

# WRITTEN AND UNWRITTEN CONSTITUTIONAL LAW IN THE FOUNDING PERIOD: THE EARLY NEW JERSEY CASES

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*Holmes v. Walton*, a case decided by the New Jersey Supreme Court on September 7, 1780, has been at the center of controversies over the legitimacy of judicial review under the federal Constitution.<sup>1</sup> *Holmes* is the earliest known example of judicial review in the American colonies.<sup>2</sup> A companion case, *Taylor v. Reading*,<sup>3</sup> decided eight years after the Constitution's adoption, offers similar insights into relationships between legislative and judicial interpretations at the time.<sup>4</sup>

*Holmes* is historically significant not only because the judges exercised a form of judicial review, but also because they went beyond the text of the New Jersey Constitution.<sup>5</sup> The judges relied on

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1. See Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HISTL. REV. 456 (1899); Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102-25, 283-316 (1910); Boudin, *Precedents for the Judicial Power: Holmes v. Walton and Brattle v. Hinckley*, 3 ST. JOHN'S L. REV. 173 (1929); 1 L. BOUDIN, GOVERNMENT BY JUDICIARY, 531 app. (1932) [references herein to Boudin's arguments are to this work]; 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 948-52 (1953); L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 89-99 (1988).

2. Other precedents for judicial review in the colonies have been identified, but none antedating *Holmes*. See, e.g., Corwin, *supra* note 1, at 110-17; 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 383-431 (1971).

3. As with *Holmes*, a written opinion for *Taylor* has not been located. Both cases are described as precedents for judicial review in an opinion for a later case, *State v. Parkhurst*, 9 N.J.L. 427, 444 (Sup. Ct. 1802) (Volume 9 of *New Jersey Law Reports* contains reports of cases from 1827 to 1828, as well as the appendix reporting *Parkhurst*.)

4. See generally W. MURPHY, J. FLEMING & W. HARRIS, II, AMERICAN CONSTITUTIONAL INTERPRETATION 181-284 (1986), on issues of interpretive authority. See also Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 THE REV. OF POL. 401 (1986).

5. See generally W. MURPHY, J. FLEMING & W. HARRIS, *supra* note 4, at 77-180, on the issue of what the Constitution is (including what it includes).

the New Jersey Constitution's written guarantee of jury trials,<sup>6</sup> but they were also willing to enforce norms not explicit in the constitutional text.<sup>7</sup> The early years of the Republic saw the emergence of both textual and non-textual judicial review.<sup>8</sup> It is remarkable that what seems to have been the first American documented case of judicial enforcement of a written constitution centered on an issue not addressed explicitly in the text of that constitution.

Constitutional theory in this century has been preoccupied with the legitimacy of judicial review. The early New Jersey precedents examined in this article link that issue to broader questions of constitutional meaning. In studying America's fundamental law, it is necessary to look beyond the texts themselves to political practices and other sources of law that infuse the texts with their meanings in ways that constrain political activity.

## I

There is substantial controversy over whether the judges in *Holmes* actually exercised judicial review. An opinion by the New Jersey Supreme Court has never been located, permitting Louis Boudin and William Crosskey to argue that the decision turned on a question of statutory interpretation.<sup>9</sup> Considerable evidence, however, supports Austin Scott's conclusion that the judges invalidated legislation based on issues of constitutional interpretation.<sup>10</sup> A case file at the New Jersey State Archives contains reliable evidence of what issues were presented to the judges;<sup>11</sup> supreme court minutes report reversal of an earlier judgment;<sup>12</sup> a petition presented to the

6. See Corwin, *supra* note 1, at 110-12.

7. See Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1141 (1987).

8. See Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 893 (1978) (stating that the effect of the "new practice" of writing constitutions on "the idea that judicially ascertainable fundamental law could itself have constitutional status remains to be carefully analyzed").

9. See L. BOUDIN, *supra* note 1, at 537-52; W. CROSSKEY, *supra* note 1, at 948-52; see also L. LEVY, *supra* note 1, at 93.

10. See Scott, *supra* note 1, at 460, 468-69.

11. The principal case file is at the New Jersey State Archives ("N.J. Archives"), which is associated with the New Jersey State Library in Trenton, filed in the "Judicial Records" record group, "Supreme Court" subgroup, "Actions at Law" series, containing cases before and after the Revolution, in Envelope No. 44928 (containing materials primarily relating to subsequent proceedings in the case). In addition, Envelope No. 18354 contains two petitions that argue for reversal of a verdict against John Holmes and Solomon Ketcham. Section II of this article centers on the theoretical premises reflected by these petitions.

Unless otherwise cited, references herein to envelope numbers at the N.J. Archives are to the record group, subgroup and series cited in this note.

12. Minutes of the New Jersey Supreme Court, April 1775-1782, at 343 (September 7, 1780). See Scott, *supra* note 1, at 459.

New Jersey legislature two months after the decision complained of the court's "set[ting] aside some of the laws as unconstitutional;"<sup>13</sup> contemporary observers apparently viewed the decision as based on constitutional grounds;<sup>14</sup> a reported opinion for *State v. Parkhurst* states that in *Holmes* an act that had been challenged as unconstitutional "upon solemn argument was adjudged to be unconstitutional and in that case inoperative;"<sup>15</sup> and a series of statutes subsequently enacted by the New Jersey legislature support *Parkhurst's* statement that the decision in *Holmes* was "recognized and acquiesced in by the legislative body of the state."<sup>16</sup> Nevertheless, Boudin and Crosskey's arguments for a different interpretation of these historical materials deserve serious scrutiny.

#### A. ACCOUNTING FOR JUDICIAL SILENCE

Boudin relied heavily on the absence of an opinion in *Holmes* in arguing that the case was not decided on constitutional grounds. He assumed that no court would have declared an act of legislation unconstitutional without writing an opinion. Because "a lot of unimportant trash" relating to the case had been preserved, he asserted that "no opinion of this kind, if written, could have been lost." He concluded that the decision "was not considered important enough for any opinion to be written."<sup>17</sup>

Boudin relied on similar presuppositions in attempting to impeach the credibility of *Parkhurst's* account of *Taylor v. Reading*, another case reported by *Parkhurst* as a precedent for judicial review within New Jersey. According to *Parkhurst*, "in the case of *Taylor v. Reading*, a certain act of the legislature . . . was by this court held to be an *ex post facto* law, and as such unconstitutional, and in that case inoperative."<sup>18</sup> Boudin asserted that *Taylor* would have been "a great case" of "tremendous importance" if this account were correct. Because "no such case is reported in the various collections of reports, and no searchers after precedents have

13. 1780 Votes and Proceedings of the General Assembly of the State of New-Jersey 52 (December 8, 1780). See Scott, *supra* note 1, at 459-60.

