

11-1-1990

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Recommended Citation

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 (1990).

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THE ROLE OF NATURAL LAW IN EARLY AMERICAN CONSTITUTIONALISM: DID THE FOUNDERS CONTEMPLATE JUDICIAL ENFORCEMENT OF "UNWRITTEN" INDIVIDUAL RIGHTS?

HELEN K. MICHAEL*

The debate over whether judges should enforce fundamental individual rights not enumerated in the Constitution has been intense in recent years. Supporters of the theory of majoritarian democracy contend that judges must adhere to the original intent found in the Constitution. In contrast, those favoring libertarian principles of respecting fundamental human rights charge judges with the duty of reading into the Constitution unenumerated rights in order to protect individual liberties.

In this Article, Helen K. Michael delves into this debate by taking to task a recent article by Suzanna Sherry which contends that the founders intended for courts to look outside the Constitution to enforce unwritten natural rights. Michael examines the natural law traditions embraced by the colonists; early state constitutions and case law; and records of state-ratifying conventions. From this historical record, she concludes that it is unclear whether the founders intended judges to void legislation to protect rights expressly enumerated in the Constitution and that the founders did not intend judges to void legislation based on unwritten natural law. At the same time, the author leaves open the question whether the intent of the founders should control contemporary interpretation of the Constitution.

INTRODUCTION

As the United States prepared to celebrate the bicentennial of its Constitution, former Judge Robert F. Bork's nomination to the Supreme Court embroiled the Senate in the debate that has long raged in academic circles: whether judges should play any role in enforcing fundamental individual rights not enumerated in the Constitution.¹ The radically different roles that participants

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1. For the Senate Judiciary Committee's report about the confirmation hearings, see SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. (1987) [hereinafter BORK DEBATES].

For a sampling of the ongoing scholarly debate about the proper scope of judicial review, see generally R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOUR-

ascribed to judges during the Senate's confirmation hearings illustrate the contemporary importance of, and the profound difficulty in reconciling, two principles that are deeply embedded in American constitutional theory. On the one hand is the principle of majoritarian democracy prohibiting the government from imposing laws on the people without their consent and accordingly awarding law-making power only to electorally accountable individuals.² On the other hand is the libertarian principle assigning to all individuals certain rights identified by Thomas Jefferson's Declaration of Independence as "inalienable,"³ and bestowed upon us, as John Dickinson wrote, not from men's "parchments and seals" but from God's "eternal maxims of justice and reason."⁴

Invoking the principle of majoritarian democracy, Judge Bork espoused the interpretivist theory of judicial review. This theory limits judges, who are neither popularly elected nor directly accountable to the electorate, to constitutional interpretation that adheres to the "original intent" of the people who made the Constitution the law. In his opening statement to the Senate Judiciary Committee, for example, Judge Bork asserted:

The judge's authority derives entirely from the fact that he is *applying the law and not his own personal values* How should a judge go about finding the law? The only legitimate way is by attempting to discern what those who made the law intended. The *intentions of the lawmakers govern*, whether the lawmakers are the Congress of the United States enacting a statute or those who ratified our Constitution and its various amendments.⁵

In Judge Bork's view, adhering to the people's original intent dictates that "[t]he Constitution specif[y] certain liberties" that judges are authorized to protect and allocates the creation of new rights "to democratic processes."⁶ Thus, Judge Bork insists that courts "invad[e] the proper domain of democratic government" when they legislate judicially under the guise of protecting unenumerated constitutional rights.⁷

Conversely, Senator Biden espoused the libertarian principle of respecting

TEENTH AMENDMENT (1977); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Berns, *Taking Rights Frivolously*, in *LIBERALISM RECONSIDERED* 51 (D. Maclean & C. Mills eds. 1983); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S.C.L. REV. 617 (1980); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981); *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-[KENT L. REV. 35 (1988).

2. See G. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 162-63 (1969).

3. The Declaration of Independence para. 2 (U.S. 1776). For further discussion of the Declaration, see *infra* text accompanying notes 131-32.

4. G. WOOD, *supra* note 2, at 293 (quoting Address by John Dickinson to the Committee of Correspondence in Barbados (1766)); cf. Hamilton, *A Farmer Refuted & C* (1770), quoted in G. WOOD, *supra* note 2, at 293 ("The sacred rights of mankind" are "not to be rummaged for, among old parchments, or musty records.").

5. BORK DEBATES, *supra* note 1, at 9 (emphasis added); see Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829 (1986).

6. BORK DEBATES, *supra* note 1, at 11.

7. *Id.* at 30.

fundamental human rights. Recalling the views expressed by Jefferson and Dickinson more than 200 years ago, the Senator contended:

I believe all Americans are born with certain inalienable rights. As a child of God, I believe *my rights are not derived from the Constitution. My rights are not derived from any government. My rights are not derived from any majority. My rights are because I exist.* They were given to me and each of my fellow citizens by our Creator, and they represent the essence of human dignity.⁸

Relying upon this principle, Senator Biden defended the noninterpretivist theory of judicial review, maintaining that judges in each generation possess the special duty of "enhancing" unenumerated rights intrinsic to human dignity and of "reading more firmly into the Constitution protection" of such rights.⁹ The Senator consequently viewed Judge Bork as shirking judicial responsibility in refusing to enforce such rights, and asserted that the judge had placed himself squarely "on the side of government intrusion . . . and against expansion of individual rights."¹⁰

In a recent article,¹¹ Suzanna Sherry attempts to resolve the seemingly irresolvable conflict between the interpretivist and noninterpretivist theories of judicial review. Sherry adopts the interpretivists' inquiry regarding the question of how "the founding generation [understood] the Constitution they created,"¹² but then provides an answer to this question that stands traditional interpretivist theory on its head. Sherry contends that, based upon the natural-law tradition inherited by the American colonists, the founding generation believed that "their new Constitution [would not] be the sole source of paramount or higher law."¹³ Specifically, she asserts that they expected "courts to look outside the Constitution in determining the validity of . . . governmental actions . . . affecting the fundamental rights of individuals."¹⁴ Sherry thus suggests that the principle of majoritarian democracy, which the interpretivists assert confines judges to enforcing only *enumerated* constitutional rights, actually is consistent with noninterpretivist review of legislation. Her thesis is that the founding generation expected judges to consult unwritten natural law to enforce fundamental rights not enumerated in the Constitution. In this Article, I will raise anew the question Sherry has posed, with the caveat that I advocate no position concerning whether the founding generation's understanding should control contemporary constitutional interpretation.¹⁵ Specifically, I ask whether the natural-law tradi-

8. *Id.* at 8 (emphasis added).

9. *Id.* at 34.

10. *Id.*

11. Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

12. *Id.* at 1127.

13. *Id.*

14. *Id.*

15. I personally support the results the Supreme Court reached in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *limited by City of Dallas v. Stanglin*, 490 U.S. 19 (1989), and its progeny including *Roe v. Wade*, 410 U.S. 113, *limited by Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989). In fact, my objective when I began this research project was to find historical support for the practice of noninterpretivist judicial review and to write an article defending this practice. I found, however, that support for the practice simply cannot be grounded in constitutional history.

tion inherited by the founding generation led them to expect judges to void legislation to protect unwritten individual rights. Part I examines the natural-law traditions that informed the American colonists' thought, while revisiting many of the historical sources upon which Sherry relies, as well as others on which she does not. To determine how states employed these natural law traditions, Part II then examines the states' first attempts at constitution-making and the judiciary's interpretation of the early state constitutions. Finally, Part III reviews the records of the debates entertained in the state ratifying conventions that ultimately made the new Constitution binding law. Contrary to Sherry, I conclude that the historical record indicates that the founders did not even uniformly expect judges to engage in interpretivist review of legislation based upon express constitutional terms, much less to void legislation based upon unwritten law.

DISCUSSION

I. *Inherited Natural Law Traditions*

To support her thesis, Sherry first looks to the natural law traditions that the American colonists embraced as a justification for revolution. She observes that the American colonists borrowed eclectically from a diverse body of thought, including the theories of John Locke, Sir Edward Coke, and the "Country Party" opposition thinkers, and various continental enlightenment thinkers, but she primarily focuses on Coke as exemplifying the spirit of English constitutionalism.¹⁶ She synthesizes the following three principles from Coke's theory: 1) That the British Constitution embodied "some form of higher law" and rendered "void Acts of Parliament inconsistent with that fundamental law";

16. See Sherry, *supra* note 11, at 1128-30. Sherry also discusses Henry St. John Viscount Bolingbroke's and Thomas Rutherford's theories, *see id.* at 1129-30, but she relies upon Coke to support her thesis concerning judicial review. For further discussion of Bolingbroke, *see infra* note 88 and accompanying text.

J.G.A. Pocock first suggested that the intellectual history of English opposition thought can best be understood as a conflict between "Court" and "Country" ideology. *E.g.*, Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549, 552 (1965). Pocock offers the following summary of Country ideology:

Society is made up of court and country; government, of court and Parliament; Parliament, of court and country members. The court is the administration. The country consists of the men of independent property; all others are servants. The business of Parliament is to preserve the independence of property, on which is founded all human liberty and all human excellence. The business of the administration is to govern, and this is a legitimate activity; but to govern is to wield power, and power has a natural tendency to encroach. It is more important to supervise government than to support it, because the preservation of independence is the ultimate political good. There exists an ancient constitution in England, which consists in a balance or equilibrium between the various organs of government, and within this balance the function of Parliament is to supervise the executive. But the executive possesses means of distracting Parliament from its proper function; it seduces members by the offer of places and pensions, by retaining them to follow ministers and ministers' rivals, by persuading them to support measures—standing armies, national debts, excise schemes—whereby the activities of administration grow beyond Parliament's control. These means of subversion are known collectively as corruption The remedy for corruption is to expel placemen, to insure that members of Parliament become in no way entangled in the pursuit of power or the exercise of administration, and to see to it that parliaments are frequently elected by uncorrupted voters.

Id. at 565-66.

2) that constitutional fundamental law "consisted of a mixture of custom, natural law, religious law, enacted law, and reason"; and 3) that judges might use this law "to pronounce void inconsistent legislative or royal enactments."¹⁷ She contends that these three principles, in turn, provided the conceptual framework for noninterpretivist judicial review and enabled state courts in the first years of the Republic to pass "on the validity of legislative enactments in light of some higher law."¹⁸

A. Cokean Theory

It is unlikely that Coke was articulating the American doctrine of judicial review, which mandates that judicial determinations of unconstitutionality are binding upon the executive and legislative branches of government, in issuing his famous dicta in *Dr. Bonham's Case*.¹⁹ In this dicta, Coke asserted that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."²⁰ At another point, however, Coke contradictorily asserted that "the power and jurisdiction of the Parliament . . . is so transcendent and absolute . . . [that] it cannot be confined either for causes or persons within any bounds."²¹

Seventeenth-century English political theory itself produced the paradox seemingly inherent in Coke's acceptance of both the limited and absolute versions of parliamentary power. Seventeenth-century Englishmen had no concept of formally separating the powers of the executive, legislative, and judicial branches of government as a mechanism to limit the government's power. Instead, they relied upon combining the monarchy, the Lords, and the Commons within a single institution ("the Crown in Parliament") so that each component of government could act as a check on the others.²² Under this theory of mixed government, the House of Lords, then and today, serves both as a legislative organ and the highest judicial court. When one focuses on the House of Lords' role as the English court of last resort, the apparent paradox evident in Coke's position seems to resolve itself: when Coke asserted that the principles of "common right and reason" could "control" acts of Parliament, he apparently was referring to the House of Lords' power as a court to enforce those principles.²³

17. Sherry, *supra* note 11, at 1129.

18. *Id.* at 1134-35.

19. *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1610), quoted in Grey, *Origins of the Unwritten Constitution in American Revolutionary Thought*, 30 STAN. L. REV. 843, 862 (1978).

20. *Dr. Bonham's Case*, 77 Eng. Rep. at 652. When Coke spoke of common right and reason he was alluding to the principles embodied in divine or natural law. See Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1-2), 42 HARV. L. REV. 149, 365, 370 (1928).

21. 4 COKE INSTITUTES 39 (1644), quoted in Smith, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 310 (1955).

22. See F. McDONALD, *NOVUS ORDO SECLORUM* 81 (1985); G. WOOD, *supra* note 2, at 18-19. The Frenchman, Charles Montesquieu, introduced Americans to the doctrine of separation of powers in expounding his idealized version of the English Constitution. See 1 C. MONTESQUIEU, *THE SPIRIT OF LAWS* 8-18, 202-04 (T. Nugent trans. 1949). For further discussion of Montesquieu's theory, see *infra* notes 74-80 and accompanying text.

23. See, e.g., A. McLAUGHLIN, *THE COURTS, THE CONSTITUTION, AND PARTIES* 139-43

Given Coke's endorsement of Parliamentary supremacy, however, it is highly unlikely that he was asserting that the Parliament would be bound by the determination of a lower king's court that a statute was unconstitutional.²⁴

While Coke probably did not envision ordinary courts as possessing the final authority to resolve constitutional controversies, the literal terms of his dicta in *Dr. Bonham's Case* nonetheless could justify the American practice of judicial review. Coke's dicta appeared to authorize the House of Lords in its judicial capacity to invalidate statutes that Parliament enacted in its legislative capacity.²⁵ In the United States, which chose not to create an institution like the House of Lords, that House's power to invalidate legislation logically could fall to the ordinary courts.

Coke's theory about the relationship between natural law and jurisprudence also could provide grounds for awarding ordinary courts the power to review legislation. For Coke, natural law was an intellectual discipline belonging to "the peculiar science of judges."²⁶ He asserted that judges, "schooled in the artificial reason and judgment of the law,"²⁷ are uniquely qualified to interpret and apply the law of nature, which "God at the time of creation of the nature of man infused into his heart."²⁸ He also asserted that judges were uniquely qualified to interpret and apply the law of reason through which Coke believed God

(1912); Corwin, *supra* note 20, at 373-75; cf. Thorne, *The Constitution and the Courts: A Reexamination of the Famous Case of Dr. Bonham*, in *THE CONSTITUTION RECONSIDERED* 15 (C. Read rev. ed. 1968) (arguing that Coke was only articulating a rule of statutory construction through which courts could avoid reaching inequitable results).

24. Cf. Grey, *Origins of the Unwritten Constitution in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 856 (1978) (contending that "[t]he doctrine of *Marbury v. Madison*, which asserts the final authority of ordinary courts on constitutional questions, probably was not suggested by *Dr. Bonham's Case*").

Lord Coke's theory of judicial review was not well received in England and eventually led to Coke's removal from the bench. See C.G. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 222-23 (1932). By Blackstone's time, the doctrine of Parliamentary supremacy had become the prevailing force in English constitutional theory. Blackstone wrote that Parliament possesses the "supreme and absolute authority of the state," 1 *W. BLACKSTONE, COMMENTARIES* *147, which is the "sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws." *Id.* at *160. Even Blackstone, however, gave Cokean theory a specious bow, stating that "the law of nature . . . is of course superior in obligation to any other," and that "[n]o human laws are of any validity if contrary to this." *Id.* at *40.

25. See Grey, *supra* note 24, at 856.

26. Corwin, *supra* note 20, at 370.

27. *Prohibitions del Roy*, 77 Eng. Rep. 1342, 1343 (K.B. 1608), quoted in Berger, "Original Intention" in *Historical Perspective*, 54 *GEO. WASH. L. REV.* 296, 306 (1986).

28. *Calvin's Case*, 77 Eng. Rep. 377, 392 (K.B. 1609), quoted in Corwin, *supra* note 20, at 369.

In fact, Coke dared to lecture King James I on this point. In *Prohibitions del Roy*, Coke asserted that the King should not interpret the law because he was not professionally trained as a lawyer and that he could not "adjudge any case, either criminal . . . or betwixt party and party." 77 Eng. Rep. at 1342, quoted in Berger, "Original Intention" in *Historical Perspective*, 54 *GEO. WASH. L. REV.* 296, 306 (1986). The following discussion then ensued:

[T]he King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges; to which it was answered by [Coke], . . . His majesty was not learned in the laws[,] . . . and causes . . . are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.

Prohibitions, 77 Eng. Rep. at 1343, quoted in Berger, "Original Intention" in *Historical Perspective*, 54 *GEO. WASH. L. REV.* 296, 306 (1986).

revealed the overarching, fundamental laws. Thus, Coke justified the American doctrine that judges are uniquely qualified to interpret and apply the fundamental law of the Constitution. Indeed, Coke, by nearly two centuries, presaged Chief Justice John Marshall's assertion in *Marbury v. Madison*²⁹ that "[i]t is emphatically the province and the duty of the judicial department to say what the law is."³⁰

Though Sherry rightly concludes that Coke's statements provided a framework for the practice of judicial review long before *Marbury*, Sherry provides no justification for relying on Coke to the virtual exclusion of other natural law theorists who provided intellectual fuel for the colonists' fight with Great Britain. While she refers to these theorists' shared belief that individuals possessed certain inalienable rights derived from divine or natural law, Sherry disregards the essential question of whether these other theorists would have agreed with Coke's evident belief that judges should be empowered to safeguard those rights against legislative or executive encroachment:

The Cokean and continental notion of fundamental principles and the more Lockean idea of fundamental rights are two sides of the same coin: both were grounded on unwritten natural law. The difference between the two visions—which the early Americans combined—is largely that between republican communitarianism, which emphasizes the relations among members of the community, and liberal individualism, which stresses rights adhering to individuals of the polity.³¹

Based on an undifferentiated reading of Cokean, Lockean, and continental natural law theory, Sherry concludes that "[t]he colonists inherited a tradition that provided not only a justification for judicial review but also guidelines for its exercise."³²

B. Continental Enlightenment Thinkers

While a comprehensive analysis of the legal and political theories influencing the American Revolution is beyond the scope of this discussion,³³ even a cursory examination of the theories of the continental natural law theorists who most influenced the American colonists refutes Sherry's conclusion about judicial review. A number of scholars have documented (and Sherry does not dispute) that Hugo Grotius, Samuel Pufendorf, Jean Jacques Burlamaqui, and Emmrich Vattel were widely read by American colonists.³⁴ Yet none of these

29. 5 U.S. (1 Cranch) 137 (1803).

30. *Id.* at 177.

31. Sherry, *supra* note 11, at 1132 (footnotes omitted).

32. *Id.* at 1145.

33. For in-depth analyses of the philosophical influences on the American colonists, see generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); F. McDONALD, *supra* note 22; C. MULLET, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760-1776* (1966); G. WOOD, *supra* note 2.

34. See, e.g., B. BAILYN, *supra* note 33, at 27, 43; C. MULLET, *supra* note 33, at 84-85 n.10; C. ROSSITER, *SEEDTIME OF THE REPUBLIC: THE FIRST AMERICAN REVOLUTION 224* (1953); Corwin, *supra* note 20, at 365, 380-82; Grey, *supra* note 24, at 300.

Mullet, who thoroughly canvassed American colonial literature, has concluded that the Ameri-

theorists envisioned *any type* of judicial review as a check on governmental infringement of the individual rights each theorist believed natural law conferred upon man.

For example, Grotius, whose theory such colonial luminaries as James Otis³⁵ and Samuel Adams³⁶ employed to protest the actions of the British crown and Parliament, expounded a theory of natural rights, but never conceived of the judiciary as an instrument to protect those rights. To the contrary, Grotius came perilously close to providing an apology for absolutism by concluding that, when man enters society and submits to a sovereign's will, he must surrender his natural rights, and that no member of society could protect those rights against the sovereign.³⁷ In his famous work *The Law of Peace and War*, Grotius rejected "their opinion, who will have the Supreme Power to be always, and without Exception, in the People, so that they restrain their Kings, as often as they abuse their Power."³⁸ He asserted instead that man may renounce all of his natural liberties upon entering society, that a people could "deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without recovering any Share of that Right to themselves."³⁹ But Grotius did not stop with the premise that it was conceptually possible for a people to renounce these liberties. He also suggested that, to preserve society, a people must renounce the right of resisting the sovereign to whom they had transferred power:

[A]ll men naturally have a Right to secure Themselves from Injuries by Resistance . . . But civil Society being instituted for the Preservation of Peace, there immediately arises a Superior Right in the State over us and ours, . . . for if that promiscuous Right of Resistance should be allowed, there would no longer be a State, but a Multitude without Union.⁴⁰

As one philosopher has observed, however, Grotius was "Janus-faced": he spoke of absolutism from one mouth, but of libertarianism from the other.⁴¹

can colonists regarded Grotius, Pufendorf, Burlamaqui, Montesquieu, and Vattel "as scarcely, if at all, less authoritative than the most popular English writers." C. MULLET, *supra* note 33, at 32.

35. See, e.g., Otis, *The Rights of the British Colonies Asserted and Proved*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 409, 476 (B. Bailyn ed. 1965). Otis wrote some of the most important initial pamphlets criticizing British tax measures, although he later fell from revolutionary America's grace when he retreated from his initial opposition to Great Britain's rule of the American colonies. See Ferguson, *Reason in Madness: The Political Thought of James Otis*, 36 WM. & MARY Q. 194, 194-95 (1979).

36. Eg., 2 THE WRITINGS OF SAMUEL ADAMS 435-37 (H.A. Cushing ed. 1906) [hereinafter ADAMS'S WRITINGS].

Bailyn notes that Otis paraphrased Grotius for the contradictory proposition that, while Parliament's power was necessarily absolute, natural law nonetheless precluded it from acting arbitrarily. See B. BAILYN, *supra* note 33, at 205. One scholar surveying 47 colonial libraries determined that Grotius's works appeared in 16 of those libraries. See A.E. HOWARD, *THE ROAD FROM RUNNYMEADE* 119 (1968).

37. See R. TUCK, *NATURAL RIGHTS THEORIES* 77-79 (1979).

38. H. GROTIUS, *THE LAW OF WAR AND PEACE* 64 (G.L. Williams trans. 1950), quoted in R. TUCK, *supra* note 37, at 78.

39. H. GROTIUS, *supra* note 38, at 102, quoted in R. TUCK, *supra* note 37, at 78.

40. H. GROTIUS, *supra* note 38, at 134, quoted in R. TUCK, *supra* note 37, at 78-79.

41. R. TUCK, *supra* note 37, at 79.

After equivocally suggesting that the people must submit to the "Law of Non-resistance" when they transferred their natural right of self-government to a sovereign, Grotius nonetheless argued that one should presume that the people did not totally renounce the right to resist all the sovereign's abuses of power:

[T]his Law (of [Non-resistance of] which we now treat) seems to depend on the Intention of those who first entered into civil Society, from whom the Power of Sovereigns is originally derived. Suppose they had been asked, Whether they pretended to impose on all Citizens the hard Necessity of dying, rather than to take up Arms in any Case, to defend themselves against the higher Powers; I do not know whether they would have answered in the affirmative: It may be presumed, on the contrary, that they have declared that one ought not to bear with every Thing, unless Resistance would infallibly occasion great disturbance in the State, or prove the Destruction of many Innocents.⁴²

Even so, the libertarian Grotius failed to conceive of any check on sovereign misconduct except the people's right to use force to resist his unlawful demands. Thus, Grotius, while indicating that man possesses certain natural rights and liberties derived from natural law, did not advance any corollary premise that natural law imposes limitations that judges may enforce against the sovereign.

Pufendorf, whom the American colonists read even more widely than Grotius,⁴³ replaced Grotius's vague presumption that the people do not completely renounce their natural rights in submitting to a sovereign with a concrete mechanism by which they could preserve at least some of those rights. This mechanism, however, was not judicial review. Pufendorf contended that, in transferring sovereignty, the people could specify the powers the sovereign acquired and the rights they retained through a written agreement, which he called an "express convention."⁴⁴ In strikingly Cokean language, he also contended that any sovereign actions violating that agreement would be void:

The sovereignty of a king is more strictly limited, if, at its transfer, *an express convention* is entered into between the king and citizens that he will exercise it in accordance with certain basic laws, and on affairs, over the disposal of which he has not been accorded absolute power, he will consult with an assembly of the people or a council of nobles, and that without the consent of one of the last two he will make no decision; and if he does otherwise, the citizens will not be bound by his commands on such affairs. *The people that has set the king over them in this way is not understood to have promised to obey him absolutely and in all things, but in so far as his sovereignty accords with their bargain and the fundamental laws, while whatever acts of his deviate from*

42. H. GROTIUS, *supra* note 38, at 112, *quoted in* R. TUCK, *supra* note 37, at 80.

43. See ADAMS'S WRITINGS, *supra* note 36, at 437; 1 THE PAPERS OF ALEXANDER HAMILTON 86 (H. Syrett ed. 1961); C. ROSSITER, *supra* note 34, at 359; Otis, *supra* note 35, at 476. James Otis, Samuel Adams, and Alexander Hamilton, among others, used Pufendorf to buttress their protests against Great Britain.

