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Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States

Nathan N. Frost, Rachel Beth Klein-Levine, and Thomas B. McAffee

I. INTRODUCTION

From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it.1

The time may ere long arrive when the minds of men will be prepared to make an offer to recover the Constitution.2

During his long and illustrious career as a constitutional law scholar, Professor Edward S. Corwin published a book in 1938 entitled Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government.3 He could not have known that, within another two generations, we would enter a period when some of our most thoughtful legal scholars would conclude “that the founding generation believed in higher law and saw the principle limiting government power as inherent in the social contract, which the written constitution only partially embodies.”4 Corwin would not

1 J.D., William S. Boyd School of Law, University of Nevada, Las Vegas, 2001.
3 Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. This author gratefully acknowledges support from the James E. Rogers Research Grant Foundation at the Boyd School of Law. Also appreciated were helpful comments on drafts by John V. Orth and colleagues, Chris Bryant and David S. Tannenhaus.
6 A Corwin scholar has asserted that “[b]efore his death in 1963 Corwin’s writings and lectures established him as a, perhaps the, foremost twentieth-century authority on the Constitution.” Richard Loss, Introduction to 1 Corwin on the Constitution 17 (Richard Loss ed., 1981) [hereinafter Corwin on the Constitution]. See also William M. Wiecek, The Lost World of Classical Legal Thought, 1886–1937, at 193 (1998) (describing Corwin as one “who would become the nation’s leading academic authority on the Constitution”). Corwin is not only one of our most distinguished constitutional historians, but was also known as “a philosopher of the Constitution.” Loss, supra, at 18.
7 Thomas B. McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding 3 (2000). See also id. at 172–73 (discussing Founders’ view of natural rights). This view is adopted, to use only one prominent example, in Lawrence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 259 (1988) (arguing that Ninth Amendment calls into question “majoritarianism” as foundational account for individual rights project of constitution; it shows that provisions of Bill of Rights must be seen as part of larger project in political morality rather than as “disembodied acts of capricious will that somehow gained widespread support”).
have been surprised, however, given that he had spent a career defending the idea that the legitimate role of the Supreme Court was limited to implementing the expressed will of the sovereign people and did not include imposing judicial constructions of the "higher law" background of the Constitution.\(^5\) He was well aware that there has always been a tendency to view constitutional interpretation as "a sustained project to define and maintain the proper relationship between government and its citizens,"\(^6\) and to reject seeing legal enforcement of the Constitution as limited to implementing a binding text adopted by a sovereign people.\(^7\) Moreover, Corwin would not have been surprised at the energy that has been devoted to reconciling the role of the Supreme Court as the ultimate arbiter of the proper relationship that should exist between citizens and government and the concept of popular sovereignty. The solution, now widely embraced, is that the people adopted a Constitution that empowered the Supreme Court to make precisely these decisions.\(^8\)

Indeed, it may be persuasively argued that Corwin is largely responsible for underscoring a new rationale for a doctrine of judicial supremacy. It was

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\(^5\) Far from being a twentieth century advocate of constitutional worship, Corwin was one who "emphasizes the serviceability of a measure to popular need as distinguished from its agreement with the founders' intention." Loss, supra note 3, at 21.

\(^6\) Sager, supra note 4, at 263. Corwin well understood that "[t]he Constitution's claim to be considered law and to be obeyed may rest on either of two ideas. Law may be understood as 'an unfolding of the divine order of things or as an expression of human will—as an act of knowledge (or revelation) or an act of power.'" Loss, supra note 3, at 22. For Corwin it was clear that the latter idea was the superior way to justify the Constitution's claim to being supreme law.

\(^7\) The power of the people as sovereign, and the question whether moral or political limits on that power are appropriately understood as legal and constitutional limits, is at the center of the historical (and ongoing) debate over the legitimate role of courts under a republican constitution. See, e.g., Thomas B. McAffée, Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis, 61 U. Cin. L. REV. 107, 125 nn.63–64 (1992) [hereinafter McAffée, Prolegomena] (summarizing natural law readings of Constitution and their rejection of "the positivist assumption that rights 'have no support other than the will of the authority that creates the rights'" (quoting Edward J. Erler, Natural Right in the American Founding, in THE AMERICAN FOUNDING—ESSAYS ON THE FORMATION OF THE CONSTITUTION 195, 197 (J. Jackson Barlow et al. eds., 1988))). For a description of one of our earliest debates, concerning whether courts might invalidate legislation solely on the ground that it authorizes "manifest injustice by positive law," see infra notes 55–79 and accompanying text.

\(^8\) See HERMAN BELZ, A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE 239 (1998) ("In American law schools there seems to be an inexhaustible supply of partisans of judicial governance."). But when it is considered that popular sovereignty is one of the underpinnings of our constitutional order, what is perhaps most striking is that these same views are "systematically opposed to popular self-government." Id. at 240. For an attempt to reconcile the ideas of self-government and popular sovereignty with an expansive, indeed open-ended, role for courts as constitutional interpreters, see CHRISTOPHER L. EISGRÜBER, CONSTITUTIONAL SELF-GOVERNMENT (2001). See id. at 116 (contending that judges should not "treat unenumerated rights less respectfully than enumerated ones," based on text of Ninth Amendment; and maintaining that doing so embodies "the aesthetic fallacy" that assumes that interpreting such open-ended provisions with full force renders "specific rights" in Bill of Rights "almost superfluous").
Corwin, after all, who linked the “higher law” background of American constitutional law with the Ninth Amendment, suggesting “that the principles of transcendental justice have been here translated into terms of personal and private rights.”\(^9\) All too often those who saw the connection between the “higher law” and the text of the Constitution paid considerably less attention to Corwin’s own theme that legislative sovereignty was ultimately displaced only by popular sovereignty:

Why, then, did not legislative sovereignty finally establish itself in our constitutional system? . . . In the first place, in the American written Constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a statute emanating from the sovereign people. Once the binding force of higher law was transferred to this new basis, the notion of sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a sovereign law-making body which is subordinate to another law-making body.\(^10\)

Although Corwin was the one who long ago pointed to two competing theories of judicial review that have characterized American legal thought from the earliest days of the republic—one based on the authority of the people and one based on unwritten “principles” of law and the power of courts to give effect to higher law concepts\(^11\)—there is no room for doubt that his loyalties were to the written Constitution adopted by the authority of the people. For

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\(^9\)Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law, in 1 The Rights Retained by the People* 67, 70 (Randy E. Barnett ed., 1989) [hereinafter Corwin, "Higher Law" Background]. See also 1 CORWIN ON THE CONSTITUTION, supra note 3, at 169 (concluding from Ninth Amendment that Constitution “was not framed to give us anything, but to protect inherent rights already possessed”) (quoting Governor Alfred M. Landon, speech at Topeka, Kan., Jan. 29, 1936)); 2 CORWIN ON THE CONSTITUTION, supra note 3, at 81 (concluding from Ninth Amendment that rights “were not fundamental because they found mention in the Bill of Rights, but they found mention in the Bill of Rights because they were of their own nature fundamental”). See also Loss, supra note 3, at 31 (“Corwin’s reference to the Ninth Amendment underlines the kinship between constitutional symbolism and the higher law theory of the Constitution. Corwin prefers the instrumental interpretation which he also attributes to the founders.”). It is thus hardly a coincidence that Corwin’s essay would be featured in Professor Randy E. Barnett’s leading compilation seeking to advance the cause of the unenumerated rights interpretation of the Ninth Amendment. Given Corwin’s larger views, however, which included “his acceptance of the positive idea of law” and his belief that a “return to higher law, understood in contrast to positive law,” is “neither possible nor desirable,” *id.* at 28, one still suspects that he would be rolling over in his grave. See also infra notes 35, 138 and accompanying text.

\(^10\)Corwin, "Higher Law" Background, supra note 9, at 91. Thus, for the early American leaders who brought us the state constitutions, “[h]igher law thereby became subsumed in the supremacy of written constitutions.” WIECK, supra note 3, at 21.

\(^11\)See 1 CORWIN ON THE CONSTITUTION, supra note 3, at 195, 199–201.
Corwin, the Constitution might be "the embodiment of sound political theory and of a venerable legal tradition," but it was also a matter of grave concern that it had become "the high responsibility of its official expounders" to ensure, by any means necessary, that it remained "the People's Law" and that it "meet their need."\footnote{Edward S. Corwin, Court Over Constitution 229 (1938) [hereinafter Corwin, Court Over Constitution].}

The idea that the Founders of the federal Constitution equated inalienable natural rights with legal and constitutional rights is "perhaps the central myth of modern American constitutional history."\footnote{Thomas B. McAffee, Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights, 36 Wake Forest L. Rev. 747, 748 (2001) [hereinafter McAffee, Inalienable Rights]. For a general discussion, see Charles L. Black, Jr., A New Birth of Freedom (1997); Douglas W. Kmiec & Stephen B. Presser, The American Constitutional Order 136 (1998); Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights (1995); 1 & 2 The Rights Retained by the People (Randy E. Barnett ed., 1989) (1993); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975) [hereinafter Grey, Unwritten Constitution]; Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987). Other works supporting this view are collected in Thomas B. McAffee, A Critical Guide to the Ninth Amendment, 69 Temple L. Rev. 61, 63 n.11 (1996) [hereinafter McAffee, Critical Guide], and sprinkled throughout the present Article. For recent attempts to link the Ninth Amendment with the idea of enforceable inalienable rights, see Robert M. Hardaway, No Price Too High: Victimless Crimes and the Ninth Amendment (2003); Marks C. Niles, Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights, 48 UCLA L. Rev. 85 (2000); Christopher J. Schmidt, Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process, 32 U. Balt. L. Rev. 169 (2003); Eric M. Axler, Note, The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights, 24 Seton Hall Legis. J. 431 (2000).} It is a commentary on the lack of sustained attention American legal scholarship has given to state constitutional development that, until recently, state constitutional law scholars have not been an important source of correction.\footnote{McAffee, Prolegomena, supra note 7, at 131–32. “America had developed the understanding of ‘a constitution established by the people, and unalterable by the government.’” Id. at 132 (quoting James Madison, The Federalist No. 53, at 359, 360 (James Madison) (Jacob E. Cooke ed., 1961). Indeed, a number of the “Federalists insisted that guarantees of basic rights were not necessary where the people ruled,” Michael Kent Curtis, Judicial Review and Populism, 38 Wake Forest L. Rev. 313, 341 (2003), as reflected in the popular sovereignty on which the Constitution was founded.} It has thus been asserted that...
“the earliest state constitutions were largely viewed as merely committing to writing ancient and inalienable unwritten rights.” In view of the central role that natural rights thinking played in the decision to declare independence from Great Britain, it is presumed even by many constitutional lawyers that the idea that “Parliament’s authority was legally limited by an unwritten constitution incorporating natural law” was a leading assumption of the revolutionary era.

Beginning with the premise that “state court judges have seen their role as implementing the principles of a just society,” it has been argued that “whether a state court should follow federal constitutional principles or instead consult its own constitution varies with the justice or injustice of federal interpretation.” Reviewing the history showing that states initially led in striking down laws authorizing slavery and requiring segregated schools, the same scholar, Professor Suzanna Sherry, contends that it is time to stop

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Suzanna Sherry, Foreword: State Constitutional Law: Doing the Right Thing, 25 Rutgers L.J. 935, 937–38 (1994) [hereinafter Sherry, Doing the Right Thing] (alteration in original) (citation omitted). See also Wiecek, supra note 3, at 49 (noting that “antebellum courts in nearly half the states of the Union,” relied on “doctrines of the social compact, common law, vested rights, republican government, natural law, limited government, just compensation, retained rights, obligation of contracts, principles of right and justice, personal liberty, and any other concept that might occur to them as inherent limitations on legislative power”).


Sherry, Doing the Right Thing, supra note 16, at 938.
substituting “a sterile argument over the arcana of federalism for a robust debate over the meaning of our fundamental constitutional principles” that will determine the real significance of our constitutional freedoms.\(^{19}\) In her mind, then, it is generally a judicial task to determine the appropriate limits that should be imposed on legislative power. If state judges would rediscover their heritage of looking behind the written constitution to find the limits a just society would impose on legislative power, they could become committed to “the goal of doing justice” rather than invoking the “judicial restraint and strict constructionism” that have prompted them to forget “the natural law heritage they once shared with the federal courts.”\(^{20}\) Notice that this is a normative theory of interpretation, not a descriptive one; history comes into play because early American history is thought to confirm that those who adopted the Constitution perceived courts as empowered to construe the Constitution to ensure just outcomes.

But in the years leading to the Philadelphia Convention, “Americans who discussed natural liberty and constitutions typically assumed that only such natural liberty as was reserved by a constitution would be a constitutional

\(^{19}\)\textit{Id.} at 943–44. In fact, considering that the states’ declarations of rights “were not addressed to the judiciary,” it has been observed that “[j]udicial review of legislation and the idea of judges as the prime protectors of rights are both anachronistic notions.” Tarr, \textit{supra} note 15, at 857–58.

\(^{20}\)Sherry, \textit{Doing the Right Thing}, \textit{supra} note 16, at 943. For more skeptical treatment of courts attempting to do the “Right Thing” by the imposition of the natural rights they perceive as “inherent” in the name of the Constitution, see STEVEN D. SMITH, \textit{THE CONSTITUTION AND THE PRIDE OF REASON} (1998); see also Steven D. Smith, \textit{Missing Persons}, 2 NEV. L.J. 590, 591 (2002) (concluding that “[h]umans are . . . far more creatures of imagination than of reason, and our legal and moral choices are determined more by the concrete pictures we see, or can conjure up, than by our theories or ‘Philosophers’ Briefs’”); Thomas B. McAffee, \textit{Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists}, 4 S. CAL. INTERDISC. L.J. 501 (1995) [hereinafter McAffee, \textit{Substance Above All}]. For general support of these arguments, see McAffee, \textit{supra} note 4; Thomas B. McAffee, \textit{The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?}, 80 OR. L. REV. 1245 (2001) [hereinafter McAffee, \textit{Should We Have an Unwritten Constitution?}]; Michael W. McConnell, \textit{The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution}, 65 FORDHAMP L. REV. 1269 (1997) (criticizing Professor Dworkin’s claim that moral reading approach is most faithful interpretation of text of Constitution). The present reader will have to determine the extent to which Sherry’s more recently articulated views are reconcilable with those set out above in text. Compare DANIEL A. FARBER & SUZANNA SHERRY, \textit{DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS} 18–19 (2002) (contending that Ninth Amendment “was designed to forestall the sort of narrow interpretation of the Bill of Rights that Bork engages in” and concluding that Madison sought to protect “natural or inalienable rights” against “legislative encroachment”), with \textit{id.} at 139 (expressing skepticism about Dworkin’s remarkable confidence “that difficult moral dilemmas have clear-cut answers” and stating preference for Learned Hand’s opposition to being ruled by “Platonic guardians”). See Thomas C. Grey, \textit{Judicial Review and Legal Pragmatism}, 38 WAKE FOREST L. REV. 473 (2003); Suzanna Sherry, \textit{Judges of Character}, 38 WAKE FOREST L. REV. 793 (2003); Steven D. Smith, \textit{Desperately Seeking Serenity}, 19 CONST. COMMENT. 523 (2002); Steven D. Smith, \textit{The Pursuit of Pragmatism}, 100 YALE L.J. 409 (1990).
right." It was a standard view that the state governments, "unlike governments of delegated and enumerated powers, had (as representatives of the sovereign people) all powers not constitutionally forbidden them." The consistent understanding was that as a government of "plenary" power, "a state constitution does not grant governmental power but merely structures and limits it." To its Framers, precisely because the proposed federal Constitution gave power to the national government only when it was explicitly conferred, it raised an inference in favor of liberty. James Wilson explained:

When the people established the powers of legislation under their separate governments, they invested their representatives with every

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21 Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 932 (1993). Moreover, although Americans contended that some portions of natural liberty were inalienable and therefore ought not to be infringed, they tended to consider a government's infringement of an inalienable right a reason for questioning the legitimacy of the legal system that permitted such a violation rather than a basis for making a claim through such a system.

22 Id.


24 G. Alan Tarr, Understanding State Constitutions 7 (1998) ("[S]tate governments have historically been understood to possess plenary legislative powers . . . ."); Christian G. Fritz, The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West, 25 Rutgers L.J. 945, 965 (1994) (noting that state legislatures were viewed as having "plenary power excepting what the people chose to withhold"; this "virtual omnipotence stemmed from the operation of popular sovereignty at the state level," given that as "the creature of that supreme power— the people," the legislature must be "limited by the [state's] Constitution");) (quoting 1 Debates and Proceedings of the Constitutional Convention of the State of California, Sept. 28, 1878, at 209, 826 (Sacramento, State Office 1880–81)) (alteration in original); Lewis Karl Bonham, Note, Unenumerated Rights Clauses in State Constitutions, 63 Tex. L. Rev. 1321, 1331 (1985) (noting that "scholars have always regarded state governments as possessing plenary power").

25 G. Alan Tarr & Mary Cornelia Aldis Porter, State Supreme Courts in State and Nation 50 (1988). See also Bd. of Dirs. v. All Taxpayers, 529 So. 2d 384, 387 (La. 1988) (stating that "a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its Legislature," which "may enact any legislation that the state constitution does not prohibit"); State ex rel. Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978) ("Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby."); Donald S. Lutz, Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions 60 (1980) (stating that drafters of state constitutions "assumed that government had all power except for specific prohibitions contained in a bill of rights"); James T. McHugh, On The Dominant Ideology of the Louisiana Constitution, 59 Ala. L. Rev. 1579, 1611–13 (1996) (contrasting Louisiana and federal constitutions); Robert F. Williams, State Constitutional Law Processes, 24 Wm. & Mary L. Rev. 169, 178 (1983) ("State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power.").
right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case [of the states] everything which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and every thing which is not given, is reserved.\textsuperscript{25}

The purpose of the Ninth Amendment, then, was not to secure unenumerated fundamental rights, but to ensure that the national government remained one of limited powers, by which the rights of the people would be reserved.\textsuperscript{26} The "other" rights "retained" by the people\textsuperscript{27} in the Ninth Amendment included all the activities that would continue to be unaffected when the national government exercised its limited and enumerated powers—whereas the states would continue to regulate all the activities of the people.\textsuperscript{28} This state power to regulate more generally explains why "no previous state constitution featured language precisely like the Ninth's—a fact conveniently ignored by most mainstream accounts."\textsuperscript{29}

A good deal of modern debate in constitutional law has concerned the appropriate methods for construing constitutional rights. But the focus on

\textsuperscript{25}James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167–68 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION]. Hence Nathaniel Gorham could justify the omission of a bill of rights from the proposed federal Constitution on the grounds that a bill of rights enabled the people "to retain certain powers," given that under the state constitutions "the legislatures had unlimited powers." Id. at 335 (Sept. 27, 1787).