14. For example, Gouverneur Morris apparently was referring to *Holmes* in his "Address on the Bank of North America," presented to the Pennsylvania Assembly (1785), reprinted in 3 J. SPARKS, THE LIFE OF GOUVERNEUR MORRIS 437, 438 (1832). See also Scott, *supra* note 1, at 460-65. Compare Corwin, *supra* note 1, at 111-12; W. CROSSKEY, *supra* note 1, at 951.

15. *Parkhurst*, 9 N.J.L. at 444.

16. *Id.* See also the series of laws catalogued at P. WILSON, ACTS OF THE COUNCIL AND GENERAL ASSEMBLY OF NEW-JERSEY app. (1784) (the volume covers laws enacted between 1776 and 1783) [hereinafter cited as WILSON'S LAWS]. Compare Scott, *supra* note 1, at 463; L. BOUDIN, *supra* note 1, at 545-52. See also note 55, *infra*.

17. L. BOUDIN, *supra* note 1, at 545.

18. *Parkhurst*, 9 N.J.L. at 444.

ever been able to discover any record of such a case," the author of *Parkhurst* must have taken "some vague rumor for an authenticated fact."<sup>19</sup> Boudin concluded that *Parkhurst* was similarly "worthless as evidence" of what happened in *Holmes*.<sup>20</sup>

Boudin was incorrect in assuming that there would be written opinions for *Holmes* and *Taylor* if the New Jersey Supreme Court had declared legislation unconstitutional in these cases. Court records at the New Jersey State Archives completely corroborate *Parkhurst's* account of *Taylor*.<sup>21</sup> Among other things, these materials explain that a written opinion was unnecessary in *Taylor* precisely because the judges exercised a form of judicial review.

Boudin and other "searchers after precedent" apparently were unable to locate court records relating to *Taylor* because the case's original name was *Cadwallader v. Reading*, not *Taylor v. Reading*. The dispute concerned bonds originally acquired by Lambert Cadwallader from Joseph Reading. Cadwallader assigned these bonds to Joseph Taylor,<sup>22</sup> who thereafter sued Reading. Although Cadwallader was the nominal plaintiff because the bonds were in his name, the case became known by the real parties in interest: Taylor and Reading.<sup>23</sup>

A hand-written petition dated November 11, 1795, submitted by Joseph Reading to the New Jersey legislature, includes a detailed account of the case. As described by Reading's petition, the New Jersey legislature adopted a law on November 28, 1789 for the purpose of "authorizing persons whose Estates had been confiscated, to demand and receive the Debts, due to the State of New Jersey."<sup>24</sup> Before the Revolutionary War, Reading had borrowed £300 from Lambert Cadwallader and "paid over the whole Amount" to a rela-

19. L. BOUDIN, *supra* note 1, at 542.

20. *Id.*

21. Again, the principal case file is at the New Jersey State Archives ("N.J. Archives"), in the "Judicial Records" record group, "Supreme Court" subgroup, "Actions at Law" series. Envelope No. 8288 is identified by the case's name, "Lambert Cadwallader vs. Joseph Reading." In addition, a handwritten petition from Joseph Reading to the New Jersey legislature describes the proceedings in the case through and including the supreme court's invalidation of a law enacted by the legislature on November 28, 1789. The "Petition of Joseph Reading to the Honorable The Legislative Council and General Assembly of the State of New Jersey," dated November 17, 1795, is located at the N.J. Archives, in the "Bureau of Archives & History" record group, "Manuscript Collection" subgroup, "Manuscripts" series, Box 42, Folder No. 23. The petition is hereafter cited as the "1795 Petition." These materials, along with others that corroborate them, are discussed below.

22. I discuss below a series of transactions relating to the bonds.

23. See N.J. Archives, Envelope No. 8288; 1795 Petition.

24. *Compare* "An Act to Authorize Persons whose Estates have been Confiscated, or their Legal Representatives to Demand and Receive all Debts or Sums of Money which are Due to this State in Virtue of such Confiscations," 1789 Acts of the General Assembly of the State of New Jersey [hereinafter cited as N.J. Session Laws] 545-48 (November 28, 1789).

tive whose other obligations Reading had guaranteed. Even following the relative's default to him, Reading had annually paid interest on the bonds to Cadwallader or Taylor, until the latter "sometime in 1776 took refuge with and Joined the Armies of the King of Great Britain . . . and took the said Bonds with him into the lines of the Enemy." After Taylor's estate had been forfeited to the state pursuant to a war-time seizure law,<sup>25</sup> Reading paid £352 to the Commissioner of forfeited Estates of Hunterdon County, in full satisfaction of "the Monies due at the time."<sup>26</sup> Reading had not been "apprized that any deficiency did exist until a suit was brought against him in The Supreme Court of New Jersey" under the law of November 28, 1789. (The 1789 law provided for the collection of debts by persons whose estates had been forfeited during the war.)<sup>27</sup> Court records confirm that Taylor had prevailed against Reading in this suit: An order by Chief Justice Kinsey, dated the second Tuesday in May 1794, commanded the sheriff to seize property belonging to Joseph Reading in satisfaction of a judgment in Lambert Cadwallader's favor.<sup>28</sup>

On March 13, 1795, apparently in response to Justice Kinsey's order authorizing the seizure of Reading's property,<sup>29</sup> the New Jersey legislature adopted a statute entitled "An act for Relief of

25. According to Reading's petition, he was "desirous of complying with the Laws which were then thought necessary for the safety and welfare of [his Country] and in pursuance of the Act passed the 18th of April, 1778 for the purpose of forfeiting the personal Estates of certain Fugitives and Offenders, an Inquisition having been duly formed against the said Joseph Taylor and final Judgment entered thereon, Your Petitioner did take Measures to raise the Money so due and forfeited to the State of New Jersey." Compare "An ACT for taking Charge of and leasing the Real Estates, and for forfeiting the Personal Estates of certain Fugitives and Offenders, and for enlarging and continuing the Powers of Commissioners appointed to seize and dispose of such Personal Estates, and for ascertaining and discharging the lawful Debts and Claims thereon," April 18, 1778, reprinted in WILSON'S LAWS, *supra* note 16, at 43-52.

