New England Journal of Political Science

Volume 2 | Number 1 Article 4

9-1-2006

Sometimes 'No Answer' Is the Answer: The Debate on Higher Law and Judicial Review in the Early Republic

Richard Drew
University of Virginia

Follow this and additional works at: https://digitalcommons.library.umaine.edu/nejps

Recommended Citation

Drew, Richard (2006) "Sometimes 'No Answer' Is the Answer: The Debate on Higher Law and Judicial Review in the Early Republic," *New England Journal of Political Science*: Vol. 2: No. 1, Article 4.
Available at: https://digitalcommons.library.umaine.edu/nejps/vol2/iss1/4

This Article is brought to you for free and open access by DigitalCommons@UMaine. It has been accepted for inclusion in New England Journal of Political Science by an authorized administrator of DigitalCommons@UMaine. For more information, please contact um.library.technical.services@maine.edu.

Sometimes "No Answer" Is the Answer: The Debate on Higher Law and Judicial Review in the Early Republic

Richard Drew
University of Virginia

Introduction

Scholars have long debated how the founding generation understood judicial review. In particular, much ink has been spilled trying to determine if the founders limited judicial review to the enforcement of written constitutional provisions, or whether they also countenanced judges striking down laws on the basis of unwritten "higher law" principles of common law or natural law origin. Despite producing many valuable and learned works,[1] this debate has long been

[1] Edward Corwin pioneered this debate and was the original proponent for the prevalence of higher law principles in early American judicial review. See Edward Corwin (1914), "The Basic Doctrine of American Constitutional Law," *Michigan Law Review*, vol. 12, 247-276; Edward Corwin (1948), *Liberty Against Government: The Rise, Flowering, and Decline of a Famous Judicial Concept*, Baton Rouge: Louisiana State University Press); and Edward Corwin (1955), *The Higher Law Background to American Constitutional Law*, Ithaca, NY: Cornell University Press. Modern examples of this argument include Thomas Grey (1974), "Do We Have an Unwritten Constitution?" *Stanford Law Review*, vol. 26, 263-301; Thomas Grey (1978), "The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," *Stanford Law Review*, vol. 30, 843-893; Thomas Grey, "The Original Understanding and the Unwritten Constitution," in *Toward a More Perfect Union: Six Essays on the Constitution*, Neil York, ed. Albany, NY, State University of New York Press; Suzanna Sherry

inconclusive, and a fresh look at constitutional law from the founding through 1830 shows the reason why. There simply was no consensus for either position on higher law's role in judicial review. Not only did early American statesmen and jurists differ with each other on the question, individuals frequently took inconsistent positions at different times. Rather than trying to herd the fractious historical evidence into one corner or another, scholars should just accept the muddle as a muddle and learn to see it as significant in its own right. Sometimes "no answer" is the answer.

In fact, the mixed and undecided character of the early republic's debate on extra-textual judicial review shows us two things about that era, one of which makes it very different from ours, while the other reveals deep continuities. First, the lack of any clear answer in the controversy partly resulted from the fact that judicial review just was not that important in early America: its exercise was rare,

(1987), "The Founders' Unwritten Constitution," *University of Chicago Law Review*, vol. 54, 1127-1162; and Suzanna Sherry (1992), "Natural Law in the States," *University of Cincinnati Law Review*, vol. 61, 171-210. For the opposition to the higher law position, see Christopher Wolfe (1994), *The Rise of Modern Judicial Review: From Constitutional Interpretation* to *Judge-Made Law*, Lanham, MD: Rowman and Littlefield; Matthew Franck (1996), *Against the Imperial Judiciary: The Supreme Court vs. The Sovereignty of the People*, Lawrence: University of Kansas Press; Thomas McAffee, (2000) *Inherent Rights, the Written Constitution and Popular Sovereignty: The Founders' Understanding*, Westport, CT: Greenwood Press; Helen Michaels (1991), *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of 'Unwritten' Individual Rights?*" *North Carolina Law Review*, vol. 69, 421-490; and Walter Berns (1982), "Judicial Review and the Rights and Laws of Nature," *The Supreme Court Review*, 49-83.

often contested, and of relatively little consequence in political life. Thus, there was not a great deal of pressure to fix the exact nature of a largely dormant power. Second, to the degree that early American jurists saw the potential of judicial review and still refused to settle the question of its scope, they pioneered a fundamental ambivalence about judicial power in our politics that survived judicial review's subsequent growth and persists to the present day.

Background to the Debate

Of the two concepts of judicial review, the one allowing the enforcement of unwritten principles was the first to emerge. Its foundation was the Revolution itself. The whole gamut of revolutionary activity up to declaring independence is properly viewed as one vast recurring exercise of constitutional review. The colonists justified their resistance to Parliament's legislation on the basis of fundamental principles understood to be so inherent to English government and common law that they amounted to an unwritten constitution (Reid 1995; Kramer 2004). Thus, the Declaration of Independence refers to Parliament's claim of unlimited legislative authority over the colonies as "a jurisdiction foreign to our constitution," rendering the statutes aimed at them mere "Acts of pretended Legislation." Parliament's pretensions, and George III's support of them, violated the bedrock principle that citizens could only be bound by laws passed with the consent of their representatives. Other important traditional rules included a ban on lawless, arbitrary arrest and the right to trial

by jury. While these principles might sometimes be set down in documents like the Magna Carta, their validity did not depend on being presented in formal texts. Rather, they demanded respect because of their intrinsic justice and their essential connection to the growth and preservation of English liberty since "time immemorial" (Sherry, 1987, 1128-1133). Reducing them to writing merely added to the certainty and vigor of their enforcement.

Of course, the colonists' main weapons in enforcing the unwritten constitution against Parliament did not include their local judiciaries, although early instances of jury nullification played a part. Direct popular action, be it through commercial boycotts or mobs in the street, was the tool of choice. But the idea that courts could act against legislation to defend the constitution was known to them. As the special custodians of the common law, English judges had long claimed a central role in preserving fundamental principles. On rare occasions, this even extended to declaring null acts of Parliament that violated them. Most famously, in *Dr. Bonham's Case*, Sir Edward Coke announced that:

> …[I]t appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void. (8 *Reports* 107a, 118a (1610), reprinted in Shephard, 2003, I, 264-283).

The statutory provision Coke held null allowed a physicians' guild to be both a party and the judge in proceedings against physicians for practicing without proper license in the city of London. The principle that no man should be judge in his own case was too important for the rule of law to allow it to be abrogated, even by an act of Parliament.

In England, a judicial power to void legislation was stoutly resisted even in Coke's time (Gough, 1961, 37-38) and it was emphatically superseded by the doctrine of parliamentary sovereignty after the Glorious Revolution in 1688. Supreme power was vested in one representative institution to bring the seventeenth century's period of turmoil and civil war to a stable end. Thus, when discussing Coke's doctrine that acts of Parliament against reason are void, William Blackstone admitted the propriety, whenever possible, of giving statutes interpretations that prevented violations of important principles. However, he refused to go further and recognize the legitimacy of holding a statute void when no such saving interpretation was possible, declaring that "if the Parliament will positively enact a thing to be done which is unreasonable, I know no power that can control it." Allowing judges to flatly reject such statutes would "set the judicial power over the legislature, which would be subversive of all government" (Blackstone, 1979, I, 91).

But in post-Revolutionary America, which had just seen a spectacular demolition of Parliament's claim to absolute authority, a few courts began to

suggest they could check state legislatures that interfered with traditional rights and principles. The high courts of New Jersey in 1780[2] and New Hampshire in 1786[3] seem, on the scant historical record left to us, to have disallowed laws that limited the right to a jury trial. No opinion survives from either case, so it is unclear whether these courts relied on the inherited standards of the English unwritten constitution, or on their new state constitutions. The distinction between the two may not have even been clear at this point, since constitutional documents had traditionally been understood as simply declarations of permanent unwritten principles.

We have more evidence on *Trevett v. Weeden*, a 1786 Rhode Island case involving, once again, a law restricting the trial by jury. Rhode Island did not even form a new constitution until decades after the Revolution, contenting itself in the meantime with its old colonial charter, slightly modified for changed circumstances. As a consequence, the lawyer challenging the statute relied by necessity on its incompatibility with traditional English rights existing from, as he put it, "time out of mind." The precise grounds of the ensuing decision refusing to enforce the law are unclear, but newspaper reports indicate at least

[2] The case was *Holmes v. Watson*. See the account in Austin Scott, (1899), "Holmes v. Watson: The New Jersey Precedent" *American Historical Review*, vol. 4, 456-473.

[3] Known as the "Ten Pound Case." See William Crosskey (1953), *Politics and the Constitution*, Chicago: University of Chicago Press, vol. II, 968-970.

some of the Rhode Island judges agreed with these arguments based on the unwritten constitution (Crosskey, 965-968).