44. S. PUFENDORF, THE LAW OF NATURE AND NATIONS 1066 (C.W. & W.A. Oldfather trans. 1934).

them, are thereby void and without force to obligate citizens.⁴⁵

Pufendorf, however, did not embrace Coke's suggestion that judges could pronounce void sovereign acts violating the express convention. He contended that "[w]hat may at any particular moment work to that end [of preserving the safety and security of society] is a matter of decision, not by those who do the transferring [of power], but by him on whom the power was transferred."⁴⁶ What Pufendorf meant when he asserted that sovereign actions contravening the express convention were void was only that the people would not be bound by, and would be entitled to resist, such actions:

*A people has the power to use force against its kings and bring them to terms if they are not ruled in accordance with its desires; and, there belongs to the people or to individuals, in the face of danger, and when the prince becomes an enemy, the right to defend their safety against him.*⁴⁷

Pufendorf's differences with Coke, moreover, extend beyond failing to conceive of judicial review as a means of policing the written convention between the sovereign and the people. Pufendorf expressly rejected the Cokean premise that natural law is enforceable against the sovereign. Although he did not contend that the sovereign is immune from divine or natural law, Pufendorf did contend that the sovereign is "accountable for his conduct under them to none but God."⁴⁸ Thus, Pufendorf's position is utterly inconsistent with Cokean theory. Moreover, it is utterly inconsistent with Sherry's suggestion that continental natural law philosophy, at least implicitly, entailed the premise that judges would employ unwritten natural law to invalidate governmental actions.⁴⁹

Like Pufendorf before him, Burlamaqui, another very important influence on the American colonists,⁵⁰ asserted that the people could safeguard their natural liberties from sovereign infringement by passing written, "fundamental laws" establishing "covenants betwixt the people and the person, on whom they confer sovereignty, which regulate the manner of governing, and by which the supreme

45. *Id.* (emphasis added), quoted in Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 71.

46. *Id.* at 1077, quoted in Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 72. In a similar vein, Pufendorf also contended that, as a consequence of "the greatest diversity of judgments . . . to be observed among men, because of which an infinite number of disputes can arise[.]" the sovereign, and not the citizens, rightfully determines "what man still retains of his natural liberty." S. PUFENDORF, *supra* note 44, at 1011.

47. S. PUFENDORF, *supra* note 44, at 1110 (emphasis added); see *id.* at 1105-11, 1140-45; L. KRIEGER, *THE POLITICS OF DISCRETION* 143-44 (1965).

48. L. KRIEGER, *supra* note 47, at 145. Consistent with his view of the ruler's supremacy, Pufendorf also contended that the ruler is "free from civil laws, or rather is superior to them." *Id.* (quoting S. PUFENDORF, *supra* note 44, at 1055).

49. Sherry characterizes continental enlightenment theories and Cokean theory as one side of the same coin and Lockeian theory as the other side of that coin. See *supra* text accompanying notes 31-32.

50. See C. MULLET, *supra* note 33, at 78 (ranking Burlamaqui as one of the continental philosophers most frequently cited by the American colonists); see also F. McDONALD, *supra* note 22, at ix (noting that James Wilson relied heavily on Burlamaqui in composing his 1774 pamphlet *Considerations on the . . . Authority of the British Parliament*). See generally R. HARVEY, JEAN JACQUES BURLAMAQUI IN AMERICAN CONSTITUTIONALISM: A LIBERAL TRADITION (1937) (discussing Burlamaqui's influence on the American colonists).

power is limited.”⁵¹ Like Pufendorf, Burlamaqui asserted that sovereign actions contravening these fundamental laws would be “void and of no effect.”⁵² But Burlamaqui also never suggested that the judiciary could control the sovereign’s conduct by interpreting the written fundamental laws, much less that the judiciary could control such conduct by interpreting unwritten natural law. Instead, he suggested that the people could enact controls such as requiring the sovereign to “convene a general assembly of the people, or of their representatives . . . when any matters happen to fall under debate, which it was thought improper to leave to [the sovereign’s] decision.”⁵³ Alternatively, Burlamaqui suggested that, as part of the fundamental laws of the state, the people could create a formal separation of powers, what he termed a “partition in the rights of sovereignty.”⁵⁴ If these measures failed to insure that the sovereign honored his covenants with the people, then Burlamaqui, like Pufendorf, viewed the people’s right to revolt against that sovereign as the only remaining remedy.⁵⁵

Burlamaqui, however, parted company with Pufendorf in maintaining that the sovereign was answerable to the people for violating certain principles of natural law. Burlamaqui contended that natural law imposed a fundamental principle on all governments, including those in which “the most absolute sovereignty prevails.”⁵⁶ the law “of the public good, from which the sovereign can never depart, without being wanting in his duty.”⁵⁷ Nonetheless, Burlamaqui did not assert that judges should insure that the sovereign complied with this natural law principle of public utility. Instead, he argued that the people should punish the sovereign for noncompliance by revolting:

For since it is most certain, that God could never entrust princes with this supreme authority, but for the good of society in general, as well as of individuals, the exercise of this power must necessarily be limited by the very intention, which the Deity had in conferring it on the sovereign; insomuch that the people would still have the same right of refusing to obey a prince, who, instead of concurring with the views of the Deity, would on the contrary endeavor to cross and defeat them⁵⁸

For Burlamaqui, then, natural law acted as an additional check on the sovereign, but he awarded the people collectively, and not judges, the right to enforce this check.

Vattel, who has been ranked with Pufendorf and Burlamaqui as being among the most important continental influences on the American colonists,⁵⁹ also failed to assign judges any role in controlling the sovereign’s conduct. Like

51. 2 J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW AND POLITIC LAW* 46 (T. Nugent trans. 5th ed. 1807).

52. *Id.* at 47.

53. *Id.*

54. *Id.* at 50; see Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 74 n.134.

55. See 2 J. BURLAMAQUI, *supra* note 51, at 41.

56. *Id.* at 46.

57. *Id.*

58. *Id.* at 37.

59. See C. ROSSITER, *supra* note 34, at 359.

Burlamaqui, Vattel asserted that natural law imposed constraints on even an absolute sovereign, requiring the sovereign to act for "the common happiness of all."⁶⁰ But, like Burlamaqui, Vattel asserted that the people would be responsible for enforcing natural law by disobeying the sovereign or, in extreme cases in which "he becomes the scourge of the state," by revolting against him.⁶¹

Vattel also maintained that the people could regulate the ruler's conduct by enacting a written constitution establishing "fundamental laws" by which his sovereignty was limited:

The prince derives his authority from the nation; he possesses just so much of it as they have thought proper to entrust him with [W]hen the sovereign power is limited and regulated by the fundamental laws of the state, those laws show the prince the bounds and the extent of his power, and the manner in which he is to exert it.⁶²

As an additional check on the sovereign, Vattel noted that the people may entrust legislative power to an assembly independent of the sovereign.⁶³ He maintained that this assembly, like the sovereign, would be bound to comply with the constitution. Because the constitution itself would establish the assembly's powers, Vattel asserted that the assembly members could not modify that constitution "without destroying the source of their authority."⁶⁴ But Vattel did not assign judges the right to determine when the assembly had exceeded its authority. Instead, he asserted "that if any disputes arise in the state respecting the fundamental laws, the public administration, or the rights of the different powers of which it is composed, it belongs to the nation alone to judge and determine them conformably to its political constitution."⁶⁵

The theories of Grotius, Pufendorf, Burlamaqui, and Vattel, then, without exception undermine Sherry's thesis that judicial review was a logical outgrowth of the diverse natural law tradition that the American colonists embraced. Although Pufendorf, Burlamaqui, and Vattel all asserted that the people could safeguard their natural liberties by establishing a written constitution that imposed limits on a sovereign's powers, each theorist contended that the people—not judges—would enforce that constitution by disobeying the sovereign in appropriate instances.

These continental enlightenment theories without exception also contradict Sherry's assumption that all of the diverse natural law theories known to the colonists validated the practice of noninterpretivist judicial review. Continental natural law theory did not validate this practice. Indeed, only Burlamaqui and Vattel asserted that natural law imposed legal, as well as moral, obligations on a

60. E. VATTEL, *THE LAW OF NATIONS* 18 (J. Chitty trans. 1859); see *id.* at 20-21.

61. *Id.* at 18; see *id.* at 21-22. Vattel, even more clearly than Burlamaqui, asserted that natural law imposed an affirmative duty upon the people to revolt against the sovereign when his violations of natural law threatened their lives or liberties. He maintained that "self-preservation is not only a natural right, but an obligation imposed by nature, and no man can entirely and absolutely renounce it." *Id.* at 22.

62. *Id.* at 14.

63. *Id.* at 12.

64. *Id.* at 11.

65. *Id.* at 12 (emphasis omitted).

sovereign, and they denied judges any role in enforcing such legal obligations. Instead, these theorists concluded that the people could enforce those obligations through disobedience or revolt. That conclusion embodies what Edward Corwin has called the "naive conception of judicial review," the conception that "nobody is bound by an unconstitutional law."⁶⁶ But, as Corwin has pointed out, that conception means that "everybody—including judges—has an equal right to determine what laws he is bound by."⁶⁷ Such a conception does not assign judges any special role in enforcing either a written constitution or unwritten natural law.

More importantly, it is doubtful whether these continental thinkers' collective failure to assign judges a role in enforcing *unwritten* natural law simply reflected an oversight. As Walter Berns has pointed out, assigning to judges a power of noninterpretive judicial review would have conflicted with two fundamental premises underlying each theorist's belief that society is created through the union of the wills of naturally equal individuals.⁶⁸ First, these theorists' belief in natural equality suggested that each man was free to form his own conception of goodness and justice, and that no person's conception was inherently superior to any other person's conception. Second, their belief that society could be created only by a consensual union of independent wills dictated that each man must reciprocally renounce his right to define goodness for that society and, as Berns stated, required each man to "acknowledge that his opinions of good and bad or justice and injustice have no status" in the process of governing that society.⁶⁹ Consistent with these premises, these theorists contended that men must, by express agreement, establish the form and powers of their government and must, thereafter, surrender to the sovereign the right of determining whether particular measures will serve the public good.⁷⁰

As Berns also has noted, assigning judges a role in enforcing the *written*

66. E. CORWIN, *COURT OVER CONSTITUTION* 5 (1957).

67. *Id.*

68. Berns, *supra* note 54, at 74; see 2 J. BURLAMAQUI, *supra* note 51, at 23-24, 36; S. PUFENDORF, *supra* note 44, at 972; Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395, 397 (1913) (quoting E. VATTEL, *LES DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, APPLIQUE'S A' LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SUVERAINES* § 4 (1758)).

69. Berns, *supra* note 54, at 73-74.

70. Burlamaqui, for example, contended:

It is this union of wills and of strengths, that the body politic or the state results, and without it we could never conceive of civil society. For let the number of confederates be ever so great, if each man was to follow his own private judgment in things relating to the public good, they would only embarrass one another; and the diversity of inclinations and judgments, arising from the levity and natural inconsistency of man, would demolish all concord, and man would thus relapse into the inconveniences of the state of nature.

2 J. BURLAMAQUI, *supra* note 51, at 23-24 (emphasis added). Pufendorf similarly wrote:

[A] union of wills cannot possibly be encompassed by the wills of all naturally being lumped into one, or by only one person willing, and all the rest ceasing to do so, or by removing in some way the natural variation of wills and their tendency to oppose each other, and combining them into harmony. But the only final way in which many wills are understood to be united is for every individual to subordinate his will to that of one man, or a single council, so that whatever that man or council shall decree on matters necessary to the common security, must be regarded as the will of each and every person.

S. PUFENDORF, *supra* note 44, at 972, quoted in Berns, *supra* note 54, at 73 (emphasis added).

terms of the people's convention or constitution would have been consistent with the continental philosophers' natural law theories because that role would have involved enforcing only the people's expressed will.⁷¹ However, the premises described in the preceding paragraph would be contradicted by any grant of authority to judges to enforce natural law principles not articulated in the people's express agreement. Thus, Berns observed that:

When government is built entirely out of materials supplied by the will—or a union of wills—that will must be expressed. In a world where all opinions of justice and injustice are understood to be merely private opinions, no man can rationally agree to an arrangement where another man is authorized to convert his opinion into fundamental law.⁷²

The continental conception of natural law, then, is fundamentally different from Coke's conception, especially with regard to the judiciary's role in government.⁷³ For Coke, judges possessed intellectual abilities and specialized training that entitled them to impose their understanding of natural law or "common right and reason" upon other men. For the continental natural law thinkers, natural law conferred an equality upon individuals that precluded any individual or group from imposing personal judgments about unwritten rights and principles on others.

The continental thinker Charles Montesquieu, whose separation of powers theory constituted a profoundly important contribution to American political theory,⁷⁴ devoted more attention to the judiciary than did the natural law theorists. But he too failed to conceive of any power of judicial review. Montesquieu did assert that the judiciary must be given exclusive control over judicial matters to preserve political liberty, "the tranquility of mind, arising from the opinion each person has of his safety."⁷⁵ Nevertheless, Montesquieu did not envision that judges would exercise any power other than their exclusive power to adjudicate criminal and civil disputes.⁷⁶

Montesquieu, in fact, did not even believe that a permanently appointed judiciary was necessary to safeguard political liberty. To the contrary, he con-

71. Berns, *supra* note 54, at 74.

72. *Id.*

73. *Cf. id.* at 73 (asserting that Pufendorf would have had to acknowledge that natural law was "a legal discipline and that those who were schooled in the discipline would be entitled to exercise authority—even if only judicial authority over other men" if he had accepted Coke's understanding of natural law).

74. See B. BAILYN, *supra* note 33, at 27; F. McDONALD, *supra* note 22, at 84-85; C. MULLET, *supra* note 33, at 32.

75. 1 C. MONTESQUIEU, *supra* note 22, at 151. Montesquieu wrote:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Id.

76. See *id.*

tended that "the judicial power, so terrible to mankind" should not be "annexed to any particular state or profession" and instead should be "as it were, invisible."⁷⁷ To achieve this "invisibility," Montesquieu asserted that "[t]he judiciary power . . . should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires."⁷⁸ Montesquieu certainly did not suggest that these temporary tribunals would have the power to review legislation or that such review could involve interpreting unwritten natural law. Indeed, he suggested that these tribunals should have no discretionary interpretive powers, that their "judgments ought . . . to be ever conformable to the letter of the law."⁷⁹ If judgments were based on the private opinions of judges, Montesquieu warned, "people would then live in society, without exactly knowing the nature of their obligations."⁸⁰

C. Locke's Theory

The continental natural theorists were not alone in failing to conceive of judges as championing man's natural rights and liberties by construing either written laws or unwritten natural law. Locke, who greatly influenced the American colonists,⁸¹ posited that people possessed the inalienable individual rights of life, liberty, and estate in the state of nature and retained these rights upon making the social compact through which civil society is created.⁸² However, he never conceived of judicial review as an institutional mechanism for safeguarding these rights. Instead, Locke regarded the people's right to dissolve the government—to revolt and withdraw from the social compact—as the ultimate check on both legislative and royal abuses of power.⁸³

77. *Id.* at 153.

78. *Id.*; cf. F. McDONALD, *supra* note 22, at 85 (arguing that "what Montesquieu clearly had in mind were the juries").

79. 1 C. MONTESQUIEU, *supra* note 22, at 153.

80. *Id.*

81. For commentators discussing Locke's contribution to the creation of the Declaration of Independence, see *infra* note 124.

82. See J. LOCKE, SECOND TREATISE OF GOVERNMENT 4-11 (1979).

83. Locke wrote:

[G]overnments are dissolved . . . when the legislative or the prince, either of them, act contrary to their trust

* * * *

[T]he legislative acts against the trust reposed in them when they endeavor to invade the property of the subject, and to make themselves, or any part of the community masters or arbitrary disposers of the lives, liberties, or fortunes of the people Whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people who are thereupon absolved of any further obedience [B]y this breach of trust they forfeit the power the people have put into their hands for quite contrary ends What I have said here concerning the legislative in general holds true also concerning the supreme executor [the king], who having a double trust put in him, both to have a part in the legislative and the supreme execution of the law—acts against both when he goes about to set up his own arbitrary will as the law of society.

Id. at 123-24.

Locke also believed that the people's liberties were best safeguarded by a paramount legislature:

In all cases, while the government subsists, the legislative is the supreme power: for what can give laws to another must needs be superior to him; . . . [B]y the right it has to make laws for all the parts and for every member of society, prescribing rules to their actions, and giving power of execution, where they are transgressed, the legislative must needs be the supreme, and all other powers in any members or parts of the society, derived from and subordinate to it.⁸⁴

In Locke's view, only the legislature had the requisite authority to make law binding on the people because only the legislature was chosen by the people:

[The] legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it; *nor can any edict of anybody else, in what form soever conceived or by what power backed, have the force and obligation of law which has not its sanction from that legislative which the public has chosen and appointed*; for without this the law could not have that which is absolutely necessary to its being a law: the consent of the society over whom nobody can have a power to make laws, by their own consent and by authority received from them⁸⁵

Locke's theory of legislative supremacy suggests that he would have found any form of judicial interpretation of legislation objectionable and that he clearly would have objected to the practice of noninterpretivist review.⁸⁶ Judicial review of legislation based upon a written constitution arguably would be inconsistent with Locke's theory. This practice could result in unelected judges substituting their interpretation of legislation for the elected legislature's interpretation of a given law. Noninterpretivist review, which would permit judges to invalidate positive legislation on the basis of unenacted and unwritten natural law, clearly would be inconsistent with his theory. This practice would permit judges to engage in a form of law-making that Locke believed was the legislature's exclusive domain.

D. Whig Opposition Theory

Locke was not the only English thinker inspiring the American colonists' fight with Great Britain who failed to conceive of judicial review. A number of thinkers, who belonged to a diverse group espousing English opposition or "Country" ideology,⁸⁷ also were influential. The colonists employed the arguments of "Country" thinkers who spanned the political spectrum from radical Tories on the right—including most notably Henry St. John, Viscount Bolingbroke⁸⁸—to radical Whigs on the left. However, the thinkers to whom the

84. *Id.* at 85.

85. *Id.* at 75 (emphasis added).

86. Cf. Corwin, *supra* note 20, at 404 (asserting that, for Locke, "the maintenance of higher law is entrusted to legislative supremacy").

87. For a discussion of the characteristics of "Country" ideology, see *supra* note 16.

88. Bolingbroke shared with the left-leaning Whig advocates of "Country" ideology the con-

American colonists turned for a solution to what they viewed as British despotism were radical Whigs. These Whigs included John Trenchard, Thomas Gordon,⁸⁹ and these men's ideological heirs, Richard Price, Joseph Priestly, and James Burgh.⁹⁰

Trenchard and Gordon, who popularized radical Whig theory in *Cato's Letters*,⁹¹ devoted far more attention to the corrupting influence of power than did Locke. They accordingly were unwilling to defend legislative supremacy or any other form of governmental supremacy. Because these Whigs, unlike Locke, dialectically viewed politics as a war between the rulers and the people they ruled,⁹² Trenchard and Gordon were far more concerned with the means by which all governmental power could be controlled.

Despite their differences with Locke, however, Trenchard and Gordon ex-

cern that English political institutions had become profoundly corrupt and that the nation was sliding toward tyranny. See B. BAILYN, *supra* note 33, at 49-51. Although he also shared the Whigs' belief that Parliament and, particularly, the House of Commons must be independent from the executive, he did not share the Whigs' confidence that electoral reform would reverse the degeneration of England's political institutions. See Liddle, "A Patriot King, or None": Lord Bolingbroke and the American Renunciation of George III, 65 J. AM. HIST. 951, 954 (1979). Bolingbroke believed that the people themselves had become corrupt and that a "Patriot King," who would "espouse no party, but . . . govern like a common father of his people," was needed to reverse this process. *Id.* (quoting 1 H. BOLINGBROKE, THE WORKS OF THE LATE RIGHT HONORABLE HENRY ST. JOHN, LORD VISCOUNT BOLINGBROKE 294-95 (D. Mallet ed. 1774)).

Although the American colonists obviously did not adopt Bolingbroke's solution, he nonetheless was widely read. See B. BAILYN, *supra* note 33, at 49-51; Boyer, *Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754*, 21 WM. & MARY Q. 328, 328-51 (1964). Bailyn suggests that Americans habitually thought of Bolingbroke as a libertarian, despite his authoritarian leanings, because Bolingbroke approvingly quoted radical Whigs such as Trenchard and Gordon on many subjects, and younger radical Whigs such as Burgh quoted Bolingbroke approvingly. See B. BAILYN, *supra* note 33, at 39 n.22.

89. LIBERTARIAN HERITAGE FROM THE WRITINGS OF JOHN TRENCARD AND THOMAS GORDON vii-viii (D. Jacobson ed. 1965) (Jacobson's introduction) [hereinafter D. JACOBSON]; accord B. BAILYN, *supra* note 33, at 35-36, 40, 45; F. McDONALD, *supra* note 22, at 70; C. MULLET, *supra* note 33, at 59-65; cf. C. ROSSITER, *supra* note 34, at 360 (noting that reprints of these authors' works "appeared everywhere in the colonies").

90. See W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS 154-56 (1981); C. ROSSITER, *supra* note 34, at 141, 360; G. WOOD, *supra* note 2, at 16. See generally C. ROBBINS, THE EIGHTEENTH CENTURY COMMONWEALTHMEN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES (1959) (discussing the theories of these later radicals).

This list of theorists is not intended to be exhaustive. Many other sixteenth and seventeenth century English thinkers influenced both the Whigs discussed above and the more erudite American colonists. See, e.g., B. BAILYN, *supra* note 33, at 44-45. John Adams, for example, identified the works of Sidney, Harrington, Milton, Needham, and Burnet, along with the works of Locke and Hoadly as establishing the fundamental principles of legitimate government. *Id.* at 45. For a discussion of the theories of a number of important sixteenth and seventeenth century Englishmen, see generally J.G.A. POCKOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (1957).

Learned Americans also were schooled in the ancient Greek writings of Plato, Aristotle, and Polybius, and the ancient Roman writings of Cicero and Tacitus. See C. MULLET, *supra* note 33, at 13-16; see also Corwin, *supra* note 20, at 153-64 (discussing the classical conception of natural law).

91. See D. JACOBSON, *supra* note 89, at 38-274 (partial reprint of Trenchard & Gordon, CATO'S LETTERS (1720-1723) [hereinafter CATO'S LETTERS]); see also D. JACOBSON, *supra* note 89, at 6-36 (partial reprint of Trenchard & Gordon, THE INDEPENDENT WHIG (1720) [hereinafter THE INDEPENDENT WHIG]).

92. See G. WOOD, *supra* note 2, at 18. In this regard, Gordon wrote: "Whatever is good for the People is bad for their Governors; and what is good for the Governors, is pernicious to the People." *Id.* (quoting 2 J. TRENCARD & T. GORDON, CATO'S LETTERS: OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 249 (5th ed. 1748)).

exploited many Lockean themes. Like Locke, they maintained that society was founded on a compact between the governors and the governed.⁹³ With the caveat that frequent elections were necessary to prevent corruption, Trenchard and Gordon also believed that the legislature, rather than the other branches of government, was the vanguard of the people's inalienable rights and liberties.⁹⁴ "Cato" maintained that "[t]he only Secret . . . in forming a free government is to make the Interests of the Governors and of the Governed the same, as far as human Policy can contrive."⁹⁵ He contended that this end, in turn, could be realized only through an electoral process enabling the people to choose "Deputies, whose Interests . . . [are] the same as their own, and whose property is so intermingled with theirs, and so engaged upon the same bottom, that Principals and Deputies must stand and fall together."⁹⁶

Trenchard's and Gordon's theory shared another similarity with Locke's theory: the implicit rejection of judicial review as a means of policing the people's compact with their governors. Indeed, even more forcibly than Locke, "Cato" insisted that the people retain the ultimate right, through revolt, to sanction their governors for breaching their trust and violating their compact. After considering the question "who shall be the Judge whether the Magistrate acts justly, and pursues his Trust," "Cato" emphatically concluded that only the people, and not any institutional judge, are entitled to make this determination.⁹⁷

Where the Interest of the Governors and that of the Governed clash, there can be no stated judge between them In such case, Recourse

93. In language reminiscent of Locke, Gordon asserted:

The entering of political Society, is so far from a departure from his natural Right, that to preserve it was the sole reason why men did so; and mutual Protection and assistance is the only reasonable Purpose of all reasonable Societies In order to achieve this good End, the Magistrate is entrusted with conducting and applying the united Force of the Community; and with exacting such a share of every Man's Property, as is necessary to preserve the Whole, and to defend every Man and His Property from foreign and domestic injuries. These are the Boundaries of the Power of the Magistrate, who deserts his Function whenever he breaks them.

CATO'S LETTERS, *supra* note 91, at 128 (Gordon No. 62, Jan. 20, 1721).

94. Trenchard contended:

No way is left, but . . . to make the Deputies [i.e. popularly elected legislators] so numerous, that there may be no way of corrupting the Majority; or, by changing them so often that there is no sufficient Time to corrupt them, and to carry the ends of that Corruption. The People may be sure, that the major Part of their Deputies being honest will keep the rest so; and that they will all be honest, when they have no Temptations to be Knaves.

Id., at 121 (Trenchard No. 60, Jan. 6, 1721).

The corruption of Parliament was a recurrent theme for "Country" writers of all political stripes. See Pocock, *supra* note 16, at 563, 574. Pocock explains that, for these "Country" writers, the term "corruption" embraced all the means by which Parliament could be subverted by the Crown. *Id.* at 565. For a discussion of the distinguishing characteristics of "Country" thought, see *supra* note 16.

