The court responded that "[i]f the records of this Court be searched, it would be found that questions as plain (plainer there could not be) have been often made, and in some instances, incorrectly decided, in the Inferior Courts." *Id.* at 139.

¹⁴⁴ 19 Va. (5 Munf.) 542 (1817).

¹⁴⁵ *Id.* at 545.

¹⁴⁶ 28 Va. (1 Leigh) 172 (1829).

¹⁴⁷ *Id.* at 181. Judge Carr similarly noted that the defendant had "voluntarily subject[ed] himself and the slave to the operation of [Maryland's] laws." *Id.* at 182. The last judge, Judge Cabell, concurred in the judgment without opinion.

concluded that freeing the slave would give effect “to those laws, operating on the rights of persons, who were to all intents and purposes justly subjected to them, and touching the rights of no others.”¹⁴⁸ The law of Maryland had operated to deprive the defendant of his property rights in the slave, and, hence, no conflict of natural rights remained. In *Griffith v. Fanny*,¹⁴⁹ the forfeiture of rights was even more apparent: an Ohio citizen had attempted to evade the Ohio prohibition against slavery by having the bill of sale for his purchase of a slave drawn up in Griffith’s name, Griffith being a citizen of Virginia. The court affirmed the grant of Fanny’s petition for freedom without opinion. Counsel for Fanny, however, had argued that “[t]he residence of Fanny in Ohio, by the consent and connivance of Griffith, dissolved the connection of master and slave, and Fanny is free.”¹⁵⁰ Again, the slave-owner had forfeited his rights.

In other cases, the facts did not so conveniently allow the court to evade a conflict of natural rights by implicitly finding a forfeiture. As in the cases involving truly unsatisfied creditors, the court in the following cases denied the petitions for freedom. In *Lewis v. Fullerson*¹⁵¹ (later distinguished in *Hunter*),¹⁵² petitioner claimed his freedom partly on the ground that before his birth his mother had become free by spending part of one day in the free state of Ohio. The court rejected this argument on the ground that she had been there “in the absence of her master, and without any evidence that it was with his permission.”¹⁵³ Thus, the court implicitly held that the owner had not

¹⁴⁸ *Id.* at 181.

¹⁴⁹ 21 Va. (Gilmer) 143 (1820).

¹⁵⁰ *Id.* at 144-45.

¹⁵¹ 22 Va. (1 Rand.) 15 (1821).

¹⁵² In *Lewis*, the slave was only temporarily in the other state, whereas in *Hunter*, the slave was taken outside of Virginia by a resident of Maryland, who acquired the slave, for twelve years. *Hunter v. Fulcher*, 28 Va. (1 Leigh) 172, 180-81 (1829).

¹⁵³ *Lewis* 22 Va. (1 Rand.) at 22. The *Lewis* case is something of an anomaly. The plaintiff also claimed that his mother had been freed by court order in Ohio, and by a deed of manumission executed in Ohio by her Virginia owner. Neither ground was sufficient, according to the court. The court’s rejection of the Ohio court’s power to free a Virginia slave rested on a fear of the consequences of any other ruling:

The right of our citizens under the constitution to reclaim their fugative [sic] slaves from other states, would be nearly a nullity, if that claim [were permitted to be intercepted by] a proceeding like the one in question; a proceeding of so extremely summary a character, that it affords no fair opportunity to a master deliberately to support his right of property in his slave.

Id. at 23. The deed was apparently executed as the only way of persuading the slave—newly freed by the Ohio court—to return voluntarily to Virginia. I suspect that *Lewis* may have involved either a fugitive slave or an Ohio court that did not respect the generally accepted doctrine that mere transit through a free state, with no intent to become a resident, did not deprive an owner of his slaves. For the northern acceptance of that doctrine in this period, see P. FINKELMAN, *supra* note 116, at 46-69, 70.

forfeited his rights. *Barnett v. Sam*¹⁵⁴ entailed a double problem of innocent property rights. Sam's original owner took him from Virginia to North Carolina, and brought him back after 1792 without complying with the statute. The statute, however, specifically exempted slaves owned by Virginians at the time of enactment, and thus the original owner had not violated any provision of the statute. Moreover, Sam remained her slave in Virginia for another eighteen years, and was then sold to Barnett. Several years later, Sam brought suit. Thus, the original owner had not forfeited her rights, *and* even if she had, Barnett was an innocent third party. The court denied Sam's petition on the ground that the 1792 statute did not apply to his original owner.¹⁵⁵

Thus, a careful examination of the cases involving petitions for freedom suggests that a solicitude for property rights had a significant influence on the court, counteracting the tendency to favor liberty. Moreover, as is common where two fundamental principles collide, the court tried whenever possible to avoid a direct conflict.¹⁵⁶

B. *The Language of Individual Cases*

Many of the cases also contain language directly reflecting a judicial awareness that petitions for freedom raised a conflict between two natural rights. That liberty was itself a natural right of persons had long been recognized, and was reflected in the much repeated phrase, "liberty is to be favored."¹⁵⁷ As counsel for defendants frequently reminded the court, however, "although it may be true that liberty is to be favored, the rights of property are as sacred as those of liberty."¹⁵⁸ In one case, counsel for the petitioning slave noted that

¹⁵⁴ 21 Va. (Gilmer) 232 (1821).

¹⁵⁵ *Id.* at 233-34.

¹⁵⁶ For an example of this in the context of the conflict between two types of property rights, see 3-4 G. EDWARD WHITE, *supra* note 1, at 628-48.