\textsuperscript{26}See McAfee, supra note 4; Thomas B. McAfee, The Original Meaning of the Ninth Amendment, 90 COLUM. L. REV. 1215 (1990) [hereinafter McAfee, Original Meaning].

\textsuperscript{27}U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). See generally Thomas B. McAfee, The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People, 16 S. ILL. U. L.J. 267 (1992) [hereinafter McAfee, Social Contract Theory] (discussing Ninth Amendment).

\textsuperscript{28}This is why it's important to recognize that

[d]ifferences in constitutional language between federal and state guarantees . . . may indicate something more than a disagreement over the scope of various individual rights; and when it does, this must be taken into account in state constitutional interpretation. Put differently, if one is to remain faithful to the original understanding of state constitutions, one must look not only to textual differences between specific state and federal provisions but also to the broader political and theoretical context from which the state provisions came.

Tarr, supra note 15, at 858.

"individual rights" has sometimes prompted us to pay too little attention to the "right" deemed most fundamental by those who brought us the state and federal constitutions: the right of the people collectively to make determinations about how they should be governed. As demonstrated in Part II.A, the key to understanding the development of the power of judicial review, both by the United States Supreme Court and by the highest courts of the states, is to perceive courts as bound by the law established by the people. Despite some historical flirtation with "natural justice" based judicial review, as shown in Part II.B, it is clear that the almost universal recognition of the people's right to amend their constitutions, documented in Part II.C, is based on an acknowledgment of their ultimate authority to make, alter, or abolish the forms of government under which they live.

From the beginning, state constitutions referred to "inalienable" rights, as is shown in Part III.A, but these general, hortatory declarations did not create enforceable limits on the constitutional powers of the other branches of government. Even as states adopted provisions similar to the federal Constitution's Ninth Amendment, which referred to the other rights "retained" by the people, Part III.B supports the view that the courts continued to construe such provisions as not adding to the "prohibitions" and "specific limitations" that the state constitutions imposed on governmental powers. As will be shown in Part III.C, this construction of the "retained" rights provisions is also the one that is most consistent with the power of the people to make decisions about how they are to be governed.

Over the years, courts have sometimes sought to reconcile the textualism articulated and defended in *Marbury v. Madison*\(^{30}\) with a more "creative" judicial function that discovered "fundamental rights" to be protected by due process clauses of state and federal constitutions. Even though a good deal of recent scholarship calls into doubt modern assumptions about the timing and significance of crucial features of the *Lochner* era, as reflected in the treatment of such themes in Part IV.A, the evidence reviewed in Part IV.B supports the view that it is difficult to square modern fundamental-rights substantive-due-process decisions with constitutional decision-making rooted in the text. Even so, given the inclusion of common law and customary conceptions of law in some of the earliest due process decisions that might be described as "substantive," and in light of its historical development, as illustrated in Part IV.C, it is almost unthinkable that we would terminate altogether the commitment to substantive due process. It may well be that a key to finding some appropriate balance is to look for what the people themselves have deemed fundamental, rather than assuming that courts possess a unique ability to discern the rights properly deemed "inalienable." To this end, the Court should remain true to its common-law heritage, looking for fundamental rights.

\(^{30}\)5 U.S. (1 Cranch) 137 (1803).
that are found either in the text or are "objectively, 'deeply rooted in this Nation's history and tradition.'"\(^{31}\)

II. POPULAR SOVEREIGNTY, JUDICIAL REVIEW, NATURAL JUSTICE, AND THE "RIGHT" TO AMEND CONSTITUTIONS

*In the view of Wilson, the Constitution was an "act of the people themselves," and he presented the image that a constitution "is as clay in the hands of a potter: [the people] have the right to mould, to preserve, to improve, to refine, and to finish it as they please."*\(^{32}\)

*The basis of our political systems is the right of the people to make and alter their Constitutions of Government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all. The very idea of the power and the right of the people to establish Government presupposes the duty of every individual to obey the established Government.*\(^{33}\)

It has been a standard practice for state constitutions to affirm the sovereignty of the people,\(^{34}\) and scholars acknowledge the centrality of the doctrine of popular sovereignty to American constitutionalism.\(^{35}\) For those who


\(^{34}\)See, e.g., Ark. Const. of 1874, art. II, § 1 ("All political power is inherent in the people," who "have the right to alter, reform, or abolish the same in such manner as they may think proper"), reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 334 (Francis N. Thorpe ed., William S. Hein & Co. 1993) (hereinafter STATE CONSTITUTIONS); L.A. Const. Bill of Rights, art. 1, reprinted in 3 STATE CONSTITUTIONS, *supra*, at 1522 ("All government, of right, originates with the people, is founded on their will alone and is instituted solely for the good of the whole."); CONST. OF REPUBLIC OF TEX.—1836, DECLARATION OF RIGHTS, ¶ 2 (1836), reprinted in 6 STATE CONSTITUTIONS, *supra*, at 3542 ("All political power is inherent in the people," who have "an inalienable right to alter their government in such manner as they may think proper."); VA. Const. of 1776, Bill of Rights, § 3, reprinted in 7 STATE CONSTITUTIONS, *supra*, at 3813 ("[W]hen any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be deemed most conducive to the public weal.").

\(^{35}\)See, e.g., KAY COLLETT GOSS, *THE ARKANSAS STATE CONSTITUTION* 25 (1993) (noting Arkansas preamble reflects its Framers' "belief in popular sovereignty"); TARR, *supra* note 23, at 74 (citing to state constitutions invoking people's power and noting that they commonly
drafted the federal Constitution, the question of sovereignty was central inasmuch as it was the sovereign who held the power to make law. In their minds, it was clear that “the Constitution was an act of popular legislation.”

A. Popular Sovereignty, the Written Constitution, and Judicial Review

Since the people themselves “were the supreme legislators, while the ordinary legislators comprised ‘mere agents of the people,’” it followed that legislation that violated the Constitution was void. Modern Americans tend to associate the doctrine of judicial review with the justifications offered by Justice Marshall in Marbury. But it is fair to state that “[o]nly the eclipse of state constitutional law has led to Marbury’s enshrinement as the case that ‘established’ judicial review.” In fact, judicial review had not only been practiced and defended at the state constitutional level, but with arguments that fully anticipated the ones that would be offered by Alexander Hamilton in The Federalist and relied upon in Marbury.

included “an explicit recognition that political power came from the people,” and that such provisions clarified “that the people did not require amendment or provisions to change the constitution” because they presumed existence of such power and “merely specified a procedure by which it could be exercised”); Albert P. Brewer, Constitutional Revision in Alabama: History and Methodology, 48 Ala. L. Rev. 583, 602 (1997) (“Because of the sovereign power vested in them, the people of a state may alter or amend their constitution in whole or in part.”); Fritz, supra note 23, at 949 (finding that “the practice of a constitutional convention” provided “the means of translating the principle of popular sovereignty into practice”); id. at 950 (stating that Americans established “the unequivocal distinction between ordinary and constitutional law, with the latter legally enforceable and enjoying unquestioned superiority as legal authority”); McHugh, supra note 24, at 1600 (“The first article of both the Louisiana Bill of Rights and the Constitution as a whole signify this fundamental value”—of popular sovereignty); Arvel (Rod) Ponton III, Sources of Liberty in the Texas Bill of Rights, 20 St. Mary’s L.J. 93, 95 (1988) (noting that “many states in the early 1800s declared that people had the sole right to govern themselves”).

Corwin, Court Over Constitution, supra note 12, at 10. “‘The fabric of American empire,’ wrote Hamilton in Federalist No. 22, ‘ought to rest on the solid basis of the Consent of the People. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.’” Edward S. Corwin, The Twilight of the Supreme Court: A History of Our Constitutional Theory 1 (1934) [hereinafter Corwin, Twilight].

Corwin, Court Over Constitution, supra note 12, at 10–11.

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

Powell, supra note 15, at 294. Powell asserts that “investigation of state constitutional history will strengthen the conclusion that Marbury’s exercise of judicial review took place against a background of state discussion and activity that rendered that part of Marshall’s opinion rather uncontroversial.” Id. It has also been observed that the Supreme Court itself rarely cited Marbury during the nineteenth century in support of the practice of judicial review, Davison M. Douglas, The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”, 38 Wake Forest L. Rev. 375, 376–77 (2003), and nineteenth century legal scholars did not stress that Marbury decided the question of judicial review. Id. at 382.

The classic example is the decision in Virginia in the case of *Kamper v. Hawkins*, decided a decade prior to the Supreme Court’s more famous decision. Judge William Nelson stated that a constitution

is to the governors, or rather to the departments of government, what a law is to individuals—nay, it is not only a rule of action to the branches of government, but is that from which their existence flows, and by which the powers (or portions of the right to govern) which may have been committed to them are prescribed—it is their commission—nay, It is their creator.

Critical to this understanding is that “the legislature is not sovereign but subordinate; they are subordinate to the great constitutional charter, which the people have established as a fundamental law, and which alone has given existence and authority to the legislature.”

During the very year that the Convention met in Philadelphia, this justification of judicial review was relied on by James Iredell in defending the exercise of judicial review in the North Carolina case of *Bayard v. Singleton*. In striking down a law that denied the right to trial by jury, the North Carolina court held that no act of legislation “could by any means repeal or alter the constitution.” Responding to Richard Spaight’s attack on the court’s use of judicial review, Iredell observed that the constitution was “a real, original contract between the people and their future government,” and argued that it was “a fundamental law, and a law in writing” which the courts “must take notice of . . . as the groundwork of [the judicial power] as well as of all other authority.” It followed that “the exercise of [judicial power] is unavoidable, the Constitution not being a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wilfully blind themselves.”

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43Id. at 36 (Roane, J.).

441 N.C. (Mart.) 5 (1787). For a treatment of the *Bayard* case and its significance, see MCAFEE, *supra* note 4, at 58, 63–65, and for a treatment of all the cases from the confederation period, see id. at 51–66.

45*Bayard*, 1 N.C. (Mart.) at 7.


47Id. at 173.

48Id. at 174. Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795) (contrasting English system where “there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested,” with America, where “[t]he constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land”); *Accord Kamper*, 3 Va. at 77–78 (Tucker, J.) (“[T]he constitution is not an
This view of judicial authority stems from seeing judicial review "as a straightforward part of the ordinary judicial business of comparing legal rules." In performing the required task, judges "are only the administrators of the public will," and the decision to treat a law as void because it conflicts with the constitution is only "because the will of the people, which is therein declared, is paramount to that of their representatives, expressed in any law." As the highest court in South Carolina put it, the legislature is supreme in all cases in which it is not restrained by the constitution; and as it is the duty of the legislators as well as of the Judges to consult this and conform their acts to it, so it ought to be presumed that all their acts are conformable to it, unless the contrary is manifest.

B. "Natural Justice" and Judicial Review

There was, of course, another way of justifying a power of judicial review that basically had nothing to do with seeing a constitution as the enactment of the popular sovereign. This is the justification referred to by Governor Hutchinson of Massachusetts, who wrote in regard to the Stamp Act: "The prevailing reason at this time is that the act of Parliament is against Magna Charta, and the natural rights of Englishmen, and therefore according to Lord Coke, null and void." On this view, courts have authority to give effect to the higher law of natural justice. Lord Coke's statements suggested the legal status of higher law concepts "were sometimes combined with Locke's more...

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49Powell, supra note 15, at 290. Even at the Philadelphia Convention, Luther Martin argued against a proposed revisionary power in which judges would be involved on the ground that the constitutionality of laws "will come before the Judges in their proper official character," which would give them "a negative on the laws," so the revisionary power would give them "a double negative." THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES 238 (Winston U. Soldberg ed., 1958). For further useful discussion, see Jacobsohn, supra note 17, at 22–27.


52See, e.g., MCAFFEE, supra note 4, at 61 ("Edward Corwin long ago pointed out that two competing theories of judicial review have characterized American legal thought from the earliest days of the republic.").

53CORWIN, COURT OVER CONSTITUTION, supra note 12, at 22 (quoting Governor Hutchinson).
universal natural law to justify judicial enforcement of natural law."\(^54\)

Thus in 1772, George Mason, the draftsman of the Virginia Declaration of Rights, objected to a 1682 act of the Virginia assembly, which had purported to sell certain Indian women into slavery, contending that it was "void in itself, because contrary to natural right."\(^55\) Indeed, he contended that the laws of nature are binding because they are the law of God, and he asserted that courts had ruled that "[a]ll human constitutions which contradict [God's] laws, we are in conscience bound to disobey."\(^56\) Under Mason's 1772 formulation, even the written constitution would be binding on courts only to the extent that it actually embodied principles of natural right, and courts might even invalidate provisions of a popularly adopted written constitution. By the time America debated the ratification of the federal Constitution, however, Mason had adopted the positivist conception of constitutionalism that was heavily relied on by the Constitution's antifederalist opponents in demanding the Bill of Rights.\(^57\) Seeking the adoption of a federal Bill of Rights, Mason argued that "the Laws of the general Government being paramount to the Laws & Constitutions of the several States, the Declaration of Rights in the separate States are no Security."\(^58\)

But the idea of legally enforceable "inherent" rights did not die with the adoption of the federal Constitution. Indeed, early in this century, Professor Charles Haines contended that "[t]he practice of judicial control acquired its significance not so much because statutes held contrary to the provisions of written constitutions were invalidated, but because courts were prevailed upon to recognize restrictions on legislative power independent of constitutional limitations."\(^59\)

In 1798, Justice Chase asserted:

There are acts which the Federal, or State, Legislatures cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or take away that

\(^{54}\) MCAFFEE, supra note 4, at 61. For scholarly treatment of judicial reliance on unwritten principles of law in invalidating acts of legislation during the early years of the American republic, see MASSEY, supra note 13, at 29–52; Sherry, Doing the Right Thing, supra note 16; Sherry, Extra-Textual Interpretation, supra note 16; Sherry, supra note 13; Suzanna Sherry, Natural Law in the States, 61 U. CIN. L. REV. 171 (1992) [hereinafter Sherry, Natural Law]; John Choon Yoo, Our Declaratory Ninth Amendment, 42 EMORY L.J. 967, 999–1035 (1993).

\(^{55}\) Robin v. Hardaway, Jeff. 109 (Va. 1772), quoted in 1 CORWIN ON THE CONSTITUTION, supra note 3, at 199. The case is treated briefly in MCAFFEE, supra note 4, at 61–62.

\(^{56}\) Robin, Jeff. at 114.

\(^{57}\) As to Mason's positivist views, see MCAFFEE, supra note 4, at 129–30. On the antifederalists generally, see id. at 127–34.

\(^{58}\) 13 RATIFICATION OF THE CONSTITUTION, supra note 25, at 348.

\(^{59}\) HAINES, supra note 51, at 289. See also WIECEK, supra note 3, at 30 ("Both state and federal courts drew on the doctrines of higher law to monitor state legislation.").
security for personal liberty, or private property, for the protection whereof the government was established.  

There is little question that Justice Chase's comments are, at most, dictum in favor of reading the Constitution as lending itself to natural rights-based adjudication. He specifically stated that the sole inquiry was whether the action of the Connecticut Legislature offended the Ex Post Facto Clause of the federal Constitution, and his analysis concluded that the Clause had no application to noncriminal, civil legislation. Indeed, Justice Chase even acknowledged that state legislatures "retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States." Nonetheless, despite acknowledging that state legislatures retain all "powers of legislation," it is clear that his approach to understanding what this means and implies was not "document-centered." Indeed, "Justice Chase expressed his willingness in a proper case to prevent a legislature from intruding upon private contract or property rights, even if not 'expressly

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60Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion) (emphasis omitted). Justice Chase concluded: "An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." Id. (emphasis omitted). For Justice Chase, then, "[t]he genius, the nature, and the spirit, of our State Governments" generated prohibitions on acts of legislation that violated principles of natural law, and courts would thereby be compelled to conclude that "the general principles of law and reason forbid them." Id. (emphasis omitted). Corwin asserted that "Chase is to be regarded as foreshadowing the doctrine of Kent, Story, and to some extent, that of Marshall, besides a host of lesser contemporaries,—in a word, the main trend of American constitutional decisions for a generation." CORWIN, TWILIGHT, supra note 36, at 376.

61Calder, 3 U.S. (3 Dall.) at 387.

62See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 42-44 (1985). There has been controversy as to whether the prohibition of ex post facto laws should have been read to include retroactive civil as well as criminal laws. Id. at 43-44; see also CORWIN, TWILIGHT, supra note 36, at 57. However, Justice Chase contended that his narrower construction "was confirmed by other clauses of the Constitution, for if the term 'ex post facto' had included retroactive civil laws, it would have been unnecessary to forbid the states to impair contracts or the United States to take property without compensation." CURRIE, supra, at 42-43.

63Calder, 3 U.S. (3 Dall.) at 399. Professor Currie characterizes this statement as "paraphrasing the tenth amendment." CURRIE, supra note 62, at 46. For Justice Chase, though, a judge "must interpret the 'vital principles in our free republican government,' whether they are to be found in the words of the Constitution or not," and thus the document itself "is to be read not as words but as a sufficient foundation for this form of politics." WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 137 (1993). See also GREY, ORIGINAL UNDERSTANDING, supra note 17, at 148 (stating that despite acknowledging conventional understandings, Justice Chase apparently concluded that "this plenary legislative power was not so plenary after all").

64HARRIS II, supra note 63, at 136 (concluding that for Justice Chase, "the power of an institution may be constrained, in the absence of express boundaries designated from within the document, on the basis of . . . the constitution-maker['s]' purposes in creating institution of legislature).
restrained by the Constitution."\textsuperscript{65} So Justice Chase winds up at nearly the opposite position from the then-standard view of the authority held by a legislature of general powers—the one formulated in a separate opinion written by Justice Iredell.

A related question, however, is whether Justice Chase intended, even in dicta, to assert a judicial power "to strike down any law offending his sense of natural justice."\textsuperscript{66} For one thing, despite his reference to reason and justice in \textit{Calder v. Bull}, "the limiting principles he articulated seem to be drawn more from Whig understandings of the British constitution than from doctrines of natural law and natural right[s]."\textsuperscript{67} In addition, Justice Chase's approach to the ex post facto question can be described as "fiercely positivistic, even literalistic."\textsuperscript{68} Moreover, based on a general conception of inalienable rights, it is probably fair to assert that "the 'great first principles' Chase had in mind were those he saw in the Federal Constitution."\textsuperscript{69} But it is equally critical to recognize that, for Justice Chase, the limiting principles of the Constitution were not restricted to the prohibitions on power stated explicitly in the text.\textsuperscript{70} Rather, it is enough that "[t]he genius, the nature, and the spirit of our State Governments amount to a prohibition of such acts of legislation."\textsuperscript{71} Moreover,

\textsuperscript{65} Laurence H. Tribe, American Constitutional Law 1336–37 (3d ed. 2000) (quoting Calder, 3 U.S. (3 Dall.) at 386 (Chase, J., seriatim opinion)). For Justice Chase, in other words, it was clear that "the judiciary had at its disposal a supplemental unwritten constitution which would catch the cases of flagrant injustice that fell through the gaps of the written one." Grey, Original Understanding, supra note 17, at 147. See also Edward Keynes, Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process 21 (1996).