95. CATO'S LETTERS, *supra* note 91, at 120 (Trenchard No. 60, Jan. 6, 1721).

96. *Id.* at 121 (Trenchard No. 60, Jan. 6, 1721). Note, however, that, for the Whigs, the people's political participation was confined to the House of Commons. See G. WOOD, *supra* note 2, at 24-25.

97. "Cato" asserted that the premise "[t]hat Subjects were not to judge their Governors, or rather for themselves in the Business of Government, which of all Things concerns them most, was an Absurdity." CATO'S LETTERS, *supra* note 91, at 111 (Trenchard No. 59, Dec. 30, 1720).

must be had to the first Principles of Government itself; which being a departure from the State of Nature, and a Union of many families forming themselves into a political Machine for Mutual Protection and Defense, it is evident, that this formed Relation can no longer exist than the Machine subsists and can act; and when it does not, the Individual must return to their former state again Government is only an Apportionment of one or more Persons, to do certain Actions for the Good and Emolument of the Society; and if the Persons thus interested will not act at all, or act contrary to their trust, their Power must return of Course to those who gave it.⁹⁸

Judicial review of legislation, then, conflicts with "Cato's" Whig ideology. This practice deprives the people of the right to abolish a government through revolt, and supplants their right with the judiciary's right to invalidate statutes or decrees as the ultimate sanction for governmental misconduct.

Without departing significantly from the fundamental premises advanced by "Cato," the younger Whigs—Price, Priestly, and Burgh—refined "Cato's" theory of representational government. They asserted that the people's liberty could be realized and their natural liberties protected only when the people themselves participated in making laws. Price, for example, contended that "CIVIL LIBERTY . . . is the power of a *civil society* or a *state* to govern itself by its own discretion; or by laws of its own making."⁹⁹ Similarly, Priestly asserted that men can have no political liberty if they "have no share in government."¹⁰⁰ Burgh likewise concluded that government controlled by one or a few individuals was impossible "without continual danger to liberty."¹⁰¹ For these Whigs, the popularly elected legislature, derived from the people, controlled by the people, and acting on their behalf, was the bastion of the people's rights and liberties.

Having absorbed the lessons of history and the teachings of their Whig predecessors, however, these radicals knew that the legislature was not immune from corruption and could itself betray the people's trust. To prevent the legislature from abusing its power or from being subverted by the executive, they embraced "Cato's" remedy of frequent elections.¹⁰² If these measures failed and the legislature enacted laws abridging the people's fundamental rights, then, like Trenchard and Gordon, these thinkers maintained that only the people could safeguard their rights by exercising their right to revolt.¹⁰³ Thus, judicial review

98. *Id.* at 113-14 (Trenchard No. 59, Dec. 30, 1720) (emphasis added); *cf. id.* at 133 (Gordon No. 62, Jan. 20, 1721) (Gordon defending the people's right of resistance and asserting that "they have the least Reason to bear Evil and Oppression from their Governors, who of all Men are the most obliged to do them Good").

99. G. WOOD, *supra* note 2, at 24 (quoting R. PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF WAR WITH AMERICA 3 (1776)).

100. W. ADAMS, *supra* note 90, at 155 (quoting J. PRIESTLY, FIRST PRINCIPLES OF GOVERNMENT 14 (1775)).

101. G. WOOD, *supra* note 2, at 23 (quoting J. BURGH, POLITICAL DISQUISITIONS: OR AN INQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES 106-07 (1774)).

102. See *supra* notes 94-96 and accompanying text.

103. G. WOOD, *supra* note 2, at 292.

was equally inconsistent with these younger Whigs' theory because they, like "Cato" and Locke, believed that the people's right to revolt was the ultimate sanction for governmental abuses of power.¹⁰⁴

Judicial review is inconsistent with the younger Whigs' theory for a second reason. Advancing the premise that the people could best safeguard their fundamental rights derived from natural law by sharing in the political franchise, these Whigs stressed more clearly than Trenchard and Gordon had that the participatory aspect of government is a prerequisite for political liberty.¹⁰⁵ Even judicial enforcement of a written constitution against the legislature would arguably conflict with the younger Whigs' opposition theory. This practice could permit judges, who were not subject to the people's electoral control, to alter the elected legislature's interpretation of the constitution.¹⁰⁶ Noninterpretivist judicial review clearly would conflict with the younger Whigs' theory. This practice would permit unelected judges to void positive legislation enacted by the people's elected representatives based on unwritten natural law principle that the people's representatives had not adopted. Thus, noninterpretivist judicial review could deprive the people of the meaningful participation in the legislative process that the Whig opposition leaders believed was vital to preserve individual rights.

E. Protestant Theology

Other philosophical traditions that influenced the American colonists also conflicted with the practice of judicial review. One tradition was Protestant religious philosophy and, particularly, Puritan covenant theology, the foundation of New England republicanism.¹⁰⁷ The Puritans rejected the Catholic doctrine

104. Cf. J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL LAW 186-90* (1955) (noting that the Whigs believed natural law imposed limitations upon the legislature's powers, but embraced the right of resistance and denied judges any role in enforcing natural law). Burgh, for example, wrote: "In planning a government by representation, the people ought to provide against their own annihilation. They ought to establish a . . . method of acting by and for themselves, without or even in opposition to their representatives . . ." G. WOOD, *supra* note 2, at 323 (quoting J. BURGH, *POLITICAL DISQUISITIONS: OR AN INQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES* 6 (1774)); see also Robbins, *Algernon Sidney's Discourses Concerning Government*, 24 WM. & MARY Q. 267, 280-81 (1966) (noting that Sidney maintained that the people could never renounce their right to revolt against either the Crown's or the Parliament's abuses of power).

105. Cf. W. ADAMS, *supra* note 90, at 155 (noting that younger Whigs expanded Trenchard's and Gordon's "concept of liberty by adding to the conventional idea of 'civil liberty' that of 'political liberty'"). For example, Price maintained that inherent in the concept of liberty "is one general idea . . . the idea of *Self-Direction* or *Self-Government*." *Id.* at 156 (emphasis in original) (quoting R. PRICE, *OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF WAR WITH AMERICA* 2-3 (1776)). Priestly similarly emphasized the self-directing nature of liberty, asserting that liberty encompassed the right of each individual, through the electoral process, "to have his private opinion or judgment become that of the public, and thereby control the actions of others." J. PRIESTLY, *FIRST PRINCIPLES OF GOVERNMENT* 155 (1775), quoted in W. ADAMS, *supra* note 90, at 155.

106. Indeed, Whigs and "Country" writers generally were suspicious of legal interpretation. Because they believed that laws would serve rather than smother liberty only if laws were accessible and comprehensible to the people, any judicial interpretation of laws could smother liberty by contorting or complicating the meaning of those laws. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 891-92 (1985). The Protestants also advocated the simplification of laws and distrusted legal interpretation. See *infra* notes 108-13 and accompanying text.

107. See B. BAILYN, *supra* note 33, at 332-33; F. McDONALD, *supra* note 22, at 70-74; see also

that God had ordained the Pope and his council as the authoritative interpreters of the scripture.¹⁰⁸ Indeed, for the Puritans, and for all Protestants, any interpretation of scripture necessarily was "human invention" that corrupted the meaning of the Bible.¹⁰⁹ Conversely, the Puritans believed that all individuals were equally qualified to ascertain God's message by adhering to the plain words of the scripture.¹¹⁰ The egalitarianism implicit in this belief, combined with distrust of biblical interpretation, resulted in distrust of judicial interpretation of laws.¹¹¹ In both England and the American colonies, this distrust produced calls for legal reform that would simplify the laws and preclude judicial discretion in the enforcement of statutes.¹¹² As Thomas Grey has observed in explaining this phenomenon: "The scriptural analogue to constitutional textualism is the Protestant doctrine that the Bible is the sole vehicle for divine revelation."¹¹³

F. Scottish Common Sense School

The philosophy of the Scottish Common Sense School was yet another important influence upon American revolutionary thought.¹¹⁴ Francis Hutcheson, Thomas Reid, Adam Ferguson, and Adam Smith,¹¹⁵ among others, espoused

T. BALDWIN, *THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION* (1928); Morgan, *The Puritan Ethic and the American Revolution*, 24 WM. & MARY Q. 3-43 (1967) (both discussing the relationship between Puritan religious and republican political philosophy).

108. See Powell, *supra* note 106, at 889-90. Under Catholic doctrine, "Christ conferred infallibility upon the Holy Office in matters of faith and morals." E. GERHART, *AMERICAN LIBERTY AND NATURAL LAW* 90 (1953).

109. See Powell, *supra* note 106, at 890. John Selden, for example, wrote that interpreting the scripture was something "which a discreet Man may do well; but 'tis his scripture, not the Holy Ghost[s]." *Id.* (quoting J. SELDEN, *TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ.* 45 (1699)) (brackets in original). Martin Luther more emphatically asserted that "[n]o believing Christian can be coerced beyond holy writ." Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5 (1984) (quoting R. BAINTON, *HERE I STAND* 116 (1951)).

110. Cf. Powell, *supra* note 106, at 890 n.26 (noting that "[o]rthodox and liberal [Protestants] alike agreed . . . that the sober and unprejudiced reader would find little need to interpret scripture because such a reader would have no difficulty in understanding the plain meaning of the text").

111. For a discussion of the democratic political implications of Puritan theology, see B. BAILYN, *supra* note 33, at 303; F. McDONALD, *supra* note 22, at 87-89; Corwin, *supra* note 20, at 397.

112. Powell, *supra* note 106, at 891; see G. WOOD, *supra* note 2, at 296-302 (discussing American distrust of judicial discretion). In 1656, for example, the Puritan lawyer William Sheppard published a critique of the British legal system in which he advocated a complete codification of Britain's "obscure" laws, a "codification" that would require judges to eschew interpretation and instead simply apply the plain meaning of the code as "settled law." Powell, *supra* note 106, at 891 (quoting E. DUMBAULD, *THOMAS JEFFERSON AND THE LAW* 146 (1978)). This critique was entitled *England's Balme*. See *id.*

113. Grey, *supra* note 109, at 5.

114. See F. McDONALD, *supra* note 22, at 54-55. See generally G. WILLS, *INVENTING AMERICA: THOMAS JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978) (discussing the Scottish Common Sense School's influence on revolutionary American thought).

115. For a discussion of the theories developed by these thinkers and by other Scottish enlightenment thinkers, see P. STEIN, *LEGAL EVOLUTION* 9-14, 23-50 (1980). David Hume also participated in the Scottish enlightenment movement, and he too was an important influence on American political theory. See, e.g., F. McDONALD, *supra* note 22, at 188. Hume's profound moral and political skepticism, however, distinguished him from Scottish Common Sense thinkers such as Hutcheson, who believed that man's innate sense of morality generally disposed him to do good. See *id.* at 54; Moore, *Hume's Political Science and the Classical Republican Tradition*, 10 CAN. J. POL. SCI. 809,

this School. These thinkers, like the continental enlightenment thinkers,¹¹⁶ articulated a markedly egalitarian doctrine.¹¹⁷ Proponents of the Scottish Common Sense School maintained that all men possess inherently equal moral faculties through which to perceive goodness, justice and charity.¹¹⁸ This position had profound political implications. Hutcheson, for example, maintained that individuals' innate moral equality also mandated their political equality and freedom.¹¹⁹ He wrote: "In this respect, all men are originally equal, . . . these natural rights equally belong to all, at least as soon as they come to the mature use of reason; and they are equally confirmed to all by the law of nature Nature makes none master, none slaves."¹²⁰ The Common Sense School's position, espousing that men have innately equal moral faculties enabling them to reach independently valid judgments about justice and injustice with the use of their native reason, is diametrically opposed to the Cokean position, espousing that judges schooled "in the artificial reason of the law" are best qualified to make such judgments. The Common Sense School's position is also inconsistent with the practice of judicial review because that practice entitles judges to impose their determinations regarding justice upon people equally qualified to make such determinations themselves. Indeed, as Forest McDonald has observed, from the School's position, "it is but a short step to radical democracy,"¹²¹ which denies judges any role in interpreting the laws and grants to the people alone, through their representatives, the right to set the meaning of the law.¹²²

* * * * *

The preceding discussion demonstrates that Sherry is incorrect in equating

820-22 (1977). On Hutcheson's influence upon early American political theory, see Robbins, *The Philosophy of Francis Hutcheson*, 11 WM. & MARY Q. 214, 214-51 (1954).

Although Gary Wills demonstrates the importance of this School's contribution to American thought, the work of a number of scholars suggests that he vastly has overstated the extent of the School's influence. See, e.g., Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Gary Wills' *Inventing America**, 36 WM. & MARY Q. 503, 505 (1979); Jaffa, *Inventing the Past: Gary Wills' *Inventing America* and the Pathology of Ideological Scholarship*, 33 ST. JOHN'S L. REV. 3, 3-19 (1981); Lynn, *Falsifying Jefferson*, 66 COMMENTARY 66, 66-71 (1978).

116. See *supra* notes 33-80 and accompanying text. Some of the egalitarian correlations between continental enlightenment thought and Scottish enlightenment thought may not have been accidental. Burlamaqui, for example, studied Hutcheson's works. See Hamowy, *supra* note 115, at 518.

117. See B. BAILYN, *supra* note 33, at 303; F. McDONALD, *supra* note 22, at 87-89; G. WOOD, *supra* note 2, at 118; Corwin, *supra* note 20, at 397.

118. See 3 ENCYCLOPEDIA OF PHILOSOPHY 94 (1967).

119. See G. WILLS, *supra* note 114, at 228. Not all of the members of the Scottish Common Sense School were political philosophers. For example, Thomas Reid, the School's founder, concerned himself with ethics and epistemology. See 7 ENCYCLOPEDIA OF PHILOSOPHY 118-19 (1967). But he too maintained that all men possessed inherently equal moral faculties that enable them to comprehend right, wrong and other ethical precepts through the use of their common sense. See 3 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 118, at 94.

120. 4 F. HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 143-44 (1755), quoted in G. WILLS, *supra* note 114, at 228.

121. F. McDONALD, *supra* note 22, at 54.

122. Cf. G. WOOD, *supra* note 2, at 301-02 (noting that the radical democrats believed that, "if the spirit of the law . . . [must] be considered, . . . then it should be done only on appeal to the representatives of the people").

with Cokean theory the natural law tradition that the American colonists embraced in revolting against the British Crown. Cokean theory gave the colonists only one vision of natural law and one system for safeguarding liberty—a system in which judges as an expert elite would define the social order and dispense justice to the populace. Juxtaposed against that vision was another vision flowing from such diverse sources as continental enlightenment theory, Whig opposition theory, Scottish Common Sense School theory, and Protestant theology. This vision offered the colonists a competing system for safeguarding liberty—an egalitarian system of majoritarian democracy in which inherently free and morally equal individuals would collectively define the social order and would, by common agreement, dispense justice consistent with that order.

The prominence that this competing vision of natural law acquired is revealed in two of revolutionary America's most important documents: Thomas Paine's famous tract *Common Sense*;¹²³ and the Declaration of Independence.¹²⁴ In *Common Sense*, Paine rejected the premise that any man is inherently more qualified than other men to establish values for society, asserting that "exalting one man so greatly above the rest, cannot be justified on the equal rights of nature."¹²⁵ Accordingly, Paine exhorted America to free herself from the corrupt English monarchy¹²⁶ and to form a new government founded upon truly egalitarian, republican principles. To implement these principles, he advocated adopting a confederated government comprised of the several states, and establishing unicameral legislatures within each state that would be elected annually by a system with "representation more equal."¹²⁷ This egalitarian system, Paine assured his audience, would immunize American government from corruption, for when "there are no distinctions there can be no superiority; perfect equality affords no temptation."¹²⁸ As Thomas Grey conceded in his article¹²⁹ in which he, like Sherry, sought to establish an historical justification for

123. For a discussion of Paine's role in propelling the American colonies into war with the British, see B. BAILYN, *supra* note 33, at 285-87. For a partial reprint of *Common Sense*, see J. LEWIS, THOMAS PAINE AUTHOR OF THE DECLARATION OF INDEPENDENCE 55-80 (1947).

124. See generally Hamowy, *supra* note 115, at 513-23 (comparing Locke's *Second Treatise* and Thomas Jefferson's Declaration of Independence). But see generally J. LEWIS, *supra* note 123 (contending that Paine, not Jefferson, wrote the initial draft of the Declaration of Independence).

Gary Wills contends that the Declaration was not modeled on Locke's *Second Treatise*, but on the writings of the Scottish Common Sense School, particularly those of Francis Hutcheson. See G. WILLS, *supra* note 114, at 230-34. Hamowy, however, has convincingly discredited that argument. See Hamowy, *supra* note 115; see also W. BERNIS, TAKING THE CONSTITUTION SERIOUSLY 242-51 (1987) (appendix devoted to critiquing Wills's interpretation of the Declaration of Independence).

125. Paine, *Common Sense*, reprinted in J. LEWIS, *supra* note 123, at 59 [hereinafter *Common Sense*].

126. See, e.g., *id.* at 61-65.

127. *Id.* at 70.

128. *Id.* Although Paine's radical democratic theory won a following among some American patriots, particularly in Pennsylvania, other patriots, including John Adams, rejected his theory as providing a recipe for anarchy. See B. BAILYN, *supra* note 33, at 286-95. Relying on the older English theory of mixed government, Adams, at least by the 1770s, believed that a republican government must consist of a bicameral legislature in which the upper house embodied the aristocracy, and that the executive (the American counterpart of the English crown) must possess an absolute veto on legislation. See G. WOOD, *supra* note 2, at 203-06, 580-87.

129. See generally Grey, *supra* note 24 (evaluating the historical justification for noninterpretivist judicial review).

noninterpretivist judicial review, Paine's view of natural law embraced "the principles of majoritarian democracy, and hence provide[d] little basis for claims of superior access to fundamental law on the part of specially trained elite judges."¹³⁰

In words that should scarcely require repeating, the Declaration of Independence echoed Paine's egalitarian theme. The Declaration pronounced "that all men are created equal and independent," and "that from that equal Creation they derive Rights inherent and unalienable," including "the right to alter or abolish" a government and "to institute new Government, laying its Foundations on Such Principles . . . as to them Shall Seem most likely to effect their Safety and Happiness."¹³¹ As Grey also conceded, "Jefferson's Declaration," like Paine's *Common Sense*, eschewed Cokean natural law theory, instead justifying revolution "in terms of Lockean natural rights" and embracing the Whig remedy of the "moral right of the people to 'alter or abolish' governments" that contravened those rights.¹³²

II. *Natural Law Theory Translated Into Early American Practice*

A. Early State Constitutions

To demonstrate that the states translated Cokean natural law theory into practice in the beginning years of the Republic, Sherry evaluates their first attempts at constitution-making. She asserts that Cokean natural law theory and English constitutional theory generally established a dichotomy under which a written constitution possessed both law-creating and law-declaring attributes.¹³³ On the one hand, written constitutions created a scheme of government and certain positive rights flowing from the limited powers delegated to that government. On the other hand, such constitutions merely declared generally recognized natural law rights that supposedly existed prior to formation of societies and prior to the enactment of positive laws.

Sherry contends that this distinction between provisions limiting governmental powers and those declaring rights suggests that fundamental individual rights based on natural law need not be enacted to be legally enforceable, and that consequently judges were authorized to apply unwritten natural law when faced with questions implicating individual rights.¹³⁴ Because seven states established a bifurcated constitutional scheme in which their "Declaration[s] of Rights" were separated from their "Frame[s] of Government,"¹³⁵ she argues

130. *Id.* at 891.

131. The Declaration of Independence para. 2 (U.S. 1776).

132. Grey, *supra* note 24, at 890-91.

133. See Sherry, *supra* note 11, at 1132-34.

134. See *id.* at 1135.

135. *Id.* at 1133. The states establishing such bifurcated constitutional schemes were Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia. See B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 276 (DEL. DECLARATION OF RIGHTS OF 1776) (1980); F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 562 (DEL. CONST. of 1776); *id.* at 1686, 1691 (MD. DECLARATION OF RIGHTS & CONST. of 1776); *id.* at 1889, 1893 (MASS. DECLARATION

that the drafts of these constitutions embraced the dichotomy inherent in Cokean theory between constitutionally declared, preexisting natural rights and constitutionally established positive rights. She also notes that six state constitutions and declarations of rights specifically characterized the individual rights they delineated as "natural," "inherent," "essential," or "inalienable."¹³⁶ She contends that these constitutions similarly suggest that the early state constitution drafters believed that they were declaring only preexisting natural rights. Based on the supposed acceptance of Cokean theory revealed in the dichotomous structure of these constitutions, Sherry implies that these drafters also must have accepted Cokean doctrine with respect to noninterpretivist judicial review.¹³⁷

The existence of the apparent dichotomy between governmental powers and individual rights present in these early constitutions, however, does not establish that these constitutions embodied Cokean theory. These constitutions both failed to authorize judicial review and severely limited the judicial independence required for the growth of this practice.

The 1776 constitutions of New Jersey and South Carolina did not even establish the judiciary as a separate branch of government.¹³⁸ A number of other

OF RIGHTS & CONST. of 1780); *id.* at 2453, 2458 (N.H. DECLARATION OF RIGHTS & CONST. of 1784); *id.* at 2787, 2789 (N.C. DECLARATION OF RIGHTS & CONST. of 1776); *id.* at 3082, 3084 (PA. DECLARATION OF RIGHTS & CONST. of 1776); *id.* at 3812, 3814 (VA. DECLARATION OF RIGHTS & CONST. of 1776) (1909).

136. Sherry, *supra* note 11, at 1133 & n.30 (citing B. SCHWARTZ, *supra* note 135, at 277 (DEL. DECLARATION OF RIGHTS of 1776, § 2); F. THORPE, *supra* note 135, at 1889 (MASS. DECLARATION OF RIGHTS of 1780, art. I); *id.* at 2453-54 (N.H. DECLARATION OF RIGHTS of 1784, art. I-IV); *id.* at 2625-26 (N.Y. CONST. of 1777, preamble); *id.* at 3082 (PA. DECLARATION OF RIGHTS of 1776, arts. I-II); *id.* at 3813 (VA. DECLARATION OF RIGHTS of 1776, § 1)).

137. See Sherry, *supra* note 11, at 1134 (contending that "[b]y the 1780's the 'constitution' of an American state consisted of fundamental law (both positive and natural), the inherent and inalienable rights of man (whether declared or not), and the recipe for a governmental mixture that would best protect and preserve the fundamental law and natural law rights[,] and that this concept of a 'constitution . . . served as the basis for the practical exercise of judicial review'").

Future Chief Justice John Marshall's remarks during the Virginia ratifying convention suggest a contrary interpretation. As discussed *infra* text accompanying note 305, Marshall contended that because Virginia's Bill of Rights was separate from its Constitution, the Bill of Rights was merely "recommendatory." This remark suggests that when the early state constitution drafters created bifurcated constitutions in which they positively enacted the forms of government but merely declared fundamental individual rights, the drafters believed that the enacted provisions were legally enforceable, while the declared provisions contained only moral desiderata.

In a careful study of the concept of "rights" embodied in the early state constitutions, Robert Palmer also rejects Sherry's interpretation. Palmer, *Liberties as Constitutional Provisions*, in CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55 (1987). Palmer suggests that the drafters of these early constitutions embraced an eighteenth century conception of "rights" that stands in stark contrast to the twentieth century conception of rights as imposing affirmative constraints on government. This older conception regarded rights as establishing only moral principles through which government should be conducted. *Id.* at 61-75. Owing to that eighteenth century conception, Palmer suggests that the drafters of seven of the early state constitutions created separate Declarations of Rights and Frames of Government because they regarded the Declarations as setting out "principles of government" rather than "rigid exceptions to power." *Id.* at 84; see *id.* at 61-75. In support of this interpretation, Palmer points out that the Pennsylvania, Virginia, and Maryland Declarations of Rights used the precatory term "ought" when enumerating rights. *Id.* at 64-69.

138. See W. ADAMS, *supra* note 90, at 266-67; C.G. HAINES, *supra* note 24, at 68-69. The New Jersey Constitution, for example, established a tripartite scheme of government in which governmen-

constitutions that did establish the judiciary as a separate branch of government nonetheless limited its independence. The 1776 Pennsylvania and 1777 Vermont constitutions, and the Connecticut and Rhode Island constitutions, which consisted of slightly modified versions of those states' colonial charters,¹³⁹ all limited judicial terms in office to a specified number of years.¹⁴⁰ The 1776 South Carolina and 1777 Georgia Constitutions also limited judicial independence by providing that many judges would serve at either the executive's or the legislature's pleasure.¹⁴¹ Moreover, even the 1776 Virginia and 1778 Massachusetts constitutions, which first explicitly confirmed the judiciary's independence as a component of a government of separated powers and granted judges permanent tenure during good behavior,¹⁴² undermined judicial independence. These constitutions authorized the legislature to control judicial salaries and fees.¹⁴³ As Professor McDonald has observed, these first constitutions suggest that, in the early years of the Republic, "the notion that the judges should be so independent as to have the power to overrule juries or to pass upon the constitutionality of laws enacted by legislative bodies was alien to American theory and practice."¹⁴⁴

The virtual impotence that the first state constitutions imposed upon the judiciary cannot be attributed to Cokean theory. To the contrary, these early constitutions embodied the competing democratic or egalitarian theory of natural law that gained prominence in the American colonies and ultimately found expression in the Declaration of Independence and Thomas Paine's pamphlet

tal powers were divided among the executive and the two houses of the legislature. See F. McDONALD, *supra* note 22, at 84-85; F. THORPE, *supra* note 135, at 2595 (N.J. CONST. of 1776, § 1).