¹⁵⁷ *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 324 (1800) (argument of counsel); see also *id.* at 335-36 (Judge Roane declaring that ordinary legal arguments in favor of petitioners "hold, with increased force, when the case is considered in its true point of view, as one, which involves human liberty"); *Charles v. Hunnicutt*, 9 Va. (5 Call) 311, 322-23, 330 (1804); *Isaac v. West's Ex'r*, 27 Va. (6 Rand.) 652, 657 (1828). See generally P. FINKELMAN, *supra* note 116, at 187-234.

¹⁵⁸ *Pleasants*, 6 Va. (2 Call) at 324 (argument of counsel); see also *Whiting v. Daniel*, 11 Va. (1 Hen. & M.) 390, 400 (1806) (argument of counsel) ("In this Court, the case now under consideration, will be decided not as a case of freedom, but in the same manner as if [the manumittor] had given her property to others, or had died intestate."); *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 136 (1806) (argument of counsel) ("In deciding upon the rights of property, those rules which have been established are not to be departed from, because freedom is in question.").

“we all agree” that a claim for freedom “must stand on precisely the same ground with any question of property.”¹⁵⁹ Judge Roane, despite his discomfort with slavery, was careful to note the validity of the opposing right in *Patty v. Colin*: “The spirit of the decisions of this Court in relation to suits for freedom, while it neither abandons the rules of evidence, nor the rules of law as applying to property, with a becoming liberality respects the merit of the claim, and the general imbecility of the claimants.”¹⁶⁰ Judge Cabell wrote in 1829 that “the right to emancipate slaves is subordinate to the obligation to pay debts previously contracted.”¹⁶¹ Perhaps the most succinct articulation of the conflict came in an 1824 case denying a petition for freedom: “Emancipation is an utter destruction of the right of property.”¹⁶²

The judges also frequently reminded the public that a decision to free a particular slave did not trample on property rights. Sometimes they noted explicitly that no individual’s vested rights were at stake. In *Wilson v. Isbell*, the court was quick to note that “[t]he question has nothing to do with the rights of Mr. Whiting, her former master.”¹⁶³ In *Spotts v. Gillespie*, the court held that “[t]he . . . question . . . as to the power of the State of Pennsylvania to confiscate the property of a citizen of Virginia, does not directly occur.”¹⁶⁴ In *Pleasants v. Pleasants*¹⁶⁵ the court upheld a testamentary manumission despite the fact that manumission became legal only after the death of the testator. Judge Roane deliberately began his analysis in *Pleasants* by considering the claim to freedom “only, as that of ordinary remaindermen, claiming property in them[selves], and endeavor[ed] to test it by the rules of the common law, relative to ordinary cases of limitation of personal chattels.”¹⁶⁶ In one case not involving freedom, the court emphasized that the rights of slave and master were in fact congruent: “it is as important for the interest of the [master], as for the safety of the [slave], that a stranger should not be permitted to exercise an unrestrained and lawless authority over him.”¹⁶⁷

Moreover, the court did not neglect to assuage the fears of those who foresaw the end of slavery as an institution—and thus of judicial

¹⁵⁹ *Talbert v. Jenny*, 27 Va. (6 Rand.) 159, 161 (1828) (argument of counsel). The court affirmed the Chancellor’s granting of Jenny’s petition for freedom. *Id.* at 165.

¹⁶⁰ 11 Va. (1 Hen. & M.) 519, 529 (1807).

¹⁶¹ *Dunn v. Amey*, 28 Va. (1 Leigh) 465, 472 (1829).

¹⁶² *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 231 (1824).

¹⁶³ 9 Va. (5 Call) 425, 429 (1805).

¹⁶⁴ 27 Va. (6 Rand.) 566, 572 (1828).

¹⁶⁵ 6 Va. (2 Call) 319 (1800).

¹⁶⁶ *Id.* at 335-36.

¹⁶⁷ *Commonwealth v. Carver*, 26 Va. (5 Rand.) 660, 665 (1827).

protection for property—with each decision to grant a petition for freedom. Judge Tucker noted in *Hudgins* that his decision to free the petitioners did “not by a side wind . . . overturn the rights of property.”¹⁶⁸ Judge Roane explained that he had freed petitioners in *Pleasants* “upon grounds . . . of strict legal right, and not upon such grounds, as, if sanctioned by the decision of this court, might agitate and convulse the Commonwealth to its centre.”¹⁶⁹ The Virginia judges were not only aware that petitions for freedom potentially raised a conflict between inherent unwritten rights, they knew the political consequences of leaning too much in favor of the right to liberty.

Thus, both the decisions and the judges’ opinions reflect a tension between two of the most venerable rights in the natural law pantheon. It is no wonder that the judiciary could not resolve the issue of slavery, nor that in the decades just preceding the Civil War southern judges ultimately took refuge in a narrow formalism that eliminated questions of unwritten law or stressed the property aspects of fundamental rights.¹⁷⁰

IV. CONCLUSION

Like their state predecessors and their federal counterparts, Virginia judges between 1790 and 1830 looked to unwritten, as well as written, sources of law. Drawing upon a rich tradition of natural rights, they combined reason, history, and judgment to grapple with the issues that came before them. Though their resolution of those issues would not be ours, their commitment to doing justice might be worth emulating.

Recourse to unwritten fundamental law is not a panacea for social injustice. Extra-textual interpretation, like textual interpretation, depends on the judges who engage in it. It yields more or less just results depending on the commitments and the consciences of judges and lawyers, the receptivity of the citizenry, and the bounds of the legal imagination.

¹⁶⁸ *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 141 (1806).

¹⁶⁹ *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 344 (1800).

¹⁷⁰ See R. COVER, *supra* note 31, at 232-36. *But see* Nelson, *supra* note 117, at 528-38 (describing formalism as an antislavery response to the perceived relationship between instrumentalism and proslavery jurisprudence).