

1984

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Recommended Citation

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E.T.: The Extra-Textual in Constitutional Interpretation

*Gary Jacobsohn**

"In reviewing laws for constitutionality, should our judges confine themselves to determining whether these laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document?"¹ In two oft-cited articles Professor Thomas C. Grey has answered these questions, contending that judges who appeal to sources beyond the written document are acting as the framers wished. The implications of this conclusion are potentially far-reaching. For if Grey is right, then free-wheeling judicial review can be justified even by reference to that most conservative of constitutional standards: the framers' intentions. Who then will take seriously the case for principled judicial restraint?

Grey claims that the natural rights tradition of the 18th century created a reservoir of legally binding principles that could be drawn upon by judges as an unwritten constitution, supplementary to the written one. Rejecting this approach, some scholars have argued that the natural rights tradition is (and was originally perceived to be) irrelevant to constitutional interpretation.² This article defends an intermediate position: that the written Constitution was meant to embody the natural rights commitments of the framers, and that therefore judicial appeals to "higher law," for example, are not justifiable to the extent that they lead to a distinction between written and unwritten constitutions. From this perspective the positivists are correct in their insistence upon the exclusive authority of the written document, but fundamentally misguided in their understanding of the nature of this docu-

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1. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

2. *E.g.*, J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

ment.³ Judges who accept this intermediate position will not feel free to invoke ideas of natural justice that are not grounded in the constitutional text. Yet neither will they read that text as if it were a business contract.

At the outset we should note that all scholarly inquiry into the kinds of questions raised here should proceed in humble recognition of the largely circumstantial nature of the evidence at hand. Thus, for example, it is noteworthy (as well as a source of some considerable frustration) that at no time during the Convention that framed the Constitution was there any mention of what the founders understood to be a jurisprudence fit for the interpretation of their creation. There are, of course, statements at the Convention and elsewhere that may be taken to be strongly suggestive of jurisprudential preference, but conclusions based upon them must be qualified by the fact that they may only represent the views of individuals lacking authority to speak on behalf of the collective will we like to call original intent. With this caveat, we turn to the "unwritten constitution."

I. JUSTICE, CONSTITUTIONALITY, AND JAMES WILSON

Professor Grey has perceptively noted a characteristic American ambivalence: we tend to regard bad laws as unconstitutional, yet we also tend to regard judicial discretion as undemocratic and hence illicit.⁴ He refers to this contradiction as the "Aristotelian dialogue that punctuates American constitutional law."⁵ Grey's side of this dialogue can claim distinguished lineage, "the idea of judicial review on the basis of an unwritten constitution being part of the common intellectual heritage of revolutionary Americans."⁶

One of the revolutionaries cited by Grey in this context is James Wilson, whose views command particular respect in light of his reputation as "the most learned and profound legal scholar of his generation,"⁷ and whose contributions during the constitutional convention were exceeded only by those of James Madison. Wilson belonged to a group of scholar-statesmen—Jefferson and John Adams are others mentioned by Grey—whose legal argumentation on behalf of the binding character of the unwritten fun-

3. I have elaborated on this argument in Jacobsohn, *Hamilton, Positivism, and the Constitution: Judicial Discretion Reconsidered*, 14 *POLITY* 70 (1981).

4. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978).

5. *Id.*

6. *Id.* at 881.

7. I *THE WORKS OF JAMES WILSON* 2 (R. McCloskey ed. 1967).

damental law supplemented the earlier polemics of such activists as Otis, Dulany, and Samuel Adams.⁸ Grey is not alone in this judgment; according to Alfons Beitzinger “[t]he conclusion is not expressly drawn but it is quite evidently implicit in Wilson’s reasoning—the judiciary must interpret the Constitution in light of the higher controlling law.”⁹

That Wilson shared enthusiastically in the consensus regarding the existence of scientifically based moral principles deducible from immutable principles of natural justice is not in doubt. He also subscribed to the fundamental belief that governments are instituted to protect the natural rights of their people. What the connection between these rights and the Constitution was perceived to have been, however, and beyond that, what the intended role of the Supreme Court in this context was, are less clear.

The place to begin is the Constitutional Convention, where the argument for an extra-textual mode of interpretation must initially confront the debate over the so-called revisionary power. Madison’s *Notes of Debates in the Federal Convention* inform us that on July 21 James Wilson moved that the national judiciary be associated with the executive in the revisionary power. According to Madison, Wilson then remarked as follows:

The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositor of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of the characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.¹⁰

Madison himself supported Wilson by arguing that the revisionary power would be “useful to the Community at large as an additional check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities.”¹¹ Interestingly, the opposition, which eventually prevailed on this issue, shared in the assessment of the likely impact of the proposal. “It was making the Expositors of the Laws the Legislators,” said Elbridge Gerry, “which ought never to be done.”¹² And, ad-

8. See Grey, *supra* note 4, at 887.

9. Beitzinger, *The Philosophy of Law of Four American Founding Fathers*, 21 AM. J. JURIS. 1, 17 (1976).

10. THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION 235 (W. Solberg ed. 1958).

11. *Id.* at 236.