139. Connecticut and Rhode Island did not actually adopt new constitutions until 1818 and 1842, respectively. W. ADAMS, *supra* note 90, at 66-68.

140. See G. WOOD, *supra* note 2, at 161 n.65. Pennsylvania and New Jersey judges held office for seven years. Vermont, Connecticut, and Rhode Island judges were elected annually. *Id.*

141. The South Carolina Constitution provided that justices of the peace would serve "during pleasure" of the executive, but also provided that superior court judges could be removed from office only for misconduct. W. ADAMS, *supra* note 90, at 267. The Georgia Constitution provided that the Chief Justice would be elected annually, but that all other judges would hold office at the legislature's pleasure. G. WOOD, *supra* note 2, at 161 n.65.

142. See W. ADAMS, *supra* note 90, at 268-69. The 1776 Virginia Constitution provided: "The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them at the same time." *Id.* at 267. The Massachusetts Constitution provided:

The legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative or judicial powers, or either of them: the judicial shall never exercise the legislative or executive powers, or either of them: To the end it may be a government of laws and not of men.

Id. at 269.

The proposal to give judges lifetime tenure met with considerable opposition in Massachusetts. See *id.* at 270. In fact, the town of Lennox rejected Massachusetts's 1778 constitution because giving judges such tenure was "making the delegated Power greater than the Constituent . . . the Creature greater than the Creator." *Id.* (quoting WESTERN MASSACHUSETTS IN THE REVOLUTION 61 (R. Taylor ed. 1954)).

143. G. WOOD, *supra* note 2, at 161; cf. 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 98 n.9 (1971) (noting that judicial salaries "became a matter of legislative caprice" under the early state constitutions).

144. F. McDONALD, *supra* note 22, at 85.

Common Sense.¹⁴⁵ Indeed, the drafters of the Massachusetts, Delaware, and Maryland Constitutions expressly adopted this competing egalitarian theory of natural law. Both the Delaware and Maryland Constitutions provided that "the right in the people to participate in the Legislature" is the "foundation" of "all free government";¹⁴⁶ the Massachusetts Constitution provided that "[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."¹⁴⁷

To implement egalitarian natural law theory, the early state constitutions endowed legislatures—the democratic institutions through which the people participated in government—with expansive powers and then established measures, such as entitling the people to give their legislative representatives legally binding instructions, to ensure that these representatives carried out the people's wishes.¹⁴⁸ Most early state constitutions failed to provide any mechanism for voiding unconstitutional laws other than the standard Whig remedy of the ballot box and the ultimate Whig remedy of revolt.¹⁴⁹ Moreover, the few state constitutions that did create such mechanisms did not use judicial review.¹⁵⁰

Both the 1776 Pennsylvania and Vermont Constitutions, for example, established a Council of Censors, which would be elected periodically by the people and endowed with the power to recommend legislative repeal of any laws deemed inconsistent with these states' constitutions.¹⁵¹ Neither constitution, however, assigned judges a participatory role in these councils.¹⁵²

The New York Constitution did assign judges such a role in the Council of Revision. It authorized the Council—which was composed of at least two state supreme court judges, the Governor, and the Chancellor—to review the constitutionality of all new legislation,¹⁵³ and provided that the Council's determina-

145. Cf. 1 D. CHIP 22 (Vt. 1824), *quoted in* C.G. HAINES, *supra* note 24, at 70 & n.4 (Reporter Daniel Chipman observed, in discussing Vermont's first constitution, that Vermonters for many years regarded judicial review as anti-republican; that they consequently never entertained the idea "that the Judiciary had any power to enquire into the constitutionality of acts of the Legislature, or pronounce them void for any cause, or even question their validity;" and that "the framers of the Constitution could never have intended to confer on the Courts the power of pronouncing an act of the Legislature void for any cause, when they provided for an annual election of Judges by the same Legislature who were to pass the laws.").

146. B. SCHWARTZ, *supra* note 135, at 277 (DEL. DECLARATION OF RIGHTS of 1776, § 6); F. THORPE, *supra* note 135, at 1890 (MD. DECLARATION OF RIGHTS of 1776, art. 5).

147. F. THORPE, *supra* note 135, at 1890 (MASS. CONST. of 1780, art. 5).

148. Three of the 11 states adopting new constitutions—Pennsylvania, Massachusetts, and North Carolina—also adopted express constitutional language establishing the right of instruction. W. ADAMS, *supra* note 90, at 248. Pennsylvania's Constitution took this right one step further by requiring that all bills of "a public nature" must be "printed for the consideration of the people" before they became law. F. THORPE, *supra* note 135, at 3086 (PA. CONST. of 1776, § 15).

149. See W. ADAMS, *supra* note 90, at 244; G. WOOD, *supra* note 2, at 162-73.

150. See W. ADAMS, *supra* note 90, at 269-70.

151. See C.G. HAINES, *supra* note 24, at 73-82; F. THORPE, *supra* note 135, at 3091 (PA. CONST. of 1776, § 47); *id.* at 3769 (VT. CONST. of 1777, § 35); G. WOOD, *supra* note 2, at 339.

152. See C.G. HAINES, *supra* note 24, at 73-82.

153. See W. ADAMS, *supra* note 90, at 268; F. THORPE, *supra* note 135, at 2628-29 (N.Y. CONST. of 1777, § 3).

tions could be overturned only by a two-thirds majority of both legislative houses.¹⁵⁴ But even this constitution, which endowed the judiciary with more power than any other early state constitutions,¹⁵⁵ did not grant judges the independent power to render conclusive decisions concerning the constitutionality of legislation.

Far from embodying Cokean theory, then, the early state constitutions underscored their drafters' unwillingness to cast judges in the role of guarding constitutional order, even though the drafters clearly were aware that legislatures might violate their respective constitutions.¹⁵⁶

B. Early Precedents for Judicial Review

Sherry adduces additional support for her thesis that evolving American constitutional theory supported noninterpretivist judicial review from the few cases in which state courts evaluated the constitutionality of legislation during the Articles of Confederation era. Sherry contends that in six of the seven cases she surveys, judges adhered to the dichotomy between constitutionally established positive rights and constitutionally declared natural rights, and that the seventh case did not mark a true departure from the dichotomy.¹⁵⁷ Accordingly, she contends that when the issue before these courts implicated governmental powers or structure, judges confined their review of legislation to evaluating its consistency with express constitutional terms.¹⁵⁸ Conversely, she contends that, when the issue involved fundamental natural law rights, judges exhibited "characteristic indifference to whether the fundamental law cited [was] in the written constitution or unwritten natural law."¹⁵⁹ Based on these cases purportedly applying a Cokean natural law theory, Sherry reaches the sweeping conclusion that "[i]t is thus unsurprising that in 1787 the men in Philadelphia could uniformly assume that the federal courts would exercise the power of judicial review, although a few disapproved of the practice."¹⁶⁰

Sherry's thesis is problematic because it suggests that these cases evince a coherent theory of judicial review in which judges would confine their interpretation to express constitutional terms when the issue involved governmental structure or powers, and would consult unwritten natural law freely when faced with questions involving individual rights. So little information is available

154. See W. ADAMS, *supra* note 90, at 268; C.G. HAINES, *supra* note 24, at 82-83; F. THORPE, *supra* note 135, at 2628-29 (N.Y. CONST. of 1777, § 3).

155. See W. ADAMS, *supra* note 90, at 268.

156. In this regard, Adams has observed:

The authors of the early constitutions were fully aware that unconstitutional laws might well win the approval of the legislature. . . . But the two methods they devised for meeting this danger were not based on faith that the judiciary would have the ability, integrity, and authority to recognize such laws and annul them. The methods were based instead on the belief in the value of a delaying veto, if not of an absolute one, and in the necessity for periodic review and revision of the constitution.

Id. at 269-70.

157. See Sherry, *supra* note 11, at 1135-36.

158. See *id.*

159. *Id.*

160. *Id.* at 1129.

about three of the cases upon which she relies—the unreported case of *Holmes v. Walton*,¹⁶¹ a series of unreported New Hampshire cases known colloquially as the “Ten-Pound Act” cases¹⁶² and the *Symsbury Case*¹⁶³—that one could manipulate them to fit any interpretation. Sherry herself concedes that the information about these cases is “sparse,”¹⁶⁴ but then molds them to fit her theory by engaging in highly speculative conjecturing. In discussing *Holmes*, for example, she admits that the case, “standing alone . . . might not prove much,” but contends that, “in the context of the other state cases,” it “suggests that in New Jersey, as in other states, fundamental law was derived from more than a written constitution.”¹⁶⁵

Sherry’s thesis is also problematic because two cases—the records of which do permit an informed interpretation—conflict with the interpretation she advances. The first of these cases is the 1787 case of *Bayard v. Singleton*¹⁶⁶ decided by the North Carolina Superior Court.

The *Bayard* court relied exclusively on the express terms of North Carolina’s Constitution in voiding a statute that violated a constitutional provision guaranteeing the right to a jury trial. The court ruled that “by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury.”¹⁶⁷ Given that the right to a jury trial implicates an individual rights question and not a governmental structure question, the court should not, according to Sherry’s formulation, have limited its review of the offending statute to the text of North Carolina’s Constitution.

Sherry herself concedes that the *Bayard* court failed to consult unwritten natural law when it ostensibly should have done so,¹⁶⁸ but attempts to harmonize the case with her thesis. She contends that *Bayard* did not truly deviate from this thesis. She relies on a letter written by James Iredell, plaintiff’s counsel in *Bayard*, to Richard Spaight, a fellow North Carolinian and member of the Federal Convention who condemned the decision.¹⁶⁹ In his letter, Iredell de-

161. *Holmes v. Walton* (N.J. 1780). See generally Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 456-60 (1899) (describing the case); see also C.G. HAINES, *supra* note 24, at 92-95 (criticizing Professor Scott’s interpretation of *Holmes*).

162. The “Ten-Pound Act” cases, described in 2 W.W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 969-71 (1953).

163. 1 Kirby 444 (Conn. Super. Ct. 1785). Of these three cases, only *Symsbury* was reported. Regarding *Symsbury*, Sherry concedes that neither the majority opinion nor the dissenting opinion “referred to any fundamental law” in concluding that “[t]he act of the general assembly,” which had granted title to a new group of grantees, “could not legally operate to curtail the land before granted to the [earlier grantees], without their consent.” Sherry, *supra* note 11, at 1142 (quoting *Symsbury*, 1 Kirby at 447). Thus, while Sherry may be right in surmising that the *Symsbury* judges “were relying on the unwritten rights of man,” *id.* at 1142, the judges failed to explain the basis for their opinion.

164. Sherry, *supra* note 11, at 1141; see *id.* at 1142.

165. *Id.* at 1141.

166. 1 N.C. (Mart.) 15 (1787).

167. *Id.* at 17.

168. See Sherry, *supra* note 11, at 1143.

169. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), reprinted in 2 G. MCREE, *THE LIFE AND CORRESPONDENCE OF JAMES IREDELL* 171-73 (1857) [hereinafter *Iredell Letter*].

Spaight’s objections to *Bayard* reflected his acceptance of the doctrine of legislative supremacy

fended the practice of judicial review and made the following observation:

Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed not inconsistent with natural justice (for that curb is avowed by even the judges in England), would have been binding on the people.¹⁷⁰

From this observation, Sherry concludes that, "[i]n 1787, Iredell clearly viewed a written constitution as supplementing natural law rather than as replacing it with a single instrument."¹⁷¹ Even assuming that Sherry correctly reads him, Iredell, as the plaintiff's attorney, could not speak for the North Carolina Superior Court Judges Ashe, Williams, and Spencer who decided *Bayard*. Consequently, Iredell's purported recognition of the Cokean natural law doctrine justifying noninterpretivist judicial review cannot transform these judges' refusal to employ that doctrine into acceptance of the doctrine.

Nor was the judges' decision in *Bayard* a fluke. In the subsequent case of *State v. (unnamed)*,¹⁷² Judge Williams again failed to employ Cokean natural law doctrine in a case appraising the constitutionality of a statute authorizing North Carolina's Attorney General to enter default judgments against debtor-defendants without providing prior notice.¹⁷³ Judge Williams looked only to two express constitutional terms: Article XII of North Carolina's Bill of Rights, which provided that free men could be deprived of their liberties and property only by "the law of the land;" and article XIV of the Bill of Rights, which guaranteed the right of jury trial.¹⁷⁴ In ruling that the statute was unconstitutional, Judge Williams unequivocally indicated that the constitutionality of legislation should be assessed only by the express limits on governmental power prescribed in North Carolina's Constitution:

[S]uch an act made by the General Assembly, who are deputed only to

often advanced by proponents of the egalitarian theory of natural law. In his letter of protest to Iredell, Spaight contended:

I do not pretend to vindicate the law, which has been the subject of controversy: it is immaterial what law they have declared void; it is their usurpation of authority to do it, that I complain of, as I do most positively deny that they have any such power; nor can they find any thing in the Constitution, either directly or impliedly, that will support them, or give them any color of right to exercise that authority. Besides, it would have been absurd, and contrary to the practice of all the world had the Constitution vested such power in them, as they would have operated as an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess: and the State, instead of being governed by the representatives in the general Assembly, would be subject to the will of three individuals, who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoys, and which would be more despotic than the Roman Decemvrate, and equally insufferable.

Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787) (emphasis added), reprinted in 2 G. McREE, *supra*, at 169-70. Spaight maintained that "though the assembly have no right to violate the constitution, yet if they do so, the only remedy is either by an humble petition that the law may be repealed, or a universal resistance of the people." *Id.*, reprinted in 2 G. McREE, *supra*, at 170.

170. Iredell Letter, *supra* note 169, at 172 (emphasis omitted).

171. Sherry, *supra* note 11, at 1143.

172. 2 N.C. (Mart.) 50 (1794).

173. *Id.* at 50-51.

174. *Id.* at 50.

make laws *in conformity to the constitution, and within the limits it prescribes*, is not any law at all. Whenever the Assembly *exceeds the limits of the Constitution*, they act without authority, and then their acts are no more binding than the acts of any other assembled body.¹⁷⁵

Because the case involved individual rights rather than governmental powers, the judge should have consulted unwritten natural law under Sherry's formulation of Cokean natural law doctrine.

Furthermore, Sherry most likely reads Iredell incorrectly. During the same month in which Iredell wrote the letter to Spaight to which Sherry attaches so much significance, Iredell also wrote a letter to the public unequivocally explaining that the people's adoption of a *written* constitution establishing "the fundamental and unrepealable law" was what made the practice of judicial review both legitimate and necessary.¹⁷⁶ Iredell asserted that judicial review was "unavoidable" because the Constitution was not a "*mere imaginary thing*, about which ten different opinions may be formed, *but a written document* to which all may have recourse, and to which, therefore, the judges cannot willfully blind themselves."¹⁷⁷

When Iredell was appointed to the federal bench, he consistently adhered to a textualist conception of judicial review. He accordingly resolved individual rights cases by specifically rejecting the Cokean premise that judges might void legislation on the basis of unwritten natural law. In the 1798 case *Minge v. Gilmour*,¹⁷⁸ for example, Iredell, sitting as federal circuit court judge, considered the question whether North Carolina's constitutional prohibition on passing ex post facto laws encompassed civil as well as criminal laws. In determining that the express terms of North Carolina's Constitution and Bill of Rights did not encompass ex post facto civil laws, Iredell considered whether Cokean theory might warrant voiding the statute at issue, stating:

The words "against natural justice" are very loose terms, upon which very wise and upright members of the legislature and judges might differ in opinion. If they did, whose opinion is properly to be regarded—those to whom the authority of passing such an act is given, or a court to whom no authority, in this respect necessarily results?¹⁷⁹

Iredell answered the question he posed by contending that the legislature, not the judiciary, possessed the authority to make the policy decision that a statute violated natural law:

[I]f the words [of a statute] are too plain to admit of more than one construction, and the provisions be not inconsistent with any articles of the constitution, I am of opinion, . . . that no court has authority to say the act is void because in their opinion it is not agreeable to the

175. *Id.* at 51-52 (emphasis added). The superior court, however, subsequently rejected Williams's preliminary ruling because Judges Ashe and MacCay, for undisclosed reasons, ruled that the statute was constitutional. See *id.* at 59.

176. Letter from James Iredell to the Public (Aug. 17, 1786), reprinted in 2 G. McREE, *supra* note 169, at 148.

177. *Id.* (emphasis added).

178. 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (No. 9631).

179. *Id.* at 444.

principles of natural justice.¹⁸⁰

In the 1798 case, *Calder v. Bull*,¹⁸¹ this time sitting as a Supreme Court Justice, Iredell again flatly rejected any judicial power to enforce unwritten natural law in considering whether a Connecticut law violated the ex post facto clause of the federal Constitution. He ruled:

If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, *the Court cannot pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice.* The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature, (possessed of an equal right of opinion,) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.¹⁸²

Common sense dictates that, in attempting to divine Iredell's position concerning noninterpretivist review of legislation, one ought to accord his reasoned opinions as a jurist greater weight than an isolated remark made in the course of a single letter. When one focuses on his reasoned opinions, it is clear that Iredell firmly and consistently opposed noninterpretivist judicial review.

The second case failing to support Sherry's thesis is the 1782 Virginia case of *Commonwealth v. Caton*.¹⁸³ Because the case involved the governmental structure issue of whether the Virginia Constitution permitted the House of Delegates to grant pardons without the consent of the Senate, Sherry reasons that the *Caton* judges should have considered the constitutionality of the resolution granting the pardon only by evaluating express constitutional terms.¹⁸⁴ She accordingly contends that Judge Wythe's adherence to an express interpretive scheme renders *Caton* consistent with her thesis.¹⁸⁵ Conversely, Sherry reasons that Judge Wythe's commitment to a textual interpretation in this governmental structure case would not have precluded him from engaging in noninterpretivist review of legislation in an individual rights case.¹⁸⁶

180. *Id.*

181. 3 U.S. (3 Dall.) 386, 398 (1798).

182. *Id.* at 399 (emphasis added). In support of Sherry's interpretation, Justice Chase apparently adopted the converse position, maintaining that courts should invalidate all statutes "contrary to the great first principles of the social compact." *Id.* at 388. There are also other cases Sherry does not cite in which courts reviewed legislation on the basis of unwritten natural law. *See, e.g.,* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795); Bowman v. Middleton, 1 S.C.L. (1 Bay) 252 (1791). What is problematic about Sherry's analysis is not her claim that some courts applied Cokean natural law theory and engaged in noninterpretivist review—though *Rutgers*, *Bayard*, and *Caton* do not provide support for that practice—but her claim that the courts had so consistently employed this type of review of legislation that it had become an accepted practice. There is ample historical support for the former claim, but no historical support for the latter claim.

183. 8 Va. (4 Call) 5 (1782).

184. *See* Sherry, *supra* note 11, at 1144-45.

185. *See id.*; *Caton*, 8 Va. (4 Call) at 8. The judge ruled that whenever the legislature "should attempt to overleap the bounds, prescribed to them by the people, I, . . . pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further." *Id.*

186. *See* Sherry, *supra* note 11, at 1145.

Given Judge Wythe's failure to express an opinion about the propriety of noninterpretivist judicial review, one can only speculate about his views on this subject. Judge Wythe's colleague, Judge Edmund Pendleton, however, did express an opinion on the subject. Foreshadowing Iredell's position in *Minge and Calder*, and contradicting Sherry's interpretation of *Caton*, Judge Pendleton condemned Cokean natural theory and the practice of noninterpretivist review founded upon it:

We find the same author, "[L]ord Coke, . . . asserting at one time the omnipotence of Parliament, who may change even the Consti[tu]tion, & [at] another exalting the Judiciary above them, giving Courts power of declaring Acts of Parliament void because they are impertinent or contrary to right and Reason, both of which are mere speculative opinions . . . & neither of them worthy of adoption by the [Virginia] legislature or Judiciary.¹⁸⁷

Perhaps consistently with this rejection of Cokean theory, Judge Pendleton also expressed some doubt about the scope of the judiciary's powers to void even legislation violating express constitutional terms:

[H]ow far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have the power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, *contrary to the plain terms of the constitution*, is indeed a deep, and I will add, a tremendous question¹⁸⁸

187. 2 W.W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 959 (1953). The *Caton* court did not publish an opinion when it decided the case in 1782. In 1827, however, Daniel Call prepared a report of the case. 1 J. GOEBEL, *supra* note 143, at 126. Although Call used Pendleton's notes in drafting the report, Call omitted this passage criticizing Coke from the published decision. See 2 W.W. CROSSKEY, *supra*, at 959. Crosskey suggests that Call, an ardent advocate of judicial review, doctored his report so that *Caton* would appear to provide a strong, early precedent in favor of judicial review. See *id.* at 952. As further evidence of such doctoring, Crosskey points to the disparity between Judge Pendleton's memorandum of the case and Call's report. Pendleton's memorandum indicates that five of the eight judges deciding *Caton* refused to rule on the question whether they possessed the power to void legislation. See *id.* at 958. However, Call's report indicated that only Pendleton passed on this question. See *Caton*, 8 Va. (4 Call) at 20.

188. *Caton*, 8 Va. (4 Call) at 17 (emphasis added). Crosskey reads Pendleton as asserting that judges should only review a particular statute if "the law invaded the prerogatives of the judiciary itself, as these were established by the constitution" and that "[i]n other cases, the interpretation of the powers of the legislature was not . . . the judiciary's concern." 2 W.W. CROSSKEY, *supra* note 187, at 955.

Just before he framed the question quoted in the text, Judge Pendleton stated that the case involved the issue "whether, if the constitution of government and the act declaring what shall be treason are at variance on this subject, which shall prevail and be the rule of judgment?" *Caton*, 8 Va. (4 Call) at 17 (emphasis added). Because the judge used the phrase "the constitution of government," Sherry contends that he was alluding to the dual conception of a constitution in which that instrument positively created or "constituted" a form of government but merely declared preexisting natural rights. See Sherry, *supra* note 11, at 1145. Sherry consequently concludes that Judge Pendleton's view was consistent "with Judge Wythe's framing of the issue . . . and suggests that Judge Pendleton might have viewed the written constitution as most relevant in cases involving the structure of government." *Id.* Pendleton's specific rejection of Cokean theory, however, refutes Sherry's conclusion. See *supra* note 187 and accompanying text; see also *infra* notes 286-89 and accompanying text (Pendleton identifying judicial review as being based on enforcing express constitutional terms during the Virginia convention's deliberations on ratifying the federal Constitution). Moreover, the uncertainty Pendleton professed about the judiciary's constitutional power to encroach upon the legislature's constitutionally established authority over legislation—professed immediately after articulating the phrase to which Sherry attaches such significance—indicates that his concern

Judge Pendleton then ducked this "question" by determining that the House of Delegates resolution under consideration was constitutional.¹⁸⁹

Pendleton was not the only judge on the eight-judge *Caton* panel who expressed doubts about the judiciary's authority to review legislation. Judge Lyons, in fact, stated that no such authority existed.¹⁹⁰

The *Caton* case, thus, fails to constitute a clear precedent for *interpretivist* review of legislation, and the case constitutes no precedent for *noninterpretivist* review. Judge Pendleton, the only judge to discuss the latter practice, expressly repudiated it.

Rutgers v. Waddington,¹⁹¹ the third case upon which Sherry relies, also fails to provide a clear precedent for the practice of judicial review. In this case, the court ruled that, contrary to the plain language of the New York trespass statute, the plaintiff was not entitled to bring a trespass action against a British citizen who occupied her property during the revolutionary war.¹⁹² Sherry suggests that *Rutgers* was consistent with the Cokean natural law tradition because the court characterized Hamilton as asserting that the 1783 trespass statute under which his client was charged was "against law and reason" and therefore "void."¹⁹³

In writing the opinion for the *Rutgers* court, however, Judge Duane did not rely on Hamilton's broad argument. Judge Duane stated:

The supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho' it appears to them to be *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.¹⁹⁴

Nonetheless, he also stated that when the legislature enacts a statute containing general language that produces an "*unreasonable*" result in a particular case, "the Judges are in decency to conclude, that the consequences were not foreseen by the Legislature; and therefore they are at liberty to expound the statute by *equity*, and only *quoad hoc* to disregard it."¹⁹⁵ Judge Duane reasoned that "[w]hen the judicial makes these distinctions, they do not controul the Legisla-

involved the express limitations Virginia's Constitution imposed upon all three branches of government, not any purported distinction between the sources that judges may consult in enforcing natural law and in upholding positive rights.

189. See *Caton*, 8 Va. (4 Call) at 18, 20.

190. Moreover, Judge Dandridge "declined the question," and Judge Blair, who subsequently would be appointed to the Supreme Court "waved [sic] the question." 1 J. GOEBEL, *supra* note 143, at 127.

191. N.Y. City Mayor's Ct. (1784), reprinted in J. GOEBEL, *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 393-419 (1964).

192. Sherry, *supra* note 11, at 1136.

193. *Id.* at 1138 (quoting J. GOEBEL, *supra* note 191, at 395).