Despite the revival of the idea that judges could enforce unwritten principles against legislatures, some Americans were moving towards a new basis for judicial review. However attached they had been to the English constitution, Americans recognized soon enough that independence and full self-rule worked decisive changes in the nature of their government. They had moved from a mixed government, incorporating aristocratic and monarchical authority, to an entirely republican one based on a social contract theory of natural equality, where the sole claim to legitimacy rested on the will of the people. In this new context, judicial enforcement of unwritten principles sat uneasily. While common law rights had derived some of their authority from their origins as popular customs, they also were recognized simply on the grounds of their antiquity ("time immemorial") and their inherent justice. Moreover, in the English context their enforcement by courts had rested on Coke's claims about the quasi-aristocratic trained reason of the common law judges, a reason able to sift through the mass of unwritten principles and apply them correctly to concrete circumstances.[4] If the fundamental principle of the

[4] For a superb analysis of Coke's "artificial reason" of the common law, see James Stoner *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*, Lawrence: University of Kansas Press.

era's natural rights philosophy was the natural equality of men, meaning that no man had a natural right to rule another, how could any claim to authority based on a special superior reason stand? (Berns, 61). Thus, some supporters of judicial review began to build a new republican foundation for it as the enforcement of limits established by the people themselves in written constitutions.

The pioneering example of this is James Iredell's essay defending his argument as counsel in *Bayard v. Singleton*, a 1787 North Carolina decision that struck down a law impairing the right to trial by jury. A future justice of the United State Supreme Court, Iredell had attacked the constitutionality of the statute and urged the state supreme court to hold it void. Responding to public criticism of the idea that courts could wield such a power, he argued in a local newspaper that judicial review was entirely compatible with popular sovereignty. The legislature was not omnipotent; its power was "limited and defined by the Constitution," a constitution established by the "*people*…[who] have chosen to be governed under such principles" (McRee, 1857, II, 145-146, emphasis provided by Iredell).

Yet if judges refused to act against constitutional violations, what recourse did the sovereign people have against breaches of their fundamental law? They could petition the legislature for redress, with no guarantee their plea would be granted. They could turn to resistance and rebellion, with all the

dangers of chaos that entailed. Judicial review provided a safe and effective alternative. Judges after all served "for the benefit of the whole people," not as mere "servants of the Assembly" (McRee, 147-148).

Likewise, in *Federalist* No. 78 Alexander Hamilton denied that judicial review implied "a superiority of the judicial over the legislative power." Instead, "it only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[5] John Marshall in *Marbury v. Madison*, of course, later grounded judicial review on written constitutional limits enacted by the sovereign people:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. ...This original and supreme will

[5] Alexander Hamilton, James Madison and John Jay (1961), *The Federalist Papers*, Jacob Cooke, ed., Middletown, CT: Wesleyan University Press, #78, 525. Some see the following statement in #78 as an endorsement of higher law review: "But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the occasional ill humors in society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws."

Published by DigitalCommons@UMaine, 2024

> organizes the government and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written (1 Cranch 137, 176 (1803)).

But this passage does not give judges a power to strike "unjust and partial" legislation directly. They can only "mitigate their severity and confine their operation" through statutory interpretation, much in the manner Blackstone allows that judges can control statutes that threaten important principles without having the right to nullify statutes that expressly and inescapably abrogate them. Holding void legislative acts in violation of these popularly enacted limits was "the very essence of judicial duty," without which "the very foundation of all written constitutions" would be subverted (Cranch 137, 178 (1803)).

The Debate Begins

So America emerged from its first few decades of independence with two conceptions of judicial review, one textual and the other extra-textual, one based on the sovereign will of the people and the other based on the inherent justice of the principles themselves. Could these two conceptions coexist and complement one another, or would judges turn to the textualist version as the only legitimate

form of judicial review in the new republic? The most serious and extensive early discussion of this question came in a federal Supreme Court case, *Calder v. Bull* (3 U.S. 386 (1798)). The debate it featured between Samuel Chase and James Iredell represents the first moment when the two broad understandings of judicial review we have been discussing were clearly and self-consciously set in opposition to one another. The confrontation has long been a favorite of scholars of American constitutionalism and justifiably so since the opinions were continually cited right up to and even beyond the Civil War. Examined carefully, the opinions reveal with striking economy both the sources that fed into the two understandings of judicial review and many of the arguments that would structure debate between them in the future.

The case itself was a challenge to an act by the Connecticut legislature setting aside a verdict in a civil case. The justices were faced with the question of whether the Constitution's *ex post facto* clause extended to civil as well as criminal laws. They decided it did not and therefore let the legislature's act stand. However, in rendering this decision Chase also ventured a discussion on wider principles of constitutional law and judicial review. Troubled by the prospect of legislative claims to "revise and correct by law, a decision of any...Court of Justice" but not being able to directly address the problem because "the resolution or law in question does not go so far," he declared:

> I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state.... The blessings 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.... There are certain vital principles in our free Republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property, for the protection whereof the government was established. ...A few instances will suffice to explain what I mean. A law that punished a citizen for an... act which, when done, was in violation of no existing law; a law that destroys the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a Legislature with SUCH powers; and therefore, it cannot be presumed that they have done it (3 U.S. 386 (1798), at 387-388).

In some ways, we can see that Chase's statement is a transitional one from the traditional common law style of higher law review to something new. Its unsystematic listing of important principles, including the rule against making a man "a Judge in his own cause," is reminiscent of the common law approach and of *Dr. Bonham's Case*in particular. And some of his principles actually track

provisions included in the Constitution, like the contracts and ex post facto clauses, suggesting a common law view that written constitutions only declare unwritten principles that are already binding.

However, newer elements are also manifest, such as the recourse to the ends of the "social compact" and the nod to popular sovereignty in his argument that the people cannot be assumed to have granted the legislature powers against "reason and justice." Chase is clearly reaching for a reconciliation of higher law review with its new republican context. Moreover, there are seeds here of inherent limits on legislative power that go beyond a bundle of traditional common law principles. The social contract rhetoric and the general language about "the security for personal liberty and private property" could conceivably be shaped into rules that confine legislatures to the minimal role of only protecting the natural rights of life, liberty, and property. Jurists in later decades would seize upon this possibility.

Whatever the exact scope and meaning of Chase's remarks, they did not go challenged. Though he agreed with the Court's resolution of the case at hand, Justice James Iredell wrote separately to challenge Chase's statements on inherent limits, the same Iredell whose earlier defenses of judicial review were quoted above. He mounted a multifaceted attack on the use of extra-constitutional principles, setting out arguments that defenders of textualist judicial review would use again and again in later decades.

Iredell began by justifying judicial review as the enforcement of popularly enacted written limits. When they formed the Constitution, "the people of United States...define[d] with precision the objects of the legislative power, and...restrain[ed] its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void." Bowing to lingering concerns about the legitimacy of any form of judicial review, he admitted that "the authority to declare [a law] void is of a delicate and awful nature" and declared "the Court will never resort to that authority, but in a clear and urgent case" (3 U.S. 386 (1798), at 399).

However, his major concern was countering Chase:

> If the Legislature...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 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 (3 U.S. 386 (1798), at 399).

Iredell argues in part from skepticism about human knowledge of the higher law, but even more from the republican doctrine of natural equality. In

stark contrast to both Coke's ideas about the special reason of the common law and Chase's suggestion that courts should enforce the terms of the social contract, Iredell denies that judges have any claim to superior knowledge that make them the primary custodian of higher law principles. In this respect, they are on a level of equality with legislators and presumably with everyone else. The courts only have the power to enforce written provisions given authority by the people themselves. Within the bounds of those textual limits, legislatures "exercise the discretion vested in them by the people, to whom they alone they are responsible for the faithful discharge of their trust" (3 U.S. 386 (1798), at 399).

Besides denying higher law review's compatibility with revolutionary theory, Iredell's opinion indirectly suggests other reasons why applying extra-constitutional principles may be invalid. His discussion of why the *ex post facto* clause should be interpreted as only a prohibition of retroactive criminal statutes opens out into a more general discussion of public power's nature and of the inherent limits to the judicial role in supervising it. The problem with extending the *ex post facto* clause to non-criminal laws that "merely affect the private property of citizens" is that many of the "most necessary and important acts of Legislation are...founded upon the principle that private rights must yield to public exigencies." Most prominently, the power of eminent domain needed for public works inevitably infringes on property rights. Without it, "the operations

of Government would often be obstructed, and society itself would be endangered" (3 U.S. 386 (1798), at 400).

The argument that this power may be abused has no real force, since this is "the nature of all power,...the tendency of every human institution." Judicially enforceable limits can never guard against all possible government injustice, not without denying government the power it must have to protect the nation's interests: "We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a Government, in ancient or modern times, more free from danger in this respect than the Governments of America" (3 U.S. 386 (1798), at 400)." This line of thought forms an often overlooked part of Iredell's argument. Both higher law review and overly broad interpretations of the Constitution that read higher law principles into it (as with the *ex post facto* clause in this case) are not only unauthorized in light of the regime's fundamental popular sovereignty theory; they are also illegitimate or invalid in the sense that they are dangerously impractical. The judicial enforcement of vague and unlimited principles of abstract justice threatens to strip away the discretionary power every government needs to function effectively. Other methods, be it periodic elections or structural mechanisms like the separation of powers, have to carry the main burden of keeping government within the bounds of morality and fairness.