26. According to the petition, "the said Joseph Taylor [was] still holding the said Bonds in his Person [behind the lines of the Enemy]" when Reading paid the £352. As further evidence of his good faith, Reading stated that he had not thought it necessary to avail himself of a law passed November 29, 1788 which provided relief to persons concealing debts. Compare "An ACT for the Relief of Persons liable to Fines, for concealing Debts and other property forfeited to this State," 1778 N.J. Session Laws 499 (November 29, 1788).

27. See note 24, *supra*.

28. N.J. Archives, 143 SUPREME COURT JUDGMENTS 344-45 (1794). Compare Parkhurst's statement that *Holmes and Taylor* were "determined upon full consideration, the former in the time of CHIEF JUSTICE BREARLEY and the latter in the time of CHIEF JUSTICE KINSEY." 9 N.J.L. at 444.

29. The supreme court presumably had held that Reading's payments during the war did not reduce his liabilities pursuant to the forfeited bonds. Having lost before the supreme court, Reading apparently petitioned the New Jersey legislature to provide relief from Kinsey's verdict, based on arguments similar to those made in his petition of November 11, 1795. The legislature had responded by adopting the law described in the text accompanying this note.

certain Persons, having paid Monies to the Commissioners and Agents of Forfeited Estates.”<sup>30</sup> The statute’s syllabus summarizes its subject-matter: “In what cases continental money shall be credited as specie.”<sup>31</sup> This is precisely the language used in *Parkhurst* to identify the law invalidated in *Taylor*.<sup>32</sup> The act itself read:

BE IT ENACTED . . . That all payments made to commissioners or agents of forfeited estates in continental, or other currency receivable by such commissioners or agents while the same was a legal tender, by any debtor, in virtue of the act or acts for confiscating the estates of certain fugitives and offenders, shall be taken and allowed by all courts and juries in this state, in favor of such debtor or debtors, to the full nominal value of the said payments respectively, notwithstanding it should appear that the whole debt and interest due from such debtor or debtors was not thereby discharged.<sup>33</sup>

According to Reading’s petition, he “viewed with much Satisfaction” the New Jersey legislature’s adoption of this law. He “well hoped that as the Suit was then pending against him that he should be entitled to the provisions therein contained.” The supreme court, however, struck down the statute:

But to the great surprize of your Petitioner the said Act of the legislature was considered as *ex post facto* and declared void, and that the same ought not to bind the Said Court in giving their Judgement upon the suit against your Petitioner. . . .<sup>34</sup>

Reading’s petition indicates that the court was concerned primarily with judicial prerogatives and the law’s effect on its judgment.<sup>35</sup> Kinsey’s order of May 1794 represented the supreme court’s determination of what the applicable law required in the context of Taylor’s suit against Reading. The judges adhered to their initial determination even after the New Jersey legislature passed the law in March of the next year to relieve Reading’s liabili-

30. 1795 N.J. Session Laws 1032 (March 13, 1795) [hereinafter cited as the “Act of March 13, 1795”].

31. *See id.*

32. *Compare Parkhurst*, 9 N.J.L. at 444 (“a certain act of the legislature . . . declar[ed] that in certain cases payments made in continental money should be credited as specie. . .”).

33. Act of March 13, 1795. The 1795 Petition identifies the law by the date of its adoption and describes it as follows: “the Act passed the 13th of March last wherein it is enacted that all payments made to Commissioners or Agents of forfeited Estates in Continental Currency shall be taken and Allowed, by all Courts and Juries in favor of the Debtor to the full Nominal Value of said Payment, notwithstanding the whole debt and Interest was not discharged.”

34. 1795 Petition.

35. In the absence of a written opinion, we cannot be certain of the extent to which Reading’s petition summarizes the court’s position as distinct from the views of Reading or his attorney. (Reading’s petition was addressed to legislators, suggesting how they might respond to the decision.) Supporting the petition’s characterization, the later (judicial) opinion for *Parkhurst* stated that in *Taylor* the court had held the 1795 law “unconstitutional, and in that case inoperative.” Thus, Reading’s petition and *Parkhurst* each indicate that the court in *Taylor* was concerned primarily with the judicial enforceability of legislative enactments rather than with the scope of legislative powers more generally.

ties. By declaring the 1795 act void as *ex post facto*, the judges implicitly reaffirmed their prior order. Boudin was therefore wrong in claiming that there would have been an opinion if the judges had exercised judicial review. On the contrary, their exercise of judicial review made amending the earlier judicial record in the case unnecessary.

These considerations also suggest why *Taylor* was not viewed as a case of "tremendous importance" at the time. The statute apparently had been designed specifically to alleviate Reading's liabilities to Taylor, and had little broader impact. The court's decision did not settle the controversy between Reading and Taylor, because the former eventually obtained similar relief through other means. His ability to do so indicates that the decision did not fundamentally challenge the legislature's lawmaking authority.<sup>36</sup>

On January 31, 1797, the New Jersey legislature again granted Reading's request for relief from his liabilities to Taylor.<sup>37</sup> This time, the legislature adopted a law tailored specifically to Reading's predicament: The law was titled "An Act for the Relief of Joseph Reading."<sup>38</sup> It made reduction of Reading's liabilities to Taylor contingent on the latter's producing a certificate that "exonerated and discharged" Reading from one-third of the judgment recovered by Taylor against Reading.<sup>39</sup> The legislature in essence utilized different legal formalities to achieve the same result as that contem-

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36. *Taylor* was of "tremendous importance," however, in terms of the interpretive principle underlying the court's refusal to revise its verdict against Reading. The thrust of the decision was to protect judicial prerogatives rather than to challenge legislative powers. The 1795 Act, which provided for a reduction of Reading's liabilities, would have effectively reversed Kinsey's verdict of May 1794 in Taylor's favor. The law therefore challenged the court's authority to interpret the Act of November 28, 1789 independently of the legislature. By invalidating the 1795 Act, the court asserted its prerogative to decide cases and controversies in a final manner.

37. In addition to the 1795 Petition, see also a subsequent "Petition of Joseph Reading to the Honorable, the Legislative Council and General Assembly of the State of New Jersey" dated November 11, 1796, at the N.J. Archives, Box 42, in Folder 24 of the "Manuscripts" series cited in note 21, *supra*. The later petition refers to a committee report recommending legislation favorable to Reading, thus anticipating adoption of the January 1797 law discussed below.

38. 1797 N.J. Session Laws 144 (January 31, 1797).