\textsuperscript{66} Currie, supra note 62, at 46.

\textsuperscript{67} Mcafee, Prolegomena, supra note 7, at 130 n.73. Moreover, despite alluding to reason and justice, Justice Chase "displayed little interest in pursuing the issue of whether [the law] violated natural justice per se." \textit{Id}.

\textsuperscript{68} John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 209 n.41 (1980). Professor Ely asks: "What happened to the natural law reference for which the opinion is remembered? Why this slavish adherence to the terms of the document and what Justice Chase took to be the narrow intent of its framers?" \textit{Id}.

\textsuperscript{69} Currie, supra note 62, at 46 (citing Ely, supra note 68, at 210–11).

\textsuperscript{70} In a standard modern formulation, it is said that Justice Chase "declared that even without express constitutional limitations, state governments were limited by 'certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power.'" Farber & Sherry, supra note 1, at 262 (quoting Calder, 3 U.S. (3 Dall.) at 388). For useful analysis that lends support to this way of viewing the decision, see Harris II, supra note 63, at 25, 133–38. For the view that Justice Chase is simply reading the text of the Constitution and finding it inapplicable to the statute being reviewed, see Ely, supra note 68, at 209 n.41.

\textsuperscript{71} Calder, 3 U.S. (3 Dall.) at 388 (emphasis omitted). For Ely, this is what is perplexing. You can't explain away, in Ely's mind, Justice Chase's construction of the Clause under consideration on the ground that "the law at issue satisfied Chase's broader sense of justice as well." Ely, supra note 68, at 209 n.41. Ely concludes:

In fact it appears it didn't: 'Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust...'. Rather, the point seems to have been that in the American context, there is no judicially
even a moderately textualist approach to construing Justice Chase’s work “does not account for the paragraph Chase devoted to demonstrating that the original decree had given Calder no vested right.” 72 Considering that such an issue would be irrelevant to addressing the ex post facto law question, this paragraph “seems to refute Ely’s conclusion that Chase found the action of the Connecticut legislature offensive” and “suggests that the reason Chase upheld the legislature’s action was that it impaired no vested right and therefore was consistent with natural justice.” 73

It is clear that Justice Iredell found the opinion setting forth the views of Justice Chase to be extremely troubling. Objecting to the views of “some speculative jurists” that the Court could invalidate a law “merely because it is, in their judgment, contrary to the principles of natural justice,” 74 Justice Iredell still acknowledged that “[i]f any act of Congress, or of the Legislature of a state, violates . . . constitutional provisions, it is unquestionably void.” 75 Considering that “[t]he ideas of natural justice are regulated by no fixed standard,” courts relying on such principles would be, in effect, asserting the right to strike down laws with which they disagreed. 76 The American response to the problem of potentially oppressive legislation was “to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.” 77 To posit a judicial power to invalidate laws on grounds of policy, which Justice Iredell read Justice Chase’s opinion as confirming, was “not only undemocratic and contrary to the English legal

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enforceable notion of natural law other than what the terms of the Constitution provide.

Id. (citation omitted).

72 Currie, supra note 62, at 46. It is important to recognize that Corwin described the “doctrine of vested rights” as “the foundational doctrine of constitutional limitations in this country.” Corwin, Twilight, supra note 36, at 375. In Twilight, he asserted that the vested rights doctrine “rests, not upon the written constitution, but upon the theory of fundamental and inalienable rights.” Id. For some historical context, see John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493, 498–500 (1997).

73 Currie, supra note 62, at 46. See also Wieck, supra note 3, at 30 (“Chase’s position expressed the doctrine of higher law in its purest and most potent form.”).


75 Calder, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring).

76 Id.

77 Id.
tradition we had inherited; it was fundamentally inconsistent with the concept of a written constitution.”

Even if there is an element of truth in the modern claim that Justice Iredell “does not do complete justice to his colleague’s position,” it is simply wrong to assert that Justice Iredell is mistakenly understood as “representing the jurisprudential orthodoxy of his times.” In requiring an express constitutional limitation on legislative power, Justice Iredell was stating the standard view that had been articulated by Wilson during the ratification debate over the Constitution and which was generally accepted by those who adopted the state constitutions. Even if Justice Chase did not articulate a view that literally equated constitutionalism with natural law, as Justice Iredell accused, it is clear that he saw the legislative power, even of the states, as subject to implied

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78 Currie, supra note 62, at 47. See also Keynes, supra note 65, at 21 n.89 (“In a remarkably contemporary criticism, Iredell stressed the abstract and subjective qualities of the concept.”).

79 Jacobsohn, supra note 17, at 36. In response to Justice Iredell’s argument against the view that a law “within the general scope of [a legislature’s] constitutional power” can be invalidated because it violates principles of natural justice, Jacobsohn contends that “Chase might have replied that if intended for him the observation is internally contradictory, because a law within the scope of constitutional power could not be contrary to the principles of natural justice.” Id. (quoting Calder, 3 U.S. (3 Dall.) at 399). But see Ely, supra note 68, at 209 n.41. Even Justice Chase’s adoption of the vested rights doctrine in dicta, however, fell short of equating constitutionalism and natural justice, and it is less than clear that Justice Iredell is claiming otherwise; his argument is against the idea of implied rights, which Justice Chase seems quite clearly to embrace.

80 Jacobsohn, supra note 17, at 36. See also Massey, supra note 13, at 52 (concluding that “[t]he lively presence of natural law thought in constitutional adjudication during the post-revolutionary period is proof that Iredell’s error was not uniformly shared”); Tribe, supra note 65, at 1337–38 (concluding that Justice Chase’s familiar example of law attempting to take from A to give to B was not based on “natural rights in some ill-defined sense,” but view that “legislatures were never established—and, according to Justice Chase, never would be—with such a function in mind”; consequently, Justice Iredell’s objections “to vague and romantic notions of natural rights as an insufficient basis for hardheaded judicial review, were to this degree wide of the mark”); Grey, Original Understanding, supra note 17, at 149 (asserting that “Iredell gave what seems to have been the first explicit statement of full-fledged constitutional positivism: the doctrine that judicial review can enforce written but not unwritten constitutional principles”).

81 See McAfee, supra note 4, at 17–18, 119–68; Ratification of the Constitution, supra note 25 and accompanying text (citing Wilson’s explanation that without federal system’s enumerated powers there was inference in favor of government power that required explicit limits because “everything which is not given is reserved”). Those who drafted the earliest state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights.” Lutz, supra note 24, at 60; see also Massey, supra note 13, at 87 (stating state constitutions rested on presumption that state governments possess “all powers except those explicitly denied” to them). Compare Grey, Original Understanding, supra note 17, at 159 (claiming that textualist position defended by Justice Iredell was simply not articulated during the 1787–1788 ratification debates over proposed federal Constitution), with McAfee, Inalienable Rights, supra note 13, at 748–50 (citing materials supporting view that in founding era Americans assumed that only natural liberty reserved in writing by constitution would be a constitutional right).
limitations supported by the purposes for which citizens had entered into the social contract.\textsuperscript{82} There is a reason that major casebooks on American constitutional law use \textit{Calder} to illustrate the possibility of judicial review based on a presumed power of courts to generally second-guess the substantive justice of legislation rather than simply enforcing the limits imposed by a popular sovereign in a written constitution.\textsuperscript{83}

The \textit{Calder} case has been influential.\textsuperscript{84} In 1828, the highest court in Maryland invalidated statutes, adopted in 1807 and 1812, seeking to abolish the institution of the Regents of the University of Maryland.\textsuperscript{85} Although the court relied centrally on the federal Constitution’s Contract Impairment Clause,\textsuperscript{86} it also boldly asserted:

Independent of that instrument, and of any express restriction in the Constitution of the State, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least) the character and genius of our government, the causes from which they sprang, and the purposes for which they were

\textsuperscript{82}It may well be that “Coke and his collaborators had made anything else seem so obviously wrong that it did not require express mention: it simply lay too deep for words, whatever Blackstone had lately said.” \textsc{John V. Orth}, \textsc{Due Process of Law: A Brief History} 38–39 (2003). But even if one can see Justice Chase’s efforts as “interpretive” in some important sense, it remains difficult to quarrel with Professor Haines’ argument that “Justice Iredell distinctly rejected the doctrine that the legislature was bound by limitations other than those contained in the fundamental law.” \textsc{Haines, supra} note 51, at 290.

\textsuperscript{83}See, \textit{e.g.}, \textsc{Paul Brest et al., Processes of Constitutional Decisionmaking: Cases and Materials} 111–13, 1131 (4th ed. 2000) (describing “limitations based on natural rights and the nature of the social compact”; noting “a tradition of American constitutional thought that argues that constitutional rights can exist outside the text or can be implied from the basic constitutional order, the fundamental narratives of American history and American identity, the common and honored traditions of the American people, or the deepest meanings of liberty and equality in a free and democratic republic”); \textsc{Kathleen M. Sullivan & Gerald Gunther}, \textsc{Constitutional Law} 452–53 (14th ed. 2001) (“The natural law tradition, drawing on English antecedents, viewed a written constitution not as the initial source but as a reaffirmation of a social compact preserving preexisting fundamental rights—rights entitled to protection whether or not they were explicitly stated in the basic document.”).

\textsuperscript{84}See, \textit{e.g.}, \textsc{Harrison, supra} note 72, at 506 (“Every nineteenth century lawyer’s favorite example of an unconstitutional statute—albeit one that was thought unconstitutional for various different reasons—involves a law that, in Justice Miller’s formulation from \textit{Davidson v. New Orleans} [96 U.S. 97 (1878)], ‘declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A. shall be and is hereby vested in B. . . .’”); \textsc{John V. Orth}, \textsc{Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm}, 14 \textsc{Const. Comment.} 337, 339 (1997) (“From its original use to encapsulate what was wrong with legislative interference with individual titles, the phrase ‘taking from A and giving to B’ became in the heyday of \textit{laissez-faire} a powerful linguistic weapon against regulatory legislation.”).

\textsuperscript{85}Regents of the Univ. of Md. v. Williams, 9 G. & J. 365 (Md. 1838).

\textsuperscript{86}U.S. Const. art. I, § 10 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .”). \textit{See Williams, 9 G. & J.} at 403.
established, that rises above and restrains and sets bounds to the power of legislation, which the Legislature cannot pass without exceeding its rightful authority. It is that principle which protects life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power.\textsuperscript{87}

In reading a just compensation requirement into state constitutional law in 1851, the highest court of Georgia clarified that the legislative power “is limited expressly by the State Constitution, and necessarily, by the Federal Constitution,” as well as “by certain great fundamental principles not embodied in either.”\textsuperscript{88} Otherwise, “there is no limitation but the opinion of the Legislature, as to what may be necessary and proper for the good of the State.”\textsuperscript{89} This all flows from a recognition of how central the right of private property truly has been in American society; after all, “[t]he right of accumulating, holding and transmitting property, lies at the foundation of civil liberty.”\textsuperscript{90}

Over time, however, clear and explicit reliance on unwritten constitutionalism became more and more controversial. In 1851, in Griffith v. Commissioners of Crawford County,\textsuperscript{91} Chief Justice Hitchcock, of the Ohio Supreme Court, clarified in dissent that he was “not the advocate of legislative supremacy, but would have every act tested by the constitution,” and, if found to be in conflict, declared “void.”\textsuperscript{92} The majority of the court, relying on unwritten principles of law, had held that the legislature lacked constitutional power to authorize counties to vote in favor of a subscription of railroad stock. Chief Justice Hitchcock responded:

It is said that these laws are “void, for the reasons that they are in violation of the general, great and essential principles of liberty and free government, recognized and forever unalterably established by the bill of rights.” And again, it is said: “To determine the extent of the legislative authority, under our constitution, we are \textit{not confined to the letter of the constitution}, but we may properly look to its declared principles and objects; and a statute violating these is as clearly void as one violating the letter of the constitution.” This is not in accordance with the rule heretofore prescribed by the courts of the country for their action in deciding questions of constitutional law, although it may be in accordance with the dogmas of some modern theorists, who seem to have little regard for written constitutions,

\textsuperscript{87} Id. at 408.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} 20 Ohio 609, 623 app. A (Ohio 1851) (Hitchcock, C.J., dissenting).
\textsuperscript{92} Id. at app. A, 7.
except as the same may comport with their ideas of right and justice.\textsuperscript{93}

In 1874, just one year after reaching the justly controversial conclusions adopted in \textit{Slaughter-House Cases}, \textsuperscript{94} the Supreme Court employed reasoning analogous to \textit{Calder} in justifying a decision that imposed limits on the power of the City of Topeka, Kansas, to tax.\textsuperscript{95} The Court reasoned:

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.\textsuperscript{96}

With this as its starting point, the Court concluded that it held power to second-guess Topeka as to whether it held a sufficient “public purpose” to justify its tax, or, instead, had imposed a tax that worked mainly to benefit private parties.\textsuperscript{97}

Justice Clifford, dissenting, contended that the Court was exercising a dangerous power:

State constitutions may undoubtedly restrict the power of the legislature to pass laws, and it is plain that any law passed in violation of such a prohibition is void, but the better opinion is that where the constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not the guardians of the rights of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance. \textsuperscript{98}

By the end of the century, the Supreme Court followed state courts that were “motivated by the same natural-rights jurisprudence that had driven the

\textsuperscript{93} \textit{Id.} at app. A, 7–8.
\textsuperscript{94} \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{95} \textit{Loan Ass'n v. Topeka}, 87 U.S. (20 Wall.) 655 (1874).
\textsuperscript{96} \textit{Id.} at 663.
\textsuperscript{97} \textit{Id.} at 663–66.
\textsuperscript{98} \textit{Id.} at 668 (Clifford, J., dissenting).
Slaughter-House dissents.” In Godcharles v. Wigeman, the Supreme Court of Pennsylvania invalidated a statute that required manufacturing and mining corporations to pay their workers in cash rather than in company-store orders. The court’s opinion did not even cite a provision of the state’s constitution, but simply concluded that the law was “utterly unconstitutional and void,” given that the legislature had attempted “to do what, in this country, cannot be done; that is, prevent persons who are sui juris from making their own contracts.” The opinion declared that a worker “may sell his labor for what he thinks best, whether money or goods, just as his employers may well his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges . . .” The conclusion was so obvious to the court that it did not consider it essential to even consider why the state legislature might have thought it necessary to enact such a statute.

C. Sovereignty and the “Right” to Amend Constitutions

The practice of making and amending constitutions became a central feature of American government in the nineteenth century, and Americans were well aware of the distinction between “normal governmental operations” and constitution making, as they warned against “mistrusting the architect of a grand edifice with the people who subsequently occupy it.” The founding generation quickly recognized “that constitutions differed from ordinary statutes and that greater popular input and control were required for their adoption.” Constitutions were frequently amended as the need was perceived, and it also became typical “to encourage constitutional fidelity by exhortation, declaring that the legislature ‘shall have no power to add to, alter, abolish, or infringe any part of this Constitution.”

Modern advocates of unwritten constitutionalism, however, have sought to reconcile this commitment to popular sovereignty with the idea of substantive limits on the power of the people to amend their constitutions. If the declarations of rights found in the early state constitutions contained “the

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102 Godcharles, 6 A. Rep. at 356.
103 McCurdy, supra note 101, at 166.
105 Tarr, supra note 23, at 69.
106 Id. at 71 (citing several state constitutional provisions based on quoted language).
107 See Sherry, supra note 13, at 1132–34, 1145–46, 1158 n.137. For a critical response, see McAffee, supra note 4, at 19–24, 123–27.
inherent natural rights which formed an integral and unalterable part of theroader fundamental law,"\textsuperscript{108} one would expect to see courts grapple with the
task of articulating the limits imposed by the tradition of unwritten
fundamental law that included the inalienable rights that would even restrict
the content of the written constitutions. Indeed, one would expect such limits
to be used as arguments against proposals for specific constitutional
provisions, particularly given that the people have, on occasion, adopted state
constitutional provisions that strike the modern mind as partial or unjust.

For example, when the president of the 1846 New York state
constitutional convention proposed to add "\textit{without regard to color}"
to a proposed guarantee of "certain unalienable rights," the convention rejected
"the prospect of explicitly enhancing the constitutional rights of New York's
black population" by deleting the entire section.\textsuperscript{109} Perhaps unsurprisingly for
the era, the same convention rejected the proposal to extend the franchise to
women, assuming, as the chair of the Committee on the Elective Franchise
explained, that the elective franchise was "not a natural right," and had
traditionally been limited "to mature age and the male sex."\textsuperscript{110}

As a general matter, nineteenth century American constitutions "vested
ultimate power in the sovereign people, but defined 'the people' in narrow
terms."\textsuperscript{111} Thus it was the standard practice of this age to deny even free blacks
the right to vote.\textsuperscript{112} Apart from the exclusion of women and blacks from

\textsuperscript{108}\textit{Sherry, supra} note 13, at 1134.

\textsuperscript{109}James A. Henretta, \textit{The Rise and Decline of "Democratic Republicanism": Political
\textit{(quoting REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF
THE CONSTITUTION OF THE STATE OF NEW YORK 539 (W. Bishop & W. Attree eds., 1846)
[hereinafter REPORT]). It is not as though state laws during this period supplied anything
approaching equal protection of rights for blacks. "Iowa, Kansas, and Michigan barred blacks
from holding public office, prohibited blacks from entering the state, and Illinois and Oregon
limited due process and equality rights to freemen or whites." James A. Gardner, \textit{Southern
Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study

\textsuperscript{110}Henretta, supra note 109, at 360 (quoting REPORT, supra note 109, at 1027).