12. *Id.* at 237.

ded Luther Martin:

A Knowledge of Mankind, and of Legislative affairs cannot be presumed to be long in a higher degree to judges than to the Legislature. And as to the Constitutionality of laws, that point will come before Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature.¹³

These comments are illuminating, if not entirely dispositive of questions concerning the jurisprudential significance of the higher law. Both sides assume the appropriateness of judicial review, which they understand as the authority to nullify legislative enactments that are unconstitutional. But they seem clear that a holding of unconstitutionality (as distinguished from an exercise of the revisionary power) is not to be based upon judicial assessments of the mere wisdom of legislation. The only way we can characterize Wilson, for example, as an advocate of an expansive policy-making judiciary is if we assume that, having lost the battle over the revisionary power, he altered his understanding of the constitutional role of the Supreme Court.

Not entirely clear, however, from Wilson's argument, are his views on a related issue of special concern to us. He indicates that the defense of constitutional rights is a judicial function, but is not explicit as to whether the "unwritten constitution" is a source of these rights. In this connection a question is raised that goes to the heart of the positivist's interpretation of the Constitution. Wilson says: "Laws may be unjust, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect." It does not matter greatly whether we substitute "unjust," or "illegal," for Wilson's "unconstitutional." In any case, the thought is that improprieties are tolerable under the Constitution, as long as basic justice is not threatened.

Wilson's law lectures provide additional insight into this matter. He addresses a broad range of topics, including the vexatious issue that so preoccupied legal theoreticians during the struggle for independence—whether a legislative enactment contrary to common right and reason is nevertheless valid. Wilson, who was consistently more critical of Blackstone than his fellow framers, takes up the question by focusing on the English legal philosopher's contention (seemingly contradicted elsewhere in the *Com-*

13. *Id.* at 238.

mentaries)¹⁴ that no power existed that could control a parliamentary action contrary to reason. His rejection of this Blackstonian position accounts, in part, for the occasional association of his name with the concept of an unwritten constitution. If in fact there was a power—the judiciary according to Wilson—that could control Parliament, Wilson's readers might conclude that the source of this power must be an extra-textual one to which legitimate appeal could be made by judges acting in their official capacity. But a careful reading suggests difficulties in such an interpretation.

Wilson quotes a follower of Blackstone, who happens to be the latter's successor in the Vinerian chair at Oxford: "We must distinguish between right and power; between moral fitness and political authority. We cannot expect that all acts of legislators be ethically perfect, but if their proceedings are to be decided upon by their subject, government and subordination cease."¹⁵ Wilson responds to this assertion by accepting the distinction between right and power, but adding that "I always apprehended, that the true use of this distinction was, to show that power, in opposition to right, was divested of every title, not that it was clothed with the strongest title, to obedience."¹⁶ On this premise he finds it shocking to imagine that "a thing manifestly contradictory to common reason" must be upheld by the courts.

Were this the end of the matter, a strong case could be made for Wilson's support of the unwritten constitution. But the specific context for his discussion is a comparison of the British and American constitutional systems, one that leads him unequivocally to prefer the latter. This preference is attributable, according to Wilson, to the fact that in the United States the legislative authority is controlled by the superior law of the Constitution. All other law, such as the enactments of the legislature, must be deemed inferior, and therefore void when in conflict with the Constitution. Essentially this is the familiar claim of Hamilton's Federalist No. 78 and *Marbury v. Madison*. But, unlike those two arguments, Wilson's lecture is not intended as a defense of judicial review. His purpose rather is to demonstrate the superiority of the American constitutional scheme by explaining how it effectively

14. Wilson notes the contradiction by quoting Blackstone to the effect that "on the two foundations of the law of nature, and the law of revelation, all human laws depend; that is to say, no human laws should be suffered to contradict these." Wilson summarizes his reference here to the earlier use of Blackstone by exclaiming: "Surely these positions are inconsistent and irreconcilable." I THE WORKS OF JAMES WILSON, *supra* note 7, at 328.

15. *Id.* at 327.

16. *Id.* at 328.

resolves the dilemma posed by parliamentary supremacy. Thus, the Supreme Court, in upholding the Constitution (and Wilson nowhere suggests he means anything but the written document), provides both “a noble guard against legislative despotism”¹⁷ and a way of avoiding the implications of Blackstone’s analysis—that the validity of law is not affected by its being contrary to right reason. By strong implication, then, the only way the Constitution could function in this role is if these principles of reason were themselves implicit in the document. One must, therefore, be cautious in ascribing to Wilson (and to others as well) positions on constitutional interpretation that may apply to the British situation, but which are at best anachronistic in the context of American improvements. Nothing, it bears emphasis, pleased Wilson more than that “the principles of our constitutions and governments and laws are materially *better* than the principles and government and laws of England.”¹⁸

At the conclusion of his comparison of constitutions, Wilson includes an eloquent encomium to the institution of trial by jury, describing it as one of the greatest blessings of liberty. Indeed, its contribution to the basic purpose of government—the securing of rights—is so great that “it should be placed on the most solid and permanent foundation.”¹⁹ Thus, it is a mark of the superiority of the American over the British system that here trial by jury in criminal cases is “constitutional” and not merely “legal,” that is, supported by the legislature.²⁰ Recalling Wilson’s comments at the Convention, we might infer from this that the Constitution incorporates those attributes of justice essential for the protection of the people’s natural rights. Appeals external to the charter are consequently obviated by the deliberate internalization of norms of right conduct.