39. Section 1 of the act provided: "BE IT ENACTED by the Council and General Assembly of this State, and it is hereby enacted by the authority of the Same, That Joseph Taylor, his heirs, executors and administrators, be, and they are hereby exonerated from the payment of the one third part of the judgment recovered by the said Joseph Taylor against Joseph Reading, of the county of Hunterdon, at the suit of Lambert Cadwallader, on a bond prosecuted to the use of the said Joseph Taylor, assignee of the said Lambert Cadwallader, by virtue of certain acts of the legislature authorizing persons whose estates have been confiscated to prosecute and recover the same; provided, that the said Joseph Taylor, his executors, administrators or assigns, produce a certificate to the treasurer of this state, that he or they have exonerated and discharged the said Joseph Reading from the payment of the one third part of the said judgment."

plated by the 1795 act.<sup>40</sup>

These differences in form were significant. The earlier act had been directed to judges and required them to modify their earlier verdict; the later act was directed to Taylor and permitted him to exonerate Reading of liabilities to him. The earlier law was largely retrospective in effect; the later law provided for prospective relief. The later act, unlike the earlier one, did not fundamentally challenge judicial prerogatives.

Vindicating *Parkhurst's* account of *Taylor* does not, of course, establish *Holmes's* precedence for judicial review. But lifting the cloud over *Parkhurst* clears the way for reconsidering *Holmes*.

## B. POWERS OF LEGISLATURES, JUDGES AND THE PEOPLE

The issue in *Holmes* was whether the defendants were entitled to a twelve-person jury. Pursuant to a 1778 statute passed by the New Jersey legislature to prevent commercial intercourse with Great Britain,<sup>41</sup> one Elisha Walton had seized goods in the possession of John Holmes and Solomon Ketcham having a value purportedly exceeding £29,000. A proviso to section 6 of the act stated:

PROVIDED ALWAYS, That it shall and may be lawful for either of the Parties to the Trial to demand a Jury; and upon such Demand the said Justice is hereby required to grant the same, and to proceed in all other Respects as in the like Case in the Act, intitled, \* An Act to erect and establish Courts in the several Counties in this Colony for the Trial of small Causes, and to repeal the former Act for that Purpose, passed the eleventh Day of February, One Thousand Seven Hundred and Seventy-five, is directed; and on the Verdict of the Jury being taken, shall give Judgment agreeably thereto.<sup>42</sup>

The "small causes" act governed trials of cases involving small claims. Among other things, it established procedures for trials by six jurors.<sup>43</sup> In accordance with these procedures, Holmes and Ketcham were tried under the seizure law by a jury of six persons.<sup>44</sup>

40. Compare *Parkhurst*, 9 N.J.L. at 444 (stating that the New Jersey legislature "acquiesced" to the court's decisions in *Holmes* and *Taylor*).

41. "An ACT to prevent the Subjects of this State from going into, or coming out of, the Enemy's Lines, without Permissions or Passports, and for other Purposes therein mentioned," October 8, 1778, reprinted in WILSON'S LAWS, *supra* note 16, app. V. at 8. Briefly, the statute, one in a series of "seizure laws," permitted anyone who suspected that another person was carrying goods into or from the British lines to seize the goods and bring them before a justice of the peace. The person or persons who seized the goods would be entitled to any amounts recovered, minus court costs.

42. *Id.* at 10-11.

43. See "An ACT to erect and establish Courts in this Colony for the Trial of small Causes, and to repeal the former Act for that Purpose," February 11, 1795, reprinted in S. ALLINSON, ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 468, 470 (1776) (covering laws enacted between 1702 and 1776).

44. See N.J. Archives, Envelope Nos. 18354 & 44928.



According to *Parkhurst*, the New Jersey Supreme Court invalidated the seizure law's provision for trial by six jurors.<sup>45</sup> Such a decision would presuppose that the magistrate had complied with the seizure law in trying *Holmes and Ketcham* with six jurors. This presupposition also underlies Scott's claim that the court "met the question of constitutionality squarely."<sup>46</sup> Crosskey argued, however, that the magistrate had not complied with the seizure law. In his view, the seizure law required "a Jury" of twelve persons, purportedly incorporating the New Jersey Constitution's requirement in this respect.<sup>47</sup>

According to Crosskey, rather than using the New Jersey Constitution to strike down the seizure law, the court used it as a basis for construing that statute.<sup>48</sup> He essentially interpreted the seizure law as providing that all trials would be "by jury as required by article XXII of the constitution," while interpreting that article to require twelve jurors in cases such as *Holmes*.<sup>49</sup> Crosskey's arguments therefore converged with Scott's in viewing constitutional norms as determinative of the case's outcome.<sup>50</sup>

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45. *Parkhurst*, 9 N.J.L. at 444.

46. Scott, *supra* note 1, at 460. See also *id.* at 468-69. I refer in this section to Scott's arguments as representing arguments that the court exercised judicial review in *Holmes* along the lines reported in *Parkhurst*. Compare Corwin, *supra* note 1, at 110-12.

47. See W. CROSSKEY, *supra* note 1, at 949-51. Compare L. BOUDIN, *supra* note 1, at 543-46.

48. W. CROSSKEY, *supra* note 1, at 948-51. Crosskey's distinction between statutory construction and constitutional review is fraught with peril. He utilized twentieth century theoretical distinctions and relied upon twentieth century norms of constitutional adjudication in analyzing a case decided when all agree judicial review on constitutional grounds was not a common practice. His arguments along these lines were seemingly anachronistic if not biased.

49. On the latter issue, Crosskey referred to "antecedent practice in New Jersey, when the constitution of 1776 was adopted." See *id.* at 949.

50. Boudin's argument roughly paralleled Crosskey's. Briefly, he assumed that "the constitutional provision for trial by jury meant trial by a jury of twelve." Furthermore, he recognized that the attorney for *Holmes and Ketcham* addressed constitutional issues in his petition of additional reasons: "Counsel for *Holmes and Ketcham* were, insofar as this particular question of the jury of six is concerned, making the point, first and principally, that under the law of October 8, 1778, they were entitled to a trial by a jury of twelve men; and then, that even if the law of October 8, 1778, does not specifically provide for it, the Constitution does." Boudin drew an artificial distinction between the seizure law's constitutionality and actions pursuant to it: "[T]here is no reference to any unconstitutionality of any law, but merely that the jury before which the defendants were actually tried was not in accordance with the Constitution." As these quotations indicate, Boudin's argument also depended on interpreting the constitutional guarantee of "trial by jury" as requiring twelve jurors in *Holmes*, but he did not examine the basis for such an interpretation other than to quote the petition's reference to "practices and laws of the land." See L. BOUDIN, *supra* note 1, at 546-48.