194. G. WOOD, *supra* note 2, at 458 (emphasis in original) (quoting J. GOEBEL, *supra* note 191, at 415).

195. *Id.* at 458 (emphasis in original).

ture; they endeavor to give their *intention* it's [sic] proper effect."¹⁹⁶

Judge Duane thus rejected the premise that judges possess the power to invalidate *unambiguous* legislation conflicting with *express* constitutional terms; he asserted that judges possess only the limited power to interpret ambiguous legislation to avoid unreasonable results.¹⁹⁷ Judge Duane certainly did not assert that judges possessed the much more far-reaching power to invalidate unambiguous legislation on the basis of unwritten natural law.

In asserting that pre-1787 state courts legitimized the practice of judicial review, Sherry also inexplicably glosses over the violent controversy sparked by *Rutgers* and *Trevett v. Weeden*,¹⁹⁸ the final case upon which she relies. As Sherry indicates, the defendant in *Trevett* was charged with violating a Rhode Island statute requiring merchants to accept paper money and was brought before the superior court pursuant to the statutory requirement that violators be tried by special courts sitting without juries.¹⁹⁹ The *Trevett* court, however, refused to decide the case, instead ruling "that the said Complaint does not come under the Cognizance of the Justices here present."²⁰⁰

In discussing *Trevett*, Sherry does note that the judges who decided *Trevett* were "called before the [Rhode Island] legislature to explain their actions."²⁰¹ What she fails to note is that the Rhode Island legislature in fact fired all of the judges involved in *Trevett* except the Chief Justice, who prudently stated no reasons for his decision.²⁰²

Sherry also underplays the equally pronounced opposition that *Rutgers* provoked when the Mayor's Court for the City of New York decided it.²⁰³

196. *Id.* (emphasis in original).

197. *Id.* at 458-59; 1 J. GOEBEL, *supra* note 143, at 135-36.

198. The unpublished decision of *Trevett v. Weeden* is described in J. VARNUM, THE CASE; TREVETT AGAINST WEEDEN: ON INFORMATION AND COMPLAINT FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE (1787).

199. Sherry, *supra* note 11, at 1138; see 1 J. GOEBEL, *supra* note 143, at 136-37.

200. 1 J. GOEBEL, *supra* note 143, at 140 (quoting 1786 R.I. Acts & Resolves 5-6). The basis upon which the *Trevett* court reached its decision is difficult to discern. The *Trevett* court did not publish an opinion, and the unofficial record of the case, composed by James Varum, who served as defendant's counsel, contains only Varum's argument and the court's judgment. *Id.* at 138. While Sherry rightly notes that Varum employed a Cokean natural law theory in arguing that the paper money statute under which his client was tried was void, see Sherry, *supra* note 11, at 1139-40, it is far from clear whether the court relied upon Cokean theory in dismissing the case. See 1 J. GOEBEL, *supra* note 143, at 140. As noted above, the court apparently stated only "that the said Complaint" is not cognizable. *Id.* (quoting 1787 R.I. Acts & Resolves 5-6).

201. Sherry, *supra* note 11, at 1139.

202. See C.G. HAINES, *supra* note 24, at 111; 1 J. GOEBEL, *supra* note 143, at 14. Julius Goebel offers a slightly different account of events. He contends that the legislature, after considerable deliberation, did not impeach the *Trevett* judges, but that, with the exception of the Chief Justice, all of these judges lost their seats on the court in the next election. *Id.* at 141. Whether the people refused to re-elect the judges or the legislature fired them, the inhabitants of Rhode Island clearly did not regard judicial review as a legitimate practice.

Sherry also fails to note that the North Carolina General Assembly attempted to sanction the judges deciding *Bayard* when they first refused to honor the Assembly's request to dismiss the case. See 2 W.W. CROSSKEY, *supra* note 187, at 971. That attempt ultimately was abandoned after the Assembly determined that the judges had not breached the duties of their office. See *id.* (citing N.C. State Records XVIII, 42, 215-17, 428-29).

203. In one cryptic sentence, Sherry concedes that the "public and legislative uproar" following *Rutgers* was "inevitable." Sherry, *supra* note 11, at 1138. Yet she seemingly argues that this uproar

Although the New York Legislature did not actually fire the *Rutgers* judges, it successfully intimidated them into submission by passing resolutions denouncing their conduct.²⁰⁴ The profound opposition that these cases provoked casts considerable doubt upon Sherry's conclusion that judicial review based upon express constitutional terms had become an accepted practice by the time the Federal Convention convened in Philadelphia.

The public opposition to *Trevett* and *Rutgers* also undermines Sherry's conclusion that noninterpretivist judicial review was an accepted component of American constitutional theory. In response to *Rutgers*, angry citizens published a letter in the *New York Packet and American Advertiser* vehemently denouncing the decision as a flagrant judicial usurpation of power and contending that "[t]he design of Courts of Justice, in our Government, from the very nature of their institution, is to *declare* laws, not to *alter* them."²⁰⁵ Another critic of the decision asserted that permitting courts to void legislation would lead inexorably to the destruction of the people's hard-won liberties:

*[I]f they [i.e., judges] are to be invested with a power to overrule a plain law, though expressed in general words, as all general laws are and must be; when they may judge the law unreasonable, because not consonant to the law of nations or to the opinions of ancient or modern civilians and philosophers; for whom they may have a greater veneration than for the solid statutes and supreme legislative power of the state; we say, if they are to assume and exercise such a power, the probable consequences of their independence will be the most deplorable and wretched dependency of the people. That the laws should be no longer absolute, would be in itself a great evil; but far more dreadful consequence arises, for that power is not lost in the controversy, but transferred to judges who are independent of the people.*²⁰⁶

The New York legislature echoed this theme, passing a resolution in which it suggested that the *Rutgers* court should be removed from office and alleging:

[T]he adjudication aforesaid is, in its tendency, subversive of all law and good order, and leads directly to anarchy and confusion, because if a court instituted for the benefit and government of a corporation may take upon them to dispense with, and act in a direct violation of a plain and known law of the state, all other courts either superior or inferior, may do like; and therewith will end all our dear-bought rights, and

does not undermine her thesis because it was not directed "at the court's use of the law of nations [and the natural law principles incorporated therein], but at its exercise of judicial review at all." *Id.* This argument does nothing to lessen the significance of the public's reaction to *Rutgers*: by objecting to all forms of judicial review, the people obviously also were objecting to noninterpretivist review.

204. See 1 J. GOEBEL, *supra* note 143, at 137; C.G. HAINES, *supra* note 24, at 101-04; F. McDONALD, *supra* note 22, at 156.

205. G. WOOD, *supra* note 2, at 459 (quoting *New York Packet & American Advertiser*, Nov. 4, 1784). One signer of this letter was Melancton Smith, who would prove to be one of Hamilton's most formidable adversaries during the New York ratifying convention. 1 J. GOEBEL, *supra* note 143, at 137 n.199; see *infra* notes 357-58, 362 and accompanying texts.

206. H. DAWSON, *THE CASE OF ELIZABETH RUTGERS VERSUS JOSHUA WADDINGTON XXXVI* (1866) (emphasis added), quoted in C.G. HAINES, *supra* note 24, at 102-03.

privileges and legislatures become useless.²⁰⁷

The Rhode Island Legislature similarly denounced the *Trevett* decision, passing a resolution asserting that "the judgment is unprecedented and may tend directly to abolish the legislative authority."²⁰⁸ These arguments again underscore the primacy of the egalitarian theory of natural law in early American thought and the concomitant distrust with which many Americans viewed the undemocratic institution of the judiciary.

III. *Natural Law, Judicial Review, and the State Ratifying Conventions*

In discussing the Federal Convention, Sherry observes that an important shift occurred with the proposal to present the new federal constitution to the state conventions chosen by the people for popular ratification, rather than submitting it to the state legislatures. She notes that this proposal was fueled in part by pragmatic considerations. These considerations included the awareness that state legislators, who would be divested of considerable power if the Constitution were adopted, would be less likely to ratify it than would conventions drawn directly from the people.²⁰⁹ She also contends, however, that "[t]hose in favor of popular ratification had grasped a crucial theory . . . to justify what had begun as a purely practical mechanism."²¹⁰ This theory, she maintains, departed from the earlier view that a written constitution could only declare preexisting fundamental law. It posited that such a constitution could create its own species of positive fundamental law "specifically because it had been enacted by the people."²¹¹

Having accurately characterized the theory of popular ratification, however, Sherry ignores the correlation between this theory and the egalitarian natural law principle establishing that law becomes binding solely because of the people's consent. She thereby glosses over the profound conflict between this theory of popular ratification and the Cokean practice of noninterpretivist judicial review.²¹² In engaging in interpretivist review, judges do not violate the central premise of this theory that the Constitution establishes the overarching law because the people enacted it. In these instances, judges only enforce the

207. H. DAWSON, *supra* note 206, at xli-xlii, quoted in C.G. HAINES, *supra* note 24, at 102-03.

208. C.G. HAINES, *supra* note 24, at 103 (quoting 1786-87 R.I. Acts and Resolves 61).

209. See Sherry, *supra* note 11, at 1151-54. Madison, for example, "considered it best to require Conventions, among other reasons, for this, that the powers given to the Gen[eral] Gov[ernment] being taken from the State Gov[ernments] the [State] Legislatures would be more disinclined . . . they could devise modes apparently promoting, but really, thwarting the ratification." J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 563 (A. Koch ed. 1966) [hereinafter MADISON'S NOTES].

210. Sherry, *supra* note 11, at 1151.

211. *Id.* at 1154. Madison, for example, argued: "The people were, in fact, the foundation of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased." MADISON'S NOTES, *supra* note 209, at 564, quoted in Sherry, *supra* note 11, at 1151.

212. Sherry does obliquely acknowledge this conflict by asserting that "[a]ny conflict between popular sovereignty and natural law was, at least until the mid-1790s more apparent than real, since 'the Revolutionary generation, believing in people's inherent goodness, simply assumed that all laws made by the people would be consistent with fundamental rights.'" Sherry, *supra* note 11, at 1156 n.132 (quoting Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 928 (1978)).

written terms of the Constitution that the people chose to adopt as positive law. In engaging in noninterpretivist review, however, judges do violate this premise. In these instances, they create new fundamental law neither contained in the Constitution nor adopted by the people.²¹³

Sherry does not overstate the importance of the new theory of popular ratification adopted by the framers of the Constitution. This theory proved to be a successful weapon against Antifederalist charges that the Philadelphia Convention wrongfully exceeded its powers by abrogating the Articles of Confederation and creating the new federal Constitution.²¹⁴ Faced with such charges during the state ratifying conventions, proponents of the new Constitution hammered home the point that the Constitution was merely a proposal that could acquire legal force only if adopted by the people. During the Pennsylvania Convention, for example, James Wilson asserted:

[T]he late Convention have done nothing beyond their powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be

213. Cf. Grey, *Origins of the Unwritten Constitution in American Revolutionary Thought*, 30 STAN. L. REV. 843, 893 (1978) (conceding that "it remains to be shown" that the Federalists' adoption and exploitation of the theory of popular ratification "was consistent with [the] acceptance of noninterpretive judicial review").

214. As Sherry notes, the opponents of the new Constitution began to dispute the Federal Convention's authority to draft the instrument soon after the Convention began. Five days after all of the delegates finally arrived in Philadelphia, for example, General Charles Pinkney asserted that he doubted "whether the act of Cong[ress] recommending the Convention, or the Commissions of the Deputies to it, could authorise a discussion of a System founded on different principles from the federal Constitution." MADISON'S NOTES, *supra* note 209, at 35 (May 30, 1787). Opponents of the Constitution continued this dispute throughout the state ratifying conventions. See, e.g., 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 24, 290 (J. Elliot rev. ed. 1866) [hereinafter ELLIOT'S DEBATES] (Joseph Taylor, in the North Carolina convention, asserting that the Convention "assumed more power than was given them"); *id.* at 290 (Rowlins Lowndes, in the South Carolina convention, asserting he "could not understand with what propriety the [Federal] Convention proceeded to change the Confederation; for every person with whom he had conversed on the subject concurred in opinion that the sole object of appointing a convention was to inquire what alterations were necessary in the Confederation"); see also 2 THE COMPLETE ANTIFEDERALIST 7, 108 (H. Storing ed. 1981) [hereinafter ANTIFEDERALIST] (Elbridge Gerry opposing the Constitution in an Oct. 18, 1787 letter read to the New York Legislature, and asserting, *inter alia*, that the Federal Convention's powers did not "extend[] to the formation of the plan proposed"); *id.* at 108 ("Cato's" letter asserting that "[t]his Convention have exceeded the authority given to them, and have transmitted to Congress a new political fabric, essentially and fundamentally distinct and different from it").

Perhaps more importantly, the theory of popular ratification enabled proponents of the new Constitution to rebut the Antifederalist charge that the national government would consume the state governments because the indivisible nature of sovereignty conflicted with the maintenance of concurrent sovereignties. The Antifederalists insisted that this characteristic of sovereignty dictated that either the national or state governments must be supreme, arguing that "two co-ordinate sovereignties would be a solecism in politics[]" and that "it would be contrary to the nature of things that both should exist together—one or the other would necessarily triumph in the fullness of dominion." G. WOOD, *supra* note 2, at 528 (quoting an unidentified Pennsylvania Antifederalist). The Federalists' argument that the people, not their servants in the state legislature, possessed this indivisible sovereignty deprived the Antifederalists' objection of any real force. For a particularly powerful refutation of this objection, see James Wilson's remarks during the Pennsylvania ratifying conventions. 2 ELLIOT'S DEBATES, *supra*, at 455-57.

judged by the natural, civil, and political rights of men. By their FIAT, it will become of value and authority; without it, it will never receive the character of authenticity and power.²¹⁵

North Carolina supporters of the Constitution echoed Wilson, although they ultimately failed to procure ratification. In arguing that the Federal Convention had not exceeded its authority, Archibald MacClaine asserted:

The Constitution is only a mere proposal. Had it been binding on us, there might be reason for objecting. After they [*i.e.* the Federal Convention] had finished the plan, they proposed that it should be recommended to the people by the several state legislatures. If the people approve of it, it becomes their act. . . . It is no more than a blank till it be adopted by the people.²¹⁶

William R. Davie similarly asserted that the Constitution would either "remain a dead letter, or receive its operation from the fiat of this [ratifying] Convention."²¹⁷

Writing as "Publius" in letters later published as *The Federalist*, James Madison offered the New York ratifying convention similar assurances.²¹⁸ He maintained that the Federal Convention understood its role to be "merely advisory and recommendatory" and that the proposed Constitution necessarily would be of "no more consequence than the paper on which it is written, unless it is stamped with the approbation of those to whom it is addressed."²¹⁹

Sherry rightly stresses the importance of the new theory that only popular ratification could endow the Constitution with authority as fundamental law. However, she then paradoxically dismisses the debates entertained in the state conventions through which popular ratification was secured as being "essentially irrelevant" to the question of whether the Constitution was intended to authorize judges to invalidate legislation by consulting unwritten natural law.²²⁰ This dismissal effectively nullifies the very theoretical innovation that Sherry attributes to the triumphant proponents of popular ratification. If, as Sherry asserts, after some initial resistance during the Federal Convention, the proposed Constitution was soon "amended . . . to conform to the idea of a positive law enacted by the people,"²²¹ then the people's understanding of the Constitution expressed by the delegates attending the state ratifying conventions simply cannot be irrelevant to answering this question. Indeed, this idea suggests that the converse proposition must be true: the understanding of the people who participated in

215. 2 DOCUMENTARY HISTORY OF RATIFICATION OF THE CONSTITUTION 483-84 (M. Jensen ed. 1976) (Wilson's speech in the Pennsylvania Convention on Dec. 4, 1787) [hereinafter DOCUMENTARY HISTORY], quoted in Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 83-84 (1988).

216. 4 ELLIOT'S DEBATES, *supra* note 214, at 24-24, quoted in Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 84 (1988).

217. 4 ELLIOT'S DEBATES, *supra* note 214, at 16.

218. The writings of "Publius" were widely read by delegates attending the New York ratifying convention. See *infra* note 385 and accompanying text.

219. THE FEDERALIST No. 40, at 200 (J. Madison) (J. Cooke ed. 1961).

220. Sherry, *supra* note 11, at 1161 n.143.

221. *Id.* at 1154.

the state conventions and ratified the Constitution, transforming it into positive, fundamental law, must be highly pertinent in resolving this and other questions of constitutional interpretation.

In surveying a wide range of historical sources, Professor Charles Lofgren recently demonstrated that early American statesmen of both Federalist and Antifederalist persuasion understood the implications of the popular ratification theory.²²² He points, for example, to the 1796 controversy that arose concerning whether the United States House of Representatives was constitutionally entitled to review the negotiating papers accompanying the Jay Treaty with England.²²³ During this controversy, Madison unequivocally indicated that, if extrinsic evidence were needed for interpreting the Constitution, only the state ratifying debates should be consulted:

As the instrument came from them [the Federal Convention] . . . it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.²²⁴

A number of Federalist Congressmen disagreed with Madison's interpretation that the state ratifying conventions had believed that the House would play a constitutional role in treaty-making.²²⁵ Lofgren, however, notes that these Congressmen did not dispute the interpretive validity of resorting to the ratify-

222. See Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 79-113 (1988). Powell argues that the framers did not intend either their subjective understanding of the Constitution or the subjective understanding of the delegates attending the state ratifying conventions to control constitutional interpretation. He contends that they instead intended that the Constitution would be construed using traditional common-law techniques of statutory construction. See generally Powell, *supra* note 106 (surveying historical sources). Lofgren, however, marshalls an impressive array of historical sources demonstrating that the framers did expect that the "intent" of the popular ratifying conventions would be consulted in interpreting the Constitution. Lofgren, *supra*, at 79-117.

223. See Lofgren, *supra* note 222, at 94-102. This controversy developed after House Republicans demanded access to the Treaty negotiating papers and refused to allocate funds to implement the Treaty. See *id.* at 94.

224. 5 ANNALS OF CONGRESS col. 776 (April 6, 1796) (History of Congress ed. 1849), quoted in Lofgren, *supra* note 222, at 103. For the remainder of his life, Madison consistently held the position that the state ratifiers' intent rather than the Federal Convention's intent should be dispositive when constitutional interpretation requires extrinsic sources. See Lofgren, *supra* note 222, at 103; Powell, *supra* note 106, at 937. In 1821, for example, Madison wrote to Thomas Ritchie:

As a guide to expounding and applying the provisions of the Constitution, the debates and incidental decisions of the [Philadelphia] Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, & as a source perhaps of some lights on the Science of Govt.[.] the legitimate meaning of the Instrument must be derived from the text itself; or if key is to be sought elsewhere, it must be, not in the opinions of the body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it receiv[ed] all the Authority which it possesses.

Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), quoted in Lofgren, *supra* note 222, at 103.

225. By 1796, Madison, who played a nationalist role at the Federal Convention and articulated

ing conventions' records of the state conventions. For example, Theodore Sedgwick disputed Madison's interpretation on the ground that Madison had never assigned a role in foreign affairs to the House during the Virginia ratification debates.²²⁶ Sedgwick queried: "How it happened that, if such was really the intention of the instrument, that such was the meaning of the people, no man had heard of it until the discovery was produced by the British [Jay] Treaty. Strange national intention, unknown for years to every individual."²²⁷ But Sedgwick did not suggest that the state ratifiers' understanding was irrelevant to discerning the House's role. To the contrary, he canvassed the Virginia ratifying debates to demonstrate that many delegates strenuously objected to the Constitution on the ground that the Constitution denied any treaty-making powers to the House.²²⁸

In denying that the House possessed treaty-making powers, South Carolina Federalist William Smith also referred to the debates in the state ratifying conventions. Smith asserted:

[H]e should not confine himself to a mere recital of the words, but he should appeal to the general sense of the whole nation at the time the constitution was formed By referring to the contemporaneous expositions of that instrument, when the subject was viewed only in relation to the abstract power, and not to a particular Treaty, we should come at the truth.²²⁹

Benjamin Bourne likewise asserted that "[i]f a doubt existed as to what was the true construction of the Constitution, it ought to be conformed to the opinion which prevailed when the Constitution was adopted."²³⁰

The theory of popular ratification adopted by the Federal Convention, as well as the subsequent congressional endorsement of the records from the state ratifying conventions as a uniquely valuable source for constitutional interpretation, indicate that these records are highly germane to resolving whether the Constitution was intended to authorize judges to review legislation by consulting unwritten natural law. Assuming that the Constitution should be interpreted in accordance with its original intent and that the state convention delegates did not understand the Constitution to authorize noninterpretivist judicial review, this lack of understanding would suggest strongly that the Constitution cannot legitimately be construed as authorizing this judicial practice.²³¹

a Federalist position in the Federalist Papers, had switched his alliance and supported many Anti-federalist positions.

226. Lofgren, *supra* note 222, at 96.

227. 5 ANNALS OF CONGRESS, *supra* note 224, at col. 520 (March 11, 1796), *quoted in* Lofgren, *supra* note 222, at 96.

228. See 5 ANNALS OF CONGRESS, *supra* note 224, at col. 523-28 (March 11, 1796), *cited in* Lofgren, *supra* note 222, at 96 n.66.

229. 5 ANNALS OF CONGRESS, *supra* note 224, at col. 495 (March 10, 1796), *quoted in* Lofgren, *supra* note 222, at 95.

230. 5 ANNALS OF CONGRESS, *supra* note 224, at col. 574 (March 11, 1796), *quoted in* Lofgren, *supra* note 222, at 96.

231. The theory of popular ratification the delegates attending the Federal Convention endorsed mandates that the understanding of those who ratified, and not those who drafted the Constitution, is the most important guide to constitutional interpretation. Therefore, I focus exclusively on the

Perhaps realizing that the debates entertained during the state ratifying conventions must have some significant bearing on whether the Constitution was intended to authorize judicial enforcement of unwritten natural law, Sherry summarily asserts, without any detailed reference to the available records, that no real dispute about this question arose during these conventions.²³² She bases her assertion solely on the fact that the Antifederalist delegates attending the state conventions refused to ratify the Constitution absent the addition of a federal bill of rights delineating fundamental, natural-law rights.²³³ From this fact, she surmises that the Antifederalists' "fight with the federalists turned on issues entirely apart from any dispute over the sources of fundamental rights."²³⁴

This logic provides no justification for ignoring the substance of the state ratifying debates. To the contrary, it reflects Sherry's recurrent confusion of two distinct doctrinal questions: The question as to the *source* of individual rights; and the question as to *enforcement* of those rights. As the previous discussion of the various natural-law traditions prominent in the American colonies demonstrates, accepting the doctrine that divine or natural law confers upon man certain inalienable individual rights need not entail accepting the doctrine empowering judges to protect those rights. By ignoring the ratification debates on the ground that the Antifederalists believed men possessed certain fundamental rights derived from natural law, Sherry's article consequently begs the question whether the Antifederalists also believed that judges should have the authority to override legislation to safeguard those rights.

A. Pennsylvania Ratifying Debates

The thoroughly one-sided account presented in the official record of Pennsylvania's convention—the first state to consider ratification of the new Constitution²³⁵—provides very little information about the Antifederalists' views. The Pennsylvania Federalists successfully excluded all Antifederalist commentary from this record.²³⁶

state ratifying conventions in the discussion that follows. For a compelling analysis of this point, see Lofgren, *supra* note 222, at 79-113.

232. See Sherry, *supra* note 11, at 1161 n.143.

233. See *id.*

234. *Id.*

235. In the discussion that follows, I review in chronological order the records of the Pennsylvania, Massachusetts, New York, Virginia, and North Carolina conventions because these records provide the most detailed accounts of the debates surrounding ratification of the Constitution and because the records of the other state ratifying conventions are fragmentary.

236. See Sherry, *supra* note 11, at 3. The Federalist-controlled Pennsylvania Legislature also rushed to convene the state ratifying convention to prevent the Pennsylvania Antifederalists from having time to organize their forces. See 3 ANTIFEDERALIST, *supra* note 214, at 4 (Herbert Storing's introduction to the writings of Pennsylvania Antifederalists).

The debates surrounding whether Antifederalists' objections to the proposed Constitution should be included in the official record, however, do suggest that the Pennsylvanians attending the ratifying convention understood that this record would have interpretive relevance in subsequent controversies surrounding the meaning of the Constitution. Dr. Benjamin Rush, for example, contended that such objections should be excluded to prevent confusing the official record, which having been "stamped with authenticity" would be consulted in the future. 2 DOCUMENTARY HISTORY, *supra* note 215, quoted in Lofgren, *supra* note 222, at 92. Robert Whitehill argued for inclusion of these objections for precisely the same reason. He contended that a complete, contemporaneous

These official records do indicate, however, that the Pennsylvania ratifying convention was never informed that the new Constitution would empower judges to invalidate legislation inconsistent with unwritten natural law. James Wilson, in an eloquent defense of the Constitution spanning more than 100 pages and constituting virtually the entire official record of the debates,²³⁷ did state that the Constitution authorized judicial review:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Any thing, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.²³⁸

Wilson, however, was suggesting that the Constitution would permit judges to invalidate federal legislation to insure that Congress did not exceed its expressly limited constitutional powers. Wilson's statement also could suggest that the federal judges would be permitted to invalidate state legislation encroaching upon Congress's expressly enumerated powers or violating other express constitutional terms. But Wilson's statement in no way suggests that the Constitution would authorize judges to invalidate either state or federal legislation based upon natural-law principles not expressly codified in the Constitution.