What this means in the context of the present Court, and in light of Professor Grey’s concern that the judiciary not retreat from its role as an engine of social justice, is perhaps clearer now. The theory of natural rights that shaped much of the political thought of the founding generation represented a departure from traditional natural law theory—for example, the Christian version of Thomas Aquinas—in its minimalist objectives, all ultimately deducible from the right of self-preservation.²¹ It provided the

17. *Id.* at 330.

18. *Id.* at 77.

19. *Id.* at 333.

20. *Id.*

21. This distinction is nicely elaborated in Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49.

conditions for peace but abjured the quest for the good life. That quest, it was assumed, might be taken up individually or collectively as a matter of policy, and the constitutional system was built in anticipation of future efforts to contribute or add to the social justice of the system. Wilson's (and Madison's) statements at the Convention are consistent with the observation in the law lectures that "[a]mong all the terrible instruments of arbitrary power, decisions of courts, whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds."²² Considerations of policy may either advance or hinder the quest for justice; they must, however, not intrude upon the domain of the judges, whose guardianship extends to constitutional rights, the necessary but not sufficient condition for social justice. Much later, Justice Frankfurter was to insist repeatedly upon the distinction between constitutionality and wisdom,²³ an insistence that clarified while it obfuscated. Thus, it served as a healthy reminder that the constitutionality of a policy does not signal its desirability; at the same time it perhaps obscured the insight derivable from Wilson, that the constitutionality of a policy does indeed connote its consistency with those minimum standards of justice that collectively represent a kind of constitutional wisdom.

II. REVOLUTION, JUDICIAL REVIEW, AND JAMES OTIS

As to Acts of Parliament. An Act against the Constitution is void; an Act against natural equity is void; and if an Act of Parliament should be made, in the very words on this petition, it would be void. The executive Courts must pass such Acts into disuse.²⁴

These defiant words of James Otis, taken from his famous argument in the *Writs of Assistance Case*, occupy a prominent place in American history; indeed to John Adams they initiated the American Revolution.²⁵ Professor Grey is only slightly less enthusiastic in his appraisal of Otis's arguments. For him, they serve to highlight the distinguished lineage of the unwritten constitution as a source for judicial decision making. Otis's views were elaborated in his famous 1764 pamphlet, *The Rights of the British Colonies Asserted and Proved*, which, according to Grey, "suggests not only that legislative authority should be subject to

22. 1 THE WORKS OF JAMES WILSON, *supra* note 7, at 299.

23. See, e.g., *Polish National Alliance v. NLRB*, 322 U.S. 643, 650 (1944).

24. 2 THE WORKS OF JOHN ADAMS 522 (C. Adams ed. 1850).

25. Letter from John Adams to William Tudor (Mar. 29, 1817), *reprinted in* 10 THE WORKS OF JOHN ADAMS 247-48 (C. Adams ed. 1856).

theoretical legal constraints, but also that those restraints should be enforceable in court.”²⁶

If there is an inflation of Otis’s importance in Professor Grey’s evaluation of his contribution to our constitutional tradition, it is only very slight; for indeed Otis should be viewed as a figure of substantial significance. But what he ultimately demonstrates is not that our written Constitution is supplemented by an unwritten one. Instead, Otis shows the necessity, in a system such as ours, of a written constitution of a particular kind. This interpretation of Otis embraces twin assumptions that have been adverted to in the discussion of Wilson: first, that a written document is compatible with natural rights interpretation; and second, that the appeal to an unwritten constitution in the political context of parliamentary sovereignty (i.e. where there is no written constitution) serves as a weak, and probably erroneous, precedent for such an appeal where this political context has been repudiated.

To see how Otis’s appeal to the unwritten constitution permits us ultimately to reject such a concept in constitutional adjudication, we begin with a perplexing ambiguity in his famous speech. Constitutional historians have understood Otis’s appeal to the English constitution in large measure as an effort to condemn certain acts of Parliament as offensive to the principles of nature that give life to the fundamental law.²⁷ With this, Grey, of course, agrees. But the relationship of these principles to judicial action does not evoke the same consensus. Grey, for example, interprets Otis as suggesting the enforceability of natural law constraints by courts. Bernard Bailyn, on the other hand, doubts that this was his intent:

[Otis] did not mean that courts could nullify statutory enactments, but only that the courts, in interpreting statutes in cases that come before them, may indicate their belief that “the Parliament have erred or are mistaken in a matter of fact or right. . . .” Courts, Otis meant, are like public-spirited citizens, who have the obligation “to show [Parliament] the truth,” but they have no authority to impose compliance; only Parliament could declare what is and what is not law.²⁸

In other words, the courts, precluded from institutional equality by the doctrine of parliamentary sovereignty, could not, as under the later doctrine of judicial review, legally enforce their constitutional objections; they could only voice them publicly and

26. *Id.* at 868. See also McLAUGHLIN, *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 120 (1932).

27. *E.g.*, E. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 77-78 (1955).