\textsuperscript{111}James A. Henretta, \textit{Foreword: Rethinking the State Constitutional Tradition}, 22

\textsuperscript{112}The same 1846 New York convention only narrowly defeated a proposal that would
have denied the right to vote to free blacks. Henretta, supra note 109, at 361. But "New Jersey,
Pennsylvania, Connecticut, and Rhode Island had excluded free blacks from the polls," \textit{id.}
at 362, and the Pennsylvania Supreme Court upheld this popular exclusion, finding "that blacks
'might be unsafe depositories of popular power.'" \textit{Id. (quoting Hobbs v. Fogg, 6 Watts 553, 557
(Pa. 1837)). "Among non-Southern states, the right to vote was restricted to whites or freemen in
Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Michigan, Ohio, Oregon, Pennsylvania,
Vermont, and Wisconsin." Gardner, supra note 109, at 1271. In Wisconsin, the 1848 convention
"overwhelmingly rejected universal male suffrage because, they said, their constituents could
Years Later}, 1998 WIS. L. REV. 661, 671. By contrast, considering that "so many thousands of
Wisconsin inhabitants had recently arrived from abroad, they agreed that resident aliens who
complete political citizenship,” modern Americans would be surprised that the same could be said of “a significant proportion of adult white men.”113 Property qualifications for holding public office, or even for voting, were standard state constitutional provisions early in the nation’s history.114 What may shock modern Americans even more is that some states excluded people from voting in elections based on their country of origin or their religion.115

Early in the nineteenth century, most judges were appointed for life by the legislature or the governor. When one examines “the vested property rights of the merchant, landlord, and slave-owning classes,” and the protection they received from judges appointed for life, it is difficult not to conclude that “[t]he constitutional order thus replicated the hierarchical and authoritarian principles that pervaded society.”116 As the nation developed, it acquired a “coherent social vision” that stressed “[u]niversal white manhood suffrage and laissez-faire economic principles” that became the “expression of a society of small-holding farmers and petty bourgeois urban artisans and shopkeepers.”117 A result was greater stress on the themes of separation of powers, which meant, in practice, strengthening the hands of governors and the judiciary.118

As would be expected, the state constitutions largely embodied the political traditions and history of the nation, and the people sometimes made

sought United States citizenship could vote.” Id. at 672. See generally TARR, supra note 23, at 101 n.23 (observing that “most state constitutions effectively defined African-Americans as not part of the politically relevant portion of the American people, denying even free blacks the right to vote”; and in “most states women were also excluded from suffrage for most of the century”); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 13–15, 17–21 (1957) (discussing race relations in late nineteenth century).

113Henretta, supra note 111, at 832. As examples, “only taxpayers could vote for the lower house of the legislature in North Carolina,” and one had to hold fifty acres of property to vote for senators. Id. Similarly, the 1780 Massachusetts Constitution apportioned seats in its upper house by reference to the wealth of counties represented. Id.

114See, e.g., Gardner, supra note 109, at 1272 (finding that “property qualifications for office holding were not uncommon among the first generation of American constitutions”).

115See, e.g., TARR, supra note 23, at 106 (noting that “Oregon specifically excluded Chinese residents from voting”); id. at 108 (observing “the California Constitution of 1879 disenfranchised Chinese residents, and the Idaho Constitution of 1889 both Chinese and Mormons”).

116Henretta, supra note 111, at 833. Even when state constitutions included seemingly “progressive” provisions, such as the provisions in early constitutions for public education, they were generally treated as stating hortatory goals that state government should strive to achieve. See, e.g., John C. Eastman, When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900, 42 AM. J. LEGAL HIST. 1, 8 (1998) (stating early state constitutional provisions “do not seem to have been intended to declare a fundamental right to education; rather, they seem merely to have articulated a goal that the constitution drafters thought important to the protection of republican government”).

117Henretta, supra note 111, at 834.

118See id. at 834–35. Professor Henretta thus supplies a useful reminder that “[t]he flowering of the doctrine of judicial review in the last half of the nineteenth century was neither accidental nor a plot hatched by judges or corporate interests”; it was, rather, “the intended outcome of the liberal democratic constitutional revolution of the mid-nineteenth century.” Id. at 835.
decisions that are regrettable to an enlightened outlook. Early state constitutions, for example, limited public office holders to Protestants, barred practicing ministers from holding public offices, and occasionally established an official state religion. Although most slave states tended to follow the federal practice of mentioning slavery "only indirectly," some state constitutions "state formally, and perhaps somewhat redundantly, the conditions of American slavery: that only whites could be citizens, hold public office, or vote; and that the principles of equal rights and due process apply only to freemen." States that joined the Confederacy adopted constitutional provisions to safeguard slavery.

Consistent with the nation's commitment to the principle of popular sovereignty, however, courts have been unwilling to impose any substantive limits on the authority of the sovereign people to amend their constitutions. Earlier in this century, "leading conservatives" asked the Supreme Court "to invalidate a number of amendments" on the ground that they were themselves unconstitutional. More recently, "there has been considerable writing by those, generally of a 'liberal' political persuasion, who argue that it is possible to imagine an 'unconstitutional' amendment and that, in such circumstances, it would be the duty of the Court to void such an alteration." To date, "the Supreme Court of the United States has never accepted such an invitation to activism," and, according to at least one expert, "should never do so." But it remains at least a theoretical possibility; and, indeed, if we take the idea of unwritten constitutionalism seriously, supposing that some limits on government are sufficiently "inherent" that there is no need for them to be reduced to writing, the prospect for invalidating a written constitutional amendment becomes very real.

In the context of state constitutional law, arguments that certain amendments were themselves unconstitutional have been rejected by state courts. It was contended, for example, that their constitutions prohibited any change in Alabama's or Kentucky's Bill of Rights respectively, but these

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119Gardner, supra note 109, at 1268 (observing that Georgia, South Carolina, New Jersey, and New Hampshire all limited "public office holders to Protestants" in eighteenth century state constitutions).

120Id. at 1269.

121Id.

122Id. at 1270–71.

123See, e.g., GOSS, supra note 35, at 4 (noting Arkansas' Civil War era constitution made "small revisions to further safeguard slavery and to substitute the words "Confederate States of America".") See also Eastman, supra note 116, at 24–29 (noting that state constitutions adopted after the Civil War sometimes provided for segregated public schools).

124JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 41 (1994). Arguments about unconstitutional amendments "were applied to the Fifteenth, Eighteenth, and Nineteenth Amendments." Id. at 51 n.52.

125Id. at 41.

126Id.
arguments were rejected.\textsuperscript{127} Contrast this approach with the relatively recent contention that the proposed constitutional amendment to permit the statutory prohibition of flag burning conflicts with the Constitution.\textsuperscript{128} To burn a flag is to engage in free speech, and free speech is an inalienable natural right that is secured by the federal Ninth Amendment:

Trying to reconcile this constitutional theory with a premise of popular sovereignty, the author contended that such an amendment "could have been enforced . . . if it had denied explicitly that speech is a natural right." On this view, the people hold constitutional authority to decide that flag burning is not the exercise of an inalienable natural right, but lack the authority to deny what they confess is an inalienable natural right. But if the Ninth Amendment secures the right to burn a flag, because doing so is to exercise an inalienable natural right—and, indeed, if our Ninth Amendment theory is that some rights are "inalienable" and cannot be given up by their omission from constitutional text—one wonders why it should make any difference what "the people" think about whether flag-burning exercises a right or whether the right is "inalienable."\textsuperscript{129}

The Framers of the federal Constitution believed that the authority of the people to make basic decisions about government was itself an "inalienable" right.\textsuperscript{130} Consequently, "[d]epartures from the document—amendments—are to come from the People, not from the High Court. Otherwise we are left with constitutionalism without the Constitution, popular sovereignty without the People."\textsuperscript{131} Sooner or later, we will have to decide which is more fundamental: the right to make decisions about government or the right, in some instances, to be free of government. We have to do this sort of thing all the time; courts have been given a final authority to interpret the Constitution, but that does not prevent the Senate from determining that a member of the Supreme Court has

\textsuperscript{127}Opinion of the Justices, 81 So. 2d 881, 883 (Ala. 1955) (holding that people "can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they 'shall forever remain inviolate'"); Downs v. Birmingham, 198 So. 231, 236 (Ala. 1940) (holding that there is no limitation on nature of amendments contained in Alabama constitution). For an equally strong endorsement of the plenary power of the people to alter their system of government and amend their constitution, see Gatewood v. Mathews, 403 S.W.2d 716 (Ky. 1966). For further discussion, see Brewer, supra note 35, at 602–06; Williams, supra note 24, at 225.

\textsuperscript{128}Jeff Rosen, Note, \textit{Was the Flag Burning Amendment Unconstitutional?}, 100 YALE L.J. 1073, 1073 (1991).

\textsuperscript{129}McAffee, \textit{Inalienable Rights}, supra note 13, at 780 (quoting Rosen, supra note 128, at 1074) (alteration in original).

\textsuperscript{130}McAffee, \textit{Inalienable Rights}, supra note 13, at 780–81.

behaved so abusively in administering his or her office and interpreting the Constitution that impeachment and conviction is warranted. The possibility that such authority might be abused tells us little about whether the Framers believed the balance of risks justified their decision to grant it. The people of the United States either held constitutional authority to permit the institution of slavery, with all its tragic consequences, or they did not. Similarly, the people may, despite the free speech protection of the First Amendment, acknowledge a constitutional power to regulate or prohibit the burning of a flag, even as part of a political protest. It would not make a difference whether they recognized that prohibiting flag burning and imposing slavery denied inalienable natural rights, or rationalized a different view of the practice.

For the founding generation, the authority of the people to decide questions about government, including what rights government officials might not intrude upon, would have been axiomatic. "Both the existence of a written constitution and the specification of a supermajority to amend it are indicative of the continuing locus of sovereignty in the people themselves."132 Moreover, a "constitution is in its very essence amendable."133 If popular sovereignty is taken seriously, it follows that "[w]hat makes a fundamental law constitutive by this account of the constitutional enterprise also makes it amendable."134 For "[t]he authority of the constitutional order, and thus its bindingness for all that goes on under it, is vested in the proposition that it could be other than what it is."135 It follows that constitutional "amendability is necessary for constitutional interpretability," and that the "possibility of amendment inescapably implies precisely the boundedness of the constitutional order at any time."136

III. "INALIENABLE" RIGHTS AND OTHERS "RETAIENED" BY THE PEOPLE

In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion.137

133 HARRIS II, supra note 63, at 178.
134 Id. at 164–65.
135 Id. at 165.
136 Id.
137 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 104 (5th ed. 1883). That Cooley would derive this principle from the nature of state legislative power is significant, given that he is well
By and large, state courts have always recognized that it makes a difference that the states are governments of general legislative powers, subject only to the limits included in their bills of rights. Just as the leading commentator of the post Civil War period, Thomas Cooley, clearly articulated this view, the leading commentator of an earlier era, Justice Story, concluded that, prior to adoption of the United States Constitution, and absent an express prohibition contained within its state constitution, a state legislature “might pass a bill of attainder, or ex post facto law, as a general result of its sovereign legislative power.” \(^{138}\) In the modern era, one of our most perceptive constitutional historians, and the scholar best known for reminding us of the “higher law” background of the Constitution, Corwin was also the one who informed us “that a state constitution is not, so far as the state legislature is concerned, a grant of powers, but is rather a limitation on powers otherwise plenary.” \(^{139}\)

A. Inalienable Rights Clauses

Even though the state constitutions created governments of general legislative powers, it was common for them to state the principle that the people have natural and inalienable rights. The Virginia provision reads:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means

\(^{138}\)JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 497 (1987). But see Sherry, Extra-Textual Interpretation, supra note 16, at 303 (finding that “Virginia judges in the early days of the republic used unwritten or natural law to protect against both ex post facto laws and uncompensated takings”); Sherry, supra note 13, at 1157 (concluding that Bill of Attainder Clause was viewed as enactment of positive right, but that prohibition on ex post facto laws described natural right that would have limited legislature even without explicit provision). For a critical reaction to the view that the Framers of the federal Constitution would have distinguished between a prohibition on bills of attainder, as a positive law limitation, and the ban on ex post facto laws as an inherent and fixed limitation rooted in natural law, see MCAFFEE, supra note 4, at 125.

\(^{139}\)CORWIN, COURT OVER CONSTITUTION, supra note 12, at 21. See supra notes 10–12 and accompanying text. Corwin’s recognition of the centrality of the plenary powers originally perceived in the state constitutions is a central reason for thinking that, at least by this time, he properly understood the original meaning of the Ninth Amendment. See supra note 9 and accompanying text.
of acquiring and possessing property, and pursuing and obtaining happiness and safety.  

It is critical to understand, however, that those who drafted the state constitutions had a different purpose in mind than we would today. Declarations of rights were intended "to declare the fundamental political principles that were to guide the government and to ensure that these principles were made effectual."  

A consequence is that "admonitory and hortatory language" was "characteristic of state declarations of rights."  

A leading modern commentator on state constitutions states: 

[T]he insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people's representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power. 

The state declarations, then, presented "moral admonitions" that were not treated as binding legal obligations. This is why Hamilton once referred to "those aphorisms" in bills of rights, which "would sound much better in a treatise of ethics than in a constitution of government."  

The general practice, then, was to treat references to unalienable rights in the declarations of rights as a "mere statement of principles . . . without substantive force in law." Historian Forrest McDonald observes that the "only exception of consequence was involved in the Quock Walker Case . . . ."

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140 Va. Const. of 1796, Bill of Rights, § 1, reprinted in 7 State Constitutions, supra note 34, at 3813. See also Pa. Const. of 1776, Decl. of Rights, § 1, reprinted in 5 State Constitutions, supra note 34, at 3082 (stating similar language).

141 Tarr, supra note 23, at 78.

142 Id.

143 Id.

144 Leslie Friedman Goldstein, In Defense of the Text: Democracy and Constitutional Theory 74 (1991). See also George D. Braden & Rubin G. Cohn, The Illinois Constitution 8 (1969) (noting state constitution's inalienable rights clause "is not generally considered, of itself, an operative constitutional limitation upon the exercise of governmental powers"); Donald S. Lutz, Political Participation in Eighteenth-Century America, 53 Alb. L. Rev. 327, 328 (1989) (observing that eighteenth century state constitutions "were not viewed as legalistically as they are today").


146 McDonald, supra note 22, at 388. Cf. Braden & Cohn, supra note 144, at 9 (noting that even though many see unalienable rights clauses as "pieties that are not specific enough for courts to use in protecting the rights of the people," there are those who "argue that the basic American theory of limited government includes, in addition to the explicit limitations set forth in a bill of rights, a sort of residual limitation that implicitly reserves to the people fundamental rights of freedom not otherwise spelled out").
(1783), in which the Massachusetts Supreme Court ordered the freedom of a slave on the ground that the state constitution of 1780 declared that "all men are born free and equal."\footnote{147} By contrast, "the Virginia courts failed to use principles of natural justice to condemn what might be considered the most flagrant violation of natural rights, the enslavement of the black race."\footnote{148} With a few other exceptions,\footnote{149} the inalienable rights clauses have been viewed, in short, as the equivalent of Article 8 of the French Declaration of Rights of Man and Citizen, which provides: "Every law which violates the inalienable rights of man is essentially unjust and tyrannical; it is not a law at all."\footnote{150} As Professor Bernard Schwartz has observed, such provisions "state abstract principles that, however high-sounding, add nothing to the practical rights possessed by Frenchmen."\footnote{151}

B. The Other Rights "Retained" by State Constitutions

A number of years ago, Professor John Hart Ely observed that nineteenth century state constitutions frequently included provisions that, tracking the federal Ninth Amendment, prohibited disparaging other rights retained by the people.\footnote{152} Ely concludes that such provisions "were inspired by the Ninth Amendment," and that they are "virtually conclusive evidence that [the drafters of such provisions] understood [them] to mean what [they] said and not simply to relate to the limits of federal power."\footnote{153} For Sherry, the presence of Ninth Amendment equivalents becomes evidence that the debate leading to the Ninth Amendment did not turn on the distinction between governments of general legislative powers and governments of enumerated powers.\footnote{154} If the distinction between governments of general and enumerated powers were really so critical, "we would not expect to find the equivalent of the Ninth Amendment in state constitutions because it would serve no purpose."\footnote{155} In this view, the traditional reading of the Ninth Amendment is clearly wrong because "there is

\footnote{147}McDonald, supra note 22, at 388.
\footnote{149}See, e.g., Billings v. Hall, 7 Cal. 1, 16 (1857) (relying on California's "inalienable rights" clause in justifying "vested rights" holding in favor of real property).
\footnote{150}Bernard Schwartz, *Experience Versus Reason: "Beautiful Books and Great Revolutions"*, in *GOVERNMENT PROSCRIBED*, supra note 22, at 426.
\footnote{151}Id. at 525.
\footnote{152}Ely, supra note 68, at 203 n.87 (observing that "one discovers that no fewer than twenty-six of them [the state constitutions] contained provisions indicating that the enumeration of certain rights was not to be taken to disparage others retained by the people"). See also Amar, *supra* note 29, at 280–81; Yoo, *supra* note 54, at 999–1035.
\footnote{153}Ely, supra note 68, at 203–04 n.87. Cf. Sherry, *Natural Law*, *supra* note 54, at 181–82 (concluding that since "both the state constitutions and the federal constitution contain such language," the language "was put in to safeguard unwritten inalienable rights").
\footnote{154}Sherry, *Natural Law*, *supra* note 54, at 183.
\footnote{155}Id.
no reason to incorporate language protecting 'reserved' rights in the constitution of a general government, such as a state government."\(^{156}\)

This is a very strange argument to come from, of all people, Sherry. The traditional reading of the Ninth Amendment presumes an important distinction between governments of general legislative powers, which are subjected only to the limits set forth in a bill of rights, and governments of enumerated legislative powers, which are limited by the granting of restricted powers. Sherry has defended the view that since a bill of rights "was thought to be the renewed declaration, not the creation, of fundamental law," it followed that even in states lacking a bill of rights the citizenry had not "ceded any of the unwritten rights themselves."\(^{157}\) Sherry's own argument, then, is that the people had implicitly "reserved" all their natural and inalienable rights even without a bill of rights. If Sherry's analysis of the state constitutions is correct, the states would not be governments of general legislative powers subject only to the limits set forth in a bill of rights. It therefore makes no sense to contend that "there is no reason to incorporate language protecting 'reserved' rights in the constitution of a general government, such as a state government."\(^{158}\)

We have little reason, however, to think that the people involved in state constitution-making altered their way of perceiving the powers granted to government or the rights retained by the people.\(^{159}\) In the decade that followed adoption of the federal Constitution, "although six states adopted seven new state constitutions and other states amended their constitutions, what is striking is how limited an impact the federal Constitution had on the structure of state governments during this period."\(^{160}\) In general, the states "found that their sister states shared similar problems and were therefore a better source of instruction than the federal Constitution."\(^{161}\) Consequently in the typical state constitution, "the bill of rights was a copy-cat version of the bill of rights of some other state or some earlier constitution," and the provisions "were carried over without much thought or debate."\(^{162}\) And, once a Ninth Amendment

\(^{156}\)Id. at 181–82. Compare Yoo, supra note 54, at 968 (concluding that "[t]he presence of these provisions in state constitutions undermines the reading of the Ninth Amendment as a rule of construction").