Although the Pennsylvania Antifederalists were denied the opportunity to air their views about the Constitution in the convention's official records, they did publish an account of their reasons for refusing to ratify the Constitution in the *Pennsylvania Packet and Daily Advertiser*.²³⁹ This account, which advanced arguments often repeated by opponents of the Constitution in other states,²⁴⁰ evinced the Antifederalist authors' profound fear of what they regarded as the dangerously expansive powers that the Constitution had conferred on the federal

record of Pennsylvania's ratifying debates would provide needed information about "the nature and tendency of the government," and that "the people at large will acknowledge, with thanks, the resulting information upon a subject so important to themselves and their latest prosperity." 2 DOCUMENTARY HISTORY, *supra* note 215, at 377, quoted in Lofgren, *supra* note 222, at 92.

237. See 2 ELLIOT'S DEBATES, *supra* note 214, at 422-527. The only other person whose remarks were recorded in this record was the Federalist Thomas M'Kean. See *id.* at 417, 529-42.

238. *Id.* at 489. When Wilson made this statement, he was responding to the objection of Robert Whitehill, who subsequently voted against ratification of the Constitution, that the constitutional "powers given to judges are dangerous." *Id.* The grounds for Whitehill's objection, however, cannot be discerned from the record of the debates.

239. See *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pa. Packet & Daily Advertiser, Dec. 18, 1787, reprinted in 3 ANTIFEDERALIST, *supra* note 214, at 146-67 [hereinafter *Address*].

Despite their defeat at the convention, the Pennsylvania Antifederalists refused to end their fight against the new Constitution. They continued to publish often caustic critiques of the Constitution in Pennsylvania and fueled opposition to the Constitution in other states. 3 ANTIFEDERALIST, *supra* note 214, at 4 (Storing's Introduction).

240. These arguments included the objection that the Federal Convention lacked the authority to draft the Constitution; that the extensive territory of the United States could not be governed under republican principles, except under a system of confederated, sovereign states; that the Constitution was defective because it did not adequately separate the powers of the legislative, executive, and judicial branches of government; that the Constitution was defective because it lacked a bill of rights; and that the representational scheme of the Constitution was defective. See *Address*, *supra* note 239, at 149, 153, 155, 163.

judiciary. They contended that "the decisive influence that a general judiciary would have over the civil polity of the several states, . . . unaided by the [federal] legislative, would effect a consolidation of the states under one government."²⁴¹ The Antifederalists particularly objected to granting any federal court equity jurisdiction and to granting the Supreme Court appellate jurisdiction over questions of both law and fact.²⁴² They believed that these jurisdictional grants taken together gave unbounded discretion to the Supreme Court and any lower federal courts Congress might create, which the aristocracy would exploit to defeat the legitimate claims of the poor. "Length of purse," they asserted, "will too often prevail against right and justice."²⁴³

Pennsylvania Antifederalists also vehemently objected to the Constitution on the ground that it abolished jury trials in civil suits.²⁴⁴ This objection reflected the flip side of their objection to granting the federal judiciary discretionary powers. For these Antifederalists, juries drawn from the common people—not judges drawn from the elite echelons of society and guaranteed independence from the people by virtue of possessing office during good behavior—were the true guardians of the people's rights.²⁴⁵

The authors did not specifically object to the new Constitution on the ground that it authorized judicial review. Their general objection that the federal judiciary would facilitate destruction of the state governments, as well as their particular objection to endowing this branch of government with any discretionary powers, however, does suggest that these Antifederalists would have opposed authorizing federal judges to invalidate state legislation contravening

241. *Id.* at 156-57. Other Pennsylvania Antifederalists echoed this theme. One Antifederalist author, for example, composed a satirical essay written from Federalist perspective in which he asserted:

[O]ur court will have original or appellate jurisdiction in all cases—and if so how fallen are the state judicatures—and must not every provincial law yield to our supreme fiat? Our constitution answers yes—then how insignificant will the makers of these laws be—it is in the nature of power to create influence—and finally we shall entrench ourselves so as to laugh at the cabals of the commonality.

Montezuma, Philadelphia Indep. Gazetteer, Oct. 17, 1787, reprinted in 3 ANTIFEDERALIST, *supra* note 214, at 56.

242. Article III, § 2 of the Constitution provides in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

243. *Address, supra* note 239, at 160.

244. *See id.*

245. Other Pennsylvania Antifederalists also expressed concern that granting the federal judiciary tenure during good behavior would detach federal judges from the people and eventually result in this judiciary's corruption. *See, e.g.,* A Federal Republican, *A Review of the Constitution Proposed by the Late Convention* (1787), reprinted in 3 ANTIFEDERALIST, *supra* note 214, at 77, 79; *cf. A Farmer*, Freeman's Oracle & N.H. Advertiser, Jan. 11, 1788, reprinted in 4 ANTIFEDERALIST, *supra* note 214, at 206 (asserting that to "secure the liberties of the people," a jury drawn from the people should sit with the Supreme Court).

the Constitution. Moreover, these authors' objections clearly indicate that they would have strenuously opposed authorizing federal judges to void legislation based on unwritten natural law.

The constitutional amendments that a number of these Antifederalist authors drafted after the Pennsylvania convention ratified the Constitution also suggest that they would have opposed the practice of judicial review.²⁴⁶ They proposed several amendments designed to insulate the states from the federal judiciary's interference and to abolish judicial discretion. To achieve the former goal, they proposed amending the Constitution to prohibit Congress from establishing any federal court other than the Supreme Court, "except such as shall be necessary for determining causes of admiralty jurisdiction,"²⁴⁷ and to preclude the Supreme Court from hearing appeals, "except in revenue cases, unless the matter in controversy exceed the value of three thousand dollars."²⁴⁸ To achieve the latter goal, they proposed amending the Constitution to confine the Supreme Court's appellate jurisdiction to questions of law only.²⁴⁹ These Antifederalists also proposed amending the Constitution to preclude all branches of the federal government from exercising any powers except those expressly enumerated in the Constitution, with the added caveat that no "authority, power, or jurisdiction, [shall] be assumed or exercised by the executive or judiciary departments of the Union, under color or pretence of construction or fiction."²⁵⁰

These authors' attempts to restrict the federal judiciary's jurisdiction so severely and their insistence that federal judges must be expressly prohibited from expanding the national government's powers through the guise of interpretation suggests that they would have vigorously opposed the practice of judicial review, a practice that the Constitution never expressly authorizes.²⁵¹ Because the judges engaging in noninterpretivist review possess virtually unlimited discretion to invalidate legislation not contravening any express constitutional term, one can readily surmise that these authors would have rejected this practice even more vehemently.

Yet the Antifederalist leaders in Pennsylvania also opposed the Constitution because it contained no bill of rights delineating "those unalienable and

246. The individuals who co-authored the *Address* and then subsequently proposed amendments were Robert Whitehill, John Bishop, Jonathon Hoge, John Smilie, Richard Baird, Adam Orth, and John Andre Hannah. See *Address*, *supra* note 239, at 166.

247. 2 ELLIOT'S DEBATES, *supra* note 214, at 546 (U.S. CONST. amend. II, art. III, § 1 (proposed Sept. 3, 1788)).

248. *Id.* (U.S. CONST. amend. II, art. III, § 2 (proposed Sept. 3, 1788)).

249. *Id.* (U.S. CONST. amend. II, art. III, § 2 (proposed Sept. 3, 1788)).

250. *Id.* at 545 (U.S. CONST. amend. I (proposed Sept. 3, 1788)).

251. The Constitution does not explicitly authorize federal judicial review, although two of its provisions, the "arising under" clause contained in article III, § 2 and the "supremacy" clause contained in article VI, arguably grant this power by implication. See generally R. BERGER, CONGRESS V. THE SUPREME COURT 198-284 (1969) (discussing various commentators' views concerning whether the "arising under" and "supremacy clauses" implicitly authorize judicial review); C.G. HAINES, *supra* note 24, at 122-47 (same). Because the Pennsylvania Antifederalists' amendment would have permitted the federal courts to exercise only expressly established powers and would have specifically proscribed employment of interpretive "fictions" or "constructions," the amendment seemingly would have prevented the federal judiciary from reviewing legislation based on any purported implicit grant of constitutional authority.

personal rights of men."²⁵² These Antifederalists' characterization of certain individual rights as "unalienable" may well support Sherry's inference that their dispute with the Federalists did not turn upon the source of fundamental rights; they apparently agreed with the Federalists that natural law bestowed upon people certain rights of which they could not be rightfully divested. However, these Pennsylvania Antifederalists' profound distrust of the federal judiciary and of judges in general does not support Sherry's additional inference that they would have agreed with the Federalists that judges should safeguard such rights by invalidating legislation.²⁵³

B. Massachusetts Ratifying Debates

Although the Federalist delegates convinced the Massachusetts ratifying convention to undertake a clause-by-clause examination of the new Constitution,²⁵⁴ the convention entertained very little focused discussion about the federal judiciary's role in the proposed scheme of limited government. Indeed, with one exception, all of the proponents of the Constitution who discussed the checks it imposed upon the federal government failed to identify judicial review as a potential check on that government's power.

James Bowdoin, for example, spoke at some length in an effort to allay Antifederalist fears that the Constitution vested the federal government with uncontrollable power.²⁵⁵ After indicating that he was providing an exhaustive list of the constitutional checks that would prevent that government from abusing its power,²⁵⁶ he identified the following seven "great" checks:²⁵⁷ 1) the elec-

252. 3 ANTIFEDERALIST, *supra* note 214, at 157.

253. One anonymous Pennsylvania Antifederalist, however, did suggest that a federal bill of rights would enable judges to play a role in safeguarding individual rights. Writing under the pseudonym "An Old Whig," the writer contended that Congress would be tyrannical "unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgments." *An Old Whig*, Philadelphia Indep. Gazetteer, Nov. 1787, reprinted in 3 ANTIFEDERALIST, *supra* note 214, at 25.

254. Because a majority of delegates opposed the Constitution when the Massachusetts convention began, the Federalists apparently feared an early vote would result in defeat and endeavored to prolong consideration of the Constitution. 4 ANTIFEDERALIST, *supra* note 214, at 3 (Storing's introductory description of the writings of New England Antifederalists).

255. See 2 ELLIOTT'S DEBATES, *supra* note 214, at 81-88. For Antifederalist objections that the Constitution awarded the federal government excessive powers, see, e.g., *id.* at 159 (Nathaniel Barrell asserting that "Congress will be vested with more extensive powers than ever Great Britain exercised over us; too great, in my opinion, to intrust with any class of men, let their talents or virtues be ever so conspicuous"). Major Samuel Nason similarly asserted:

Great Britain . . . first attempted to enslave us, by declaring her laws supreme, and that she had a right to bind us in all cases whatever. What . . . roused the Americans to shake off the yoke preparing for them? It was this measure, the power to do which we are now about giving to Congress.

Id. at 133.

256. Bowdoin indicated that he believed he was providing a comprehensive list of the checks that would preclude the federal government from abusing its powers in the following passage:

[In] all delegations of importance, like the one contained in the proposed Constitution, there should be such checks provided as would not frustrate the end and intention of delegating the power, but would, as far as it could be safely done, prevent the abuse of it; and such checks are provided in the Constitution. Some of them were mentioned the last evening by one of my worthy colleagues; but I shall here exhibit all of them in one view.

toral process;²⁵⁸ 2) the oath-taking requirement mandating that the President and the Vice-President swear to uphold the Constitution;²⁵⁹ 3) the similar oath-taking requirement imposed upon Senators and Congressmen;²⁶⁰ 4) the impeachment process;²⁶¹ 5) the prohibition against Senators and Congressmen holding any other position in the federal government;²⁶² 6) the prohibition of the federal government granting any title of nobility and of any federal government official receiving such a title from a foreign state;²⁶³ and 7) the requirement that the federal government guarantee every state "a republican form of government."²⁶⁴

Bowdoin also enumerated several other essential checks expressly established in the Constitution, including the President's right to veto federal legislation,²⁶⁵ the requirement that all federal legislative proceedings and all federal expenditures be published as matter of public record,²⁶⁶ and the requirement that public funds be spent only after legislative appropriation.²⁶⁷ Finally, he identified

a further guard against the abuse of power, which, though not expressed, is strongly implied in the federal Constitution, and, indeed, in the constitution of every government founded on the principles of equal liberty; and that is, that those who make the laws, . . . do, in common with their fellow-citizens, fall within the power and operation of those laws.²⁶⁸

Never in giving this purportedly complete list of constitutional checks, however, did Bowdoin mention judicial review of legislation.

Theophilus Parsons, another supporter of the Constitution, similarly failed to identify judicial review as an effective check upon the federal government. Speaking after Bowdoin, Parsons explained that he wished, in part, to expand upon Bowdoin's list of checks.²⁶⁹ First, Parsons noted that "[t]he oath the several legislative, executive, and judicial officers of the several states take to support the federal Constitution, is as effectual a security against the usurpation of the general government as it is against the encroachment of the state govern-

Id. at 85.

257. *Id.* at 86.

258. *Id.* at 85; see U.S. CONST. art. I, § 2, cls. 1-4; *id.* art. I, § 3, cls. 2-4; *id.* art. II, § 1, cls. 2-3.

259. 2 ELLIOT'S DEBATES, *supra* note 214, at 85-86; see U.S. CONST. art. II, § 1, cl. 8.

260. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. VI, cl. 3.

261. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6-7; *id.* art. II, § 4.

262. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. I, § 6, cl. 2.

263. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. I, § 9, cl. 8.

264. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. IV, § 4.

265. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. I, § 7, cls. 2-3.

266. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. I, § 5, cl. 3; *id.* art. I, § 9, cl. 7.

267. 2 ELLIOT'S DEBATES, *supra* note 214, at 86; see U.S. CONST. art. I, § 9, cl. 7. He also identified "the negative which each house has upon the acts of the other" as an important check. 2 ELLIOT'S DEBATES, *supra* note 214, at 86.

268. 2 ELLIOT'S DEBATES, *supra* note 214, at 87.

269. *Id.* at 93.

ments."²⁷⁰ Second, he asserted:

[T]here is another check, founded in the nature of the Union, superior to all the parchment checks that can be invented. *If there should be a usurpation, it will not be on the farmer and merchant, employed and attentive only to their several occupations; it will be upon thirteen legislatures, completely organized, possessed of the confidence of the people, and having the means as well as inclination, successfully to oppose it.* Under these circumstances, none but madmen would attempt a usurpation. But . . . the people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. *Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.*²⁷¹

Parsons could have relied on federal judges to accomplish this check. He could have declared that judges would invalidate any federal legislation contravening constitutionally safeguarded individual rights as affecting an impermissible "usurpation" of power. However, like his Antifederalist adversaries, Parsons did not put his faith in professional judges. Instead, he trusted the state legislatures to intervene when Congress enacted laws violating the Constitution. Failing the legislatures' intervention, he trusted juries to override such laws in practice by refusing to convict people for violating the offending laws.²⁷²

Like Parsons, the Federalist, Reverend Thomas Thatcher, failed to identify judicial review as a check on the federal government. Instead, Thatcher highlighted the state legislatures' ability to act as a check.²⁷³ He asserted:

There are other restraints, which, though not directly named in this Constitution, yet are evidently discerned by every man of common observation. These are, the government of the several states, and the

270. *Id.* at 93-94.

271. *Id.* at 94 (emphasis added).

272. Cf. E. CORWIN, *supra* note 66, at 43 (describing Parsons as advocating "state interposition and trial by jury, but nothing approximating judicial review more closely than the power of juries to take the law into their own hands when returning general verdicts"); see also 2 ELLIOT'S DEBATES, *supra* note 214, at 162 (Parsons asserting that there was no need for a federal bill of rights because "no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced").

273. 2 ELLIOT'S DEBATES, *supra* note 214, at 145. Thatcher did note that the federal judiciary's independence from the executive and Congress could serve as a check on those branches, but he did not contemplate judicial review as a facet of that check. Instead, Thatcher viewed independent judges as a check because they would be insulated from pressures exerted by the other branches of the federal government that otherwise could induce them to ignore previously passed laws or the Constitution. He asserted: "The independence of judges is one of the most favorable circumstances to public liberty; for when they become . . . the hirelings of tyranny, all property is precarious, and personal security at an end; a man may be stripped of all his possessions; and murdered, without the forms of laws." *Id.* Other supporters of the Constitution also ignored judicial review in identifying checks on the federal government's abuse of its powers. At the very end of the Massachusetts ratifying convention, Reverend Samuel Stillman enumerated a long list of such checks without mentioning judicial review. *Id.* at 165-69.

spirit of liberty in the people. Are we wronged or injured, our immediate representatives are those to whom we ought to apply.²⁷⁴

If the legislative representatives failed to intercede on the people's behalf, then Thatcher relied upon the people's right to revolt as the ultimate sanction for governmental misconduct. "[S]hould any servants of the people, however eminent their stations, attempt to enslave" the people, Thatcher maintained, "from this spirit of liberty such opposition would arise as would bring them to the scaffold."²⁷⁵ Judicial review figured nowhere in Thatcher's scheme of limited, constitutional government.

Surprisingly, Samuel Adams, whom many Federalists regarded as hostile to the new Constitution,²⁷⁶ was the only delegate to assert specifically that the Constitution might endow judges with the power to review legislation. He contended that an amendment similar to the present-day tenth amendment would improve the Constitution by enabling courts to invalidate legislation that exceeded Congress's specifically enumerated powers.²⁷⁷ Adams observed that adopting such an amendment would address the often-stated concern that Congress would usurp powers not delegated to it, and would "give[] assurance that, if any law made by the *federal government should be extended beyond the power granted by the proposed Constitution, and inconsistent with the constitution of this state*, it will be an error, and adjudged by the courts of law to be void."²⁷⁸

Several aspects of Adams's characterization of judicial review should be noted. First, he depicted judicial review as a mechanism by which the states' reserved powers and constitutions could be safeguarded against federal encroachment. His advocacy of states' rights makes it uncertain whether he would have endorsed federal judicial power to invalidate state legislation.²⁷⁹ Second, like Wilson during the Pennsylvania ratifying convention, Adams characterized judicial review as involving enforcement of express constitutional terms. Adams never suggested that judges could look beyond such express constitutional terms to invalidate legislation contravening unenacted natural law. Third, Adams seemed to believe that an express constitutional provision resembling the present-day tenth amendment must be adopted to enable judges to review legislation.²⁸⁰ If Adams had been espousing Cokean theory under which judges

274. *Id.* at 145.

275. *Id.* at 145-46.

276. See 4 ANTIFEDERALIST, *supra* note 214, at 3 (Storing's introductory description of the writings of New England Antifederalists). Despite the Federalists' concerns, Adams eventually voted for ratification. See 2 ELLIOT'S DEBATES, *supra* note 214, at 178.

277. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Adams advocated adopting an amendment providing "that all powers not expressly delegated to Congress are reserved to the several states, to be by them exercised." 2 ELLIOT'S DEBATES, *supra* note 214, at 131.

278. 2 ELLIOT'S DEBATES, *supra* note 214, at 131 (emphasis added).

279. Cf. H. DAVIS, THE JUDICIAL VETO 88 (1914) (asserting that when Adams made this statement, "the strong inference is that he referred to state courts only [because] . . . [he] was discussing . . . limitations to be imposed on the national government in favor of the States; and [because] he mention[ed] this action of 'the courts of law' as a primary instance of exercise of a reserved power by the States"), quoted in R. BERGER, *supra* note 251, at 125 (emphasis added).

280. See *supra* note 277 and accompanying text.

purportedly may void legislation to enforce natural-law principles regardless of whether they have been codified, then no such amendment would have been necessary.

In short, no declared supporter of the Constitution attending the Massachusetts convention clearly suggested that the Constitution authorized federal courts to engage in interpretivist review of *both* state and federal legislation. Moreover, no one even alluded to the practice of noninterpretivist judicial review. Adams, whose support for the Constitution was equivocal, was the only delegate to mention judicial review, and then only in the context of a proposed amendment to empower the courts to invalidate federal statutes encroaching upon the states' expressly reserved powers.

On the other end of the spectrum, the Massachusetts Antifederalists echoed the objections of the Pennsylvania Antifederalists. They too feared the expansive powers that the Constitution granted the federal government, including the judiciary.²⁸¹ The Antifederalist Abraham Holmes, for example, asserted that "Congress possessed . . . powers enabling [it] to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*."²⁸² Like their Pennsylvanian brethren, the Massachusetts Antifederalists trusted juries, not judges, to safeguard the people's rights and opposed the Constitution in part because they viewed it as eliminating jury trials in civil suits. Finally, as was the case in Pennsylvania, the delegates most distrusting of the constitutional powers conferred upon all three branches of the federal government most adamantly demanded adoption of a federal bill of rights.²⁸³ As was the case in Pennsylvania, these Massachusetts Antifederalists clearly were not calling for adoption of a federal bill of rights to enable federal courts to void legislation to protect the rights identified therein, and especially not to enable the courts to void legislation to protect natural-law rights not enumerated in such an instrument.

C. Virginia Ratifying Debates

The Virginia debates differ from the earlier debates entertained in Massachusetts and Pennsylvania in their overall analytical quality and in the thoroughness with which the delegates discussed article III of the Constitution.²⁸⁴

281. See, e.g., 2 ELLIOT'S DEBATES, *supra* note 214, at 109-12 (remarks of Abraham Holmes); see also *supra* note 253 and accompanying text (discussing concerns of Pennsylvania Antifederalists). Many Massachusetts Antifederalists, however, were less articulate in explaining their objections, often expressing only a generalized fear of the new Constitution and suspicion of the socially prominent men who framed it. See, e.g., 2 ELLIOT'S DEBATES, *supra* note 214, at 102 (Amos Singletary asserting that "[t]hese lawyers and men of learning, and moneyed men, that talk so finely, . . . expect to be the managers of this Constitution, . . . and then they will swallow up all us little folks, like the great Leviathan").

282. 2 ELLIOT'S DEBATES, *supra* note 214, at 111.

283. See, e.g., *id.* at 132 (Samuel Adams summarizing the Antifederalists' recommended modifications of the Constitution).

284. The delegates devoted four days of discussion to article III and spent more than three weeks debating the merits of the Constitution.

Despite the extensive discussion of article III, few supporters of the Constitution explicitly indicated that this article authorized judicial review. James Madison, for example, implied, but did not specifically state, that federal judges might review legislation to enforce the Constitution. In defending the grant of federal jurisdiction provided by the "arising under clause," he referred only cryptically to the power of judicial review:

It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions.²⁸⁵

While judicial review by federal courts to enforce the constitutional restrictions imposed on Congress and the states obviously could be a component of this new "policy," Madison certainly did not make this point explicitly.

The Federalist Edmund Pendleton, who served as the Virginia convention's president and who previously had expressed doubts about the Virginia judiciary's power to void legislation in the *Caton* case,²⁸⁶ also implied that the Constitution authorized judicial review. In vigorously defending article III, he asked: "Must not the judicial powers extend to enforce the federal laws, govern its own officers, and confine them to the line of their duty? Must it not protect them, in the proper exercise of duty, against all opposition, whether from individuals or state laws?"²⁸⁷ Earlier in the debates, Pendleton also noted that state court judges "have prevented the operation of some unconstitutional acts,"²⁸⁸ thereby implying that federal judges similarly might invalidate legislation. Assuming that Pendleton was in fact suggesting the federal courts would review legislation, he nevertheless minimized the importance of judicial review in the federal system. Immediately after making the statement that federal courts must protect federal laws from "opposition," Pendleton stated: "Notwithstanding [the federal judiciary], I rely upon the principles of the government—that it will produce its own reform, by the responsibility resulting from frequent elections. We are finally safe while we preserve the representative character."²⁸⁹ Pendleton's remarks, then, while not foreclosing the possibility that federal courts might review legislation, did not indicate definitively that federal courts would exercise such a power either.

Edmund Randolph was perhaps the delegate most troubled by judicial review. Randolph initially refused to sign the Constitution at the close of the Fed-

285. 3 ELLIOT'S DEBATES, *supra* note 214, at 532.

286. See *supra* notes 188-89 and accompanying text.

287. 3 ELLIOT'S DEBATES, *supra* note 214, at 548. Pendleton also pointed to the paper money and tender laws passed by a number of states to defeat creditors' claims as exemplifying why federal judges must possess the foregoing powers: "Paper money and tender laws may be passed in other states, in opposition to the federal principle, and restriction of this Constitution, and will need jurisdiction in the federal judiciary, to stop its pernicious effects." *Id.* at 549.

288. *Id.* at 299.