Compare Leonard Levy's remark: "The constitutionality of the act was not at issue, and the court gave no opinion, not even in obiter dicta, on whether it had the power to void an act for unconstitutionality." L. LEVY, *supra* note 1, at 93. In the absence of an opinion, the absence of obiter dicta is only logical.

It seems odd that Crosskey went to such lengths to avoid viewing *Holmes* as an example of judicial review.<sup>51</sup> Although generally opposed to judicial review, Crosskey did concede that courts can properly disregard legislation interfering with "judicial prerogatives."<sup>52</sup> He therefore implied that courts have ultimate interpretive authority with respect to constitutional provisions concerning judicial powers and processes.<sup>53</sup> If Crosskey had not been so committed to a theory of determinate constitutional meanings,<sup>54</sup> it is doubtful he would have expended such great effort to avoid concluding that the New Jersey court opposed the legislature by enforcing "judicial prerogatives" in *Holmes*.<sup>55</sup>

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51. By locating the entire ambiguity at the level of statutory rather than constitutional meanings, Crosskey avoided issues of interpretive authority. Thus, he glossed over whether the court had authority to interpret the constitution independently of the legislature—either to resolve ambiguity or to invalidate the law. But if the seizure law had unambiguously permitted trial by six jurors in cases such as *Holmes*, Crosskey would have been forced to confront directly the possibility of conflicting constitutional interpretations. If the judges interpreted the constitution as requiring twelve jurors, would it have mattered whether particular legislators interpreted the constitution as requiring only six jurors? Would the judges have been constrained by their knowledge or ignorance of whether or how legislators had interpreted the constitution? If the court had ultimate interpretive authority for purposes of resolving the particular case, what would have been the effect (if any) of its decision on the authority of executive officers with respect to the law's enforcement in future cases? Would the court's interpretation of the constitution have bound legislators in making future laws? What if the legislature re-enacted a law previously declared void by the court? Would re-enactment preclude judges from adhering to their earlier views of unconstitutionality?

For an argument that judges are bound to give effect to unconstitutional acts of a coordinate legislature as long as they are "passed according to the forms established by the constitution," see Judge Gibson's dissent in *Eakin v. Raub*, 12 Sergeant & Rawle (Sup. Ct. of Pa., 1825), reprinted in W. MURPHY, J. FLEMING & W. HARRIS, *supra* note 4, at 221.

52. See W. CROSSKEY, *supra* note 1, at 974, 1002-07.

53. Or perhaps courts have penultimate authority concerning judicial prerogatives, with the people retaining ultimate authority. Compare U.S. CONST., preamble & amend. X.

54. See Wollan, *Crosskey's Once and Future Constitution*, 5 THE POL. SCI. REVIEWER 129 (1975).

55. Boudin also expended great effort to avoid a conclusion contrary to his theory of legislative supremacy. Unlike Crosskey, however, he confronted at least obliquely the issue of whether *Holmes* set a precedent regarding the constitutionality of trials by six jurors. The evidence Boudin cited, however, does not support his conclusion that the legislature acted "quite irrespective of any decisions by courts, or imaginary constitutional questions" in amending the seizure law first to allow and then to require trial by twelve jurors. See L. BOUDIN, *supra* note 1, at 548-50. To the contrary, the pattern of legislation and adjudication following the court's decision in *Holmes* indicates a remarkable degree of consistency and cooperation between the legislature and the courts. See Scott, *supra* note 1, at 461-63 and the series of laws reprinted in the appendix to WILSON'S LAWS. The evidence Boudin cited regarding legislation and adjudication permitting trials by six jurors in "small causes" (not cases arising under the revised seizure statutes) did not support his claim that *Holmes* was not decided on constitutional grounds or was disregarded. *Holmes* certainly was not a "small cause," and hence the materials Boudin cited were not on point.

A fact that is particularly damaging to Crosskey and Boudin's arguments is that the New Jersey legislature continued to direct the magistrate "to proceed in other respects" as provided in the small causes act, even after it amended the seizure law to require twelve jurors following the supreme court's decision in *Holmes*. See "An ACT more effectually to

As Crosskey recognized, determining the scope of trial by jury is a paradigmatic judicial prerogative.<sup>56</sup> Attempts by the legislature to circumscribe this judicial power would have seriously threatened judicial independence, among other things challenging the judges' authority to interpret the extent of their own judicial powers.<sup>57</sup> The judges in *Holmes* therefore resisted a challenge to their authority different in kind but similar in principle to that later presented in *Taylor*.<sup>58</sup>

In addition to threatening judicial independence, the seizure law threatened one of the people's most fundamental rights. Within the American colonies, the people's representation within legislatures and their participation on juries were conceived as "the heart and lungs" of popular government.<sup>59</sup> Through these institutions, the people shared in making and enforcing laws.<sup>60</sup> The issues of interpretive authority in *Holmes* were integrally related to prerogatives that the judges would have been especially concerned to protect from legislative encroachment.<sup>61</sup>

## II

Although related in practice, the question of *what* norms the judges were enforcing in *Holmes* is conceptually distinct from the question of *whose* interpretation of these norms prevailed.<sup>62</sup> On the former issue, *Holmes* is clear precedent for courts' enforcing fundamental norms in addition to those explicit in New Jersey's constitu-

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prevent the Inhabitants of this State from Trading with the Enemy, or going within their Lines, and for other Purposes therein mentioned," December 22, 1780, reprinted in WILSON'S LAWS, *supra* note 16, app. VIII, at 16, 18.

56. See W. CROSSKEY, *supra* note 1, at 1002-07.

57. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See also, L. LEVY, *see supra* note 1, at 99.

58. The challenge in *Holmes* was both conceptually and chronologically prior to that in *Taylor*.

59. See J. Adams, Letter from The Earl of Clarendon to William Pym (Jan. 20, 1766), quoted in C. ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 388-89 (1953).

60. See generally 1 W. BLACKSTONE, COMMENTARIES 120-41 (1765), reprinted in 5 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 388-94 (1987); 2 S. ADAMS, THE RIGHTS OF THE COLONISTS (1772), reprinted in P. KURLAND & R. LERNER, *supra*, at 394-97. See also B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 18-19 (1981); C. ROSSITER, *supra* note 59, at 362-401; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

61. Compare Walter Murphy's argument for a "departmental" view of interpretive authority in Murphy, *supra* note 4. Note that the judges in *Holmes* were strategically situated to resist an encroachment by the legislature upon the right of trial by jury: They could refuse to enforce laws infringing that right.