No Clear Outcome: The "Higher Law" Debate through 1830.

Chase and Iredell's opinions in *Calder v. Bull* were foundational for all later discussions of higher law judicial review. But the striking thing for the decades immediately following *Calder* was how rarely American judges returned to the debate with anything like the seriousness and thoroughness that Chase and Iredell gave to it. Thus, when state courts claimed for themselves the authority of judicial review and discussed its foundation, they usually justified the power as the enforcement of written limits established by the sovereign people, but without expressly considering higher law review might also be legitimate.[6] Opinions addressing the controversy appear sporadically, and their treatment of it is usually cursory.

Within this limited group of cases, judges sometimes set their face directly against the legitimacy of higher law appeals. In *Whittington v. Polk* (1 H & J 236 (Maryland, 1802)), a Maryland law brought under review had modified the lower level of the state court system, turning several judges out of office. Chief Justice Jeremiah Chase of the state supreme court began his opinion by declaring that courts had the right to declare void violations of the Constitution, justifying

[6] See, for example, *State v. Parkhurst* 9 N.J.L. 427, 443-444 (New Jersey, 1802); *Emerick v. Harris* 1 Binn. 416, 421 (Pennsylvania, 1808); *Rutherford v. M'Faddon* (Ohio, 1807) in *Ohio Unreported Decisions—Prior to 1823*, at 73-74 (E. Pollack ed. 1952); *Grimball v. Ross* T. Charlt. 175, 178 (Georgia, 1808); *Dawson v. Shaver* 1 Black. 204, 206-207 (Indiana, 1822); *Runnels v. State* 1 Walker 146 (Mississippi, 1823); *Phoebe v. Jay* 1 Breese 207, 210 (Illinois, 1828).

Published by DigitalCommons@UMaine, 2024

the power as the only effective way to defend popularly enacted limits. He nevertheless upheld the law. Even though he believed it "incompatible with the principles of justice," there was "no clause or article in the Bill of Rights or form of government prohibiting or restricting the legislature [from] passing" the challenged statute (1 H & J 236 (Maryland, 1802), at 249). The New Hampshire Supreme Court dismissed a constitutional challenge to a law authorizing local governments to stop and arrest those "traveling unnecessarily" on Sunday (*Mayo v. Wilson* 1 N. H. 53, 54 (New Hampshire, 1817)). During the course of its argument, the court ruled out any recourse to natural rights, writing that "[w]hen we agree to become members of society, then we surrender our natural right to be governed by our wills in every case where our wills would lead us counter to the general will. We agree to conform our actions to the rules prescribed by the whole, and we agree to pay the forfeiture which the general will may impose..., whether it be the loss of property, of liberty, or of life" (1 N. H. 53, 54 (New Hampshire, 1817), at 58).[7]

In 1827, the Louisiana Supreme Court heard a challenge to a New Orleans ordinance forbidding the establishment of private hospitals within the city limits. The Court responded to a higher law argument from the petitioner by bluntly

[7] The court also turned aside a due process argument by adopting a narrow reading of the state constitution's "law of the land" clause. The provision was interpreted as not being intended "abridge the power of the legislature, but to assert the right of every citizen to be secure from arrests not warranted by law," 1 N. H. 53, 54 (New Hampshire, 1817), at 57.

declaring that the "natural right to the enjoyment of property, in opposition to the positive regulations of society, is a subject of little utility in a court of justice." Allowing such claims would make the work of both the legislature and the court impossible:

> The modifications which legislative power may make, in the possession and distribution of property are infinite, and nearly every contest which arises in courts of justice, proceeds from the real or imputed violations of some one of these modifications: any one of which might be understood to be a violation of natural law with as much reason as that of which the appellant now complains (*Milne v. Davidson* 5 Martin 409, 412-413 (Louisiana, 1827)).

We see here the continuing vitality of Iredell's "other" argument against higher law review. Aside from being inconsistent with popular sovereignty, wielding principles of natural justice against legislation is dangerously impractical. Nearly every government action affecting private rights can be characterized as violating such norms. Making them grounds of decision would entangle the courts in a quest for a libertarian utopia entirely foreign to American tradition and practice. In *Commonwealth v. M'Closkey*, the Pennsylvania Supreme Court summarized and then directly countered Chase's higher law argument in *Calder*, using portions of Iredell's opinion without attribution and further declaring that judicial review based on natural justice would give judges a "latitudinarian authority…dangerous to the well being of society, or, at least, not

in harmony with the structure of our ideas of natural government" (2 Rawle 368, 373 (Pennsylvania, 1830)).

There were also unambiguous judicial declarations of support for higher law review. A series of early South Carolina decisions pronounced allegiance to *Dr. Bonham* and something like traditional common law extra-textual review.[8] In Virginia, Judge Spencer Roane was a particularly fierce proponent of court authority to enforce extra-textual principles. In 1809, an attorney arguing before the Virginia Supreme Court admitted it possessed the power of judicial review but denied it could use principles outside the state or federal constitutions. Outside of revolution, the only remedy for "unjust and unequal laws" that were not unconstitutional was a "change of rulers by the accustomed mode of election" (*Currie's Administrators v. The Mutual Assurance Society*, 14 Va. 315, 344 (Virginia, 1809)). This drew a sharp rebuke from Roane:

[8] The main examples are *Ham v. M'Claws* 1 Bay 93, 98 (South Carolina, 1789); *Bowman v. Middleton* 1 Bay 252, 254 (South Carolina, 1792); and *Zylstra v. The Corporation of Charleston* 1 Bay 382, (South Carolina, 1794). In *Ham,* the Court stated the *Dr. Bonham* principle but avoided an explicit overrule through interpretation. In Bowman and Zylstra, the laws being challenged were actually struck down. The statutes in questions had transferred ownership of a piece of land (Bowman) and limited the trial by jury (Zylstra). Interestingly, the main author of these opinions, Chancellor Thomas Waites, later moved to a sort of precocious substantive due process position, locating the whole mass of common law principles within the state constitution's "law of the land" provision. Relying on the provision meant that "the judges claim no judicial supremacy; they are only the administrators of the popular will." *Lindsay v. Commissioners*, 2 Bay 39, 61 (South Carolina, 1796). See also *Adm'rs of Byrne v. Adm'rs of Stewart Bay* 463 (South Carolina, 1812).

> [L]egislative acts are bound by the constitutions of the general and state governments; and limited also by considerations of justice. It was argued... that the legislature had a right to pass any law, however just, or unjust, reasonable or unreasonable. ...What is this, but to lay prostrate at the footstool of the legislature all our rights of person and of property, and abandon those great objects for the protection of which, alone, all free governments have been instituted? (14 Va. 315, 344 (Virginia, 1809), at 346-347).

In another case, Roane set limits on popular sovereignty itself, proclaiming "I shall not be among those who assert a right in the government, or even in the people, to violate private rights and perpetuate injustice" (*Turpin v. Lockett* 10 Va. 113 (1804)).

Other expressions of support for higher law review were less strident. In 1822, Chief Justice Stephen Hosmer of the Connecticut Supreme Court cited Chase in *Calder v. Bull* and argued for extra-textual review even as he acknowledged the ongoing controversy over its legitimacy, declaring that "[w]ith those judges who assert the omnipotence of the legislature in all cases, where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist...a case of the direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact and within the control of the judiciary" (*Goshen v. Stonington* 4 Conn. 209, 225 (Connecticut, 1822)). There were also a number of decisions

Published by DigitalCommons@UMaine, 2024

asserting fairly casually that just compensation for property seized by the public was an inherent requirement of natural justice, regardless of the lack of an equivalent to the 5th amendment's takings clause in most state constitutions (*Bradshaw v. Rogers* 20 Johns. Rep 103, 106 (New York, 1822); *Bristol v. New-Chester* 3 N. H. 524, 535 (New Hampshire, 1826); and *Thomas & Crenshaw v. The State River Company* 27 Va. 245, 265 (Virginia, 1828).[9] Judges sometimes mixed in a matter of fact fashion textual and extra-textual principles as a basis for judicial review. Chief Justice Isaac Parker of the Massachusetts Supreme Court wrote that the judicial power can impede legislative acts that "manifestly infringe some of the provisions of the constitution *or violate the rights of the subject*" (*Foster v. Essex Bank* 16 Mass 245, 270 (1819), emphasis added). The list of examples that followed this statement revealed no very clear demarcation between violations of the constitution and deviations from higher law principles.[10]

So far, the initial analysis of early American constitutional law reveals that the legitimacy of extra-textual judicial review was only sporadically discussed, and within that discussion opinion was divided. Yet it might be thought too soon to declare that the early debate on higher law review had no settled outcome.