28. *I PAMPHLETS OF THE AMERICAN REVOLUTION* 417 (B. Bailyn ed. 1965).

hope that their arguments would be sufficiently compelling to induce change. This assessment comports with the English experience with the fundamental law which, according to the leading student of the subject, was not connected to the practice of judicial review.²⁹ In seventeenth century England the idea of fundamental law essentially stood for "the principle that politics is subordinate to ethics, and . . . that in the last resort rebellion or revolution may be morally justifiable."³⁰ Whether or not Otis represents a departure from that tradition is the point at issue between Bailyn and Grey. In condemning the principle of taxation without representation as a violation of "the law of God and nature," did Otis in fact seek *judicial* nullification of a law contravening the unwritten constitution?³¹

Interesting and intriguing as this question is, fortunately it is not one that needs to be resolved here. If Bailyn is correct, it is nevertheless possible that the Americans later borrowed from the tradition of appealing to principles of natural justice and equity, while they were institutionalizing their own unique practice of judicial review. And if Grey's version is correct, it does not follow that the previous assumptions about judicial prerogatives still applied after adoption of a written constitution establishing more or less coequal branches of government. As in judging, so in scholarly commentary about judging: the best precedents come from a factual context that parallels the present one.

Assuming, arguendo, that Grey has succeeded in capturing Otis's intent, the fact remains that our earliest judges were functioning in a political-constitutional context fundamentally different from the setting within which Otis delivered his famous sentiments. As Grey astutely notes, "[t]he new practice of establishing a written constitution, drawn up by a special representative convention and ratified by the people influenced the place of unwritten law in constitutional theory."³² What this influence was, Grey leaves unaddressed.³³

29. J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 206 (1955).

30. *Id.*

31. Grey does not assert categorically that this was Otis's intent. His qualified judgment seems to be this: "Otis may have seen the courts as possessing an initial power to invalidate unconstitutional statutes, while believing that if Parliament persisted in supporting a statute declared unconstitutional, it should have the last word." Grey, *supra* note 4, at 873.

32. *Id.* at 893.

33. Grey maintained, in effect, that our early constitutional history evinces no disinclination by judges to appeal to the unwritten constitution in much the same way that earlier jurists had done. T. Grey, *Judicial Review and the Unwritten Constitution* (1977 Annual Meeting of the American Political Science Association) (unpublished paper).

Perhaps the most significant contextual difference is the demise of parliamentary sovereignty, although Grey, once again challenging Bailyn, claims that the eighteenth century theory of legislative supremacy had very little influence in the colonies.³⁴ This is not to say, however, that the doctrine was unimportant, for even if it failed to persuade the Americans, it certainly shaped their constitutional arguments, specifically their assertions of supremacy for the fundamental law. Grey reminds us that the "idea of an enacted constitution was relatively novel in 1760, while the idea of an ancient unwritten constitution compounded of custom and reason was comfortable and familiar in the English-speaking world."³⁵ This is true enough, but it tells us little or nothing about the status of the unwritten constitution after our revolutionary success and subsequent legitimation of the written Constitution.

Several decades ago Corwin asked why legislative sovereignty did not establish itself in our constitutional system, and his answer speaks directly to the issue before us. "In the American *written Constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a *sovereign* law-making body which is subordinate to another law-making body."³⁶

Corwin's understanding is consistent with the findings of a recent inquiry into the origin of judicial review in the United States. The author, Sylvia Snowiss, takes a fresh look at the historical evidence, and by distinguishing three distinct periods in the early evolution of the American practice of judicial review, succeeds in generating insights that bear usefully upon the issue of the unwritten constitution.³⁷ She shows that during the first period (from Independence to the publication of Federalist No. 78) judicial review was still affected by the Blackstonian teaching on legislative omnipotence. While the explicit Blackstonian dogma was not acceptable, it nevertheless shaped the contemporary debate between those who supported legislative supremacy against

34. Grey, *supra* note 4, at 867.

35. *Id.* at 864.

36. Corwin, *supra* note 27, at 89.

37. S. Snowiss, *From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review in the United States* (1981 Annual Meeting of the American Political Science Association) (unpublished paper).

judicial power and those who appealed to the same fundamental law tradition that had attracted James Otis. This latter position held laws violating commonly accessible standards of political right to be void, but their illegality was not connected to a judicial determination to that effect. Thus, violation of the fundamental law had political significance, but the judiciary was not yet in a position to enforce pronouncements of voidness against legislative excess. During the second period (roughly from No. 78 to *Marbury v. Madison*), the written Constitution emerged as a "vehicle for the explicitness of American fundamental law," thereby providing the basis for a decisive rejection of Blackstonian legislative supremacy.³⁸ The explicitness, clarity, and public nature of the fundamental law removed the principal theoretical impediment to judicial enforcement of it; deference to legislative judgment on matters of constitutionality no longer seemed institutionally justified. The point is best articulated in Judge Tucker's opinion in the 1793 Virginia case of *Kemper v. Hawkins*:

This sophism [legislative sovereignty] could never have obtained a moment's credit with the world, had such a thing as a written Constitution existed before the American revolution. . . . What the *constitution* of any country *was* or rather *was supposed to be*, could only be collected from what the *government had at any time done*; what had been *acquiesced* in by the people, or other component parts of the government; or what had been *resisted* by either of them. Whatever the government, or any branch of it had *once done*, it was inferred they had a *right* to do it *again*. The union of the legislative and executive powers in the same men, or body of men, ensured the success of their usurpations; and the judiciary having no *written Constitution* to refer to, were obliged to *receive* whatever *exposition* of it the legislature might think proper to make. But, with us, the Constitution is not an "ideal thing, but a real existence: it can be produced in a visible form:" its principles can be ascertained from the living letter, not from obscure reasoning or deductions only.³⁹

This observation and the analysis by Professor Snowiss do not convey precisely the point Corwin, who emphasized higher law, was making; the two, however, can be read to suggest an interpretation of judicial review that is difficult to reconcile with extra-textual sources for constitutional adjudication. The written Constitution emerges in this synthesis as a document appealing to potentially contradictory jurisprudential aspirations. Thus, the constitutional positivist's yearning for order, predictability, and certainty are addressed by the codification of the fundamental law. But this codification cannot be viewed as valid simply as a result of its parchment form; it must (and does) satisfy the natural law proponent's insistence upon ethically grounded fundamental

38. *Id.* at 4.

39. *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 77-78 (1793).

law. The traditional connection between fundamental law and right reason (Corwin's higher law) is maintained through the absorption of principles of natural justice in the charter itself. Had, in Judge Tucker's words, "such a thing as a written Constitution existed before the American revolution," then Otis's speech, we may speculate, might have impressed his contemporaries less as a revolutionary appeal (recall John Adams's reaction) than as a conventional, legal assertion of natural rights. When the principles of natural right have, in effect, been constitutionalized in written form, they transform revolutionaries into judges; that is, they replace rebellion with judicial review.

In his *Letters of Fabius*, the conservative revolutionary, John Dickinson, allows us to reflect more deeply upon this point:

If it be considered separately, a *constitution* is the *organization* of the contributed rights in society. *Government* is the exercise of them. It is intended for the benefit of the governed: of course can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this—that it is founded on the nature of man, that is, on the will of his *Maker*, and is therefore sacred. It is then an offence against Heaven, to violate that trust.⁴⁰

The excerpt makes much the same argument as the Declaration of Independence, but makes more explicit the relationship between constitutional law and natural law. Where there is no agent to enforce the sacred trust that underlies the Constitution, the clear implication, as in the Declaration, is that revolutionary action may be necessary to restore justice to the civil community. What is justice under a Constitution? The "*organization* of the constituted rights in society," rights founded on the nature of man. Under a written Constitution this organization exists for all to observe, but judges, under the Federalist theory of judicial review, bear a special responsibility to declare what the law (organized rights) is, and to enforce its content against transgressors—those, in other words, who dare to offend against Heaven.⁴¹ In so doing the judges civilize politics, thus obviating the necessity for revolution.

In short, the eighteenth century doctrine of natural rights, especially the theory associated with John Locke, always contained revolutionary implications, and yet the same doctrine formed the basis for legitimate government. It was at once a radical and a conservative theory. For Otis, the judicial appeal to those principles served the revolutionary purposes of galvanizing sentiment

40. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 181 (P.L. Ford ed. 1968).

41. The special responsibility was severely criticized in Judge Gibson's famous opinion in *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825).

against an illegitimate governance. On the other hand, the practice of judicial review involves the judiciary in a legitimizing role or function, the purpose of which is preservation, not change. Take, for example, Hamilton's famous argument in Federalist No. 84 against a Bill of Rights. "The truth is, after all the declamations we have heard, that the Constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS."⁴² Why, then, not enumerate them in detail? Because, as Herbert Storing has noted, such rights, while they provide the ultimate source and justification for government, can also threaten government.⁴³ "Even rational and well-constituted governments need and deserve a presumption of legitimacy and permanence. A bill of rights that passes these first principles to the fore tends to deprive government of that presumption."⁴⁴ The Hamiltonian argument was that the enumeration of rights was necessary in a political setting where the absence of a written Constitution required some alternative method of limiting royal or parliamentary prerogative; but that the American Constitution is itself a bill of rights, in that its grant of limited government (including the practice of judicial review) was an implicit articulation of those first principles upon which these familiar declarations of rights rested.⁴⁵ Thus, by enforcing the language of the written Constitution, judges were indeed defending the same principles of right conduct represented in a declaration of particulars.

Ultimately, of course, the Federalists reconciled themselves to a Bill of Rights, a development that does not affect the argument here. The Hamiltonian logic was not repudiated; judges were simply provided with greater specificity in enforcing constitutional guarantees. Why, one must ask, need judges appeal to sources external to the document when those sources have, as it were, been internalized?

III. THE SUPREME COURT AND THE FIRST PRINCIPLES OF FUNDAMENTAL LAW

On August 22, 1787, a brief debate occurred at the Constitutional Convention over the *ex post facto* change. Ellsworth of Connecticut contended that "there was no lawyer, no civilian who would not say that *ex post facto* laws were void of themselves. It

42. THE FEDERALIST PAPERS 515 (C. Rossiter ed. 1961).

43. Storing, *The Constitution and the Bill of Rights*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 32, 46 (M. Judd Harmon ed. 1978).

44. *Id.* at 46.