289. *Id.*

eral Convention, in part because he believed it needed amendments, including an amendment to "limit[] and defin[e] the judicial power."²⁹⁰ However, he ultimately supported ratification of the Constitution with amendments.²⁹¹

Seeming to approve of judicial review, Randolph, on the one hand, asserted that

nothing is granted which does not belong to [the] federal judiciary. Self-defense is its first object. Has not the Constitution said that the state shall not use such and such powers, and given exclusive powers to Congress? If the state judiciaries could make decisions conformable to the laws of their states, in derogation [of] the federal government . . . the federal government would soon be encroached upon. If a particular state must be at liberty, through its judiciary, to prevent or impede the operation of the general government, the latter should soon be undermined. It is, then, necessary that its jurisdiction should "extend to all cases in law and equity arising under this Constitution and the laws of the United States."²⁹²

On the other hand, however, Randolph criticized article III for providing "too great an extension of jurisdiction":²⁹³

It is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right, arising from the Constitution? . . . What do we mean by the words *arising under this Constitution*? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word *arising* will be carried so far that it will be made use of to aid and extend the federal jurisdiction.²⁹⁴

Randolph thus evidently considered judicial review a means by which federal judges could exercise the legitimate judicial function of self-defense. However, his clearly stated concern about interpreting article III to enable the federal judiciary to extend its jurisdiction strongly suggests that Randolph would not have endorsed noninterpretivist judicial review.

It is also noteworthy that Randolph failed to discuss judicial review of federal legislation as a means of enforcing the Constitution in two instances in which such discussion would have been particularly germane. First, he failed to mention judicial review in addressing objections to the necessary and proper clause.²⁹⁵ Randolph conceded that the clause was ambiguous, but asserted that

290. Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), reprinted in 1 ELLIOT'S DEBATES, *supra* note 214, at 491.

291. Randolph changed his mind and supported ratification of the Constitution because he determined that the consequences of nonadoption could be disastrous. Cf. 3 ELLIOT'S DEBATES, *supra* note 214, at 471 (Randolph asserting during the Virginia ratifying convention that "though I do not reverence the Constitution . . . its adoption is necessary to avoid the storm which is hanging over America . . . no greater curse can befall her than the dissolution of the political connection between the states").

292. *Id.* at 570.

293. *Id.* at 571.

294. *Id.* at 572.

295. See U.S. CONST. art. 1, § 8, cl. 18.

any harm this ambiguity could cause would be averted through constitutional interpretation. He did not, however, look to the courts to perform this ameliorating interpretive role. Rather, he looked first to Congress and then to the constitutional amendment process: "[T]he members of Congress themselves will explain the ambiguous parts; and if not, the states can combine in order to insist on amending the ambiguities. I would depend on the present actual feeling of the people of America, to introduce any amendment which may be necessary."²⁹⁶

Second, Randolph failed to mention judicial review in explaining why the ratifiers should adopt a constitutional amendment equivalent to the present-day tenth amendment. While Randolph viewed such an amendment as an important mechanism to prevent federal laws from exceeding Congress's enumerated powers, he suggested that the amendment would be enforced by the state legislatures or, alternatively, by the people in refusing to obey the offending laws. Randolph asserted that, if such an amendment were added to the Constitution, the states and the people would "be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein."²⁹⁷ Randolph's failure to discuss judicial review when such a discussion would have been so apposite raises questions about his support for judicial invalidation of federal legislation—a practice that, given his concerns about limiting the federal government's powers, he logically should have endorsed.

Fittingly, it was John Marshall, the future Chief Justice of the United States, who first explicitly stated at the Virginia convention that the Constitution authorized judicial review. Marshall sought to refute the Antifederalist objection that the "arising under" clause would give the federal judiciary virtually unlimited jurisdiction and, thereby, would annihilate the state governments.²⁹⁸ Marshall queried: "Has the government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers?"²⁹⁹ Answering his own question, he asserted: "If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement [against] which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."³⁰⁰ He added that the judiciary was the only "quarter" to which Americans could look "for protection from an infringement [of] the Constitution."³⁰¹ Although Marshall never specifically indicated that the Constitution also authorizes judges to invalidate state legislation, this result logically flows from his characterization of judicial review. If courts must be empowered to invalidate federal legislation not enacted pursuant to Congress's enumerated powers, then they equally must be authorized to invalidate state legislation encroaching upon those enumerated powers.

296. 3 ELLIOT'S DEBATES, *supra* note 214, at 471.

297. *Id.* at 576.

298. *See, e.g., id.* at 527 (objection of George Mason).

299. *Id.* at 553.

300. *Id.*

301. *Id.* at 554.

Even the future author of *Marbury v. Madison*,³⁰² however, never suggested at the Virginia convention that the Constitution authorizes judicial enforcement of unwritten natural-law principles.³⁰³ Indeed, in attempting to refute the charge that the Constitution abolished jury trials in civil suits, Marshall reached a conclusion about the Virginia Bill of Rights inconsistent with both Cokean theory and with the practice of noninterpretivist judicial review. Marshall argued that the Virginia Constitution did not itself guarantee jury trials in civil suits because the right to jury trials was protected only by "our bill of rights, which is not a part of the Constitution."³⁰⁴ He characterized Virginia's "bill of rights . . . [as] merely recommendatory,"³⁰⁵ and maintained that its precatory and nonbinding status was beneficial. "Were it otherwise," he asserted, "the consequence would be that many laws which are found convenient would be unconstitutional."³⁰⁶ Had Marshall been espousing Cokean natural-law theory, the "recommendatory" status of the bill of rights—and, indeed, its very existence—would have been irrelevant. Cokean theory supposedly would authorize judges to invalidate legislation abridging fundamental rights derived from natural law regardless of whether those rights have been codified in statutes or constitutions.³⁰⁷

Challenging the Federalists' defense of article III, the Antifederalist George Mason, who refused to sign the Constitution after attending the Federal Con-

302. 5 U.S. (1 Cranch) 137 (1803).

303. Marshall's statements at the Virginia convention were consistent with his subsequent *Marbury* opinion. As William Nelson points out, in *Marbury*, Marshall characterized the Constitution as setting out "fundamental principles" of law that were intended to be "permanent," explaining that the Constitution derived this status from the people's "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." Nelson, *The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 937 (1978) (quoting *Marbury*, 5 U.S. (1 Cranch) at 176). Thus, as Nelson observes, Marshall did not attribute the status of the Constitution as fundamental law in *Marbury* to any supposed identity between the principles contained in that instrument and those created by natural law. *Id.* But see *infra* note 307 (evaluating significance of later Supreme Court decisions in which Marshall did discuss natural law principles in adjudicating constitutional issues).

304. 3 ELLIOT'S DEBATES, *supra* note 214, at 561.

305. *Id.*

306. *Id.*

307. In opinions he authored after *Marbury*, however, Marshall did rely, at least partially, on natural-law principles in rendering constitutional decisions. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810). In his *Fletcher* opinion, for example, Marshall reasoned that a Georgia statute, which effectively nullified the title of a bona fide purchaser for value and divested him of his property, was unconstitutional based on either "general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States." *Fletcher*, 10 U.S. (6 Cranch) at 139; see *id.* at 132. Marshall's statements during the Virginia convention and his recognition of the doctrine of popular ratification in *Marbury*, see *supra* note 303, thus conflict with his later decisions in cases such as *Fletcher*. Nelson has suggested that this conflict indicates that Marshall sought to strike a balance between his Cokean belief in certain paramount, universally recognized principles, which positive laws must not abridge, and his competing democratic belief that "the best rule for freemen . . . was . . . obedience to laws enacted by a majority." Nelson, *supra* note 303, at 933 (quoting Marshall's Address of the Minority: Journal of Virginia House of Delegates 88-90 (Dec. 1798)). "[T]o reconcile the people's transcendent power with the law's immutable principles," *id.*, Nelson opines that Marshall, in cases such as *Fletcher*, distinguished between "law and politics" and thereby sought "to circumscribe, however imperfectly, the extent to which the political, majoritarian style could engulf all government, as it was threatening in 1800 to do." *Id.* at 935.

vention,³⁰⁸ perceived that the rationale Marshall had advanced for judicial review of federal legislation also would justify judicial review of state legislation. Mason vehemently opposed authorizing federal courts to review legislation. He believed that these courts invariably would use this power not to check the federal government, but to serve its own ends at the expense of the states' and the people's liberties.³⁰⁹ For Mason, federal judges appointed by the general government were "not men in whom the community can place confidence."³¹⁰ Consequently, he objected to virtually every power that article III granted to the federal judiciary,³¹¹ asserting "that the greater part of these powers are unnecessary, and dangerous, as tending to impair, and ultimately destroy, the state judiciaries, and, by the same principle, the legislation of the state[s]."³¹² He again objected to authorizing federal judicial review when he explained why he opposed the *ex post facto* clause, noting that "[a]s an express power is given to the federal court . . . to declare null all *ex post facto* laws, I think [that] gentlemen must see there is danger, and that it be guarded against."³¹³

Other opponents of the Constitution echoed Mason. William Grayson asserted that the federal courts would interfere unduly "with the state judiciaries," contending that state judges "are the best check we have . . . [to] secure us from encroachments on our privileges."³¹⁴ John Tyler similarly charged that the Constitution imposed no "limitation . . . or restriction on [federal judges];"³¹⁵ that the constitutional provision mandating "the supremacy of the laws of the Union, and of treaties, are exceedingly dangerous;"³¹⁶ and that "ambiguities" in the Constitution would put liberty in danger.³¹⁷ Like Mason, these Antifederal-

308. See *Objections of the Hon. George Mason, One of the Delegates From Virginia in the Late Continental Convention, to the Proposed Federal Constitution; Assigned as His Reasons for Not Signing the Same*, reprinted in 1 ELLIOT'S DEBATES, *supra* note 214, at 494-96.

309. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 214, at 524.

310. *Id.*

311. Mason believed that the lower federal courts' appellate jurisdiction should be limited to suits brought by citizens of the same state claiming land grants from two different states. See *id.* at 523. He also asserted that the Supreme Court should not possess equity jurisdiction and that it should have no power to review questions of fact. See *id.* at 524.

312. *Id.* at 527. Richard Henry Lee raised similar objections in his Letters from the Federal Farmer to the Republican. See 2 ANTIFEDERALIST, *supra* note 214, at 243-45.

313. 3 ELLIOT'S DEBATES, *supra* note 214, at 480. For the *ex post facto* clause, see U.S. CONST. art. I, § 9, cl. 3.

314. 3 ELLIOT'S DEBATES, *supra* note 214, at 563. Grayson also asserted that the grant of "jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude," *id.* at 565, and that the Constitution endowed the Supreme Court with "more power than any court under heaven." *Id.* at 564. On the day following Marshall's defense of judicial review, see *supra* notes 299-301 and accompanying text, however, Grayson indicated that he may not have opposed the courts' exercise of this power as a means of checking the federal government. Grayson asserted: "If the Congress cannot make a law against the Constitution, I apprehend they cannot make a law to abridge it. The judges are to defend it. They can neither abridge nor extend it." See 3 ELLIOT'S DEBATES, *supra* note 214, at 567.

315. 3 ELLIOT'S DEBATES, *supra* note 214, at 638-39.

316. *Id.* at 641.

317. *Id.* at 642. Although Virginia Antifederalists generally placed more faith in their state's judges than did Antifederalists from other states, see, e.g., *supra* note 245 and accompanying text, they also placed great faith in juries and condemned the new Constitution because they believed it abolished jury trials in civil suits. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 214, at 539 (remarks of Patrick Henry); *infra* note 335 (other Virginia Antifederalists emphasizing the virtue of juries).

ists believed that the federal judiciary would be an instrument of national consolidation serving the federal government to the state governments' and the people's detriment.

The Virginia Antifederalists' position once again contradicts Sherry's inferences that the Antifederalists' accepted judicial review. Like their compatriots in Pennsylvania and Massachusetts, the Virginia Antifederalists who most adamantly objected to the federal judiciary's powers under the new Constitution also demanded adoption of a federal bill of rights.³¹⁸

George Mason, for example, made it crystal clear that he was not demanding adoption of a federal bill of rights to enable federal judges to invalidate state legislation or to enforce the unwritten natural law from which these federal rights were derived. Proposing a hypothetical, he used the general welfare clause to make this point:

Now, suppose oppressions should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press?³¹⁹

He concluded:

That Congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.³²⁰

Mason thus demanded a federal bill of rights to ensure that the federal government, including the federal courts, would not expand that government's powers by utilizing vague constitutional terms—much less even vaguer natural law.³²¹

Grayson and Tyler also indicated that they were demanding a bill of rights to preclude the federal government from opportunistically expanding its powers by exploiting vague constitutional provisions. Tyler asserted that the Virginia convention must "do away [with] ambiguities" in the Constitution and "establish our rights [in] clear and explicit terms."³²² Grayson similarly asserted that "he did not believe there existed a social compact upon the face of the earth so

318. Cf. 3 ELLIOT'S DEBATES, *supra* note 214, at 612 (Antifederalist John Dawson asserting that the "clear and comprehensive language used when [constitutional] power is granted to Congress" contrasted with the "ambiguous terms in which all rights are [granted] to the people" afforded grounds for "suspicions and objections").

319. *Id.* at 441-42.

320. *Id.* at 442.

321. Sherry is correct, however, in assuming that the Virginia Antifederalists agreed with the Federalists that man's most important rights were derived from natural law. See, e.g., *id.* at 445 (Mason); *id.* at 448-49, 462 (Henry); *id.* at 449 (Grayson); *id.* at 641 (Tyler). Their fundamental dispute with the Federalists concerned whether the states or the federal government would be most likely, and therefore best entrusted, to protect these rights.

322. *Id.* at 642.

vague and so indefinite as the one now on the table"³²³ and that "he doubted whether . . . *anything* given up to the federal government was retained."³²⁴

It is, therefore, a clear misreading of the historical record to infer that these delegates envisioned that their proposals for a *federal* bill of rights would enable the federal judiciary to invalidate *state* legislation. A conclusion that the Virginia ratifying convention intended federal judges to protect unenumerated, natural law rights is similarly bereft of support in the record.³²⁵

At first blush, however, the views of one ardent Virginia Antifederalist appear to support Sherry's position. During the convention, Patrick Henry endorsed judicial review: "[O]ur judiciary . . . had firmness to counteract the legislature in some cases. . . . They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts."³²⁶ Moreover, he added: "I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."³²⁷ Henry also linked judicial review with the existence of a bill of rights, suggesting that the state had empowered Virginia judges to invalidate legislation by adopting a bill of rights.³²⁸ Conversely, Henry asserted that one of the greatest defects in the Constitution was the absence of a bill of rights.³²⁹ He insisted: "If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights. . . . You, . . . by a natural and unavoidable implication, give up your rights to the general government."³³⁰ These remarks seem to support the inference that, in advocating adoption of a federal bill of rights, Henry was accepting the premise that both federal and state judges could invalidate legislation violating those rights.

Further examination of Henry's position, however, greatly weakens this inference. Henry did not trust the federal judiciary to safeguard individual rights by invalidating statutes Congress enacted, even if the federal bill of rights he championed ultimately were adopted. Henry made this point most emphatically in response to one of Madison's suggestions. In an attempt to assuage Antifederalist fears that the federal courts' expansive jurisdiction would effectively abolish the state courts,³³¹ Madison had suggested that state court judges also might sit as federal judges.³³² Henry responded with alarm to the suggestion "that our state judges might be contented to be federal judges and state judges also," asserting that "[i]f we are to be deprived of that class of men, and if they are to

323. *Id.* at 583.

324. *Id.* at 449.

325. For further discussion of this point, see generally Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

326. 3 ELLIOT'S DEBATES, *supra* note 214, at 324-25.

327. *Id.* at 325.

328. *See id.* at 462.

329. *See, e.g., id.* at 445-46, 448-89, 593.

330. *Id.* at 445-46.

331. *See, e.g., id.* at 527 (George Mason asserting that article III will "annihilate your state judiciary").

332. *See id.* at 536.

combine against us with the general government, we are gone."³³³ Henry assumed that federal judges necessarily would render decisions supporting Congress because they "are sworn to preserve the Constitution," and because they "will be inclined to favor their own officers."³³⁴ For this reason, he insisted that only Virginia judges, "one of the best barriers against strides of power,"³³⁵ could safeguard individual rights against federal encroachment, and that the states' judges could achieve this end only if they possessed complete independence from the federal government. He exhorted:

So small are the barriers against the encroachments and usurpations of Congress, that, when I see this last barrier—the independency of [Virginia] judges—impaired, I am persuaded I see the prostration of all our rights. In what situation will your judges be, when they are sworn to preserve the Constitution of the state and of the general government! . . . [B]y this system we lose our judiciary, and they cannot help us, we must sit down quietly, and be oppressed.³³⁶

Henry's position, then, provides only partial support for Sherry's inference about the Antifederalists' position toward judicial review; his advocacy for a federal bill of rights embodied acceptance only of *state* judges' right to invalidate *federal* legislation. Moreover, Henry's professed concern about precluding the federal government from encroaching upon the rights of the states refutes Sherry's corollary inference that the Antifederalists accepted *federal* noninter-pretivist judicial review of state legislation on the basis of uncoded natural law.

At the close of the Virginia convention, the Antifederalists reaffirmed their reasons for insisting upon adoption of a federal bill of rights when they persuaded the convention to send Congress a list of proposed amendments along with Virginia's notice of ratification of the Constitution.³³⁷ Two key amend-

333. *Id.* at 539.

334. *Id.* at 538; *cf. id.* at 539 (Henry asserted: "They cannot serve two masters struggling for the same object. The laws of the Constitution being paramount to those of the states, and to their constitutions also, whenever they come in competition, the judges must decide in favor of the former.").

335. *Id.* Other Virginia Antifederalists were less sanguine about the trustworthiness of judges. Richard Henry Lee, writing under the pseudonym "The Federal Farmer," believed that jury trials should be safeguarded in all cases because juries acted as a much-needed check on judges, who were inherently "formidable, somewhat arbitrary and despotic." The Federal Farmer, *An Additional Number of Letters From the Federal Farmer to the Republican Leading to a Fair Examination of the System of Government Proposed by the Late Convention; to Several Necessary Alterations in it; and Calculated to Illustrate the Principles and Positions Laid Down in the Preceding Letters* (Jan. 18, 1788), reprinted in 2 ANTIFEDERALIST, *supra* note 214, at 256. In defending the sanctity of jurors and of the general verdict, Lee wrote:

If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change forms of the government, the jury may check them, by deciding against their opinions and determinations, in similar cases. It is true, that the freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties.

Id. at 320; *cf.* 3 ELLIOT'S DEBATES, *supra* note 214, at 528, 542, 568 (Antifederalist delegates to the Virginia convention objecting to the Constitution because it did not safeguard jury trials in civil suits).

336. 3 ELLIOT'S DEBATES, *supra* note 214, at 539.

337. *See id.* at 659-61.

ments that would become, with modifications, the ninth and tenth amendments to the Constitution,³³⁸ provided:

1st. That *each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.*³³⁹

. . . .

17th. That those clauses which declare that Congress shall not exercise certain powers, *be not interpreted* in any manner whatsoever, *to extend the powers of Congress*; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.³⁴⁰

These amendments clearly were designed to retain for the states all powers not granted to the federal government, and conversely to limit the federal government to exercising only its enumerated constitutional powers. The Virginia Antifederalists' support for these amendments further undermines the inference that they accepted the proposition that federal judges could expand the federal government's powers by invalidating state legislation based on natural-law principles not enumerated in the Constitution.

D. New York Ratifying Convention

Unlike the Virginia convention, the New York convention conducted no focused discussion of article III. The New York delegates instead devoted the overwhelming majority of their convention to debating Congress's powers under article I. Even Alexander Hamilton, who so eloquently defended the practice of judicial review in other fora,³⁴¹ failed to discuss judicial review in responding to Antifederalist objections that the Constitution provided no effective checks on Congress's powers.³⁴² Hamilton did note that "the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer . . . binding."³⁴³ However, he never indicated clearly that judges would

338. See generally Caplan, *supra* note 325 (discussing the evolution of the ninth and tenth amendments).

339. 3 ELLIOT'S DEBATES, *supra* note 214, at 659 (emphasis added). This proposed amendment clearly reflected Henry's concern that the people and the states could retain their rights only by expressly reserving them in the Constitution. See *supra* text accompanying note 328.

340. 3 ELLIOT'S DEBATES, *supra* note 214, at 659, 661 (emphasis added). Commentators have suggested that this amendment was designed to prevent courts from applying the rule of construction that Congress possessed all powers not expressly denied by the Constitution. See, e.g., Caplan, *supra* note 325, at 250-51.

341. See THE FEDERALIST NOS. 78-83, *supra* note 219, at 392-434 (A. Hamilton).

342. See, e.g., 2 ELLIOT'S DEBATES, *supra* note 214, at 259, 334 (objections of Melancton Smith), 338 (objections of John Williams), 359 (objections of Governor Clinton). Governor Clinton, whose Antifederalist party was dubbed the "Clintonians," was surprisingly circumspect about his opposition to the Constitution during the New York convention's debates. At the end of the convention, however, he did send a letter to the other state governors urging them to procure their citizens' acceptance of the extensive amendments to the Constitution that the New York Antifederalists had proposed at the close of the convention. See Circular Letter from the Convention of the State of New York to the Governors of the Several States in the Union (July 28, 1788), reprinted in 2 ELLIOT'S DEBATES, *supra* note 214, at 413-14.

343. 2 ELLIOT'S DEBATES, *supra* note 214, at 362.

determine when Congress had exercised powers falling outside this sphere. In identifying important constitutional checks, Hamilton discussed the President's role;³⁴⁴ the division of legislative powers between the Senate and the House;³⁴⁵ the separation of powers between the Congress, the executive and the judiciary;³⁴⁶ the state legislature's role;³⁴⁷ and, ultimately, the people's role in revolting against the federal government.³⁴⁸ Hamilton never mentioned judicial review.

While no Antifederalist specifically objected to the Constitution because it empowered federal judges to review legislation, a number of Antifederalists suggested that they would have opposed granting federal judges this power. For example, Thomas Tredwell asked: "Have we not neglected to secure to ourselves the weighty matters of judgment and justice, by empowering the general government to establish one supreme, and as many inferior, courts as they please, whose proceedings they have a right to fix and regulate as they shall think fit . . . [?]"³⁴⁹ He also charged that the federal judiciary's powers generally "may be extended to any degree short of almighty,"³⁵⁰ and that the Supreme Court would be a "Star Chamber."³⁵¹ John Lansing, a New York delegate to the Federal Convention who refused to sign the Constitution³⁵² and who continued to oppose the Constitution during New York's ratifying convention, similarly objected to the expansive powers granted to the federal government, and specifically to the "extensive jurisdiction [given] to the federal courts."³⁵³ He maintained that, "as the state governments will always possess a better representation of the feelings . . . of the people at large, it is obvious that those powers can be deposited with much greater safety with the state than the general government."³⁵⁴ Tredwell's vehement objections to the scope of the federal judiciary's powers under the Constitution and Lansing's insistence that only the state governments could be trusted to represent the people's interests suggest that both delegates would have been opposed to federal judges reviewing any legislation, though their remarks do not necessarily indicate opposition to state courts reviewing federal legislation.

Other Antifederalists voiced objections to Congress's powers under article I that ambiguously implicated the federal judiciary's powers under article III. John Williams, for example, objected to the necessary and proper clause on the ground that a "case cannot be conceived which is not included in this

344. *See id.* at 253.

345. *See id.* at 348.

346. *See id.*

347. *See id.* at 257-58, 266-67.

348. *See id.* at 266-67.

349. *Id.* at 400.

350. *Id.* at 401.

351. *Id.* at 400.

352. For Lansing's reasons for refusing to sign the Constitution, see Letter from Robert Yates & John Lansing to the Governor of New York (1787), reprinted in 1 ELLIOT'S DEBATES, *supra* note 214, at 480-82.

353. 2 ELLIOT'S DEBATES, *supra* note 214, at 372.

354. *Id.* at 217.

power.”³⁵⁵ He contended that, because “[t]he legislature [and, in this case, Congress] is the highest power in a government[,] [w]hatever they judge necessary for the proper administration of the powers lodged in them, they may execute without any check or impediment.”³⁵⁶ Melancton Smith, the leader of the Antifederalist delegates, similarly asserted that the Constitution provided “no possibility of checking a government of independent powers, which extended to all objects and resources without limitation[,] . . . such checks as would not leave the exercise of the government to the operation of causes which, in their nature, are variable and uncertain.”³⁵⁷ Smith also used the necessary and proper clause to illustrate his point that Congress’s powers under the Constitution could not be limited. “Nothing . . . is left to *construction*,” he maintained, “the powers are most express.”³⁵⁸

Smith’s and Williams’s remarks can be interpreted in two contrary ways. By focusing on their concern about the vagueness of constitutional provisions such as the necessary and proper clause, one could conclude that Smith and Williams would not have opposed empowering the federal courts to invalidate federal legislation. However, their repeated objections that the national government would destroy the state governments³⁵⁹ suggest that they would have opposed authorizing the federal courts to invalidate state legislation. Under this interpretation, Smith and Williams were objecting to the Constitution for providing Congress with unlimited power and, thereby, depriving federal judges of any opportunity to determine that Congress had passed laws inconsistent with the Constitution.³⁶⁰ Alternatively, by focusing on their view that Congress necessarily would be the most powerful branch of the federal government, one could conclude that Smith and Williams simply failed to conceive of judicial review. Under this interpretation, these Antifederalists were articulating the English doctrine of legislative supremacy, which categorically denied judges the power to invalidate legislation.³⁶¹

Although the Antifederalists did not clearly articulate their position about the federal judiciary’s power to review state or federal legislation during the New York convention, the extensive amendments they proposed at the close of the convention suggest that these delegates believed federal courts should not exercise either power. In an amendment seconded by Melancton Smith, the Antifederalists proposed to prohibit Congress from establishing lower federal courts with original jurisdiction over any suits, “except such as may be necessary for trial of causes of admiralty and maritime jurisdiction, and for trial of piracies

355. *Id.* at 331.