[9] For an overview, see J.A.C. Grant (1930), "The 'Higher Law' Background of the Law of Eminent Domain," *Wisconsin Law Review*, vol. 6, 67-85.

[10] From the same court, see *Holden v. James*, striking down a legislative act suspending a statute of limitation for one specific litigant because it was "manifestly contrary to the first principles of civil liberty and natural justice and to the spirit of our constitution and laws" 11 Mass. 396, 405 (Massachusetts 1814).

One could always demand more detailed and extensive tours of the historical evidence in the hopes of proving a clearer verdict. However, another set of clues greatly strengthens the case for a mixed or muddled outcome to the early higher law debate: Not only did jurists disagree among themselves, individuals sometimes expressed contradictory, or at least deeply ambiguous, opinions on the issue at different times.

Take the opponents from *Calder v. Bull*, Samuel Chase and James Iredell. In *Calder*, Chase declared that "I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state" 3 Dallas 386 (1798), at 387). Two years earlier, he had asserted that the Virginia state legislature had "supreme and sovereign power… to make any Laws in their discretion to affect the lives, liberty or property of all [its] citizens…with this exception only, that such laws should not be repugnant to the Constitution…." (*Ware v. Hylton* 3 Dallas 199, 223 (1796), quoted in Franck, 124). As for James Iredell, in 1787, while he was defending *Bayard v. Singleton* on textualist, popular sovereignty grounds, he offhandedly remarked in a private letter that that without the written constitution "any act *not inconsistent with natural justice* (for that curb is avowed even by the judges in England) would [be] binding on the people" (McRee, 172.) While Chase's *Calder* opinion in 1798 suggesting extra-textual review sparked Iredell's determined opposition, his

Published by DigitalCommons@UMaine, 2024

brief aside in 1787 seems to make judicial enforcement of principles based on "natural justice" permissible and perhaps obligatory in the absence of written limits, a practice he considered endorsed by various unnamed "judges in England."

A similar pattern can be found in other members of the founding generation. In the Federal Convention, James Wilson argued for a Council of Revision involving judges in the executive veto power on the grounds that in the exercise of judicial review alone "laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the judges in refusing to give them effect" (Madison, 1987, 337). This seems to imply a conception of judicial review that rules out an easy application of higher law principles. However, in his 1791 law lectures Wilson declared in passing that statutes could be nullified if they violated not just the written constitution but also "natural and revealed law," citing *Dr. Bonham* (Wilson, 1967, 329). In *Federalist* #78, Alexander Hamilton gave undoubtedly the most important defense of textualist judicial review. But a few years earlier, while trying to overturn a New York law that effectively stripped some former Tories of their property rights (in the case of *Rudgers v. Waddington*), he had cited *Dr. Bonham* and its principle that statutes against common right and reason are void (Goebel, 134-135).

The same tendency continued in later decades. In 1811, faced with some higher law arguments in a majority opinion, Judge Ambrose Spencer of the New York state judiciary dissented vigorously. Citing Iredell's *Calder v. Bull* argument against higher law review, he declared that "our State legislature, when acting with the pale of the Constitutions of the United States and of this State, has the same omnipotence which Judge Blackstone ascribes to the British Parliament" (*Dash v. Van Kleeck* 7 Johns. Rep 477, 492 (New York, 1811)).[11] And yet, when presented eleven years later with an uncompensated taking, he wrote an opinion striking it down as a violation of "natural right and justice" (*Bradshaw v. Rogers* 20 Johns. Rep 103, 106 (New York, 1822)).

Similarly, while riding circuit in New Jersey, US Supreme Court Justice William Baldwin dismissed a claim, coming before him under diversity jurisdiction, attacking the validity of a state law allowing only the owners of private fisheries to use drift nets and "gilling seines" on the Delaware River. The law was attacked as a violation of "common right," but Baldwin denied that judges could rely on extra-textual principles:

> We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency or justice. We are not the

[11] The opinion for the court did not actually strike a law down on higher law grounds, directly. Instead, it argued that the statute should be construed to operate, only prospectively. However, Justice James Kent did use *Dr. Bonham* principle as a reason for giving it this construction. *Dash v. Van Kleeck* 7 Johns. Rep 477, 492 (New York, 1811), at 502.

> guardians of the rights of the people of a state unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil, but the courts cannot assume their rights.

Moving beyond the written constitution would “submit state laws to a test as fallible and uncertain as all rules must be which have not their source in some certain and definite standard, which varies neither with time, circumstances or opinion.” Judges would thus become “the makers and not the expounders of constitutions” (*Bennett v. Boggs* 3 F. Cas. 221, 227, 228 (1830)). However, later that same year, out on circuit, again, Baldwin argued that the “obligation to make just compensation” was “concomitant” with the power of the state to take property, even “if it is not provided for by the state constitution” and even if the 5th amendment’s takings clause did not apply to state governments. For authority he cited a number of European natural law writers, including Vattel, Rutherford, Burlamaqui, Puffendorf, and Grotius (*Bonaparte v. Camden & A.R. Co.* 3 F. Cas 821, 830-831 (1830)).[12]

[12] Baldwin later moved to base his argument on the contract clause, using the *Fletcher v. Peck* precedent, so the higher law portion of his opinion was not a ground of decision.

Moving from the clearly contradictory to the deeply ambiguous, there is the case of John Marshall. In *Marbury v. Madison*, he of course fashioned the most famous justification of judicial review as the enforcement of written limits established by the sovereign people. Did he also accept extra-textual review? That depends on how you interpret the famous case (*Fletcher v. Peck* (10 U.S. 87 (1810)), in which the Supreme Court reviewed a Georgia statute revoking an earlier land sale supposedly obtained through corrupt means, abrogating the ownership rights even of third parties who had later obtained portions of the land without knowledge of any past fraud. In his opinion for the Court, Marshall flirted with simply applying the compensation principle on extra-textual grounds:

> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where they are to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection. It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in

> cases where the constitution is silent, never has been, and perhaps never can be, definitely stated (10 U.S. 87 (1810), at 135-136).

The language here ("may well be doubted," "well worthy of serious reflection") wears its hesitancy on its sleeve. It moves from an inherent just compensation principle to limits based on the separation of powers that might be fairly implied from a written constitution.

Moreover, after sticking his toe in the higher law water, Marshall stepped away from taking the full plunge. While the law's validity "might well be doubted" even if Georgia were a sovereign nation, it was in fact bound by the federal Constitution and its contract clause, thus allowing Marshall to interpret the original land grant as a contract barring the state from reclaiming ownership. However, later in the opinion he summarizes the holding as follows: "it is...the unanimous opinion of the court that...the state of Georgia 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 rendered null and void" (10 U.S. 87 (1810), at 139).

Does this represent Marshall fully endorsing the kind of extratextual review he only danced around earlier in the opinion? Or, as some scholars argue (Hobson, 1996, 86-87), is this passage really driven by the Chief Justice's abiding passion for unanimity? Justice William Johnson had written a concurring opinion

agreeing with the resolution of the case but not Marshall's reading of the contract clause. He preferred to decide the case solely on a higher law ground, a "general principle, on the reason and nature of things: a principle which will impose laws even on the deity" (10 U.S. 87 (1810), at 143). Thus, only by including higher law principles in his conclusion could Marshall credibly claim to report "the *unanimous* opinion of the court." Which interpretation of Marshall's statements is right? Either side can rely on any number of the opinion's features. Its very inconclusiveness makes it emblematic of the overall state of the higher law debate in early American constitutional law, even when the era's greatest judge was involved.

A few more examples of the same phenomenon will suffice. In *Satterlee v. Mathewson* (27 US 380 (1829)), Justice Bushrod Washington first declares that while the law being reviewed might be condemned as "an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise by the legislature of a judicial function;" this was irrelevant to the only question the Court should answer: whether it "impaired the obligation of contracts" (27 US 380 (1829), at 412). So far, we seem to have a fairly routine textualist opinion. But at the end of his opinion Washington briefly references some higher law arguments made in *Fletcher* and elsewhere, and declares them irrelevant not because they are automatically illegitimate for courts to consider but because the

Satterlee case reached the Supreme Court on appeal from a state supreme court, not a federal circuit court (27 US 380 (1829), at 414).

The historian G. Edward White argues that this distinction, at first glance mysterious, is explained by the fact that cases appealed from state supreme courts were understood to be limited by the 25th section of the Judiciary Act to purely federal issues, and thus to constitutional challenges based solely on the text of the federal Constitution. By contrast, there was no bar to considering general principles of constitutional law, including extra-textual limits, in diversity jurisdiction cases from federal circuit courts (White, 1991, 674-675), thus explaining the presence of higher law arguments in early diversity cases like *Fletcher* and *Terrett v. Taylor* (13 U.S. 43, 52 (1815)). However, while this may work as a *post hoc* reconstruction, there is certainly no clear statement of any doctrine like this in the contemporary cases, and we cannot be sure of how widely it was held, if at all. In the end, *Satterlee* only adds to the general fog in early American constitutional law on the question of extra-textual judicial review.