\(^{157}\)Sherry, Extra-Textual Interpretation, supra note 16, at 298.

\(^{158}\)Sherry, Natural Law, supra note 54, at 181–82. It is admittedly less than clear whether Sherry's current advocacy of "pragmatic" constitutional decision making places her in the position of affirming or denying that state legislatures have "general" legislative powers subject only to textual limitations. See supra note 20 and accompanying text.

\(^{159}\)It has been observed that "from 1800 to 1860, thirty-seven new state constitutions were adopted," and "[f]ifteen of the twenty-four states in the Union by 1830 revised their constitutions by 1860, two of them twice." TARR, supra note 23, at 94.

\(^{160}\)Id. at 88.

\(^{161}\)Id. at 90. The result was that "conventions were influenced by earlier constitutions, constitutional experience, practice, and interpretations," and "scores of different editions" of constitutional compilations "were present in nearly every nineteenth-century constitutional convention." Fritz, supra note 23, at 975–76.

\(^{162}\)Lawrence M. Friedman, State Constitutions and Criminal Justice in the Late Nineteenth
counterpart was adopted, it became natural for it to be copied, inasmuch as
"states seeking congressional approval for their admission to the Union sought
to avoid controversy by modeling their constitutions on those of existing
states."163

Consistent with this pattern, despite its adoption of a Ninth Amendment
equivalent approximately thirty years after adoption of the federal Bill of
Rights, Alabama stated expressly in the same constitution "that everything in
the article [setting forth the declaration of rights] is excepted out of the general
powers of government."164 Alabama’s Supreme Court, moreover, has
concluded that "the federal Constitution is a grant of power, while the state
Constitution is only a limitation of power."165 So even though the Alabama
Constitution states that "this enumeration of certain rights shall not impair or
deny others retained by the people,"166 the Alabama Supreme Court has stated
that this section refers only to "rights enumerated in the preceding . . . sections
of the Constitution constituting the bill of rights."167

Sherry is correct, though, that the presence of Ninth Amendment
equivalents in state constitutions can be confusing and disorienting. Despite the
court’s clear holding in the 1939 case Johnson v. Robinson, the 1819 Alabama
Constitution seems to state that, in addition to the "rights" enumerated in the
declaration of rights, there are "others retained by the people."168 It is a natural
response to the arguments that led to the adoption of the Ninth Amendment to
the federal Constitution169 to wonder what other rights are retained under a

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163 G. Alan Tarr, Models and Fashions in State Constitutionalism, 1998 WIS. L. REV. 729,
731. See also Baldwin, supra note 112, at 673; Tarr, supra, at 730 (stating that “[c]onstitutional
borrowing in the United States is as old as the nation”).

164 ALA. CONST. of 1819, art. I, § 30, reprinted in 1 STATE CONSTITUTIONS, supra note 34,
at 98. Years ago, Professor Haines observed that it “was customary to provide in the state
constitutions that the fundamental law should never be violated and to prescribe that all powers
delegated by the constitution were ‘excepted out of the general powers of government and
were to remain forever inviolate.’” HAINES, supra note 51, at 137–38, reprinted in 6 STATE
CONSTITUTIONS, supra note 34, at 3422 (quoting TENN. CONST. of 1796, art. X, § 4).

165 Alford v. State ex rel. Att’y Gen., 54 So. 213, 222 (Ala. 1910); see also State ex rel.
Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978) (concluding that “[w]here the
constitutionality of a statute is involved, the question is, therefore, not whether the act is
authorized by the constitution, but whether it is prohibited thereby”); CORWIN, COURT OVER
CONSTITUTION, supra note 12, at 21; see supra notes 21–25 and accompanying text.

166 ALA. CONST. of 1901, art. I, § 36, reprinted in 1 STATE CONSTITUTIONS, supra note 34,
at 185.


168 ALA. CONST. of 1819, art. I, § 30, reprinted in 1 STATE CONSTITUTIONS, supra note 34,
at 98. It is true that Robinson was decided under the 1901 Constitution of Alabama, but it also
provided that “this enumeration of certain rights shall not impair or deny others retained by the
people.” ALA. CONST of 1901, art. I, § 36, reprinted in 1 STATE CONSTITUTIONS, supra note 34,
at 185.

169 See McAFFEE, supra note 4, at 17–18, 33 n.49, 37 n.82, 84–85, 89–90, 128–31, 137–40,
144–45, 155 n.66; McAffee, Inalienable Rights, supra note 13, at 751–69.
state constitution, and by what means.\textsuperscript{170} Little wonder that one result of \textit{In re J.L. Dorsey} was that an Alabama state statute, adopted in 1826, required attorneys to take an oath stating that they had not engaged in any dueling in the past, and would not in the future.\textsuperscript{171}

The state supreme court, adopting an argument advanced by \textit{Dorsey},\textsuperscript{172} held that the legislature’s “disqualifying power” had to “be derived from an express grant in the constitution, or fundamental articles of government—or else the act is null and void.”\textsuperscript{173} Even though Article VI of the Constitution specifically granted “power to pass such penal laws to suppress the evil practice of dueling, extending to disqualification from office or the tenure thereof, as they may deem expedient,”\textsuperscript{174} the court held the imposition of an

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\textsuperscript{170}It is precisely this sort of confusion and bewilderment that “retained” rights clauses have caused that prompts us to think that such provisions deserved treatment in the book confronting such all-too-human constitutional provisions. \textit{See} \textit{Constitutional Stupidities, Constitutional Tragedies I} (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (considering which is “stupidest” provision of Constitution). A prominent scholar who relied upon these state constitutional provisions to shed light on the original meaning of the Ninth Amendment, for example, also observed that several state constitutions “were quite clear about distinguishing this caveat,” apparently referring to “unenumerated” rights, from those stating “that unenumerated powers are not to be inferred.” \textit{Ely, supra} note 68, at 203 n.87. \textit{E.g., Const. Of Kan.} of 1855, art. I, § 22, reprinted in 2 \textit{State Constitutions, supra} note 34, at 1181 (providing that “all powers not herein delegated shall remain with the people”). If Ely and others wonder why a state constitution establishing a legislature with general powers would include an “unenumerated” rights provision, they might also ponder why such a constitution would include a prohibition on “undelegated” powers, while the state constitution is only a limitation of power. \textit{Alford v. State ex rel. Att’y Gen.}, 54 So. 213, 222 ( Ala. 1910). What does this mean if it isn’t that states are governments of “unenumerated” (or “undelegated”) powers? \textit{See infra} note 176 (discussing Griffith case relying on prohibition on undelegated powers to infer limits on legislative power).

\textsuperscript{171}Port. *293 (Ala. 1838). \textit{Dorsey} is briefly discussed in McAfee, \textit{Inalienable Rights, supra} note 13, at 776–77 n.113.

\textsuperscript{172}\textit{Dorsey}, 7 Port. at *301 (contending that legislative act must be “made pursuant to the power vested by the constitution in the legislature”); \textit{id.} at *302 (contending that legislative act “is unauthorised by the constitution, as there is no provision in it, from which such a power is derivable”).

\textsuperscript{173}\textit{id.} at *333. At one point, the court asserted that if it admitted “the general power of the legislature to curtail or abridge the privileges of the citizen, without expressly delegated authority,” it would be hard “for the imagination to conceive or grasp the evils to which it would tend.” \textit{id.} at *335. In a separate concurring opinion, Justice Goldwaite relied directly on the guarantee in article I, section 30 that “the particular enumeration should not be construed to disparage or deny others retained by the people.” \textit{id.} at *359 (Goldwaite, J., concurring). The law being challenged, in his view, was “adverse to the principles of liberty and free government.” \textit{id.} at *360 (Goldwaite, J., concurring). Justice Ormond’s opinion expressly relied upon Lord Coke’s dictum \textit{in Dr. Bonham’s Case} and Justice Chase’s opinion in \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion). \textit{id.} at *375–77 (Ormond, J., concurring).

\textsuperscript{174}\textit{Ala. Const.} of 1819, art. VI, § 3, reprinted in 1 \textit{State Constitutions, supra} note 34, at 109, quoted in \textit{Dorsey}, 7 Port. at *333.
oath against dueling exceeded the legislature’s authority. In addition, the court concluded that, beyond the limitations expressly stated in its declaration of rights, the Constitution secures “all these inherent, unalienable rights” from intrusion by the “law making power.”

By contrast, the dissenting opinion reminded the majority that “in regard to the authority of the State, the legislative power is not derived from a constitutional grant—it was possessed previous to the formation of its constitution, and is but regulated and controlled by that instrument.” The dissenting justice thus concluded that:

[T]he terms on which attorneys shall be admitted, and the causes for which they shall be disbarred, are matters of legislative regulation: and consequently, that the act of eighteen hundred and twenty-six, to suppress the evil practice of duelling, so far as it relates to attorneys and counsellors, is not repugnant to the constitution.

In this century, the Supreme Court of Alabama has expressly and specifically rejected the reasoning that supported the holding in Dorsey. Finding that the power of the legislature “is plenary, and unrestricted except by specific limitations in the Constitution,” the modern court has effectively rejected seeing provisions assuring the other rights “retained” by the people as “powerful rights-bearing texts.” Dorsey, however, was not the only decision to rely upon a state constitutional provision providing that the enumeration of rights “shall not be construed to impair or deny others retained by the people.”

In the 1857 case of Billings v. Hall, the California Supreme Court not only adopted the doctrine of “vested rights,” but relied upon the state

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175 Dorsey, 7 Port. at *344 (concluding that “the law presumes every man to be guilty, until he proves the reverse, by purging himself, through the medium of a test oath”).
176 Id. at *324. The Court waxed eloquently as to the ultimate source of these rights: “It may be remarked, that the right of regulating our own pursuits, the right of protection of society, and the right of property, are three twin sisters, born of the same common mother—natural law. Id. Cf. Griffith v. Comm’rs of Crawford County, 20 Ohio 609, 623 (1851) (reaching similar result by relying on provision declaring “that all powers not hereby delegated remain with the people”).
177 Dorsey, 7 Port. at *387, *400 (Collier, C.J., dissenting). See also id. at *401 (“[W]hile the constitution of the United States is an enabling charter, the constitutions of the States are instruments of restraint and limitation upon powers already plenary.”)
178 Id. at *419 (Collier, C.J., dissenting).
180 See Yoo, supra note 54, at 1016–18.
181 Billings v. Hall, 7 Cal. 1, 16 (1857) (Burnett, J., concurring).
182 7 Cal. 1 (1857). The case is discussed in Yoo, supra note 54, at 1018–19.
183 Corwin viewed the vested rights doctrine as “the foundational doctrine of constitutional limitations,” which rests on the idea of inalienable rights. See supra note 72.
constitution's recognition of inalienable rights as a ground for rejecting the view that state legislatures hold plenary power:

It has been erroneously supposed, by many, that the Legislature of a State might do any Act, except what was expressly prohibited by the Constitution. Whether there is any restriction upon legislative power, irrespective of the Constitution, is a question upon which ethical and political writers have differed. . . . Some contend that the very existence of government depends upon the supreme power being lodged in some branch of the Government, from which there is no appeal, and, if laws are passed which are immoral, or violate the principles of natural justice, the subject is bound to obey them. Others contend that there are boundaries set to the exercise of the supreme sovereign power of the State, that it is limited in its exercise by the great and fundamental principles of the social compact, which is founded in consent, express or implied; that it shall be called into existence for the great ends which that compact was designed to secure, and, hence, it cannot be converted into such an unlimited power, as to defeat the end which mankind had in view, when they entered into the social compact. 184

Justice Terry dissented. Observing that the inalienable rights provision "is a mere reiteration of a truism which is as old as constitutional government," Justice Terry almost sounds like Wilson in contending that a "similar declaration is contained in the Constitutions of most of the States of the Union, but, I think, has never been construed as a limitation on the power of the government." 185 Warning about a form of judicial activism in which courts presume to find rights not specified in the constitution, Justice Terry concludes:

We may think the power conferred by the Constitution of this State too great, and dangerous to the rights of the people, and that limitations are necessary; but we cannot affix them, or act in cases arising under the State laws as if limitations had been fixed by the Constitution previously. We cannot declare a legislative act void because it conflicts with our opinion of policy, expediency, or justice. We are not guardians of the rights of the people of the State,

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184 Billings, 7 Cal. at 10.
185 Id. at 19 (Terry, J., dissenting). See 2 RATIFICATION OF THE CONSTITUTION, supra note 25, at 388 (contending that when the people invested their legislatures with "every right and authority which they did not in explicit terms reserve," they conferred jurisdiction that "is efficient and complete" whenever the Constitution is silent).
unless they are secured by some constitutional provision which comes within our judicial cognizance.\textsuperscript{186}

Moreover, the statute being challenged merely required a legitimate claimant of real property to pay for the value of improvements made by the property’s occupant, and Justice Terry thought the law’s requirements were reasonable ways to respect the valid interests of all concerned.\textsuperscript{187}

An overwhelming portion of the courts that have considered provisions that merely refer to inalienable rights, or which purport to protect all the rights “retained” by the people, have in fact held that such rights do not come “within our judicial cognizance.”\textsuperscript{188} Courts have “properly viewed ‘inalienable rights’ and other ‘unenumerated rights’ clauses . . . as not stating meaningful, or enforceable, limitations on government power.”\textsuperscript{189} A recent, important work on constitutional interpretation provided this analysis:

In order for the text to serve as law, it must be rulelike. In order to be a governing rule, it must possess a certain specificity in order to connect it to a given situation. Further, it must indicate a decision with a fair degree of certainty. Such certainty and specificity need not be absolute, but the law does need to provide determinate and dichotomous answers to questions of legal authority. In order for the Constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms. Similarly, the Constitution is binding only to the extent that judges do not have discretion in its application. Although the application of the law may require controversial judgments, the law nonetheless imposes obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another. For the Constitution to serve this purpose, it must be elaborated as a series of doctrines, formulas, or tests. Thus, constitutional interpretation necessarily is the unfolding of constitutional law. Debates over constitutional meaning become debates over the proper formulation of relatively narrow rules.\textsuperscript{190}

Even in a state that deliberately adopted a provision in 1974 to clarify not only that the additional rights are "retained by the people," but to specify "that these rights are ‘retained by the individual citizens of the state,’"\textsuperscript{191} the

\textsuperscript{186}Billings, 7 Cal. at 21. For Justice Terry it is equally clear that “[a]ny assumption of authority beyond this, would be to place in the hands of the judiciary, powers too great and too undefined, either for its own security or the protection of private rights.” Id. at 22–23.

\textsuperscript{187}Id. at 23–25.

\textsuperscript{188}Id. at 21.

\textsuperscript{189}McAffee, Inalienable Rights, supra note 13, at 792. See also id. at 792–94.

\textsuperscript{186}Whittington, supra note 132, at 6.

\textsuperscript{191}McHugh, supra note 24, at 1611 (quoting La. CONST. art. I, § 24 (1974)). McHugh says
state supreme court underscored that “to hold legislation invalid under the constitution, it is necessary to rely on some particular constitutional provision that limits the power of the Legislature to enact such a statute.” 192 Noting that “the language that the court adopted in this particular opinion is striking in that it echoes the traditional values that were upheld in this area by state courts prior to 1974,” a legal scholar states that “it is difficult to find a state court that has expressed this principle as categorically as the Louisiana courts have done.” 193

C. Popular Sovereignty and Retained Inalienable Rights

In the long run, we will have to make a decision whether constitutional interpreters are empowered to discover and implement unenumerated inalienable rights:

The very concept of inalienable natural rights is one that limits, at least in moral and political theory, the power of the people. But the founders were just as clear that the power of sovereignty is unlimited as they were that there are inalienable rights. So we now face a fundamental question: we can treat the founders as speaking the sentiments of an unlimited sovereign people on the applicability of a particular right, or we can choose to view their powers as substantively limited by an “inalienable” right—but we cannot have it both ways. . . . Undoubtedly a member of the founding generation would characterize the Constitution as an exercise in collective self-government, and might add that one of its purposes was to provide security for the rights the people held and deserved. It would take almost two centuries before fundamental accounts of the Constitution

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that the drafters “were determined to change the emphasis of the state’s constitutional tradition from one based upon a collective and integrated identity to one that was consciously libertarian.”

Id.

192Bd. of Dirs. v. All Taxpayers, 529 So. 2d 384, 387 (La. 1988). In an earlier opinion, the same court concluded that the constitution “protects an individual’s rights by enumerating them, by providing that the rights of the individual shall be inalienable and by declaring that they shall be preserved inviolate.” Bd. of Comm’rs v. Dept. of Natural Res., 496 So. 2d 281, 287 (La. 1986). Similarly, in 1970 Illinois adopted a new state constitution that guaranteed that “[t]he enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.” ILL. CONST. art. 1, § 24 (1970) (emphasis added). Even though “[t]he legislative history reveals that the language change was intended to clarify that the contemplated unenumerated rights were individual rights that belong to each citizen,” Thomas B. McAffee, The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine, 12 S. Ill. U. L.J. 1, 71 (1987), the Illinois Supreme Court has not construed the provision as generating unlisted limitations on government power. See, e.g., Ill. Mun. League v. Ill. State Labor Relations Bd., 488 N.E.2d 1040, 1050–51 (Ill. App. Ct. 1986).

193McHugh, supra note 24, at 1613.
would place securing rights at the very center of the constitutional project, even ahead of the people’s power to make fundamental decisions about their government. 194

The only way to harmonize the Founders’ commitment to popular sovereignty and inalienable rights is to fully recognize the institutional implications of one’s decision in this context. 195 A decision to render “inalienable rights” clauses, or mini-Ninth Amendments, enforceable at the highest level of generality, is a decision to be ruled by judges.