356. *Id.* at 338.

357. *Id.* at 259.

358. *Id.* at 334. In this instance, Smith specifically was concerned that Congress would have unlimited taxing power by virtue of the necessary and proper clause. *See id.*

359. *See, e.g., id.* at 330-31, 339 (Williams’s objections), 332, 334 (Smith’s objections).

360. Raoul Berger has interpreted their remarks in this fashion. *See* R. BERGER, *supra* note 251, at 130.

361. C.G. Haines has interpreted their remarks in this fashion. *See* C.G. HAINES, *supra* note 24, at 141.

and felonies and piracies committed on the high seas."³⁶² The Antifederalists also proposed other amendments that would have drastically limited the lower federal courts' appellate jurisdiction. These amendments would have precluded these courts from hearing appeals brought by citizens of the same state or by citizens of different states, unless the suit involved two people claiming land grants under the laws of different states.³⁶³ These amendments also would have limited judicial discretion by precluding appellate courts from reviewing questions of fact.³⁶⁴

To limit the Supreme Court's power, the Antifederalists proposed an additional amendment. This amendment would have deprived the Court of authority to render final, binding decisions by granting any party the right to appeal the Court's judgment to a committee selected by the President and the Senate, which would "correct the errors in such judgment . . . and to do justice to the parties in the premises."³⁶⁵

Finally, to cement these limitations on the federal judiciary's powers, the Antifederalists proposed an amendment providing "that the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, ought not, in any case, to be increased, enlarged, or extended, by any fiction, collusion, or mere suggestion."³⁶⁶ It seems clear that the last amendment would have prohibited noninterpretivist judicial review as a "fiction" unconstitutionally extending the federal courts' jurisdiction.

Moreover, had the foregoing amendments been adopted, nothing like the contemporary practice of interpretivist judicial review could have evolved in the federal courts. Lower federal courts would have had jurisdiction over very few cases implicating constitutional questions, and even the Supreme Court would not have been the final arbiter of such questions because its decisions would have been subject to appeal. These results, in turn, suggest that the Antifederalists advocating these amendments wished to prevent federal courts from reviewing any type of legislation.

Like the Antifederalists in Massachusetts, Pennsylvania, and Virginia, the New York Antifederalists opposed the new Constitution because it did not contain a bill of rights.³⁶⁷ The consistent recurrence of this pattern of Antifederalist opposition to federal judicial authority, along with support for a federal bill of rights, contradicts Sherry's inference that the Antifederalists were prepared to accept federal judicial review of state legislation based either on express constitutional terms or on unwritten natural law.

The extensive debates about article III, which were conducted in the *New York Journal* during the months immediately preceding the New York conven-

362. 2 ELLIOT'S DEBATES, *supra* note 214, at 408. The amendment was offered by a Mr. Jones, whose first name is not identified in the official record. *See id.*

363. *See id.* at 409 (resolutions 3 & 6).

364. *See id.* at 408-09 (resolution 1 providing that "appeals from any courts in this state, proceeding according to the course of the common law, are to be by writ of error, and not otherwise").

365. *Id.* at 409 (resolution 8).

366. *Id.* (resolution 9).

367. *See, e.g., id.* at 339 (Williams), 398 (Tredwell), 411-12 (Lansing).

tion,³⁶⁸ bring the controversy surrounding judicial review into much sharper relief. "Brutus"—generally believed to be Robert Yates,³⁶⁹ the New York Delegate who, along with Lansing, refused to sign the Constitution after attending the Federal Convention—mounted an Antifederalist attack on federal judicial review, while Hamilton, writing as "Publius," provided a Federalist rebuttal.³⁷⁰

Perhaps more systematically than any other Antifederalist, Brutus attacked the powers article III granted to the federal judiciary. Articulating the egalitarian theory of natural law, Brutus maintained that article III was defective because it authorized the federal judiciary—a judiciary that the Constitution rendered totally independent of the people—to render binding decisions concerning the meaning of the Constitution and "the laws made in pursuance of it."³⁷¹ In Brutus's view, republican political principles dictated that electorally accountable legislatures, not independent federal judges, should possess the ultimate authority to establish the meaning of the Constitution:

A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with greater facility, those whom the people chuse [sic] at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but *with a high hand and an outstretched arm*.³⁷²

Although Brutus asserted that the Constitution violated republican political principles because it authorized federal judges to interpret the express terms of the people's compact with their governors and concomitantly to invalidate legislation found inconsistent with those terms,³⁷³ this criticism did not constitute his greatest objection to article III. What he found even more objectionable was that the Constitution would enable federal judges to rove beyond express constitutional terms "to explain the constitution according to the reasoning and the

368. 2 ANTIFEDERALIST, *supra* note 214, at 358 (Storing's introduction to the writings of "Brutus").

369. Paul Leicester Ford made this attribution, after initially concluding that Thomas Tredwell employed the pseudonym "Brutus." Compare P.L. FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 117 (1968) (Tredwell) with *id.* at 424 (Yates). William Jeffrey, however, has asserted that Melancton Smith used this pseudonym. Jeffrey, *The Letters of Brutus—A Neglected Element of the Ratification Campaign of 1787-88*, 40 U. CIN. L. REV. 643, 645 (1971).

370. See THE FEDERALIST Nos. 78-83 (A. Hamilton), *supra* note 219, at 392-434.

371. Brutus, Letter No. XI (Jan. 31, 1788), reprinted in 2 ANTIFEDERALIST, *supra* note 214, at 418 [hereinafter Brutus]. Brutus believed that the Constitution rendered the federal judiciary uncontrollable by entitling judges to hold office during good behavior and prohibiting any reduction in their salary. *Id.* at 418.

372. Brutus, *supra* note 371, at 442 (Letter No. XV, Mar. 20, 1788).

373. *Cf. id.* at 440 (Letter No. XV, Mar. 20, 1788) (contending that empowering the federal judiciary to bind the legislature to its interpretation of the Constitution made its power "superior to that of the legislature").

spirit of it, without being confined to the words or letter."³⁷⁴ Brutus, in other words, attacked article III precisely on the ground that it would permit judges to engage in noninterpretivist review of legislation. He contended that this practice inevitably would result from the vague wording of many constitutional provisions, which would permit federal judges to "mould the government, into almost any shape they please."³⁷⁵ He asserted further that this vague wording would be combined with the constitutional grant of equity jurisdiction to give federal judges carte blanche to decide cases without adhering to "any fixed or established rules."³⁷⁶ For Brutus, this interpretive practice was an anathema to political liberty. "Had the construction of the constitution been left with the legislature," Brutus contended, the legislature "would have explained it at their peril; if they exceed[ed] their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them."³⁷⁷ But under the proposed federal constitution, Brutus warned, judges "independent . . . of every power under heaven"³⁷⁸ would interpret the spirit of the Constitution at the people's peril.

Commentators have debated whether Brutus's attack on judicial review led Hamilton, writing as "Publius," to respond in numbers 78 through 83 of *The Federalist Papers*.³⁷⁹ Regardless of Hamilton's specific motivations, however, these papers did provide a sustained rebuttal to Brutus's arguments. Hamilton mounted a frontal attack on Brutus's charge that the Constitution violated republican political principles by endowing the independent federal judiciary with the final authority to establish the meaning of express constitutional terms. Perhaps believing "a strong offense to be the best defense,"³⁸⁰ Hamilton contended in *The Federalist* number 78 that the federal judiciary must be endowed with this final authority to safeguard the constitutional scheme of limited government:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all reservations of particular

374. *Id.* at 419 (Letter No. XI, Jan. 31, 1788).

375. *Id.* at 422 (Letter No. XI, Jan. 31, 1788). Brutus pointed in particular to the vague language in the preamble establishing that the objects of the Constitution were "to form a more perfect union," "to establish justice," and "to provide for the general welfare." *Id.* at 425 (Letter No. XII, Feb. 7, 1788).

376. *Id.* at 420 (Letter No. XI, Jan. 31, 1788).

377. *Id.* at 442 (Letter No. XV, Mar. 20, 1788).

378. *Id.* at 438.

379. Compare E. CORWIN, *supra* note 66, at 45 and L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* 6 (1967) (arguing that Hamilton was responding to "Brutus") with G. WILLS, *EXPLAINING AMERICA* 130-50 (1981) (offering a different interpretation of Hamilton's motivations).

380. E. CORWIN, *supra* note 66, at 47.

rights and privileges would amount to nothing.³⁸¹

Hamilton thus dealt with Brutus's charge that the Constitution was defective because it authorized federal courts to construe its express terms by extolling this purported defect as a constitutional virtue.

Hamilton, however, used a different tactic in responding to Brutus's charge that the federal judiciary would be authorized to construe the Constitution according to its spirit rather than its letter. In *The Federalist* number 81, for example, Hamilton maintained "that the constitution ought to be the standard of construction for the laws, and that wherever there is *evident opposition*, the laws ought to give place to the constitution."³⁸² But he assured his readers that the federal judiciary's power to void legislation extended only to cases in which a statute in fact contravened an express constitutional term: "[T]here is not a syllable in the plan under consideration, which directly empowers the national courts to construe the laws according to the spirit of the constitution."³⁸³ In *The Federalist* number 84, Hamilton again sought to rebut Brutus's charge that the federal courts would enlarge the federal government's powers immeasurably by construing the Constitution according to its spirit:

[T]he judicial authority of the federal judicatures is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases *marks the precise limits beyond which the federal courts cannot extend their jurisdiction*; because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.³⁸⁴

Rather than defend noninterpretivist review of legislation, then, Hamilton expressly assured Brutus and his Antifederalist colleagues that federal judges could not permissibly use this interpretive technique.

One can reasonably surmise that the delegates attending the New York convention understood that the Constitution could authorize the federal judiciary to engage in interpretivist review of legislation because many of the delegates attending the New York ratifying convention were familiar with the writings of "Brutus" and "Publius."³⁸⁵ One cannot reasonably surmise, however, that the delegates schooled in these writings understood that the Constitution also could authorize the federal judiciary to engage in noninterpretivist review because "Publius" had repudiated precisely this proposition.

381. THE FEDERALIST No. 78 (A. Hamilton), *supra* note 219, at 394 (emphasis added).

382. *Id.* No. 81, at 409 (emphasis added).

383. *Id.* (emphasis omitted).

384. *Id.* No. 84, at 442-43 (emphasis added).

385. See L. DE PAW, THE ELEVENTH PILLAR 104 (1966); P.L. FORD, *supra* note 369, at 117; S. HARDING, THE CONTEST OVER RATIFICATION OF THE CONSTITUTION IN THE STATE OF MASSACHUSETTS 17-18 n.3 (1896); 2 ANTIFEDERALIST, *supra* note 214, at 359 (Storing's introduction to the writings of "Brutus"). Indeed, during the New York ratifying convention, Hamilton reiterated so many of the arguments he had first rehearsed in *The Federalist* "that Governor Clinton sarcastically inquired if the young knight errant was planning to bring out a second edition." J. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION 212 (1959). Melancton Smith also revealed his familiarity with "Publius's" writings by noting that Hamilton, "who speaks out very frequently, very long, and very vehemently, has, like Publius, very much to say not applicable to the subject." *Id.*

E. North Carolina Ratifying Convention

Ironically, the North Carolina Federalists—who indicated more clearly than had the Federalists in any of the preceding conventions that the Constitution would permit federal courts to review both state and federal legislation—failed to secure ratification of the Constitution.³⁸⁶ Early in the convention, in response to Antifederalist objections to the scope of Congress's powers under the Constitution, John Steele stated that federal judges could invalidate federal legislation as a check upon Congress: "The judicial power of that [*i.e.*, the federal] government is so well constructed as to be a check If the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them."³⁸⁷ Unlike their colleagues in many of the other conventions, the North Carolina Federalists did not shrink from asserting the corollary proposition that the Constitution would also enable judges to invalidate state legislation. William R. Davie, one of North Carolina's delegates to the Federal Convention, unequivocally stated this proposition:

Every member who has read the Constitution with attention must observe that there are certain fundamental principles in it, both of a positive and a negative nature, which, being intended for the general welfare of the community, ought not to be violated by future legislation of the particular states. Every member will agree that the positive

386. In a 184 to 84 vote, the convention decided not to ratify the Constitution until it was amended. See 4 ELLIOT'S DEBATES, *supra* note 214, at 248-51. For discussion of some of these amendments, see *infra* notes 395-96 and accompanying text.

387. 4 ELLIOT'S DEBATES, *supra* note 214, at 71. Hamilton asserted that the enumeration of legislative powers similarly marked the parameters within which Congress could act:

The plan of the convention declares that the power of congress, or in other words the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension of a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended.

Id. at 442.

In contrast to Steele's statement, both Governor Samuel Johnson and future Supreme Court Justice James Iredell articulated the naive conception of judicial review, indicating that any law passed by Congress not constituting an exercise of constitutionally delegated powers would be void, but failing to assign the federal judiciary any special role in voiding such laws. In defending the supremacy clause, Johnson asserted that "[t]he Constitution must be the supreme law of the land," and that "laws made in pursuance thereof by Congress ought to be the supreme law of the land." *Id.* at 187. Accordingly, he also asserted: "When Congress shall make a law in virtue of their constitutional authority, it will be an actual law Every law consistent with the Constitution will have been made in pursuance of the powers granted by it." *Id.* at 188. Conversely, he asserted that any law Congress passed derogating from its constitutionally granted powers would be void, but failed to suggest that judges would make such determinations: "Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void." *Id.* Iredell similarly failed to assign judges any role in invalidating unconstitutional statutes passed by Congress, asserting:

If the Congress should claim any power not given to them, it would be as bare a usurpation as making a king in America. If this Constitution be adopted, it must be presumed the instrument will be in the hands of every man in America, to see whether authority be usurped; and any person by inspecting it may see if the power claimed be enumerated. If it be not, he will know it to be a usurpation.

Id. at 172; *cf. id.* at 194 (Iredell seemingly relied on the people's right to revolt rather than judicial review to prevent Congress from violating the Constitution in asserting that "[i]f any future Congress should pass an act concerning the religion of this country, it would be an act which they are not authorized to pass by the Constitution, and which people would not obey.").

regulations ought to be carried into execution, and that the negative restrictions ought not to be disregarded or violated This great object can only be safely and completely obtained by the instrumentality of the federal judiciary.³⁸⁸

No North Carolina Federalist, however, suggested that the proposed system of government would empower federal judges to void either state or federal legislation based on natural-law principles not expressly codified in the Constitution. Davie and Steele, who made the clearest statements about judicial review during the Convention, both indicated that courts should invalidate only legislation that was plainly inconsistent with *express* constitutional terms.

Moreover, in a last-ditch effort to prevent defeat of the Constitution, the Federalist James Iredell proposed a constitutional amendment designed to ensure that no branch of the federal government could exercise any power not expressly enumerated in the Constitution. This amendment, which would have fulfilled the purpose ultimately served by the tenth amendment, provided:

Each state in the Union shall respectively retain . . . every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the general government; nor shall the said Congress, *nor any department of the said government exercise any act of authority over any individual in any of the said states, but such as can be justified under some power particularly given in this Constitution, but the said Constitution shall be considered at all times a solemn instrument, defining the extent of their authority, and the limits of which they cannot rightfully in any instance exceed.*³⁸⁹

Given that this amendment would have precluded federal courts from invalidating any state statute unless that statute contravened "some power particularly given in the Constitution"—in other words, an express constitutional term—Iredell's amendment represented an additional assurance from North Carolina's Federalists that the federal courts would not engage in noninterpretivist review of legislation.

The North Carolina Antifederalists were not mollified by the suggestion that federal courts might review legislation to enforce the Constitution. Like the Virginia Antifederalists, they did not want the federal judiciary to exercise this power. The North Carolina Antifederalists believed that federal judicial review would be a vehicle for national consolidation, that "the laws of the United States must necessarily clash with the laws of the individual states, in consequence of which the states will be obstructed and the state governments absorbed."³⁹⁰ Because the Constitution conferred powers upon the federal government in vague and often fearsomely broad terms, these Antifederalists believed that federal

388. *Id.* at 156-57.

389. *Id.* at 249 (proposed amendment I) (emphasis added).

390. *Id.* at 160 (Davie summarizing the Antifederalist position). To the extent these Antifederalists trusted judges, they trusted only state court judges. Compare *id.* at 136, 139, 142, 168-69 (Antifederalists speaking approvingly of North Carolina judges) with *id.* at 142-43, 202-03 (Antifederalists opposing the Constitution on the ground that it eliminated jury trials in civil suits brought before the federal judiciary).

judges, sworn to uphold the United States Constitution and laws, would expand the federal government's powers without limit, if they were permitted to review legislation. For example, William Lenoir contended that the federal government's constitutionally granted powers were "very indefinite."³⁹¹ He contended that this indefiniteness was a threat to the people's liberties because all men serving the federal government "will naturally put the fullest construction on the powers given them."³⁹² Timothy Bloodworth similarly opposed the indefiniteness of the supremacy clause, stating: "It appears to me to sweep off all the constitutions of the states. . . . The judges are sworn to uphold it. It will produce an annihilation of the state governments."³⁹³

In an overwhelming defeat of the Federalists,³⁹⁴ the North Carolina convention refused to ratify the Constitution until far-reaching amendments were adopted. The convention proposed amendments including extensive amendments to article III, which reaffirmed the Antifederalist delegates' opposition to federal judicial review. The delegates' amended version of article III would have precluded lower federal courts from reviewing legislation by limiting these courts' jurisdiction to admiralty cases.³⁹⁵ Furthermore, their amended version of article III would have drastically curtailed the Supreme Court's jurisdiction, permitting the Court to hear only cases "arising under treaties[.] . . . cases affecting ambassadors, other foreign ministers, and consuls; cases of admiralty and maritime jurisdiction; . . . controversies in which the United States is a party; . . . controversies between two or more states, and [between] parties claiming lands under the grant of different states."³⁹⁶ Thus, the proposed North Carolina amendment to article III would have permitted the Court to invalidate statutes only in cases in which a statute conflicted with a treaty.

The North Carolina Antifederalists also insisted on a federal bill of rights as a condition precedent to North Carolina's ratification of the Constitution.³⁹⁷ Once again, the North Carolina Antifederalists did not demand adoption of a federal bill of rights to enable federal courts to review legislation; their proposed amendments to article III were designed to *prevent* federal courts from exercis-

391. *Id.* at 206.

392. *Id.*

393. *Id.* at 179; *cf. id.* at 93 (William Goudy asserting that Congress's broad powers under the new Constitution "will totally destroy our liberties"), 169 (Matthew Locke expressing distrust of the federal judiciary), 176 (Andrew Bass observing that so many different interpretations of article III had been advanced that "he thought the thing was either uncommonly difficult, or absolutely unintelligible"), 187 (David Caldwell objecting to article III on the ground that it was "equivocal and ambiguous").

394. *See supra* note 386.

395. As amended, article III would have provided that "the judicial power of the United States shall be vested in one Supreme Court and in such courts of admiralty as Congress may from time to time ordain and establish." 4 ELLIOT'S DEBATES, *supra* note 214, at 246 (proposed amendment XV) (emphasis added).

396. *Id.* (proposed amendment XV). Thus, article III, as amended, would not have contained the "arising under" clause, which gives the Court jurisdiction over "all cases arising under the Constitution" and "the Laws of the United States." U.S. CONST. art. III, § 2.

397. 4 ELLIOT'S DEBATES, *supra* note 214, at 242-44 (North Carolina convention's proposed "Declaration of Rights").

ing this power.³⁹⁸ Moreover, regardless of their belief in natural law, these Antifederalists certainly were not demanding a federal bill of rights to enable the federal judiciary to expand its jurisdiction by looking beyond express constitutional terms to invalidate legislation on the basis of unwritten natural law.³⁹⁹

* * * *

Thus, in each state ratifying convention surveyed, the Antifederalists articulated positions directly contrary to Sherry's thesis that their call for a federal bill of rights entailed an acceptance of noninterpretivist judicial review. In each convention, the Antifederalists unequivocally demanded adoption of a federal bill of rights to *limit* the powers of all three branches of the federal government, not to authorize the federal government to void legislation infringing upon the rights identified in such an instrument, and certainly not to authorize the voiding of legislation infringing upon unenumerated natural-law rights.⁴⁰⁰ Moreover, the Antifederalists in Pennsylvania, Virginia, New York, and North Carolina all proposed constitutional amendments plainly designed to ensure that the federal government exercised only its constitutionally enumerated powers.⁴⁰¹ These Antifederalists, therefore, would have bitterly objected to any assertion that the federal judiciary had the power to void state legislation to enforce unwritten natural-law principles. Indeed, in the clearest instance in which an Antifederalist discussed noninterpretivist judicial review, "Brutus" emphatically repudiated this practice.⁴⁰²

The remarks of the Federalists attending the state ratifying conventions also fail to support Sherry's thesis. No proponent of the Constitution attending any of these conventions suggested that the Constitution would authorize noninterpretivist review of legislation,⁴⁰³ and Hamilton, writing as "Publius," specifically stated that the Constitution would not authorize this practice.⁴⁰⁴ Indeed, the remarks of the proponents for the Constitution, taken collectively, fail to evince even a coherent theory of interpretivist judicial review. Some delegates, including Wilson during the Pennsylvania convention and Davie and Steele during the North Carolina convention, did indicate that the Constitution would enable the federal judiciary to invalidate both federal and state legislation.⁴⁰⁵ But other delegates, like Adams during the Massachusetts convention,

398. See also *id.* at 136-37, 163 (Spencer demanding a federal bill of rights to impose effective limitations on the federal government, including the judiciary), 167 (similar remarks from Bloodworth), 168-69 (similar remarks from Locke), 202, 206 (similar remarks from Lenoir).

399. For statements in which the North Carolina Antifederalists evinced their belief in natural law, see, e.g., *id.* at 138 (Spencer), 168-69 (Locke). Cf. *id.* at 243 (first article of proposed "Declaration of Rights" providing, in part, "[t]hat there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity").

400. See *supra* notes 241-53, 281-83, 307-25, 349-54, 367, 390-99 and accompanying texts. Only Patrick Henry spoke approvingly of judicial review as a means by which state courts could enforce the constitutional limits imposed upon the federal government. See *supra* notes 326-27 and accompanying text.

401. See *supra* notes 246-50, 336-39, 362-66, 395-96 and accompanying texts.

402. See *supra* notes 374-78 and accompanying text.

403. See *supra* notes 237-38, 280, 298-306, 341-48, 387-89 and accompanying texts.

404. See *supra* notes 382-83 and accompanying text.

405. See *supra* notes 237-38, 387-88 and accompanying texts.

evidently believed that only state courts should possess the power to review legislation.⁴⁰⁶ Yet other delegates, like Bowdoin, Parsons, and Thatcher during the Massachusetts convention, apparently failed to conceive of judicial review.⁴⁰⁷

CONCLUSION

Contrary to Sherry's reading of the historical record, noninterpretivist judicial review cannot be justified as a constitutionally legitimate practice based on the founding generation's acceptance of natural-law philosophy. The American colonists inherited two competing strains of natural-law theory. The first theory articulated by Coke did provide a framework for judicial enforcement of unwritten individual rights. However, the second theory, advanced by a diverse group of thinkers that included continental enlightenment philosophers, Locke, Whig opposition thinkers, the Scottish Common Sense School, and Protestant theologians, did not provide such a framework. Each of the diverse groups espoused a democratic or egalitarian theory of natural law, which granted to the people the sole power to make law and categorically denied the judiciary the power to alter the people's law based on the judges' subjective conceptions of "natural justice."

Cokean natural law theory, furthermore, was not the predominant theory in revolutionary America. It was the competing democratic theory of natural law that inspired Thomas Paine's call to arms in *Common Sense* and Thomas Jefferson's Declaration of Independence. The newly formed states, moreover, embraced this competing theory in their first attempts at constitution-making. Implementing this theory, the early state constitutions endowed the people's chosen representatives in the legislatures with expansive powers and concomitantly limited the judiciary's powers severely.

Nor, as Sherry asserts, did courts somehow legitimize judicial review in the few cases in which judges clearly asserted the power to review legislation. To the contrary, the public responded with outrage and, in one instance, hounded the judges responsible from office.

Even more importantly, the democratic natural law theory supported the theory of popular ratification adopted by the men attending the Philadelphia Convention. This latter theory—by which the Constitution would obtain the status of binding, paramount law only if adopted by the people—mandates that, to the extent anyone's "intent" should control constitutional interpretation, the understanding of the delegates attending the state ratifying conventions who adopted the Constitution must be accorded great, if not conclusive, weight.

The records of the debates entertained in the state ratifying conventions demonstrate that noninterpretivist judicial review frustrates the expectations of the delegates who made the Constitution fundamental law. Indeed, these records fail to demonstrate unequivocally that the ratifiers understood that the Constitution authorized even interpretivist judicial review, and fail utterly to establish any acceptance of noninterpretivist judicial review.

406. See *supra* text following notes 279-80.

407. See *supra* notes 255-76 and accompanying text.