The haze is not lifted by even the two most famous jurist-commentators of early America. Both James Kent and Joseph Story seem at first to be fairly clear supporters of higher law review. But neither really committed to a full fledged, unambiguous justification of courts enforcing extra-textual principles. Serving in the New York state judiciary, Kent drew on higher law principles in a number of

cases, but held back from ever explicitly and plainly striking down a law on the basis of them. In *Dash v. Van Kleeck,* he cited *Dr. Bonham's* principle that the common law will adjudge a statute against reason to be void, but only to justify giving a law altering legal remedies a purely prospective operation, not to formally strike it down (*Dash v. Van Kleeck*, 7 Johns. Rep 477, 502 (New York, 1811)). In *Gardner v. Newburgh*, he drew on a variety of natural law and common law sources to hold that "provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property," even though the New York constitution at that time lacked any such requirement (*Gardner v. Newburgh* 2 Johns. Ch. 162, 168 (New York, 1816)). But although this had the effect of voiding part of a statute, Kent narrowly avoided an explicit overrule by declaring himself "persuaded that the Legislature never intended, by the Act in question, to violate or interfere with this great and sacred principle of private right" (2 Johns. Ch. 162, 168 (New York, 1816)).

This promotion of extra-textual review without ever giving a full and formal endorsement to it persists in Kent's famous *Commentaries on American Law*. In his discussion of judicial review, he admits that Blackstone's doctrine of parliamentary supremacy is the correct rule in England, but adds that he "cannot but admire the intrepidity and powerful sense of justice which led Lord Coke" to announce *Dr. Bonham's* rule that "the common law" adjudges acts of parliament

"void when against common right and reason." However, he goes on to say that America avoids legislative supremacy through the presence of a "written constitution" established by an "act of the people" and enforceable by an independent judiciary (Kent, 1826, 420-421). Yet one of his first examples of judicial review is an early South Carolina higher law case, which he admits was not "not strictly" based "upon any special provision of the state constitution," but instead grounded on "the fundamental principles which support all government and property" (Kent, 423).[13] In a later edition, he muddied the waters further by adding a statement that "if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government" (Kent, 448).

Similarly, Joseph Story used higher law principles in a number of cases, most prominently *Terret v.* Taylor (13 U.S. 43, 52 (1815))[14] and *Wilkinson v. Leland* (27 U.S. 627, 657 (1829)). There is some doubt as to whether the higher law standards were actually a ground for decisions in either of these cases (Franck, 140ff). Aside from that issue, the interesting thing is that Story saw fit to include

[13] The case to which he referred was *Bowman v. Middleton* 1 Bay 252 (South Carolina, 1792).

[14] A statute stripping a private corporation of its property would be forbidden "upon the principles of natural justice, upon the fundamental laws of every free government, upon the sprit and letter of the constitution of the United States, and upon the decisions of the most respectable judicial tribunals...." 13 U.S. 43, 52 (1815).

a modified version of his extra-textual argument from *Wilkinson* in his *Commentaries on the Constitution of the United States:*

> It seems to be the general opinion, fortified by a strong current of judicial opinion, that since the American revolution no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A and give it to B by a mere legislative act. A government can scarcely be deemed to be free, where the rights of property are left solely dependent upon 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. At least no court of justice in this country would be warranted in assuming that any state legislature possessed the power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and positive declarations to that effect (Story, 1987, 510-511).

This seems a fairly clear endorsement of extra-textual review. Yet Story does not include it within his section on general constitutional interpretation, tacking it on instead at the end of chapter on the contract clause. Is it meant to be a gloss on the *Fletcher v. Peck* doctrine that the contract clause forbade state divestitures of land? The terms of his statement are more general than this. Then

again, within that chapter on interpretation, we find stern warnings against applying a limitation on Congress' power based on "conjecture" or without a "clear restriction" (Story, 142). This difference of emphasis might result from Story's view of the Constitution as a grant of power to the national government and a limitation on the states. But the end result is that even with Story the legitimacy of higher law review is left cloudy.

In even stronger terms, this has to be the verdict on the entire higher law debate in early American constitutional law. It is a muddle. There is no clear consensus to be had, and individual jurists not infrequently contradict themselves on the question. This is not to say it would be impossible to come up with explanations reconciling some of the contradictory statements. Nor would it be absolutely impossible to drag out some characterization of the evidence presented so far that would accord with one of the main positions in the higher law debate. On the one hand, you could argue that the prevalence of higher law arguments in constitutional cases, however often contested, constituted a sort of victory for the legitimacy of extra-textual review, since it did not have to displace textual review, only survive as a possible complement to it.

On the other hand, you could say that, since higher law principles are usually, though not always, *obiter dicta* in the cases in which they're pronounced, textual judicial review was in fact considered the more solid and legitimate version of the power. One could even cobble together some sort of intermediate

position and argue that while early American jurists generally stuck to a textual grounding for judicial review, they flinched and reached for higher law arguments whenever confronted with an uncompensated taking without a ready constitutional provision to stop it. This would probably cover a fair amount of the cases, considering how often the compensation principle comes up in early higher law opinions.

All of these approaches could be tried, but rather than trying to wring some viable consensus out of a historical debate remarkably resistant to one, why not just admit the muddle and try to explain it? Instead of seeing confusion and contradiction as an obstacle to scholarly inquiry, why not see it as something interesting in and of itself, and try to account for it?

Why the Muddle?

First and foremost, the debate on extratextual review in early American constitutional law was mixed and inconclusive because judicial review was relatively rare and unimportant in the early republic. Consequently, there was little pressure to settle its legitimate scope or foundation. Contradictory conceptions of a largely dormant power do not spark much concern.

Considering how much attention we lavish today on the origins of judicial review and the founding period, it is easy to forget just how minor a place this power had in early American politics. Even a cursory glance at the ratification debates shows how much more attention was given to structural remedies like

the separation of powers as a protection for individual rights.[15] Judicial review was relatively new and unfamiliar; its legitimacy still open to question. Even if its propriety was admitted, its effectiveness as a check on legislatures was a matter of grave doubt. Thus, even provisions that today seem inextricably bound up with judicial review did not have the same obvious connection in the early republic.

Consider the Bill of Rights. Proponents of a bill of rights during the ratification debates usually did not call for one as a mechanism to empower judges. Instead, it was a way to guide and inform popular action. A leading Anti-Federalist writer, the "Federal Farmer," explained how a bill of rights did this: "There are certain unalienable and fundamental rights which...ought to be explicitly ascertained and fixed" so that they will be "plainly seen by those who are governed as well as those who govern; and the latter will know they cannot be passed unperceived by the former, and without giving a general alarm" (Storing, ed., 1981, 40-41). Other Anti-Federalists used the same rationale.[16]

---

[15] In one effort to quantify the various subjects addressed in the ratification controversy, judicial review does not even merit a separate category to itself, William Riker (1996), *The Strategy of Rhetoric: Campaigning for the Constitution*, New Haven: Yale University Press, 265-273.

[16] In Pennsylvania, John Smilie argued a bill of rights was essential to provide "a plain, strong and accurate criterion by which the people might at once determine when…their rights were violated." Without it, the people's right of "altering or abolishing [their] government" as they saw fit would became "a mere sound without substance" for want of a sure guide. Bernard Bailyn, ed. (1993), *The Debates on the Constitution*, New York: Library of America, vol. I, 809,

Seeing a bill of rights as a springboard for popular resistance, not court enforcement, was entirely in tune with both English tradition and the American revolutionary experience, in which documents like Magna Carta were rallying cries against overreaching governments. This view of a bill of rights understands it as primarily a guide to popular action extended beyond the Antifederalists to the Federalists who eventually agreed to add more protections to the Constitution. True, when Madison proposed his list of amendments to the first Congress he stifled his own lingering doubts about judicial review and allowed that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights....they will naturally be led to resist every encroachment upon rights expressly stipulated in the constitution." But this was actually an auxiliary argument for him, almost an afterthought. The first and most fully elaborated reason Madison gave in favor of a new Bill of Rights was that they "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community...[they] may be one mean to control the majority from those acts to which they might otherwise be inclined" (Madison, 449, 446-447). Like the Antifederalists, Madison believed the main benefit of a Bill of Rights came from

805. As Massachusetts Antifederalist Thomas Wait put it, "Bill of Rights have been the happy instruments of wresting the…rights of the people from the hand of Despotism: and I trust God that Bills of Rights will still be made use of by the people to defend them against future encroachments of despotism." Bailyn (1993), I, 728.

its educative effect on the people, not its judicial enforcement. The Madisonian twist was that he hoped it would teach the people to respect in advance the limits to their own power, as opposed to giving them a signpost for resisting governments gone wrong (Rakove, 1997, 335-336).