62. See generally W. MURPHY, J. FLEMING & W. HARRIS, *supra* note 4.

tional text, whether in conjunction with interpreting statutes or invalidating them.

#### A. ENUMERATED RIGHTS AND UNWRITTEN LAW

The petition filed by the attorney for Holmes and Ketcham listed eight grounds for reversal. The seventh claimed that by the "Laws of the Land" the jury should have consisted of twelve rather than six jurors.<sup>63</sup> The attorney's statement of "additional reasons" elaborated on this claim, stating that the jury "of six men only" had been "contrary to Law," "contrary to the constitution of New Jersey" and "contrary to the Constitution, practices and Laws of the Land."<sup>64</sup>

Although we cannot be certain why the attorney drew these distinctions or what they meant to the justices of the New Jersey Supreme Court, we may reasonably interpret "the Law" as a reference to common law and statutory law; "the constitution of New Jersey" as a reference to New Jersey's written constitution; and "the Constitution, practices and Laws of the Land" as a reference to fundamental norms including but not limited to those made explicit in the constitutional text.<sup>65</sup> Reversal of the verdict in Walton's favor

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63. The petition stated that "the Judgment given . . . ought to be reversed and annulled for the following reasons . . . 7. Because the Jury sworn and who tryed the above cause, and on whose Verdict Judgment was entered, consisted of six men only when by the Laws of the Land, it should have consisted of twelve men." Boudin and Crosskey emphasized the sixth reason included in the bill of exceptions: "6. Because the said Elisha Walton did at his own expense, and without the Consent of the said John and Solomon treat with strong Liquor the jury sworn to try this cause after they were impanelled and appeared, and before they gave their verdict in the said cause." Boudin argued that the placement of this (sixth) reason before the constitutional challenge indicated that the latter was relatively unimportant. See L. BOUDIN, *supra* note 1, at 546-47. Compare W. CROSSKEY, *supra* note 1, at 949. Consider, however, the final (eighth) reason: "8. For that the said Justice gave Judgment for the said Elisha against the said John and Solomon, when according to the Laws and Customs of the State of New Jersey, he should have given Judgment for the said John and Solomon against the said Elisha." Apparently the reasons were arranged in order of increasing generality, rather than decreasing importance. See N.J. Archives, Envelope No. 18354.

64. N.J. Archives, Envelope No. 18354. Note the difference in capitalization, which suggests a difference between New Jersey's "constitution" and its "Constitution." Furthermore, compare the eighth reason given for reversal included in the initial petition, quoted at note 63, *supra*, which indicates that there was a significant amount of continuity between the initial and subsequent petitions. Compare also MAGNA CARTA, Ch. 39 (1215), reprinted in B. SCHWARTZ, *supra* note 2, at 8, 12 ("No freeman shall be captured or imprisoned or diseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land."); U.S. CONST., art. VI, para. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

65. See generally Grey, *supra* note 8; Sherry, *supra* note 7. I use the term "we" in describing these positions to emphasize that the interpretive premises of contemporary interpreters shape their organization of historical materials in ways that do not perfectly correspond to contemporaneous understandings. The distinctions that Grey and Sherry have

required interpretation of these three overlapping sets of norms.

Article XXII of the New Jersey Constitution, the same article that guaranteed "the inestimable right of trial by jury," also stated that:

The common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter.

The constitutional text therefore established a tri-partite hierarchy (in order of increasing priority): (1) common law and prior statutory law, (2) subsequent statutory law, and (3) the constitutional "Charter." Thus, although the common law and prior statutes required twelve jurors in cases such as *Holmes*,<sup>66</sup> article XXII treated the authority of the common law and earlier statutes as subordinate to subsequent legislation. The judges could not rely on the common law to invalidate a trial by six jurors, but had to rely on the constitutional text or other (unwritten) norms of higher authority than ordinary legislation.

Confounding searchers after determinacy, New Jersey's constitutional text, like that of the later federal Constitution,<sup>67</sup> was silent on the question of how many jurors would satisfy its most fundamental guarantee.<sup>68</sup> Thus the first documented case of a court's en-

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drawn (which I largely follow) were apparently blurred in the late-eighteenth century, as indicated by the initial petition's not distinguishing the requirements of "Laws of the Land."

66. See generally the works cited at note 60, *supra*. See also the West Jersey "Concessions and Agreements" of 1676, which proclaimed that the following guarantee, among others, was "not to be altered by the Legislative authority": "THAT the tryals of all causes, civil and criminal, shall be heard and decided by the verdict or judgment of twelve honest men of the neighbourhood." See A. LEAMING & J. SPICER, GRANTS AND CONCESSIONS 382, 393, 398 (Articles XIII and XXII) (2nd ed. 1881). See also Articles XVII and XIX of the "Concessions and Agreements," which also referred to trials by twelve jurors (Spicer, at 395, 396-97); and Articles VI of the Act of November 21, 1681, West Jersey (Spicer, at 426, 428-29). In addition, a formal declaration of "Rights and Priviledges" passed by the House of Representatives in East Jersey on March 13, 1698 stated: "All tryals shall be by the verdict of twelve men." (Spicer, at 368, 372.) See also Article XIII of the Act of March 1682, East Jersey. (Spicer, at 227, 235). Compare Scott, *supra* note 1, at 459 (referring to these documents as "a part of the 'law of the land.'").

67. See U.S. CONST., art. III, sec. 2 & amends. VI-VII.

68. Article XXII of New Jersey's constitutional text of 1776 reads in part: "The inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." To ensure the perpetuity of this guarantee, article XXIII required members of the state legislature to take an oath not to take any action annulling or repealing the part of article XXII respecting trial by jury. Articles XXII and XXIII together suggested both that the constitution's framers regarded trial by jury as the constitution's most fundamental guarantee and that they relied primarily upon the legislature for its preservation. Compare Corwin's comment: "It is interesting to note as evidence that the idea of judicial review had not occurred to those who drafted the New Jersey Constitution three years before [argument in *Holmes*], the fact that they relied for the preservation of this,—as they evidently esteemed it—most fundamental provision of the constitution upon the good faith of the legisla-

forcing an American colony's written constitution centered on an issue not addressed explicitly in the text of that constitution.<sup>69</sup>

The court could have affirmed the verdict in Walton's favor, but could not have reversed it, based on a literal application of article XXII. There had been a "trial by jury." Because the constitutional text did not specify how many jurors were required, the court quite plausibly could have affirmed the verdict on textual grounds. In contrast, the judges had to rely on norms extrinsic to the constitutional text in deciding that the number of jurors was inadequate. The judges might have relied on extrinsic norms (1) by interpreting the constitutional text as incorporating them, or (2) by conceiving of such norms as having authority independent of the constitutional text.