Even if we pay appropriate lip service to the idea that those who adopted the Constitution had authority to establish fundamental law, this will make little difference if we also find that they delegated effective authority for establishing governing norms to constitutional interpreters—which, of course, in this country means the courts. 196

The result would not be that we would live lives protected by natural law, but that we would live our lives under the direction of the judges’ views of the requirements of natural law. This would be so even though our experience informs us “that in modern cases raising the most challenging political-moral questions—especially those on abortion, homosexuality, and the right to die—the treatment of the core moral questions has been unenlightening at best.” 197 Further, even though we assume that more rights invariably translates into more freedom, which can only be good, it is clear that the rights of some may be purchased at the cost of great harm to the community as a whole. 198

As Justice Clifford offered in dissent in 1874, “courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restrictions.” 199 Even if we acknowledge that “[i]n a democracy there must be a final tribunal

194 McAfee, Inalienable Rights, supra note 13, at 780–81.
195 For documentation of the importance attached to popular sovereignty by the Framers, see McAfee, supra note 4, at 125–27, 172–73; McAfee, Substance Above All, supra note 20, at 519 n.56. It is critical, in any event, to recognize that our choice “is not between natural right and majoritarian rule” but “one set of human institutions and another, none of which is infallible.” Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 CHI.-KENT L. REV. 89, 96 (1988).
196 McAfee, Inalienable Rights, supra note 13, at 782.
198 See Lino A. Graglia, Judicial Review, Democracy, and Federalism, 4 DET. C.L. REV. 1349, 1350–51 (1991); see also McAfee, Inalienable Rights, supra note 13, at 782 n.141 (rights are not “costless benefits,” but serve to create new benefits to some interests while diminishing others; “[t]rade-offs are necessarily involved”).
199 Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655, 669–70 (1874) (Clifford, J., dissenting). Clifford concluded:
somewhere for deciding every question in the world," we must also perceive that "[a]ll human institutions are imperfect—courts as well as commissions and legislatures." The crucial question “always is, what is the lawful tribunal for the particular case?” Justice Bradley thought that, “in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose.” Even when courts deem themselves limited to enforcing the terms of a written constitution adopted by the people, and do not view themselves as empowered to implement an unwritten constitution consisting of natural and inalienable rights, this need not imply that courts will have little to do; the American constitutional order begins with the assumption that the potential for government abuse is very real, and judicial review was designed as a check on that power.

IV. UNWRITTEN CONSTITUTIONALISM AND THE DUE PROCESS CLAUSE

Marshall’s rationale for judicial authority in Marbury v. Madison helped assure that Iredell’s position, not Chase’s, would emerge as the dominant one: a justification for judicial review that relied so heavily on the implications of a written constitution probably found it more congenial to justify any invalidations on the bases of explicit constitutional restraints.

Modern advocates of unwritten constitutionalism acknowledge that we have moved away from pure unwritten constitutionalism, thanks in part to Marbury’s reliance on textualist justifications for the power of judicial

Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism. . . . Unwise laws and such as are highly inexpedient and unjust are frequently passed by the legislative bodies, but there is no power vested in Circuit Court nor in this court, to determine that any law passed by a State legislature is void if it is not repugnant to their own constitution nor the constitution of the United States.

Id. The case is discussed usefully in Haines, supra note 51, at 414–15.


201Id.

202Id.


204SULLIVAN & GUNThER, supra note 83, at 454–55. See also ORTH, supra note 82, at 44 (“Whereas Coke had declared ‘void’ an act of Parliament that was ‘against common right and reason,’ Marshall echoed Iredell and substituted for an appeal to reason an appeal to the U.S. Constitution . . .”).
review. But many contend that this is more a matter of form than substance. Professor Thomas C. Grey acknowledges, for example, that judges have come to feel an obligation to grab on to text to warrant human rights decision making. He concludes that we are thus likely “to read normative content into such general phrases in the Constitution as ‘due process’ and ‘equal protection’ in order to prevent legislative infringement on individual rights the judges deem fundamental.”

But in the mind of Grey and those with a similar perspective, the use of such noninterpretive methods of judicial review is justified precisely because the Founders were themselves committed to the idea that there are fundamental rights, and that they may not all be enumerated in constitutional text. It has become standard to assume that this is why we have the Ninth Amendment, for it is “the textual expression of this idea [of higher law] in the federal Constitution.”

When Grey suggested in 1978 that courts had simply used available texts to warrant fundamental rights decision making, he may well have articulated a conventional wisdom that had developed around the use of so-called substantive due process. Perhaps the general understanding at that time was that the Supreme Court’s historical use of substantive due process supplied an example of the Court’s employment of noninterpretive judicial review. By the end of that decade, however, Ely articulated the other half of this conventional wisdom:

It is a bit embarrassing to suggest that a text is informative “when so many, for so long, have found it to be only evocative,” but there is simply no avoiding the fact that the word that follows “due” is “process.” No evidence exists that “process” meant something different a century ago from what it means now—in fact as I’ve indicated the historical record runs somewhat the other way—and it should take more than occasional aberrational use to establish that those who ratified the Fourteenth Amendment had an eccentric definition in mind. Familiarity breeds inattention, and we apparently

205 U.S. (1 Cranch) 137 (1803). See Sullivan & Gunther, supra note 83, at 453–55. Indeed, one of the difficulties confronting advocates of unwritten constitutionalism is the extent to which the Founders justified judicial review power by reference to the centrality of the text adopted by the sovereign people. See McAfee, Should We Have an Unwritten Constitution?, supra note 20, at 1251–56.

206 Grey, Original Understanding, supra note 17, at 844 n.8.

207 See id; see also supra note 13 and accompanying text. Thanks in part to Grey’s efforts, a leading case for establishing unwritten constitutionalism has become Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and “[a]s American legal scholars delight in observing, Iredell’s view triumphed only in form; ‘in substance, however, the beliefs of Justice Chase have prevailed as the Court continually has expanded its basis for reviewing the acts of other branches of government.” Orth, supra note 82, at 43 (quoting Constitutional Law 426 (John E. Norwak et al. eds., 2d ed. 1983)).

208 Grey, Unwritten Constitution, supra note 13, at 716.
need periodic reminding that “substantive due process” is a contradiction in terms—sort of like “green pastel redness.”209

A. The Lochner Era Revisited

In many respects, it seems fair to conclude that the Supreme Court relied on the Ninth Amendment in Griswold v. Connecticut210 and Roe v. Wade211 to justify open-ended judicial review precisely because the Supreme Court had been so badly burned by its use of substantive due process during what is referred to as the Lochner era of the Court.212 It had become the conventional view that from the 1890s through the New Deal Court crisis, the Supreme Court had, in effect, pled the cause of business interests and imposed a laissez-faire vision on the Constitution by its use of the Due Process Clause.213 But,

209 ELY, supra note 68, at 18 (citation omitted). Despite beginning as a critic of Roe v. Wade on the basis of the Court’s use of noninterpretive judicial review, however, Ely acknowledges that the Ninth Amendment and the Fourteenth Amendment’s Privileges or Immunities Clause demand the use of noninterpretive judicial review and the discovery of unenumerated fundamental rights. See id. at 22–30, 34–41. But see MCAFEE, supra note 4, at 173 (“The goal of this book has been to show that a sovereign people has spoken to these issues and that their purpose did not include giving unrestrained power to the judiciary.”); MCAFEE, INalienable Rights, supra note 13, at 794 (“Neither judges nor politicians were given the authority to rewrite the Constitution, and yet that is exactly what the court claims the power to do when it establishes fundamental personal rights that were never adopted by the American people.”).

210 381 U.S. 479 (1965).
211 410 U.S. 113 (1973).
212 The classic illustration of this is the article, drafted during the birth control litigation that eventually became Griswold, which is cited in the concurring opinion relying on the Ninth Amendment. 381 U.S. at 490 n.6 (Goldberg, J., concurring). Norman Redlich, Are There “Certain Rights . . . Retained by the People”? 37 N.Y.U. L. REV. 787, 801, 803 (1962) (arguing for reliance on Ninth Amendment as means to secure unenumerated fundamental rights while avoiding “a repetition of the pre-New Deal experience” and return to “an interlude when the due process clause of the Fifth Amendment was used to invalidate laws involving economic regulation”). See also Charles A. Miller, The Forest of Due Process of Law: The American Constitutional Tradition, in DUE PROCESS: NOMOS XVIII 3, 33 (J. Roland Pennock & John W. Chapman eds., 1977) [hereinafter DUE PROCESS] (quoting Tussman and tenBroek as stating in 1949 that due process was “a weapon blunted and scarred in the defense of property” and suggesting that Supreme Court “may well wish to develop some alternative to due process as a sanctuary for these rights”).

during the last quarter century or so, we have found ourselves taking a fresh
look at the Lochner era, and it has now become almost standard to underscore
how much we have not understood about it. For example, a number of scholars
have reminded us that opposition to governmental interference with the daily
lives of American citizens had tap roots going back far beyond the 1890s to the
founding, the Jacksonian era’s concept of democracy, or to the ideology

Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–
1897, 61 J. AM. HIST. 970 (1975); Robert E. Riggs, Substantive Due Process in 1791, 1990 WIS.
L. REV. 941.

GILLMAN, supra note 213, at 10. Gillman argued that the
standards used by these judges to evaluate exercises of legislative power were not
illegitimate creations of unrestrained free-market ideologues, but rather had their
roots in principles of political legitimacy that were forged at the time of the creation
of the Constitution and were later elaborated by state court judges as they first
addressed the nature and scope of legislative power in the era of Jacksonian
democracy.

Id.; KEYNES, supra note 65, at xi (contending that “framers of the Fifth and Fourteenth
Amendments relied on natural law, social-contract philosophy, and Anglo-American legal
history”); C. Ian Anderson, Survey of Books Relating to the Law, 92 MICH. L. REV. 1438, 1439
(1994) (book review) (describing Gillman’s argument that “the decisions and opinions of this
period represented a ‘serious, principled effort’ to maintain the coherence and integrity of a
long-standing constitutional ideology that distinguished between valid economic regulation and
invalid ‘class,’ or factional, legislation”) (reviewing HOWARD GILLMAN, THE CONSTITUTION
BESIEGED (1993)); Benedict, supra note 213, at 318 (linking laissez-faire constitutionalism with
heritage of Jeffersonian Republicans who “made ‘equal rights for all, special privileges for none’
the central plank of their platform”). Even among revisionist critics of conventional assumptions
about the Lochner era, however, there is frequently skepticism that the decision making of that
era reflected the originally intended meaning of the Due Process Clause. See, e.g., WIECEK,
supra note 3, at 49 (acknowledging that nineteenth century state judges tended initially to
construe due process clauses “in a procedural sense only,” and concluding that “higher law
principles and the due process clauses attracted each other and tended to merge toward mid-
century”); Mary Cornelia Porter, Lochner and Company: Revisionism Revisited, in LIBERTY,
PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW
DEAL 17 (Ellen Frankel Paul & Howard Dickman eds., 1989) [hereinafter BEFORE THE NEW DEAL]
(noticing that “[o]ne group of revisionists are persuaded that laissez faire embodies the system of
limited government intended by the Framers of the Constitution”); Riggs, supra note 213, at 946
(“Reexamination of the available evidence leads me to conclude that the ‘procedure only’
interpretation of the fifth amendment cannot be sustained by the historical facts.”); Philippa
regulation dovetailed with Madison’s thinking about factions and the importance of
governmental neutrality among them”).

See, e.g., GILLMAN, supra note 213, at 7–10, 13–15 (arguing that standards used by
Court during Lochner era were “elaborated by state court judges as they first addressed
the nature and scope of legislative power in the era of Jacksonian democracy”); KENS, supra note
213, at 20 (concluding that “[r]esistance to interference by the government in the daily lives of
its citizens had been part of the Jacksonian concept of democracy, a favored theory not of the
elite but of the common American”); Benedict, supra note 213, at 298 (noting laissez-faire
constitutionalism should be perceived not as “an embarrassment but part of a long heritage of
protection for liberty, as it has been understood by Americans at different times in our history”);
id. at 318–19 (linking laissez-faire with “Andrew Jackson’s opposition to legislation for the
benefit of the privileged few, as he perceived it in the charter of second national bank”); Herbert
Hovenkamp, Book Review, 11 CONST. COMMENT. 256 (1994) (reviewing GILLMAN, supra note
of the antislavery movement and the Republican party. It remained true that Americans managed to favor non-interference by government as a matter of general theory, but also to support extending the actions of government to “ever-widening fields.” The gradual increase in intrusive economic regulation prompted historian William R. Brock to use one prominent example, “to conclude that ‘Americans had a unique capacity for living in one world of theory and another of practice.’” We sometimes have difficulty appreciating that the changes that occurred in the late nineteenth and early twentieth centuries led to a completely new way of seeing the world, but still occurred gradually and incrementally. Thus William Novak, a contemporary legal historian, reminds us:

The formative period from 1877 to 1937 in United States history was not about a simple shift from laissez-faire individualism to interventionist statecraft, from a bourgeois Rechtstaat to a modern welfare state. Nor was it about a polarized battle between the backward-looking liberal rule of law and forward-looking social-democratic welfare politics. Rather, the story was one of the mutual reconstitution of a jural and a welfare state, of liberalism and social welfare, of the rule of law and modern political administration—the synthetic story of the creation of a decidedly new liberal constitutional state.

We are thus reminded that the Lochner era grew out of attempts to undo

\[213\) (observing that Gillman’s book traces “the origins of substantive due process to the Jackson era’s market revolution itself”); McCurdy, supra note 213, at 973 (arguing that Justice Field derived his jurisprudence not so much from social Darwinism as from Jacksonian antislavery precept that individual is free to pursue fruits of her labor as she sees fit).

\[216\] FREEDOM OF CONTRACT, supra note 99, at 201–02 (stating that American Revolution “had redefined Locke’s social contract in terms of choosing one’s rulers rather than simply consenting to them,” to “its heirs, the ability to choose one’s relationships was the essence of the inalienable right to liberty; ‘pursuit of happiness’ meant exercising that liberty in the self-interested pursuit of wealth in the marketplace”; North’s Civil War victory “represented the triumph of free labor and free contract over the last vestiges of the pre-industrial regime”); GILLMAN, supra note 213, at 6–7 (citing works by Eric Foner, Charles McCurdy, William Nelson, David M. Gold, and William Forbath, tracing the Lochner era to “the antislavery movement, the infant Republican party, and (by extension) the newly reconstructed Union”); KEYNES, supra note 65, at xiii (observing that “[w]ith few exceptions, congressional Republicans argued that the Fourteenth Amendment prohibited the states from exercising their powers arbitrarily vis-à-vis the individual’s life, liberty, and property rights”); McCurdy, supra note 101, at 167 (seeing Lochnerism as “the product of a ‘free labor’ ideology that virtually all northerners—Republicans and Democrats, workers and employers—regarded as an expression of the North’s distinctive social order from the 1840s through the 1870s”).

\[217\] \textit{Kens}, supra note 213, at 20.

\[218\] \textit{Id}.

legislative actions that created special burdens and benefits to particular classes of citizens and to restore equality before the law.\textsuperscript{220} In one view, the “crisis in American constitutionalism that we associate with the \textit{Lochner} era was triggered by the judiciary’s stubborn attachment to what historical participants perceived to be an increasingly anachronistic jurisprudence, one that had lost its moorings in the storm of industrialization.”\textsuperscript{221} Even critics of the \textit{Lochner} era, among these revisionists, underscore mainly that the Supreme Court did not manage to remain true to its model of state neutrality in assessing exercises of the police power.\textsuperscript{222} One does not hear much of Justice Black’s themes that there simply is not room for the exercise of judicial discretion contemplated by the use of natural law-linked substantive due process. An even more radical form of revisionism, however, agrees that there are stronger intellectual underpinnings for the constitutional jurisprudence of the era than had been previously acknowledged, but also rejects the general assessment that the era is appropriately characterized by reference to “the judiciary’s stubborn attachment” to an anachronistic jurisprudence.\textsuperscript{223} In general, these revisionists

\textsuperscript{220}Gillman, supra note 213, at 8–9; Keynes, supra note 65, at 3; Anderson, supra note 214, at 1440–43; Benedict, supra note 213, at 305–06, 318–22, 330–31; Paul L. Murphy, Holmes, Brandeis, and Pound: Sociological Jurisprudence as a Response to Economic Laissez-Faire, in Before the New Deal, supra note 214, at 39, 40 (seeing laissez-faire as “a reaction to mercantilism” that “counseled a termination of governmental handouts to business”).

\textsuperscript{221}Gillman, supra note 213, at 11; see also Anderson, supra note 214, at 1439 (stating that “the Supreme Court was struggling to maintain an increasingly anachronistic constitutional ideology”); Benedict, supra note 213, at 296 (arguing that move away from laissez-faire reflects that “[c]hanging understandings of how society operates, changing standards of fundamental right and wrong help to shape legal doctrine” and can bring us to point that “whole areas of the law based on them may become unintelligible to those who imbibe the new”); Hovenkamp, supra note 215, at 257 (\textit{Lochner} era “is a story about judicial fidelity to crumbling foundations, not judicial infidelity to recoverable foundations”).

\textsuperscript{222}Wiccek, supra note 3, at 82 (noting that common law “status quo at any given time was itself a product of antecedent state action, and its preservation amounted only to further use of state force to protect what the state, not nature, had already formed”); James Willard Hurst, \textit{Freedom of Contract}, in 3 \textit{Encyclopedia of the American Constitution} 1111, 1115 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (noting freedom of contract decisions by American courts showed “a definite bias of policy” against statutes showing favor to “the interest . . . of labor”); McCurdy, supra note 101, at 167 (finding that “the very ‘specialness’ of the labor contract inclined judges to suspend the presumption of constitutionality when legislatures intervened,” which meant in practice that “the disproportionate bargaining power of employers did not provide a legitimate ground for government intervention”); \textit{See}, e.g., Murphy, supra note 220, at 42 (stating liberty of contract “in practice” only enhanced “the power of the contracting employer in a clearly unequal bargaining relationship with individual employees”); Harry N. Scheiber, \textit{Economic Liberty and the Modern State, in Freedom of Contract}, supra note 99, at 153 (arguing that one of freedom of contract’s ironies is that challenges to regulatory legislation as “class legislation” never led to judicial recognition that in industrial accident law and, later, in application of antitrust principles, “the courts were themselves engaged in precisely the deployment of power that they were wont to deny to legislatures”).

are far more sympathetic to the outlook of the Lochner-era Court.

There is more to the standard revisionist critique of traditional understandings of the Lochner era. We have tended to assume that the Court's police powers jurisprudence centered on "liberty of contract" and presented a significant barrier early in the twentieth century to meaningful economic reform. Critics of our traditional understanding have pointed out how often contemporary critics of Lochner, including members of the Supreme Court, supported other applications of substantive due process, including economic substantive due process. It is often observed as well that even the dissenting opinions in well-known economic substantive due process cases often conceded the validity of central premises underlying Lochner-era jurisprudence. Thus, even economic substantive due process' harshest critic, Justice Holmes, qualified his commitment to "the natural outcome of a dominant opinion" where the challenged statute "would infringe fundamental principles as they have been understood by the traditions of our people and our


224 See, e.g., Gillman, supra note 213, at 131 ("Holmes's unprecedented admonition that judges ought to respect the 'right of a majority to embody their opinions in law' and let the 'natural outcome of a dominant opinion' prevail amounted to an abdication of judicial responsibility that was as unacceptable to his peers as it would be today if the same was said about the Court's approach to racial classifications."); Anderson, supra note 214, at 1445 (observing that Gillman's treatment of Holmes' dissent in Lochner views it as presenting view that "failed to address the central terms of the debate among the other Justices"). Even some criticism of revisionist interpretations focuses on the central role Holmes' dissent has come to play. E.g., id. at 1446 (arguing that "redefinition" of Lochner era actually suffers because Gillman "has chosen to posit his account against the straw man embodied in the Holmesian paradigm").
Yet, “no one on the Court at the turn of the century was prepared to accept it [Holmes’ view], for it virtually denied the judicial function as they understood it.”