Indeed, this educative function may be the best reading of the Ninth Amendment,[17] which some scholars have claimed amounts to a textual authorization for extra-textual review (Barnett, 2004; Gerber, 1995, 70ff). Given the unsteady place of judicial review in American political thought at this time and the fairly sparse discussion of the amendment, itself, it is doubtful that the amendment was really widely understood to give judicial power such a large scope. Madison, after all, declared that the Bill of Rights would lead judges to resist encroachments "upon rights *expressly* stipulated in the constitution." While other scholars have interpreted the amendment as only a "rule of construction" to reinforce the limitation of the federal government to its enumerated powers (McAffee, 1990, 1215), or even as an affirmation of the people's absolute right to change their government whenever it seems to threaten their rights or interests (Yoo, 1993), 967-1043), there really is no problem seeing it as also a reference to unenumerated substantive rights, so long as it is understood as primarily a guidepost for the people themselves, instead of judges, to be vigilant in defense

[17] It provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," US Const., amend. IX (1791).

of them. The almost complete absence of the Ninth Amendment from legal arguments and judicial opinions until well into the twentieth century adds to the plausibility of this reading.

Things are a little different for the interesting case of the so-called "baby Ninths": provisions placed in nineteenth century state constitutions that approximated the federal Ninth Amendment (Yoo, 1993, 1014-1015) and for other state constitutional provisions declaring that citizens had inalienable natural rights. Later in the antebellum era, state courts sometimes used these to justify higher law review. But interpretations making these provisions judicially enforceable were either resisted or ignored by those who did not support a judicial power to protect extra-constitutional rights. Thus, the significance or insignificance of the "baby Ninths" for a given judge depended on the prior question of whether or not he favored higher law review. On their own, they added little or nothing to the debate.[18]

Given the rather tenuous place judicial power held in early America, it's not surprising that judicial assertions of authority in this era often brought on harsh reactions. The era saw judicial impeachments, but usually not convictions, at the national level in 1805 (Ellis, 1971), in Ohio in 1807 (Utter, 1927, 3-24),

---

[18] For cases debating the judicial enforcement of "baby Ninth" or natural rights provisions in state constitutions, see *Mayo v. Wilson* 1 N. H. 53 (New Hampshire 1817); *In re Dorsey* 7 Port. 293 (Alabama, 1838); *Ex parte Newman* 9 Cal. 502 (California, 1858); and *Lincoln v. Smith* 27 Vt. 328 (Vermont, 1855).

Alabama in 1827 (Thornton, 1978, 17-18), and a series of them in Pennsylvania (Klein, 1940, 30-32; Rowe, 1994).[19] In reaction to unpopular decisions, Kentucky, at one point, created an entirely new replacement court system that for a while competed with the old one, which refused to disband in 1825 (Stickles, 1929). Mississippi's legislature demanded its Supreme Court present itself for questioning after an exercise of judicial review in 1825. The dispute led to the resignation of one of the judges (Dunbar, 1895, 92-99). South Carolina actually abolished its Supreme Court after a ruling during the Nullification crisis that seemed to undermine the state's position (Senese, 1972, 367-369. Georgia refused to even create a state supreme court until 1848 (Harris, ed., 1948).

Even less surprising, given such an environment, is how rare the actual exercise of judicial review was in the early republic. The tables found at the end of the paper show the well known fact that *Marbury* was the only instance of the US Supreme Court striking down a federal statute in this period. But, as seen in eight selected states, judicial review by state supreme courts was also rare. In the forty years between 1790 and 1830, there were a total of fifteen cases striking down laws, of which six were in New York alone.[20] Moreover, of the nine non-

[19] The dates of the impeachments in Pennsylvania were 1805, 1817, and 1825. Not all involved Supreme Court judges and they were generally driven by anger at various non-constitutional decisions.

[20] The New York courts' outlier status in the exercise judicial review of may be related to its exceptional institutional history. Until 1821, New York judges served on the state Council of Revision, in effect sharing the veto power with the governor. Even after the Council of Revision

New York cases, six amounted to a form of judicial self-defense, striking down laws that involved legislative adjudication (*Holden v. James*, 11. Mass. 396 (1814); *Merrill v. Sherburne*, 1 N.H. 199 (1818)), interference with the trial by jury, (*Rutherford v. M'Faddon* (Ohio 1807) in *Ohio Unreported Decisions* (E. Pollock, ed. 1952); *Armstrong v. Jackson*, 1 Blackford 286 (Indiana, 1825)) or unconstitutional changes in a court's jurisdiction (*Kemper v. Hawkins* 3 Va. 20 (1793), *State v. Flinn* 1 Minor 8 (Alabama 1820)). The most important exceptions to this overall picture of judicial inactivity were the United States Supreme Court's decisions against state laws in the 1810s and 1820s. But even here, the Marshall Court frequently had to struggle for compliance, and by the end of the period it was in retreat (Goldstein, 2001, 23-29; Graber, 1995; Graber 1998).

Given how infrequently the power was actually used in the early republic, is it any wonder that its scope was undefined? When a generation could pass between exercises of judicial review in some state courts, it seems too much to expect that all the questions of its proper foundation would be fully worked out. Instead, jurists of the period held divergent conceptions of a power that was still as much theoretic as real.

Bypassing the Muddle: The New American Consensus on Judicial Review

---

was abolished, the state's highest court until 1846 was composed of a combination of judges and state senators. While such arrangements might be thought to have compromised the courts' independence, they seem to have had the effect of making New York judges more comfortable with interventions in the political sphere.

The minor significance of judicial review in the early republic obviously makes a stark contrast with our politics today. Yet in another way, the early discussion of higher law revealed enduring features of American constitutional thought that survived the growth of judicial review into a pervasive force. Although American judges eventually moved past the terms of the old higher law debate, the same refusal to choose between conceptions of judicial power persisted.

As the end tables show, the frequency of judicial review surged during the latter decades of the antebellum period.[21] As a result, the higher law debate that had been sporadic and desultory in the early republic became extremely urgent. Now that judicial review was being routinely exercised, the question of its foundation had to be addressed, and hopefully settled. Thus, in case after case, intense debates broke out over the legitimacy of enforcing extra-textual principles (for examples of cases in which judges on the same court took opposing positions, see *Cochran v. Van Surlay* 20 Wend. 365 (New York, 1838) *Goddin v. Crump* 35 Va. 120 (Virginia, 1837). *In re Dorsey* 7 Port. 293 (Alabama, 1838) *Taylor v. Porter* 4 Hill 140 (New York, 1843). *Griffith v. The Commissioners of Crawford County* 20 Ohio 609 (Ohio, 1851). *Sharpless v. Mayor of Philadelphia* 21 Pa.

[21] In another work, I argue this surge was triggered by the development of intense, sustained party competition during the 1830s, Richard Drew (April 16, 2004), "The Surge and Consolidation of American Judicial Power: Judicial Review in the States, 1840-1879," Paper presented at the annual meeting of the Midwest Political Science Association, Chicago.

147 (Pennsylvania 1853). *Beebe v. State* 6 Ind. 401 (Indiana, 1855). *Billings v. Hall* 7 Cal. 1 (California, 1857). *Ex parte Newman* 9 Cal. 502 (California, 1858) *Sears v. Cottrell* 5 Mich. 251 (Michigan, 1858)).

The terms of these debates largely amounted to amplified versions of the arguments first employed by Chase and Iredell in *Calder v. Bull*. For example, in *People v. Gallagher*, (4 Mich. 243 (Michigan, 1856)), the Michigan Supreme Court heard a constitutional challenge to an 1855 law prohibiting the sale of alcoholic beverages. The challenger of the statute appealed to natural justice, but the court, after citing Iredell and a number of other anti-higher law opinions, refused to adopt extra-textual principles as foundations for decisions, citing "the great practical difficulty of defining, with any degree of certainty, what those rights are." The court was happy to admit that men had inherent rights, but "from their very nature [they] must be dependent on some large discretionary power, and the whole question is solved when we determine where that power exists." The court was in no doubt it must rest with the legislature for the public interest to be advanced:

> Great wrongs may undoubtedly be perpetrated by legislative bodies, but this is only an argument against the exercise of discretionary power. It weighs nothing, for no government can exist without the exercise of that power somewhere. Unfortunately, the scheme has never yet been designed by human invention by which the power to do great good has not been

> mingled with the power to do evil (4 Mich. 243 (Michigan, 1856), at 247).

The alternative would be to give judges a discretionary power over the legislature, and then the question would be "by what authority" judges could claim such a power: "certainly not by anything contained in the written constitution" (4 Mich. 243 (Michigan, 1856), at 247, 254, 255).[22] We see here the persistence of Iredell's view that judicial review outside the written constitution lacks republican legitimacy, and an even stronger version of his other argument that extra-textual review posed the danger of a boundless judicial power that could restrain legislatures from acting effectively for the public good.