45. I have discussed this further in Jacobsohn, *supra* note 3.

cannot then be necessary to prohibit them.”⁴⁶ James Wilson concurred, claiming that inserting a constitutional prohibition would “bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.”⁴⁷ In opposition, Williamson of North Carolina indicated that “such a prohibitory clause is in the Constitution of North Carolina, and tho it has been violated, it has done good there and may do good here, because the Judges can take hold of it.”⁴⁸ From this debate Professor Grey concludes that “the validity of judicial review on the basis of unwritten first principles was supported as a matter of course by two important delegates, and implicitly disputed by no one.”⁴⁹

How plausible is this interpretation? Ellsworth does indeed seem to believe in an unwritten constitution. But his reasoning applies only to well-settled principles, a rationale that would not extend to controversial applications of the concept. His logic would hardly apply, for example, to modern abortion cases. Wilson’s argument is even less helpful to advocates of an unwritten constitution. He seems to have meant only that an *ex post facto* clause would imply congressional ignorance of “first principles”—a weak argument, perhaps, but not one that helps Professor Grey’s case. Wilson’s statement can also be interpreted as an early formulation of Hamilton’s argument against a Bill of Rights. More specifically, perhaps his notion was that an *ex post facto* law is not “legislation,” and therefore is beyond Congress’ power, a position that would make the proposal superfluous and, again, would not enhance the case for an unwritten constitution.

In any event, Williamson’s view prevailed. His reference to enabling the judges to “take hold of it,” while ambiguous, inclines more against than in favor of the concept of an unwritten constitution.

It was not long before the *ex post facto* clause became a subject of judicial attention, and ultimately of scholarly concern. Let us consider some of the leading cases on which Professor Grey relies, beginning with *Calder v. Bull*.⁵⁰ Justice Chase’s opinion in *Calder* has figured prominently in the scholarly treatment of the uses of natural law in the American constitutional context.⁵¹ It is

46. THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION, *supra* note 10, at 288.

47. *Id.* at 288.

48. *Id.* at 289.

49. Grey, *supra* note 34, at 9.

50. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

51. See, e.g., C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 86-88 (1930); B.

typically juxtaposed with Justice Iredell's opinion in the same case to present a classic debate on the validity of natural law jurisprudence. At the outset, however, it should be noted that all the Justices agreed that the Connecticut statute alleged to have offended the *ex post facto* clause was not unconstitutional.

Chase begins his examination by carefully limiting its scope. "The sole inquiry is whether this resolution or law of Connecticut . . . is an *ex post facto* law, within the prohibition of the federal constitution."⁵² He then delivers himself of certain eloquent sentiments that do indeed demonstrate his attachment to the orthodox natural rights position:

The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.⁵³

The critical sentence is that which denies the status of law to any legislative act "contrary to the great first principles of the social compact." This can be construed as an appeal to higher law outside of the Constitution only *if* the great first principles of the social compact have not been incorporated within the document. Significantly, then, we find Justice Chase turning immediately to the specific language and intent of the constitutional prohibition, which he interprets narrowly in terms of its "technical"⁵⁴ meaning. The result is a denial of its application to private rights of property or contract; the clause was meant to apply, he claims, only to criminal matters. What is more, "Every law that takes away or impairs rights vested [which this one did], agreeably to

WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 294 (1931); and ELY, *supra* note 2, at 210-11. Ely's treatment is in essential agreement with the interpretation provided here, although his assessment of Chase's opinion as "fiercely positivistic" goes beyond the claim of my argument. The most recent treatment of *Calder v. Bull* is in Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981).

52. 3 U.S. (3 Dall.) at 387.

53. *Id.* at 388.

54. *Id.* at 391.

existing laws, is retrospective, and is generally unjust, and may be oppressive. . . ."⁵⁵ But the fact that a law may be somewhat lacking in justice does not deprive it of constitutionality if it is not so deficient as to offend that basic level of justice guaranteed by the Constitution. We see, in short, an illustration of the point made earlier, that the Constitution is no guarantor of good laws, or even just laws, only laws that are compatible with the great first principles of republican, that is, free government.⁵⁶

To the extent that Justice Iredell's concurring opinion criticizing "speculative jurists" who hold "that a legislative act against natural justice must, in itself, be void,"⁵⁷ was directed against Justice Chase, it does not do complete justice to his colleague's position. Iredell surely differs from Chase, but, to use Grey's terminology, it is not a question of interpretivism versus noninterpretivism. Iredell writes that a law "within the general scope of [a legislature's] constitutional power," cannot be pronounced void by the Court "merely because it is, in their judgment, contrary to the principles of natural justice."⁵⁸ To which Chase might have replied that if intended for him the observation is internally contradictory, because a law within the scope of constitutional power could not be contrary to the principles of natural justice. Iredell was an early constitutional positivist, believing in a separation of natural and constitutional law, although his commitment to written Constitutions has caused him mistakenly to be understood as representing the jurisprudential orthodoxy of his times.⁵⁹ It was Chase, and not Iredell, who stood for the received opinion in the formative years of the constitutional system.