Scott alluded to the possibility that article XXII incorporated prior charters, statutes, or customary norms.<sup>70</sup> He was not clear, however, on whether the various documents to which he referred were relevant only to interpreting the constitutional text or whether they had independent authority as judicially enforceable law. The petition by Holmes and Ketcham's attorney advocated the former view by claiming that the verdict was contrary to "the constitution of New Jersey." The petition implicitly claimed, in other words, that the reference in the constitutional text of 1776 to "trial by jury" meant "trial by twelve jurors," at least in the context of *Holmes*.

*Holmes* offers insights on some of the advantages as well as difficulties associated with enumerating and interpreting constitutional rights. Enumerating the right of "trial by jury" in New Jersey's constitutional text reinforced arguments that some form of jury trials had fundamental constitutional status. But as Madison warned in relation to the federal Constitution, "there is great reason to fear that a positive declaration of some of the most essential

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ture. . . ." See Corwin, *supra* note 1, at 111. Another possibility comes to mind: placing primary responsibility for compliance upon the legislature was not inconsistent with assuming that courts had a secondary/supplemental/corrective role.

69. In light of Boudin and Crosskey's arguments, which are discussed above, I am not here assuming that the court interpreted the Constitution separately from the seizure law. The judges had to confront in some manner the issues discussed in the text in order to resolve the case. As indicated above, however, how the judges interpreted the Constitution is conceptually independent from whether they interpreted the seizure law as consistent with the Constitution.

70. He stated: "The assumption that the phrase 'trial by jury' as thus used [in Article XXII] meant exactly twelve jurors must find its warrant farther [sic] back." Scott, *supra* note 1, at 458-59. Compare the constitutional text's treatment of such sources as otherwise subordinate to recent statutory law. See note 66, *supra*, and accompanying text.

rights could not be obtained in the requisite latitude."<sup>71</sup> He was concerned that the "public definition" of rights would be "narrowed much more than they are ever likely to be by an assumed power."<sup>72</sup> Enumerated rights might be interpreted literally in a narrow manner and as implying the legitimacy of exercising power except to the extent specifically prohibited.<sup>73</sup> In the case of the New Jersey Constitution, article XXII might be interpreted literally as requiring only some type of "trial by jury" and as implying that the legislature had authority to regulate judicial proceedings except as specifically prohibited.<sup>74</sup>

*Holmes* supports a richer interpretive approach. The judges relied on extrinsic norms whose authority the constitutional text affirmed rather than circumscribed. The constitution did not contemplate narrowing the right of trial by jury, but rather provided additional security for it. Legislators were required to give an oath not to take any action annulling or repealing that right, and its enumeration in the constitutional charter provided a textual peg upon which judges could rely in exercising judicial review.<sup>75</sup> Compliance with this oath by legislators, or judicial enforcement of its requirements in the event of legislative non-compliance, would require more than literalism. Legislators and judges were obliged to interpret enumerated rights with reference to fundamental norms transcending the constitutional text itself.

Relationships among political culture, constitutional text and governmental institutions were mutually reinforcing. Reflecting widespread political priorities of the time, the right of "trial by jury" was the only right explicitly "confirmed as a part of the law of this Colony, without repeal, forever." Enumerating this right, in

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71. See Letter from J. Madison to T. Jefferson (October 17, 1788), reprinted in B. SCHWARTZ, *supra* note 2, at 614-15.

72. See *id.* at 615-16.

73. Compare Wilson's and Hamilton's arguments against enumerating rights in the case of the United States Constitution. See, e.g., article I, section 9 (categorical prohibitions); article I, section 10 (prohibitions on the states); article III, section 2 (requires the trial of crimes by jury, except in cases of impeachment). But see article IV, section 2 (protects "privileges and immunities," primarily against state action. See also the preamble (the Constitution is ordained and established to "secure the Blessings of Liberty.")). Compare the first amendment (prohibitions on Congress.)

74. Compare Corwin's argument that "from the standpoint of present day constitutional law the assembly, rather than [the court in *Holmes*], was right in its construction of the constitution." See Corwin, *supra* note 1, at 111.

75. As Madison explained, again in the federal context, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [enumerated] rights." See J. Madison, "Speech to the House of Representatives," June 8, 1789, reported at 1 ANNALS OF CONGRESS 424, 439 (Gales and Seaton ed. 1834). See also note 77, *infra*, and accompanying text. Furthermore, as discussed in the text below, issues of federalism complicated the role of courts' enforcing rights.

turn, fostered its recognition and affirmation as a "fundamental maxim[] of free Government,"<sup>76</sup> thereby creating and preserving social meanings binding on the legislature through their solemn oath not to repeal or annul the constitutional guarantee. In addition, naming the right in the constitutional text provided a "legal check" upon which courts could rely in exercising judicial review.<sup>77</sup> Legislative compliance with this right, as well as its judicial enforcement, would involve the people in governmental processes. The people's participation in trials, as well as legislators and judges' reaffirming the people's fundamental prerogative to do so, would further promote the incorporation of "fundamental maxims of free Government" into political culture.<sup>78</sup>

### B. WRITTEN LAW AND UNENUMERATED RIGHTS

The attorney's argument that Holmes and Ketcham's trial had been "contrary to the Constitution, practices and Laws of the Land" also invoked traditions of unwritten fundamental law, according to which certain rights were judicially enforceable whether or not enumerated in a constitutional text or any other particular document.<sup>79</sup> It is apparent that the court would have invalidated the seizure statute's provision for six jurors even if the constitutional text had not enumerated the right to "trial by jury." Scott was correct in referring to various documents as "constituting . . . a part of the 'law of the land.'"<sup>80</sup> It is important to recognize, however, that the right of trial by twelve jurors had fundamental constitutional status in New Jersey independent of colonial charters, acts of assembly, or even the constitutional text. This right was legally authoritative because it was regarded as fundamental; it was not a fundamental right merely because it was affirmed in the constitutional text.<sup>81</sup>

76. Compare Madison's argument in the context of debates over the desirability of amending the constitutional text of 1787 to enumerate particular rights: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." Letter from J. Madison to T. Jefferson (October 17, 1788), reprinted in B. SCHWARTZ, *supra* note 2, at 614, 616-17.