To the dissenting Justice Pratt, this reasoning amounted to a justification and excuse for outright tyranny. Citing Chase and other higher law opinions, he argued the prohibition law was clearly "in direct conflict with fundamental principles and subversive of our system of government." It violated a "natural inherent right" by stripping away all value in property "honestly accumulated." Moreover, the court's opinion upholding it cleared the way for a limitless variety of other despotic measures:

> If the doctrine is true that the legislature can, by the exercise of an implied discretionary power, pass any law not expressly

[22] The majority opinion also contained an extensive review of the higher law debate, providing a fairly evenhanded look at the precedents on both sides while never leaving its own sympathies in doubt.

> inhibited by the constitution, then it is certain that a hundred laws may be enacted by that body, invading directly legitimate business pursuits, impairing and rendering worthless trades and occupations, and destroying the substantial value of private property to the amount of millions of dollars (4 Mich. 243 (Michigan, 1856), at 272).

Given the majority's principles, the legislature in its discretion to act for the public good could outlaw "tobacco and cigars" and enforce a certain diet for the people to further the public health. It could forbid "extravagant fashions for dress" that prove ruinous for some and stamp out "dancing" and "other youthful recreations" that seem "demoralizing in their tendency." Since agriculture is undeniably important for the state's prosperity, the government would have the right to "prescribe the mode in which every farmer shall cultivate and till his farm and entirely prohibit every other mode" (4 Mich. 243 (Michigan, 1856), at 272, 277-278).

Chase's original extra-textual arguments are harnessed here to the libertarian task of protecting an autonomous private sphere. Pratt deploys what must have been a true parade of "horrible" for the antebellum era, listing shocking potential extensions of legislative power. Only higher law review could protect ordinary private life from an endless variety of despotic attempts at public control, many of which were unforeseen and unimagined when the written constitution was established.

In part the increased amount of debate on extra-textual review in the late antebellum period represented a simple intensification of arguments first raised in the early republic by jurists like Chase and Iredell. However, late antebellum judges began to move past the old terms of debate and find a new consensus for judicial power, one that has lasted in one form or another to the present day. One way judges left the higher law controversy behind is obvious from the current shape of constitutional law. Instead of arguing about the propriety of enforcing extra-textual principles, judges increasingly began to argue that these same broad principles were already contained in "due process" and "law of the land" provisions in the constitutional text. While conceptions of substantive due process had been around for decades, they were usually considered more of a complement to extra-textual review than an alternative to it (for example, see *Bank of Columbia v. Oakely*, 17 U.S. 235, 244 (1819) and *Zylstra v. The Corporation of Charleston,* 1 Bay 382, 391 (South Carolina, 1794). In the late antebellum period, judges began using substantive due process as a way around the intractable higher law debate. The most famous example, *Wynehamer v. New York* (13 N.Y. 378 (New York, 1856)), used a due process clause to strike down an alcohol prohibition statute. All of the opinions arguing for the law's unconstitutionality begin with strident renunciations of using extra-textual principles in judicial review, before moving on to use substantive due process to strike the law (13 N.Y. 378 (New York, 1856), at 391-392, 410-411, 430, 452).

Although it took a while to win full acceptance,[23] substantive due process eventually offered an acceptable way for judges to enforce broad principles without running afoul of Iredell's argument that judicial review outside the written constitution had no legitimacy in a republic. But one should remember that this was not the only argument used by Iredell and later higher law opponents. They argued that reliance on extra-textual principles would make judicial power boundless and risk confining legislative discretion so tightly that effective governance would be impossible. Simply merging higher law principles with the due process clause doesn't meet this objection. Therefore, judges in the late antebellum period also began to outline what might be called zones of governmental discretion, areas where legislative action would be presumptively valid, while reserving the rights to impose limits outside of them. Two important cases in this movement were *Sharpless v. Mayor of Philadelphia* (21 Pa. 147 (Pennsylvania 1853)) and *Thorpe v. Rutland and Burlington* Railroad (27 Vt.

[23] See the blistering attack on substantive due process by Chief Justice Samuel Ames of the Rhode Island Supreme Court: "Surely if any clause in the constitution has a definite meaning, which should exclude all vagaries which would render the courts the tyrants of the constitution, this clause, embodying as it does the precious fruits of our English liberty, can claim to have it, both from its history and long received interpretation." It was "no vague declaration concerning the rights of property, which can be made to mean anything and everything; but an intensely practical and somewhat minute provision guarding the rights of persons *accused of crime*...." *State v. Keeran*, 5 R. I. 497 (Rhode Island, 1858), at 504-505, italics in the original.

49 (Vermont, 1855)). These state court cases, massively influential in later years, began with broad discussions of the power to tax and the police power, respectively, outlining just how much discretion the legislature has in wielding them for their usual purposes, even to the extent of causing injustice. But each opinion reserves a judicial authority to intervene if the legislature passes a law interfering with private rights for no real public interest or purpose

Together, using substantive due process and identifying zones of governmental discretion offered a way to end the old higher law debate through bypassing it. It took a while for these two elements to fuse and then win overwhelming acceptance, but in the decades after the Civil War this was generally achieved, helped along by the efforts of prominent national commentators like Thomas Cooley (Cooley, 1972). In *Munn v. Illinois* (94 US 113, 124 (1877)), the US Supreme Court cited *Thorpe v. Rutland and Burlington* and incorporated the zones of discretion approach to the police power into the 14th amendment, laying the doctrinal groundwork for constitutional limits on economic regulation that would take full shape later in the nineteenth century.

The results of these developments for judicial power are well demonstrated in an 1878 case *Bertholf v. O'Reilly* (74 N.Y. 509 (New York, 1878)), in which the New York Court of Appeals heard a challenge to a state law holding property owners liable for damages done by those intoxicated with liquor sold on their premises, even if their only personal connection to the event was renting

their property to a tavern or bar keep. The court stated at the outset that limits to legislative power must be determined "solely by reference to constitutional restraints and prohibitions." A power in the judiciary to void laws violating "natural justice and equity" may be supported in the *dicta* of some "learned judges," but it could not qualify as a legitimate basis of decision (74 N.Y. 509 (New York, 1878), at 514).

The good news was that this rule still left the court with ample grounds on which to review legislation. Under "the broad and liberal interpretation now given to constitutional guaranties," every truly fundamental right was protected by textual provisions: it was "unnecessary to seek for principles outside the Constitution." The "main guaranty" of these rights was the state constitution's requirement that "no person shall be deprived of life, liberty, or property without due process of law." Once unshackled from a "narrow or technical" reading, this clause secured to the individual a full range of freedoms, including as a part of "liberty" the right to "exercise his faculties and follow a lawful avocation" and as part of "property" the right "to acquire power and enjoy it any way consistent with the equal rights of others" (74 N.Y. 509 (New York, 1878), at 515).

However, these rights were subject to the state's police power to protect "the general safety and public welfare." Looking at the act in question, its aims were the "suppression of intemperance, pauperism, and crime." It was

undeniable that these were "public purposes within the legitimate scope of legislation." As a consequence, the act was valid, even though it departed drastically from common law understandings of legal responsibility and was "doubtless an extreme exercise of legislative power." Given that the object pursued by the law was one of real public concern, the means chosen by the legislature were almost entirely a matter of its discretion. The judges could not void a law simply for violating their "notions of justice" or for being "oppressive and unfair in its operation" (74 N.Y. 509 (New York, 1878), at 521, 520, 526, 516).

Thus, *Bertholf v. O'Reilly* represents the emerging consensus on judicial review in a fully crystallized form. Reliance on extra-textual principles is renounced in favor of a "broad and liberal" reading of due process, replacing an outmoded "narrow or technical" interpretation of the provision. This movement from what we could call procedural to substantive due process involved finding a plethora of specific individual rights in the provision, but the function of these rights was to trigger a general principle originally developed independently of due process: a public purpose requirement. Individual freedoms could only be hindered by laws aimed at the general welfare, but once a public purpose was established the legislature enjoyed largely untrammeled discretion. The challenged law's goals of suppressing "intemperance, pauperism, and crime" easily lined up with undoubted areas of public concern, like health, safety and morals. Therefore, it was constitutional even though it clearly treated many

property owners harshly and unfairly. By turning to due process, the court secured a general ground on which to scrutinize potentially extreme or unjustified legislation without having to resort to higher law review and its problematic legitimacy. By outlining ample zones of legislative discretion, the court avoided charges of extreme libertarianism or unlimited judicial power.

Moreover, in *Bertholf v. O'Reilly*we can recognize a conception of judicial power that, after many vicissitudes and changes, is still our own. Like the New York judges, we rely on substantive due process as a shield against actual and potential uses of public power that disturb different notions of what should be inviolate in the private sphere. We also specify areas (though different from theirs) where legislative action is presumptively valid, avoiding any risk of a judicially-imposed libertarian dystopia. Thus, we too have left behind the higher law debate that troubled the early republic and antebellum eras. But we have not really solved that original conflict over judicial power, any more than the judges in *Bertholf v. O'Reilly*did. We just have similar ways of avoiding it. We have no real answer for how judges can exercise a broad, discretionary authority over legislation without making America a mixed regime, instead of a republic in which all authority rests on popular sovereignty. Nor have we been willing to live without such a power in courts. We simply have methods to make it palatable and manageable. To the extent that jurists in the early republic were

confused about judicial review and higher law because they also sensed the same problem, we are their direct heirs.