The case of *Wilkinson v. Leland*⁶⁰ is less well-known, but similarly instructive. Here, too, the Court upheld a statute against a claim that it violated the *ex post facto* clause. Justice Story's opinion contains language reminiscent of Justice Chase's earlier opin-

55. *Id.*

56. Justice Paterson's opinion is also consistent with this observation. "I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every discipline, that they neither accord with sound legislation, nor the fundamental principles of the social compact. But on full consideration, I am convinced that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense." *Id.* at 397.

57. *Id.* at 398.

58. *Id.* at 399.

59. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 252 (1977).

60. 27 U.S. (2 Pet.) 627 (1829).

ion: "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."⁶¹

The case is also noteworthy for the fact that the statute in question came from Rhode Island, which according to Story, was "the only state in the Union which has not a written Constitution of government, containing its fundamental laws and institutions."⁶² This became a central issue in the complicated litigation involving a legislative ratification of a probate action that the defendant claimed exceeded the authority of the state government. The legislation was acknowledged to be retrospective, but in a state without a written constitution how does one determine whether such a law is invalid?

The Court heard two quite different answers to this question. Whipple, counsel for the plaintiff in error, argued:

No other limit to the power of the legislature of Rhode Island is known, than that which is marked out by the Constitution of the United States. If any clause in that instrument is expressly or virtually infringed by the confirmatory act of 1792, such a violation would render the act a nullity. The national constitution being the only limitation, the court has no right to pronounce a law of Rhode Island void, upon any other ground. It has been said in England, that an act of Parliament, contrary to the principles of natural justice would be void. Such an opinion in reference to a law of a state, has never been intimated in this Court.⁶³

To this, Webster, counsel for the defendant in error, replied:

It is of no importance to the question before the Court, whether there are restrictions or limitations to the power of the legislature of Rhode Island, imposed by the constitution. If, at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end to private property.

Though there may be no prohibition, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact. . . .⁶⁴

Ultimately, of course, the case would have to be decided on the basis of an interpretation of the Federal Constitution; but this debate, while perhaps not critical to the outcome, is nonetheless worth some reflection. Whipple's argument, for example, is more subtle than it may first appear. His rejection of the principle of voidness, used earlier by Otis, has an important implicit qualification. The Court, he argues, has never accepted the formulation

61. *Id.* at 657.

62. *Id.* at 656.

63. *Id.* at 632.

64. *Id.* at 646-47.

that, in the absence of an express prohibition, *a law of a state* that violates principles of natural justice is to be considered void. This leaves open the possibility that a law of the federal government would be a nullity if it contravened such principles. Thus, sixty-five years after Otis made his declaration, the Supreme Court was still hearing faint repetitions of his argument, but the context had changed dramatically. How much so is marked by the fact that Whipple's interpretation of the only constitution relevant to the State of Rhode Island is confined to the specific language (and underlying intentions) of the document. Indeed, his examination of the *ex post facto* clause follows precisely Chase's reasoning in *Calder v. Bull*. There is no extra-textual interpretation of the Federal Constitution, although this Constitution is the only documentary restraint upon the federal government, a government, according to the legal document, which inferentially is limited by the principles of natural justice. Thus, it follows that these principles must be embedded in the written fundamental law; that, in other words, Otis's appeal no longer relies upon the unwritten constitution.

Whipple's legal brief would not command this much attention were it not for the fact that Justice Story's opinion is in essential agreement with it. Story nowhere accepts Webster's broad claim regarding the unwritten Constitution, choosing instead to find Rhode Island limited only by the express limitations of the federal Constitution. "We cannot say, that this is an excess of legislative power, unless we are prepared to say, that in a state, not having a written Constitution, acts of legislation, having a retrospective operation, are void. . . ."65 His reference, then, to the "fundamental maxims of a free government" must be seen in the context of an opinion that first refuses to embrace an explicit formulation of the concept of an unwritten constitution and then provides a technical, some might say narrow, interpretation of the *ex post facto* clause of the written Constitution. It is difficult, in short, to see *Wilkinson v. Leland* as supportive of Professor Grey's thesis.

The famous case of *Fletcher v. Peck*,⁶⁶ containing the Court's first interpretation of the contract clause, does appear to have an opinion based upon the unwritten constitution. Justice Johnson's separate opinion declares: "I do not hesitate to declare, that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a

65. *Id.* at 661.

66. 10 U.S. (6 Cranch) 87 (1810).

principle which will impose laws even on the deity."⁶⁷ Chief Justice Marshall's opinion for the Court, on the other hand, demonstrates a commitment to principles of natural right without abandoning the written Constitution. The state of Georgia, he claims, "was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff . . . could be constitutionally and legally impaired and rendered null and void."⁶⁸ Admittedly, the reference, in a separate clause, to general principles, might convey a commitment to extra-textual interpretation.⁶⁹ However, in *Ogden v. Saunders*,⁷⁰ another famous contract clause case, Marshall indicates that "the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nations have guided public opinion in the subjects of obligation and of contract."⁷¹ It would be logical to assume that the "particular provisions of the Constitution," adverted to by Marshall in *Fletcher*, framed as they were by statesmen knowledgeable in the treatises that formulated the "general principles," were indeed intended to incorporate those strictures within the specific language of the relevant clauses.