77. See Letter from T. Jefferson to J. Madison (March 15, 1789), reprinted in B. SCHWARTZ, *supra* note 2, at 620.

78. See note 76, *supra*.

79. See generally Grey, *supra* note 8; Sherry, *supra* note 7.

80. See Scott, *supra* note 1, at 458-59.

81. Compare Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247-48 (1914) ("private rights, since they precede the constitution, gain nothing of authoritativeness from being enumerated in it, though possibly something of security. These rights are not, in other words, fundamental because they find mention in the written instrument; they find mention there because they are fundamental.")



The ninth amendment to the federal Constitution made explicit this theoretical premise that rights do not depend for their authority on being enumerated in a constitutional text. That amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The constitutional text of 1787 and its first eight amendments enumerate various rights,<sup>82</sup> but according to the ninth amendment these documents do not contain an exhaustive listing of the people's rights: The people retained others which shall not be denied or disparaged.<sup>83</sup> Unlike the federal Constitution, New Jersey's Constitution did not explicitly afford constitutional status to unenumerated rights. But this omission did not imply that only those rights enumerated in the state's charter were legally authoritative.<sup>84</sup>

The ninth amendment's reference to unenumerated rights is analogous to the New Jersey constitution's enumeration of the right of "trial by jury" without specifying its context. Neither text was an exhaustive listing of the governing norms. Neither text entirely supplanted extra-textual sources of law. Both texts were designed to reinforce rather than circumscribe rights whose authority transcended the text itself.

*Holmes* is a particularly valuable precedent because it was decided shortly before the federal Constitution's adoption complicated efforts to ascertain the basis for decisions invalidating state laws. *Taylor* highlights these complications under the federal system. Although the United States Constitution included a prohibition on *ex post facto* laws, it is not clear whether the judges relied on that prohibition in *Taylor*.<sup>85</sup> As in *Holmes*, they may have relied on unwritten norms having higher authority than ordinary legislation. Justice Chase's claim in *Calder v. Bull* that a prohibition on *ex post*

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82. The constitutional text of 1787 does not use the terminology of "rights" to describe prohibitions on government or prerogatives of the people. Instead it uses the discourse of "powers" and prohibitions.

83. Compare the ninth amendment's usage of the term "shall" with, for example, the first amendment's usage of the same term. Note also that whereas the first amendment states what Congress shall not do in making laws, the ninth amendment contains no exclusions in terms of the persons to whom it applies or the types of activities it constrains.

84. Compare the status of rights enumerated in the federal Constitution until the adoption of the Bill of Rights in 1791. Compare also the legality of *ex post facto* laws within New Jersey prior to the New Jersey Constitution's amendment in 1844 to enumerate that right.

85. Charles Erdman, Jr., and William Crosskey both assumed that the judges in *Taylor* relied on the federal Constitution. See C. ERDMAN, *THE NEW JERSEY CONSTITUTION OF 1776* 96, n.36 (1929); 1 W. CROSSKEY, *supra* note 1, at 340-41. Both, however, noted that the New Jersey court's decision in *Taylor* was broader than the United States Supreme Court's decision interpreting the federal *ex post facto* clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (holding that the clause applied only to criminal proceedings).

*facto* laws was "a fundamental principle [which] flows from the very nature of our free republican government"<sup>86</sup> was an equally plausible argument at the state level, independent of the federal Constitution.

### CONCLUSION

We need to take a fresh look at the texts that constitute our fundamental law. The framers of state constitutions and of the federal Constitution were aware of the limitations of language,<sup>87</sup> yet they were captivated by the possibilities that written texts provided. They attempted to secure the people's rights by carefully delegating governmental powers and in some cases by enumerating the people's rights. Recognizing imperfections in their works, the framers of the federal Constitution also granted unspecified powers, reserved others, and prohibited interpreting enumerated rights as an exhaustive listing of the people's prerogatives.

Open-ended provisions such as the federal Constitution's necessary and proper clause, its due process and privileges and immunities clauses,<sup>88</sup> and the ninth and tenth amendments present interpretive issues that are greater in magnitude but similar in kind to those presented by more determinate parts of the constitutional text. In each instance, the constitutional text alone does not provide an exhaustive statement of the governing norms. In each instance, the constitutional text therefore needs to be interpreted with reference to norms extrinsic to the text. In each instance, the Constitution as "law" requires interpreting a particular provision in relation to other parts of the Constitution.<sup>89</sup> Both to interpret and to identify rights and powers, extrinsic norms are important parts of America's fundamental law.<sup>90</sup>

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86. 3 U.S. at 388.

87. See, e.g., James Madison's statement in the THE FEDERALIST NO. 37 at 229 (C. Rossiter ed. 1961) that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas." Compare James Wilson's statement to the Pennsylvania Convention on October 28, 1787: "In all societies, there are many powers and rights which cannot be particularly enumerated." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (J. Elliot ed. 1861).

88. See U.S. CONST., art. IV, sec 2 (privileges and immunities); amend. V (due process); amend. XIV (privileges or immunities, due process).

89. Compare C. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

90. In *Holmes*, the judges relied on connections between constitutional provisions and extrinsic norms: The constitutional text supported the court's holding that Holmes and Ketcham were entitled to a trial by twelve jurors. Similar connections exist in the case of the United States Constitution's more open-ended provisions. The Constitution's enumeration of some rights and the manner of its enumerating powers support the enforcement of unenumerated rights and powers. For example, the first amendment's enumeration of rights of speech

The viability of judicial review in reliance on these extra-textual sources of law depends on the establishment and maintenance of constitutional meanings within a broader interpretive community. Two hundred years ago, constitutional meanings were developing which would support an expansion of judicial power. We need to reconsider which of these meanings remain a part of America's fundamental law and how they relate to others that have subsequently developed.

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and assembly supports by analogy the enforcement of an unenumerated right to associate. Similarly, relationships between enumerated rights and delegated powers suggest that some unenumerated rights represent absences of delegated power and others limit the manner of exercising powers that were delegated. Relationships between powers delegated to the United States government and those reserved to the states provide conceptual categories for analyzing relationships between governmental powers and powers reserved to the people. Similarities and differences between references to unenumerated rights and references to unenumerated powers provide further criteria for interpreting unenumerated rights and powers and their respective relationships to other parts of the Constitution.