Even if one reaches another conclusion, it is reasonably clear that the analysis of revisionists offers a more realistic, as well as more sympathetic, account of the factors that prompted members of the Court to behave as they did:

The hypothesis advanced in these pages—that the justices were by and large motivated by principled commitment to the application of a constitutional ideology of state neutrality, as manifested in the requirement that legislation advance a discernible public purpose—explains a good deal more of the dependent variable (judicial behavior) than do hypotheses that suggest that the justices were basing decisions on a blind adherence to laissez-faire or on a desire to see members of their class win specific lawsuits or on an interest in imposing their idiosyncratic policy preferences on the country. Properly understood, the patterns of judicial decision making and the preoccupations of judicial opinions display a remarkable degree of coherence and consistency, down to the kinds of issues the justices faced with near unanimity and the kinds of issues on which they divided.

Little wonder that a well-known legal historian has concluded: “I have increasingly come to believe that to a surprising extent, the picture we have of the Court between 1880 and 1937 is largely the product of winner’s history.”

B. Revisionism Revisited: Substantive Due Process as Unwritten Constitutionalism

If we are attempting to understand the Lochner-era Court, we would be ahead of the game by consulting the work of those who have offered revisionist accounts of the history. Any true student of the history of state constitutional law could have told us that substantive due process was not an invention of the late nineteenth century, did not have its roots in social Darwinism, and was not centrally designed to aid business in avoiding any and all forms of social regulation. But, if the Lochner era has given rise to misconceptions about the origins and purposes of substantive due process, it is

229Gillman, supra note 213, at 199.
not at all clear that a genuine understanding of the era yields the conclusion that the Due Process Clause is properly read as an appropriate source from which to derive unenumerated fundamental rights—rights that legitimately call for strict scrutiny of impacting legislation.

It is important to recall that substantive due process did not begin or end with the *Lochner* era. There are at least three relevant categories of substantive due process decision making:231 (1) decisions embodying the vested rights doctrine; (2) the *Lochner* era’s requirement that “every restriction on liberty or property had to be reasonably related to a legitimate public purpose”;232 and (3) more recent invocations of the doctrine to justify the incorporation of the federal Bill of Rights, the application of the Equal Protection Clause to the national government, and decisions—like the right of privacy opinions—in which “the content of the doctrine is not borrowed from elsewhere in the Constitution.”233

Indeed, among modern advocates of substantive due process doctrine, there are those who rely mainly on the text and history of the due process clauses,234 and their application by courts,235 and there are those who rely chiefly on broader themes of social contract political theory and the history of unwritten constitutionalism.236 The dilemma for someone seeking understanding is that one will be unlikely to understand the history without focusing on judicial decisions relating to the due process clauses; on the other hand, it is not clear that those decisions will enable one to understand the relationship between the text and the legal doctrine. Many of us who have studied the due process decisions ultimately react the way described by Professor John Harrison:

A reader of the Supreme Court’s substantive due process cases can come to feel like a moviegoer who arrived late and missed a

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231See Harrison, supra note 72, at 498–501.
232Id. at 499.
233Id. at 500.
234Gillman, supra note 213; see Phillips, supra note 213; Riggs, supra note 213.
235Benedict, supra note 213; Ely, supra note 213; McCurdy, supra note 101.
crucial bit of exposition. Where is the part that explains the connection between this doctrine and the text of the constitutional provisions from which it takes its name? . . . [T]he textual pedigree of substantive due process has no definitive judicial articulation—there is no Marbury, no M'Culloch, for substantive due process.237

Even so, in this treatment we will begin with a review of substantive due process decisions before turning to the somewhat broader themes of social contract political theory.

1. The Text of the Due Process Clause

Part of the trickiness of applying the concept of due process in American constitutional law is the application of what was most clearly a limitation on executive power as a limitation on legislative power.238 The temptation to effectively punish individuals by taking away their life, liberty, or property is associated historically with executive decisions that completely bypassed the law—the attempt to seize one’s property or to imprison without the benefit of a trial to determine whether the law authorizes such a penalty.239 When Magna Carta was drafted, the Supreme Court itself has acknowledged, the main point was for the Crown to concede, as to the barons who imposed it, that their property should not be disposed of by the Crown “except as provided by the law of the land,” which included either “the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were

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237Harrison, supra note 72, at 493, 495. Noting that during the last century, “the state courts were the principal innovators in due process doctrine, with the federal courts following their lead,” Harrison also observes that he has “been unable to find a state court opinion that provides the kind of textual exegesis I am talking about.” Id. at 504 n.36.

238 Americans took pride in the fact that their constitutions limited both the executive and legislative branches of government. E.g., Statement of James Madison (June 8, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD OF THE FIRST FEDERAL CONGRESS 77, 80 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS] (observing that England has “gone no farther, than to raise a barrier against the power of the crown, [while] the power of the legislature is left altogether indefinite”); Ely, supra note 213, at 324 (“[T]he Bill of Rights, including the due process clause, was clearly intended to bind the legislative branch.”).

239 As Professor Riggs has observed:

Magna Carta was intended as a limit upon the king. Chapter 39 was not directed to his “legislative” functions, if they could be distinguished, but to “the arbitrary acts of imprisonment, diselson, and outlawry in which King John had indulged.” In a broader perspective, extending beyond the remedy of specific abuses, it “established the principle that the King, as well as his subjects, was bound by the law of the land.”

Riggs, supra note 213, at 953. See also Keynes, supra note 65, at 28 (observing that Justice Story equated due process with “a series of procedural guarantees in the civil and criminal process. . . . Magna Carta’s objective was to guard against arbitrary government and preserve the public peace”).
a controlling element.” Due to this control, Magna Carta was not imposed by the barons “to protect themselves against the enactment of laws by the Parliament of England.”

When courts have invalidated laws that attempted to authorize the bypassing of constitutionally secured legal procedures, the application of due process as a limitation on legislative power has not been especially controversial. The harder questions concern when, if ever, legislatures may issue what seem to be adjudicatory-like decisions that have negative consequences for individuals. The classic example is provided in Cooper v. Telfair, an 1800 Supreme Court decision upholding the power of the legislature of Georgia to declare, by a 1782 law, an individual guilty of treason and to provide for the confiscation of his real property. The Court reasoned:

And as the power of attainder, banishment, and confiscation, is essential to the existence and operations of government, yet, cannot be exercised by the ordinary tribunals of justice; it naturally belongs to the sovereign, that is, to the legislature of the nation. . . . But, independent of the necessity of the existence of such a power, and of the implication that it does exist under every constitution, unless it is expressly excluded, a just analysis of the various clauses of the constitution itself, (which contemplates a trial by jury only in the case of an offence committed within a county of the state) the contemporaneous construction of the legislature of Georgia, the corroborative example of other states . . . demonstrate the legitimacy and validity of the acts of attainder and confiscation, which naturally grew out of the revolutionary war.

To reach the conclusion that it did in Cooper, however, the Court not only had to justify the departure from the procedures ordinarily required to be followed in criminal cases—as with the denial of trial by jury—but also had to justify ignoring the separation of powers. In a separate concurrence, Justice Chase contended:

The general principles contained in the constitution are not to be regarded as rules to fetter and control; but as matter merely declaratory and directory: for, even in the constitution itself, we may

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241 Id.
242 E.g., Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382 (1794) (overruling conviction and fine that exceeded court's authority and was rendered without trial by jury despite constitutional guarantee of jury trial right; concluding that to deny jury trial right was to deprive individual of life, liberty, or property contrary to "the law of the land").
243 4 U.S. (4 Dall.) 14 (1800).
244 Id. at 17-18.
trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers, should be kept separate and distinct.\textsuperscript{245}

The doctrine of vested rights grew out of a recognition that when legislatures act like courts, the potential for abuse grows not only by the omission of some particular procedure in question—such as trial by jury—but also by the departure from separation of powers. As Professor Wallace Mendelson observed: “Separation with its procedural connotations had been a ready, if narrow, bridge between orthodox procedural due process and the doctrine of vested rights in an age when legislatures habitually interfered with property by crude retrospective and special, \textit{i.e.}, quasi-judicial, measures.”\textsuperscript{246}

Thus, Justice Chase’s example of a law taking property from A and giving it to B became “the shorthand to describe what substantive due process was designed to prevent.”\textsuperscript{247} Notice, though, that a subtle shift rather quickly occurred. Although an A-to-B law would “violate procedural due process, if a judicial proceeding was denied,”\textsuperscript{248} it was also clear that “another meaning lurked, redistributive and substantive.”\textsuperscript{249} What this means is that “[t]he appeal of vested rights due process is thus parasitic on the underlying assumption that some statutes, paradigmatically confiscatory statutes, are \textit{not} valid exercises of legislative authority, but are instead judicial decrees in disguise.”\textsuperscript{250} This is why separation of powers themes pervade the work of courts and commentators articulating and defending the doctrine of vested rights.\textsuperscript{251} It is also why the “doctrine of vested rights should stand or fall with the principle

\textsuperscript{245} \textit{Id.} at 18–19 (Chase, J., concurring).
\textsuperscript{247} \textit{Orth}, \textit{supra} note 82, at 339. For a summary of Justice Chase’s reliance on social contract theory as generating limits on legislative power, see \textit{supra} text accompanying notes 61–74.
\textsuperscript{248} \textit{Orth}, \textit{supra} note 82, at 343.
\textsuperscript{249} \textit{Id.} at 344.
\textsuperscript{250} \textit{Harrison, supra} note 72, at 522. Harrison continues: Imagine that someone were to respond, in defense of an A-to-B law, that a legislature gives due process when it acts like a legislature. The answer would be that in effecting a deprivation the legislature was acting like a court and hence was not giving the process due to the function being performed. That answer too rests on the premise that only the courts and not the legislatures may work deprivations. Once again, the Due Process Clause adds nothing. It is a fifth wheel.
\textit{Id.}

\textsuperscript{251} See \textit{Thomas M. Cooley, A Treatise On the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union} \textsuperscript{*}175 (5th ed. 1883); \textit{Keynes, supra} note 65, at 29; \textit{Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law} \textit{676} (1857) (stating that “the special clause works a division of power”); \textit{Tribe, supra} note 236, at 2569.
that legislative power may not interfere with vested rights,” and in fact “[d]ue process has nothing to do with it.”

Another suggestion, occasionally adopted by the Supreme Court, is that substantive due process is a method of ensuring that government proceed by “law”—and “law,” according to this view, is limited by a requirement that the action must be sufficiently general in nature:

It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case . . . [it thus excludes] as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.

In response to Ely’s contention that substantive due process is an oxymoron, Professor Laurence H. Tribe has asserted that “[i]t should be remembered . . . that the phrase after ‘due process’ is ‘of law,’ and there is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase ‘of law’ was substantive.”

Harrison observes, however, that the Court’s dictum in Hurtado v. California “does not seem to have had much influence,” was not built on by the Court during the Lochner era, and in fact was “far removed” from the merits of the controversy in the decided case. It also seems to rest on a reading of “law” that contradicts the text of the Constitution itself.

According to the restrictive reading of the word “law,” however, the Fifth Amendment to the Constitution contains additional formal or substantive constraints on the federal legislative power. Once again, sensible drafters who wanted to reopen the question, to add a

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252Harrison, supra note 72, at 524. Cf. Keynes, supra note 65, at xiii (concluding that “there is no direct link between pre-Civil War judicial decisions and later cases invoking substantive due process”); Tribe, supra note 236, at 2569 (finding that “legislatures have at times been understood as structurally improper sources of particular kinds of public actions”).


254TRIBE, supra note 65, at 1332–34. There are critical reactions to this approach to justifying substantive due process. See Thomas B. McAffee, Constitutional Interpretation—The Uses and Limitations of Original Intent, 12 U. Dayton L. Rev. 275, 291–93 (1986); McAffee, Should We Have an Unwritten Constitution?, supra note 20, at 1272–73.

255Harrison, supra note 72, at 529. See also 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 1150–51 (1953) (supporting Harrison’s view that early due process cases “rested on the notion that American legislative power was substantively limited”).

256Harrison, supra note 72, at 530–31.
new definition of legislative power or to take away some of the enumerated powers, would say so explicitly. If an amendment’s drafters wanted to change aspects of the Constitution that are already dealt with by fundamental provisions, they would make that clear. Packing it all into the word “law” hardly does that.  

On balance, it is difficult to quarrel with the argument that “[t]he suggestion that the word ‘law’ alludes to a substantive theory of the scope of legislative authority is thoroughly unpersuasive.”

The most impressive effort to link the “substantive” interpretation of the Due Process Clause to the text of the Constitution has come not from a court, but from an academic. Professor T.M. Scanlon suggests that substantive due process rests on the power of courts “to arrive at an independent judgment of the limits and conditions of the authority” of a government entity, including a legislature. A law might be unconstitutional because it violates a specific constitutional prohibition, or, alternatively, it “might be found to exceed the authority of the legislature in a more general sense as determined by an argument about the nature of legislative authority.” For Scanlon, even though substantive due process “opens the door to general theoretical argument about what the powers of government ought to be, i.e., to judicial revision and extension of the Constitution,” a careful consideration of the likelihood of abuse of legislative power and the potential for a meaningful judicial check on such abuses may lead one to conclude that substantive due process supplies “a less arbitrary method of decision than the alternative of unrestrained legislative authority.”

There is only one problem with Scanlon’s rationale for substantive due process: it proceeds from an assumption that conflicts with the assumption upon which the Framers of the federal Constitution proceeded. The Framers began by assuming that the state legislatures were the representatives of the sovereign people and therefore held “all powers not constitutionally forbidden them.” Scanlon’s substantive due process analysis assumes, instead, that courts might devise limiting principles to legislative power based on a general,

257 Id. at 532.
258 Id. at 534. It may be that the most creative aspect of the development of substantive due process, however, has been the judicial discovery that “life, liberty, and property” included freedom of contract, as well as more modern notions of “privacy” and “autonomy,” and was not limited, as it had been for Blackstone, to “‘the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.’” ORTH, supra note 82, at 85.
259 T.M. Scanlon, Due Process, in DUE PROCESS, supra note 212, at 93.
260 Id. at 108.
261 Id. at 113.
262 Id. at 115.
263 Id. at 116–17.
264 GOVERNMENT PROSCRIBED, supra note 22, at 388. See supra notes 21–29 and accompanying text.
court-created theory of legislative authority and the potential for abuse of that authority. This interpretation, in short, construes the Due Process Clause as an invitation to engage in unwritten constitutionalism on behalf of judicially created fundamental rights.

2. Social Contract Theory

An alternative justification for interpreting the Constitution favorably to claims of substantive due process is less focused on the text of the Constitution; it begins with the assumption that there are “bounds within which the social contract allowed the legislature to operate” and concludes that those bounds had been “reached and passed” by the New York statute invalidated in *Lochner*. According to Professor Owen M. Fiss, under the view of social contract theory dominant at the time *Lochner* was decided, “the state was subject not only to external but also to internal restraints, that is, restraints derived from the reasons for the power’s very existence.” Consequently, although the states could regulate “to further the ‘safety, health, morals and general welfare of the public,’” this was not understood to embrace “the totality of all social interests,” but was instead viewed as “identifying a discrete and separate public end.” But the state’s power to regulate was limited by general principles, including the Constitution’s “commitment to ‘equality before the law.’”

Notice, however, that Fiss begins with the assumption that “limited” government does not refer to external limits imposed by the specific provisions of a bill of rights. It includes implicit limits that stem from the nature of the powers deemed legitimate to be exercised by the state. And it is from this perspective that Fiss is able to characterize Justice Holmes as embracing “the widest conception of permissible ends for state action, believing that legislative power could be used to favor one economic class or social group over another.” Thus Justice Holmes could be seen as rejecting “the very core of the social contract tradition.” Accordingly, Fiss quotes a letter from Justice Holmes to Professor James B. Thayer of Harvard Law School in which Justice Holmes characterizes state legislatures as having “absolute power, except so far as expressly or by implication it is prohibited by the Constitution.” For Holmes, then, at least as he characterized state constitutional law for Professor Thayer, “the question always is where do you find the prohibition—not, where

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265 Fiss, *supra* note 228, at 158.
266 *Id.* (quoting *Lochner*, 198 U.S. at 58).
267 Fiss, *supra* note 228, at 159.
268 *Id.* at 160.
269 *Id.*
270 *Id.* at 180.
271 *Id.*
272 *Id.* at 181.
do you find the power.”

Indeed, in his letter to Professor Thayer, Justice Holmes characterized the “contrary view,” the one that commanded the assent of a majority of his judicial brethren in Massachusetts, as “dangerous and wrong.”

Though Fiss does not underscore it, Justice Holmes’ insistence that the fundamental question concerns where you find the “prohibition” rather than where you find the “power,” is consistent with the understanding of state power articulated by those who defended the federal Constitution when it was ratified. Even as to the proposed national government of enumerated powers, the Federalist proponents of the Constitution were clear that government power included the authority to use the power required to accomplish delegated ends. When James Madison drafted the federal Bill of Rights, his purpose was to “proceed with caution” so as to make the “revisal” of the Constitution “a moderate one.” Thus, he reassured his congressional colleagues that he supported only constitutional safeguards “against which I believe no serious objection has been made by any class of our constituents” and as to which “they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power.” Madison’s goal became to make provision for all “essential rights,” but to omit all others, and this

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273 Id. (quoting Letter from Oliver Wendell Holmes, Jr., to James B. Thayer, Nov. 2, 1893, in Holmes Papers (Harvard Law School Library, manuscript division)). Cf. State ex rel. Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978) (suggesting that question is “not whether the act is authorized by the constitution, but whether it is prohibited thereby”).