Terrett v. Taylor,⁷² another case involving contract rights, is inconclusive on the question of the unwritten constitution. Justice Story does say:

[T]hat the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state . . . we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.⁷³

But the opinion is quite ambiguous on the role that "natural justice" plays in deciding the case. One recent study, for example, suggests that the reliance on natural justice was at most an alternative holding, perhaps meant to express moral outrage at a statute that violated the Constitution.⁷⁴ Unlike Justice Johnson's

67. *Id.* at 143.

68. *Id.* at 139.

69. See, e.g., Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 889-99 (1982).

70. 25 U.S. (12 Wheat.) 213 (1827).

71. *Id.* at 353-54.

72. 13 U.S. (9 Cranch) 43 (1815).

73. *Id.* at 52.

74. Currie, *supra* note 69, at 902.

opinion in *Fletcher*, which explicitly relies on natural justice independent of the written charter, Story speaks of these principles in the same sentence in which he cites “the spirit and letter of the Constitution of the United States.” Perhaps the passage was analogous to a first amendment opinion citing the Declaration of Independence and the works of Tom Paine, without meaning to imply that those documents would be legally sufficient substitutes for the constitutional text. Be that as it may, the ambiguity of Story’s formulation renders problematic any final assessment of the case in the present context.

Finally, there is Justice Paterson’s opinion in *Van Horne’s Lessee v. Dorrance*.⁷⁵ In it we are treated to an explicit consideration of the written Constitution, one that provides a fitting conclusion to this article. Near the beginning of his opinion, Justice Paterson asks, “What is a Constitution?”⁷⁶ This question occurs immediately after an inquiry into the authority of Parliament:

[I]n England, the authority of the parliament runs without limits, and rises above control. It is difficult to say, what the constitution of England is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the parliament. . . . Some of the judges in England have had the boldness to assert, that an act of Parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence. Besides, in England, there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America, the case is widely different. . . .⁷⁷

It is interesting to note Paterson’s non-recognition of British fundamental law and its relationship, in his estimation, to the absence of a written constitution. This takes on greater significance when, in response to his query about the nature of a constitution, he avers: “It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established.”⁷⁸ Here, in brief, is the rejoinder to Professor Grey’s thesis. The written Constitution of the United States is the documentary embodiment of the fundamental law, of the first principles of government. When, then, in the next several paragraphs, Paterson invalidates the Pennsylvania statute, declaring it to be “inconsistent with the principles of reason, justice, and moral rectitude,” as well as “contrary both to the letter and spirit

75. 2 U.S. (2 Dall.) 304 (1795).

76. *Id.* at 308.

77. *Id.*

78. *Id.*

of the Constitution,"⁷⁹ there is no question that these two sources of adjudication are inextricably linked in his mind, that the written Constitution contains the principles of justice for which Professor Grey seeks external justification.

IV. CONCLUSION

The debate over the unwritten constitution, interesting as it is for the historian of ideas, should also be appreciated for its practical implications in contemporary constitutional adjudication. Professor Grey, who argues for the judicial enforceability of "theoretical legal constraints," is quite explicit in articulating the practical tendencies of his jurisprudential position.⁸⁰ We should understand that in the context of the modern Court's increasingly expansive definition of the scope of judicial review, the judicially enforceable unwritten law promises even more extensive constitutional innovations than might otherwise occur. Thus, for example, judges applying Grey's analysis to a "fundamental interest" claim under the fourteenth amendment, might readily perceive the wisdom and logic of going beyond the explicit text (and discernible intent) of the Constitution to evaluate the legitimacy of the claim and its corollary expectation of heightened judicial scrutiny.⁸¹ Whether or not that is a good thing, the legitimation of the unwritten constitution, and the judicial mode of interpretation associated with it, surely makes the judiciary a more obvious participant in the governmental pursuit of a socially just society.

In the end, perhaps, the best question to be raised in this context, is one put forward by Grey himself. "Conceding the natural-rights origins of our Constitution, does not the erosion and abandonment of the 18th century ethics and epistemology on which the natural-rights theory was founded require the abandonment of the mode of judicial review flowing from that theory? Is a 'fundamental law' judicially enforced in a climate of historical and cultural relativism the legitimate offspring of a fundamental law which its exponents felt expressed rationally demonstrable, universal and immutable human rights?"⁸² That Grey's answer to his question is affirmative is indicated by his sympathy for the role of the con-

79. *Id.* at 310.

80. Thus, he connects his extra-textual approach to many of the social reforms facilitated by the work of the modern Court. Grey, *supra* note 1, at 710-14.

81. See, especially, *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969). And note Grey, *supra* note 1, at 712: "All of the 'fundamental interests' that trigger 'strict scrutiny' under the equal protection clause would have to be discarded, if the interpretive model were to control constitutional adjudication."

82. *Id.* at 718.

temporary Court as “expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.”⁸³ Justice Paterson, who also believed in the role of the Court as expounder of national ideals (or, more accurately, because they were rooted in nature, supranational ideals), adhered to a conception of judicial review that differs from Grey’s not on the basis of any disagreement over the validity of natural rights, but on the extent to which these rights were incorporated within the written document. Hence Paterson’s conclusion: “The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable. . . .”⁸⁴ To a great extent the future of constitutional law will reflect the competition between these alternatives.

83. *Id.* at 706.

84. 2 U.S. (2 Dall.) at 309.