State Supreme Court Cases Declaring State Laws Unconstitutional

(number of challenges given in parentheses)

States	1790-1799	1800-1809	1810-1819	1820-1829	1830-1839	1840-1849	1850-1859	1860-1869	1870-1879
New York	0 (-)	0 (2)	3 (7)	3 (18)	3 (14)	11 (46)	20 (93)	16 (103)	37 (186)
Indiana **(Entered Union 1816)**	-	-	0 (2)	1 (7)	2 (11)	2 (14)	28 (73)	14 (49)	20 (67)
Ohio **(Entered Union 1802)**	-	1 (1)	0 (-)	0 (2)	2 (14)	5 (16)	16 (71)	3 (31)	17 (79)
Pennsylvania	1 (3)	0 (3)	0 (9)	0 (12)	1 (15)	8 (36)	10 (50)	17 (65)	23 (102)
Massachusetts	0 (-)	0 (3)	1 (6)	0 (14)	0 (17)	1 (11)	7 (33)	5 (40)	11 (54)
New Hampshire	0 (-)	0 (-)	1 (4)	1 (4)	2 (3)	1 (9)	3 (13)	2 (14)	6 (25)
Virginia	1 (5)	0 (7)	0 (8)	1 (5)	0 (9)	0 (7)	0 (26)	1 (6)	7 (36)
Alabama **(Entered Union 1819)**	-	-	-	1 (5)	2 (11)	3 (17)	6 (36)	10 (41)	24 (117)

United States Supreme Court Cases
Declaring State and Federal Laws Unconstitutional

Jurisdiction	1790-1799	1800-1809	1810-1819	1820-1829	1830-1839	1840-1849	1850-1859	1860-1869	1870-1879
State	0	1	7	8	3	9	7	24	36
Federal	0	1	0	0	0	0	1	4	7

141

References

Bailyn, Bernard, ed. 1993. *The Debates on the Constitution*. New York: Library of America.

Barnett, Randy. 2004 *The Presumption of Liberty.* Princeton, NJ: Princeton University Press.

Berns, Walter. 1982. "Judicial Review and the Rights and Laws of Nature." *The Supreme Court Review*.

Blackstone, Sir William. 1979. *Commentaries on the Law of England*. Chicago: University of Chicago Press.

Cooley, Thomas. 1972. *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. NewYork: Da Capo Press, 1972.

Corwin, Edward. 1914. "The Basic Doctrine of American Constitutional Law." *Michigan Law Review*, Vol. 12.

Corwin, Edward. 1948. *Liberty Against Government: The Rise, Flowering, and Decline of a Famous Judicial Concept*. Baton Rouge: Louisiana State University Press.

Corwin, Edward. 1955. *The Higher Law Background to American Constitutional Law*. Ithaca, NY: Cornell University Press.

Crosskey, William. 1953. *Politics and the Constitution*. Chicago: University of Chicago Press.

Drew, Richard. April 16, 2004. "The Surge and Consolidation of American Judicial Power: Judicial Review in the States, 1840-1879." Paper presented at the annual meeting of the Midwest Political Science Association, Chicago.

Dunbar, Charles. 1895. *Bench and Bar of Mississippi*. Jackson, MS: Horace Evans.

Ellis, Richard J. 1971. *The Jeffersonian Crisis: Courts and Politics in the Young* Republic. New York: Oxford University Press.

Franck, Matthew. 1996. *Against the Imperial Judiciary: The Supreme Court vs. The Sovereignty of the People*. Lawrence: University of Kansas Press.

Gerber, Scott. 1995. *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation.* New York: New York University Press.

Goebel, Julius. 1971. *History of the Supreme Court of the United States: Antecedents and Beginnings*, Stanley N. Katz, ed. Cambridge: Cambridge University Press.

Goldstein, Leslie. 2001. *Constituting Federal Sovereignty*. Baltimore: John Hopkins University Press.

Gough, J. F. 1961. *Fundamental Law in English History*. London: Oxford University Press.

Graber, Mark. 1995. "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Review." *Constitutional Commentary*, vol. 12.

Graber, Mark. 1998. "Federalist or Friends of Adams: The Marshall Court and Party Politics." *Studies in American Political Development*. Vol. 12.

Grant, J. A. C. 1930. "The 'Higher Law' Background of the Law of Eminent Domain." *Wisconsin Law Review*, vol. 6.

Grey, Thomas. 1974. "Do We Have an Unwritten Constitution?" *Stanford Law Review*, vol. 26.

Grey, Thomas. 1978. "The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought." *Stanford Law Review*, vol. 30.

Grey, Thomas. 1988. "The Original Understanding and the Unwritten Constitution," in *Toward a More Perfect Union: Six Essays on the Constitution*, Neil York ed. Albany, State University of New York Press.

Hamilton, Alexander, James Madison, John Jay. 1961. *The Federalist Papers*, Jacob Cooke ed. Middletown, CT: Wesleyan University Press.

Harris, John, ed. 1948. *A History of the Supreme Court of Georgia*. Macon, GA: Burke.

Hobson, Charles. 1996. *The Great Chief Justice: John Marshall and the Rule of Law*. Lawrence: University of Kansas Press.

Kent, James. 1826. *Commentaries on American Law*. New York: Halsted.

Klein, Phillip. 1940. *Pennsylvania Politics, 1817-1832: A Game Without Rules*. Philadelphia: Historical Society of Pennsylvania.

Kramer, Larry. 2004. *The People Themselves: Popular Constitutionalism and Judicial Review*. Oxford: Oxford University Press.

Madison, James. 1987. *Notes of Debates in the Federal Convention*. New York: Norton.

Thomas McAffee. (2000). *Inherent Rights, the Written Constitution and Popular Sovereignty: The Founders' Understanding*. Westport, CT: Greenwood Press.

McAffee, Thomas. 1990. "The Original Meaning of the Ninth Amendment." *Columbia Law Review*, vol. 90.

McRee, Griffith. 1857. *The Life and Correspondence of James Iredell*. New York: D. Appleton.

Michaels, Helen. 1991. “The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of ‘Unwritten’ Individual Rights?” *North Carolina Law Review*, vol. 69.

Rakove, Jack. 1997. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Knopf.

Reid, John Phillip. 1995. *Constitutional History of the American Revolution*. Madison: University of Wisconsin Press.

Riker, William. 1996. *The Strategy of Rhetoric: Campaigning for the Constitution*. New Haven: Yale University Press.

Rowe, G. S. 1994. *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684-1809*. Cranbury, NJ: Associated University Presses.

Scott, Austin. 1899. “Holmes v. Watson: The New Jersey Precedent.” *American Historical Review*, vol. 4.

Senese, Donald. 1972. "Building the Pyramid: The Growth and Development of the State Court System in Antebellum South Carolina." *South Carolina Law Review*, vol. 24.

Shephard, Steven, ed. 2003. *The Selected Writings and Speeches of Edward Coke.* Indianapolis: Liberty Fund.

Sherry, Suzanna. 1987. "The Founders' Unwritten Constitution." *University of Chicago Law Review*, vol. 54.

Sherry, Suzanna. 1992. "Natural Law in the States." *University of Cincinnati Law Review*, vol. 61.

Stickles, Arndt. 1929. *Critical Court Struggle in Kentucky, 1819-1829*. Bloomington: Indiana University Press.

Stoner, James. 1992. *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*. Lawrence: University of Kansas Press.

Storing, J. Herbert, ed. 1981. *The Anti Federalist*. Chicago: University of Chicago Press.

Story, Joseph. 1987. *Commentaries on the Constitution of the United States*, Ronald Rotunda and John Nowak, eds. Durham: Carolina Academic Press.

Thornton, J. Mills. 1978. *Politics and Power in a Slave Society: Alabama, 1800–1860*. Baton Rouge: Louisiana State University.

Utter, William. 1927. "Judicial Review in Early Ohio." *The Mississippi Valley Historical Review*, vol. 14.

White, G. Edward. 1991. *The Marshall Court & Cultural Change, 1815-1835*. New York: Oxford University Press.

Wilson, James. 1967. *The Works of James Wilson*, Robert McCloskey, ed. Cambridge, Harvard University Press.

Wolfe, Christopher. 1994. *The Rise of Modern Judicial Review: From Constitutional Interpretation* to *Judge-Made Law*. Lanham, MD: Rowman and Littlefield.

John Yoo. 1993. "Our Declaratory Ninth Amendment." *Emory Law Review*, vol. 42.