274 Fiss, supra note 228, at 181. Cf. Grey, supra note 20, at 505 n.137 (contrasting Justice Holmes’ views with his characterization of the views of others as reflecting the “tendency” to regard “our corpus juris as an image, however faint, of the eternal law”) (quoting Oliver Wendell Holmes, Address at the Banquet of the Middlesex Bar Assoc. (Dec. 3, 1902), in 3 COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 536 (Shelton M. Novick ed., 1995)); Orth, supra note 82, at 68-69 (observing that in 1897, while still justice of Massachusetts Supreme Judicial Court, Holmes complained that those “who no longer hope to control the legislatures ... look to the courts as expounders of the Constitutions, and ... in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of economic doctrines which prevailed about fifty years ago”) (quoting Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 467-68 (1897)); Wieck, supra note 3, at 130 (noting Holmes’ dissenting opinion in 1891 Massachusetts case invalidating law for depriving employers of “certain fundamental rights,” despite fact that “the enactment of it is not expressly forbidden” by Constitution; according to Holmes, a judge should not overrule legislation “unless [he] thought that an honest difference of opinion was impossible, or pretty nearly so”).

275 See supra notes 21–29 and accompanying text.

276 Statement of James Madison (June 8, 1789), in CREATING THE BILL OF RIGHTS, supra note 238, at 79.

277 Id. See also 12 THE PAPERS OF JAMES MADISON 219 (Charles F. Hobson et al. eds., 1979) [hereinafter MADISON’S PAPERS] (explaining that he would limit his amendments to those “which are important in the eyes of many and can be objectionable in those of none”).

278 Letter from James Madison to George Eve (Jan 2, 1789), in 11 MADISON’S PAPERS, supra note 277, at 404–05.
determination became the source of debate in Congress.\textsuperscript{279}  

It may well be true that "the Court’s about-face in 1937 and its acceptance of the New Deal could be seen as marking the end of the constitutive theory of the state and the triumph of a more organic one, giving the state what Holmes referred to as ‘absolute power.’"\textsuperscript{280} But, it is also true that the view Justice Holmes advocated in correspondence, but could not bring himself to insist upon in a judicial opinion, was the view that embodied what was intended by those who originally drafted the Constitution. And, it is the insistence on a general power of courts to determine the appropriate “ends” that government might legitimately and constitutionally pursue that most singularly characterizes an activist judiciary, whether in 1905 or 2005.\textsuperscript{281}

\textbf{C. Substantive Due Process and the Doctrine of Precedent}

Despite the fact that substantive due process has been the victim of merciless criticism, not only by critics of the Court’s modern fundamental rights jurisprudence, but also by advocates of alternative theories for justifying unenumerated fundamental rights,\textsuperscript{282} it clearly remains the most plausible

\textsuperscript{279}See Ely, supra note 213, at 325 (acknowledging that “Madison harbored no plan to fashion new rights or depart from settled norms,” but sought “to formulate a document which reflected a consensus about widely held values”); Thomas B. McCaffee, The Federal System as Bill of Rights: Original Understandings, Modern Misreadings, 43 Vill. L. Rev. 17, 113–20 (1998) [hereinafter McCaffee, Federal System as Bill of Rights].

\textsuperscript{280}Fiss, supra note 228, at 181.

\textsuperscript{281}See, e.g., Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 13 (1972) (asserting that “hesitancy in articulating values not clearly rooted in the Constitution” had become legitimate characteristic of Court); id. at 20 (stating that Court is nevertheless disinclined to show undue “deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications”); id. at 20–21 (arguing for “new bite” in the “old equal protection” that would “gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing”); id. at 21–22 (offering “modest interventionism” as way to avoid making “ultimate value judgments about the legitimacy and importance of legislative purposes”); id. at 23 (observing that Justice Jackson “shrank from” decisions that “foreclosed legislative purposes and left conduct ‘ungoverned and ungovernable,’” but advocated newer equal protection that would enable courts to “do more than they have done for the last generation to assure rationality of means, without unduly imposing on legislative prerogatives regarding ends”).

\textsuperscript{282}See, e.g., Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 1 (1997) (“The foundations of American human-rights law are in bad shape. They creak, they groan for rebuilding.”) (emphasis omitted); id. at 3 (describing substantive due process as “paradoxical, even oxymoronic”; it “leaks in the front and leaks in the back”); id. at 4 (“We ought not to be content to face the twenty-first century with a patchy, tacky human-rights law, so poorly legitimated, so feeble of reason.”); id. at 91–92 (“I tell my students sometimes that it resembles a Zen Buddhist Koan, a saying that expresses or asks for the impossible, even the unimaginable, in order to tease or stimulate or press the mind or the spirit into awakening to a transcendent reality, to a transformation of the inmost self.”); id. at 100–01 (“Why not just
justification for finding rights not clearly or explicitly set forth in the text. Indeed, from the beginning, the commitment of requiring compliance with due process of law, and keeping the government within the “law of the land,” was not limited to requiring compliance with acts of Parliament, but included common law and customary conceptions of law. Well prior to the American Revolution, Lord Coke wrote that the granting of an economic monopoly “is against the liberty and freedome of the subject,” and, consequently, such a grant “was against this great charter [Magna Carta].”

Surprisingly enough, even though provisions expressly condemning monopolies were not uncommon in the pre-1787 state constitutions, and Thomas Jefferson included an anti-monopoly provision in his list of rights that people should invariably have against government, Madison quite purposely omitted such a provision from his proposed Bill of Rights. Professor Frank R. Strong, in fact, suggests that “[a]s conversant with English constitutional history as were Jefferson, Richard Henry Lee, Madison, Mason, Wilson and other Founders, it is passing strange that none appeared to connect monopoly with violation of Due Process.” Even so, it was antebellum state courts that interpreted “due process to restrain arbitrary deprivations of property,” and it was during this period that courts also began to perceive due process as “establishing equal treatment as a constitutional norm,” and prohibiting laws “which aided one class of individuals” to the detriment of others.

Substantive due process could reflect either of two possibilities. First, it could present an honest grappling with text and the recognition that reading due process as a limit on legislative power involves tricky questions for which historical materials do not supply easy and straightforward answers. Under

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stick with ‘substantive due process,’ irritating as it is? Because, quite visibly, this non-concept rests on insufficient commitment, and has too little firm meaning (if it has any at all) to beget the kind of confidence, in judges or in others, that ought to underlie the regime of human rights in the country that based and bases its life, and its claims to leadership, on its dedication to human rights.”); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 (2000) (concluding that “the very phrase ‘substantive due process’ teeters on self-contradiction,” and hence “provides neither a sound starting point nor a directional push to proper legal analysis”); for basically the same view, see supra note 210 and accompanying text (John Hart Ely). Cf. KEYNES, supra note 65, at 29 (“Despite the persistence of substantive due process, modern jurists tend to shy away from such theories as abstract, subjective, and undemocratic concepts fraught with the dangers of judicial tyranny and confrontation with Congress and the state legislatures.”).

283 *See* STRONG, supra note 213, at 10, 12–13; Ely, supra note 213, at 320–21; Riggs, supra note 213, at 951, 960–61, 965, 968, 986.


285 STRONG, supra note 213, at 47, 50; McAfee, *Federal System as Bill of Rights*, supra note 279, at 116–18.

286 STRONG, supra note 213, at 50.

287 Ely, supra note 213, at 336.

288 *Id.* at 338.
such circumstances, the doctrine of precedent becomes especially important:

However committed we may be to the idea of a fixed and written Constitution, as well as to the idea of objective interpretation, in the final analysis, fallible human beings will implement those ideals. We need not embrace the simplistic slogan that the Constitution means what this Court says it means. Sooner or later, authoritatively adopted judicial decisions may be embraced by the nation as a whole and become a settled part of our constitutional order. What is being recognized is not an unrestrained power to amend the Constitution outside of Article V, but the authority to determine and fix the meaning of the Constitution.\(^{289}\)

Alternatively, substantive due process could present us with unwritten constitutionalism once removed—as though it were a “life, liberty, or property” clause, rather than a due process clause. It may be that the doctrine of precedent will justify reading the Due Process Clause as protecting liberty and property against arbitrary derivations, and as establishing equal treatment as an enforceable constitutional norm. But, neither historical evidence nor the doctrine of precedent support empowering courts to engage in the moral analysis required to “discover” natural or inalienable rights and subjecting laws impacting on such rights to the strictest forms of judicial scrutiny. Although the modern Supreme Court has sometimes implied something more, the best reading of its recent cases suggests that the Court itself recognizes that substantive due process reflects a jurisprudence based on the common-law tradition rather than the assumption that the Court is the best place to look for the moral analysis required to impose natural and inalienable rights. Clearly, however, given that the Court puts into effect principles adopted by courts and legislatures, over and above what appeared to judges as shorter-term resolutions of problems, it appears that substantive due process in the twentieth century became the implementation of the “common-law tradition seen through a natural-law lens.”\(^{290}\)

It is little wonder that the Supreme Court Justice most associated with the


\(^{290}\)Grey, supra note 20, at 488. Grey points out that “the Lochner judges and commentators carried forward an older tradition of blurring common law and natural law.” *Id.* at 504. Common law was “right reason” rooted in history and culture, and the combination of reason with positive custom was what made its principles legally fundamental. Without the blurring of evolutionary custom and reason, it would have been difficult to justify elevating freedom of contract to constitutional status, as a fundamental aspect of the liberty protected by the Fifth and Fourteenth Amendments.

*Id.*
renewal of the common-law heritage of substantive due process is Justice Harlan.\textsuperscript{290} For some, Justice Harlan’s association with common-law decision making is ground for criticism, as it is acknowledged that “the libertarian growth potential” of Justice Harlan’s constitutional method “seems modest.”\textsuperscript{291} Professor Bruce Ackerman, for example, would look instead to “the model of the independent constitutionalist,” and points to Justice Douglas’ attempt “to convince us that, after the New Deal, it is the concept of privacy, not property, that best serves to organize many of the particular concerns the Founders expressed in the Bill of Rights.”\textsuperscript{292} But the technique of “independent constitutionalism” seems to contemplate “a Supreme Court busily making constitutional changes quite ‘independent’ of the Constitution and quite as it thinks best.”\textsuperscript{293} Ultimately it seems rooted in “the encouragement of judicial flexibility in lieu of amendments (of participation and protection) by decisional fiat—without proposal or ratification pursuant to Article V.”\textsuperscript{294}

Increasingly, Justice Harlan’s common-law approach, with its emphasis on tradition, is replacing the “moral philosophic” approach to discovering and defining due process fundamental rights.\textsuperscript{295} While advocates of “independent”

\textsuperscript{290} See, e.g., Bruce Ackerman, The Common Law Constitution of John Marshall Harlan, 36 N.Y.L. SCH. L. REV. 5, 10 (1991) (concluding that “Justice Harlan exemplifies the type of judicial character that the common law model places at the center of the constitutional stage”; under common-law constitutionalism the idea is to look for “‘leaders of the bar,’ masters of good judgment and interstitial adaptation of established norms”).

\textsuperscript{291} Id. at 23. See also Anthony C. Cicia, Note, A Wolf in Sheep’s Clothing?: A Critical Analysis of Justice Harlan’s Substantive Due Process Formulation, 64 FORDHAM L. REV. 2241 (1996).

\textsuperscript{292} Ackerman, supra note 291, at 24. According to Professor Ackerman, “Douglas’s principal aim was to look upon the particulars in the Bill of Rights as grounded on a more abstract principle expressed by the modern legal idea of privacy.” Id. For skeptical views of the ability of courts to rely on abstract moral principles to determine appropriate limits on government, see sources cited supra note 23.

\textsuperscript{293} William W. Van Alstyne, The Enduring Example of John Marshall Harlan: “Virtue as Practice” in the Supreme Court, 36 N.Y.L. SCH. L. REV. 109, 117–18 n.49 (1991). For Professor Van Alstyne, it is clear that Ackerman’s model will operate (as it sometimes already has operated) much in the manner of Hans Christian Andersen and The Emperor’s New Clothes. Within the new parable “the Constitution” is the Emperor. The Court then tells us from time to time, just how perfect the Emperor looks (he merely looks a bit naked, as it were, to us). But I surely agree that Justice Harlan can be faulted (if fault it be) for not giving himself as readily as others to this often personally self-gratifying and sometimes even highly rewarding, and thoroughly constructive community fraud. Perhaps, moreover, even as Professor Ackerman implies, some who served with Harlan thought this entirely appropriate, and accordingly declared “Behold!” Justice Harlan did not usually exclaim “Behold.” Rather, in his quiet, professional manner, he was more likely to say: “Behold what?”

\textsuperscript{294} Id.

\textsuperscript{295} Id.

\textsuperscript{296} Michael W. McConnell, The Right to Die and the Jurisprudence of Tradition, 1997 UTAH L. REV. 665, 672. Some would question whether the Court has stayed true to the “common law” approach it articulated and defended in Washington v. Glucksberg, 521 U.S. 702, 721
constitutionalism underscore that “one cannot understand the Founders or their great successors without recognizing that they were great gamblers on the power of untested abstractions,” the Supreme Court now sees itself as governed by the traditions of our law rather than by moral abstractions:

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.

Professor Michael W. McConnell suggests the Court’s approach should yield a more cautious, incremental analysis of fundamental rights:

The traditionalist approach adopted in *Glucksberg* differs sharply from the moral philosophic approach not just in its substance but in its intellectual style. The moral philosophic approach is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions. For example, the Ninth Circuit’s argument

1997). *Compare* Lawrence v. Texas, 123 S. Ct. 2472, 2475 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *id.* at 2478 (“The liberty protected by the Constitution allows homosexual persons the right to make this choice.”); *id.* at 2479 (noting that through nineteenth century, homosexual conduct “was not thought of as a separate category from like conduct between heterosexual persons”; consequently laws against sodomy “do not seem to have been enforced against consenting adults acting in private”); *id.* (“far from possessing ‘ancient roots,’ *Bowers*, 478 U.S. at 192 . . . American laws targeting same-sex couples did not develop until the last third of the 20th century”; in that it was “not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so”); *id.* at 2480 (stating that “laws and traditions in the past half century are of most relevance here,” and they “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”; this changing pattern is reflected in the American Law Institute Model Penal Code’s recommendation against prohibiting adult consensual sexual relations), with *id.* at 2489 (relying on *Glucksberg*’s insistence “that only fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’ qualify for anything other than rational basis scrutiny under the doctrine of ‘substantive due process’”); *id.* at 2491-92 (Scalia, J., dissenting) (summarizing cases limiting finding of fundamental rights to those “so rooted in the traditions and conscience of our people as to be ranked as fundamental”); *id.* at 2492 (Scalia, J., dissenting) (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1983)) (criticizing Court’s decision as based on “rational basis” scrutiny rather than on a finding of a fundamental right that requires strict judicial scrutiny).

297 Ackerman, *supra* note 291, at 9.
298 *Glucksberg*, 521 U.S. at 725.
for recognizing a right to assisted suicide was based on the assertion that this right is encompassed within a supposed right of each individual "to make the 'most intimate and personal choices central to personal dignity and autonomy.'" The traditionalist approach, by contrast, is inductive and experiential. Rather than reasoning down from abstract principles, it reasons up from concrete cases and circumstances. It can be seen as the conservative heir to legal realism: cautious, empirical, flexible, skeptical of claims of overarching theory.\footnote{McConnell, *supra* note 296, at 672. The Court's reliance on developments of the past fifty years in explaining the decision to invalidate Texas' anti-sodomy law, though not satisfying everyone, reflects this more incremental and cautious approach to substantive due process decision making. See *supra* note 296.}

The Court agrees that its developing approach avoids over-generalization: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."\footnote{Glucksberg, 521 U.S. at 727.} Concluding that fundamental rights must be either textually based or be "objectively, 'deeply rooted in this Nation’s history and tradition,'"\footnote{Id. at 720–21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).} the Court was clear that its task is to determine what the people have deemed fundamental, and not what the Justices are persuaded should be fundamental.

V. CONCLUSION

* A people, therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution, cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power.\footnote{James Madison, quoted in *Letters of Pacificus* and *Helvidius* 86–87 (1884).}

It was Corwin who reminded us that the United States Constitution presents a unique example of a people establishing a document that would at once vindicate their collective right to self-government and their rights as individuals:

The idea of putting legal restraints upon government in the interest of private rights, though of respectable antiquity, has never before received institutional embodiment. The principle of separation of powers was, even in America before the Massachusetts Constitution of 1780 mere literary theory, but it furnishes the constructive
principle of the Constitution of 1787. So, too, the derivative notion of checks and balances had hitherto failed as against legislative power; for only in Massachusetts and New Hampshire did the executive veto exist in form, and though judicial review had been asserted in three or four dicta and one or two decisions, it was still, when the Federal Convention assembled, the rawest sort of raw idea. . . . Lastly, the method by which the Constitution was adopted employed the principle of popular sovereignty on an unparalleled scale; for the first time did the right of revolution appear as the more positive right of the citizens of a great national community, acting through bodies chosen for the specific purpose, to remodel their political institutions.\textsuperscript{303}

Our goal, even today, is to attempt to reconcile the goal of securing vital individual rights with the end of enabling the people to govern themselves.

As the nation struggled to determine whether it would ratify the Constitution drafted in 1787, Hamilton answered concerns about judicial power that had “arisen from an imagination that the doctrine [of judicial review] would imply a superiority of the judiciary to the legislative power.”\textsuperscript{304} He responded:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.\textsuperscript{305}

Hamilton’s views have been reiterated more recently:

The words of the Constitution are not authoritative for fetishistic reasons, but because they are the verbal embodiment of certain collective decisions made by the people. The theory of judicial review is not based on any claim that judges are superior to the people, but on the claim that in enforcing the Constitution they are carrying out the will of the people. It follows, then, that judges act legitimately under the Constitution only when they are faithfully

\textsuperscript{303}Corwin, Court Over Constitution, supra note 12, at 226–27.
\textsuperscript{304}The Federalist No. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
\textsuperscript{305}Id.
enforcing those collective decisions. To enforce something else (on
the claim that it would do more “credit to the nation”) separates the
text from the source of authority.\(^{306}\)

But the insight that the role of the Supreme Court, as the Constitution’s
central interpreter, is a limited one, was not a recognition unique to the
founding era or to Hamilton. If they are wise, modern judges will follow
Corwin’s advice: “Today we think of the Constitution in the way that
Gouverneur Morris thought of it while its adoption was pending. ‘You have
given us a good Constitution,’ said a friend. ‘That depends,’ Morris answered,
‘on how it is construed.’”\(^{307}\)

Fifty years ago, Justice Jackson attempted to encourage fellow members
of the United States Supreme Court to acknowledge the need the Court has for
humility. He stated: “We are not final because we are infallible, but we are
infallible only because we are final.”\(^{308}\) At times in the nation’s history, courts
have been tempted to think that they alone hold the answers to fundamental
moral questions about the appropriate reach of government power. They would
be well advised to take counsel from figures ranging from the statesman, to the
scholar (Corwin), to the modern jurist (Justice Jackson)—encouraging judges
to limit their task to implementing the people’s decisions, as inserted into the
written Constitution.


\(^{307}\)CORWIN, COURT OVER CONSTITUTION, supra note 12, at 228.