



1-1-1982

# "Interpretation" of "Due Process of Law"--A Study in Futility

B. Abbott Goldberg

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

## Recommended Citation

B. A. Goldberg, *"Interpretation" of "Due Process of Law"--A Study in Futility*, 13 PAC. L. J. 365 (1982).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol13/iss2/7>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# “Interpretation” of “Due Process of Law”—A Study in Futility

B. ABBOTT GOLDBERG\*

The state reports are . . . the great wasteland of American legal history. Not even our constitutional law can be placed in proper perspective without considering them.<sup>1</sup>

In a prior essay I tried to illustrate the futility of resorting to the conventional canons of construction to find the meaning of the constitutional language “due process of law.”<sup>2</sup> There I canvassed some of the English materials and American materials up to the adoption of the Constitution and showed, at least to my own satisfaction, that the current application of the due process clauses has no relation to their literal or historical meaning which was simply that the executive and judicial departments of government must proceed according to “the law of the land.” Here I review some of the American materials to show that by the time of the adoption of the fourteenth amendment “due process of law” had already acquired such amorphous and undefinable qualities that Justice Miller less than a decade after its adoption, “confessed”:

that the constitutional meaning or value of the phrase ‘due process of

---

\* B. A. Michigan; LL.B. Harvard. Judge of the Superior Court of California, Retired. Scholar in Residence, McGeorge School of Law. The author thanks Miss Margaret Dailey, a member of the third year class, for her research and editorial assistance during the fall of 1980 and the spring of 1981.

1. L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 3 (1957) [hereinafter cited as LEVY].

2. Goldberg, “Interpretation” of “Due Process of Law”—*A Study in Irrelevance of Legislative History*, 12 PAC. L.J. 621 (1981) [hereinafter cited as Goldberg].

law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all other guarantees of personal rights. . . . [T]here is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.<sup>3</sup>

My object remains as before—to help students understand the cases and enjoy the literature on judicial review.

When Justice Miller wrote that there was no “satisfactory precision of definition” of due process, he may have meant there was no satisfactory definition in the decisions of the United States Supreme Court. But it seems more likely that he meant in the state decisions as well. Up to the Civil War there had been only four Supreme Court decisions which even mentioned due process, and only two of those were significant.<sup>4</sup> Most, if not all, of the early state constitutions had law of the land clauses patterned after Magna Carta but lacked due process clauses. Later some had both clauses, and some had only due process clauses. This variation made no difference to the American courts which followed the interpretation of Lord Coke and treated “law of the land” and “due process of law” as equivalent terms. *Murray v. Hoboken* is a typical, but far from the earliest, example:

The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Carta*. Lord Coke, in his commentary on those words (2 Inst. 50) says they mean due process of law.<sup>5</sup>

Historically, the two expressions are not equivalent. “Law of the land” was intended to confine the king’s rights; “due process of law” was to confine him to the settled procedures. Thus the king could not use improper procedures to vindicate his acknowledged rights, nor could he use proper procedures to assert rights that were not his.<sup>6</sup> But the assumption of equivalence in the American cases is so uniform that

---

3. *Davidson v. New Orleans*, 96 U.S. 97, 101-02, 104 (1877).

4. *Dred Scott v. Sanford*, 60 U.S. 393, 450 (1857); *Murray v. Hoboken*, 59 U.S. (18 How.) 272, 276-77, 280 (1855); *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553-54 (1852) (a special act of Congress denying a purchaser the right to use a patented device and reverting an exclusive privilege to the patent owner would deprive the purchaser of due process under the fifth amendment); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (the law of the land clause in the Maryland Constitution is intended in “the good sense of mankind . . . to secure the individual from the arbitrary exercise of the powers of government. . . .”); *Murray and Dred Scott* are the important cases and are considered hereafter.

5. 59 U.S. (18 How.) at 276. Here Justice Curtis was repeating his own language on circuit in *Greene v. Briggs*, 10 F. Cas. 1135, 1140 (C.C.D.R.I. 1852), where he cited earlier like statements. An even earlier instance is *Mayo v. Wilson*, 1 N.H. 53, 55 (1817), a case Justice Curtis could not have used. See note 13 *infra*. The earliest reference I found is *Zylstra v. Charleston*, 1 S.C.L. (1 Bay) 382, 391 (1794).

6. See generally Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV.

"it makes no difference whether Coke was right or wrong in identifying due process with the law of the land,"<sup>7</sup> and, therefore, the same assumption will be made herein in discussing the fair number of state cases interpreting either due process or the law of the land and which Justice Miller may have had in mind.

Another assumption that will be made is that the law of the land and due process clauses were intended to be restrictions on the authority of legislatures. This assumption is also based on the general tenor of American authority but is historically inaccurate, as the United States Supreme Court acknowledged at least twice.<sup>8</sup> Here history was not abandoned quite as readily as it had been in the synonymization of the two phrases. Read literally, neither "law of the land" nor "due process of law" indicate a limitation on the authority to make "law." Thus in an early anonymous case in North Carolina, the attorney general argued that the law of the land clause in the Declaration of Rights in the North Carolina Constitution was "not intended to restrain the Legislature from making the law of the land, but a declaration only that the people are to be governed by no other than the law of the land."<sup>9</sup> And his argument succeeded in sustaining a statute allowing summary judgments against receivers of public moneys although one of the two concurring judges admitted "that yet he did not very well like it,"<sup>10</sup> and the third judge dissented.

The point is stated clearly in the state court's opinion in *Dartmouth College v. Woodward*.<sup>11</sup> The law of the land clause is not a general restriction on the legislature. Legislative acts "if not repugnant to any other constitutional provision, are 'the law of the land' within the true sense of the constitution."<sup>12</sup> Two New Hampshire cases are illustrative. Solomon Mayo, teamster, was forcibly detained by town tythingmen

---

555, 563 n.24 (1938); Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am. J. Legal Hist. 265 (1975).

7. Hough, *Due Process of Law—Today*, 32 HARV. L. REV. 218 (1919).

8. The great barons who wrung Magna Carta from King John at the point of the sword did not intend "to protect themselves against the enactment of laws by the Parliament," in which "those barons were a controlling element." *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). "It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament. . . . The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons." *Hurtado v. California*, 110 U.S. 516, 531 (1884).

9. *State v. —*, 2 N.C. (1 Hayw.) 50, 52 (1794).

10. *Id.* at 60.

11. 1 N.H. 111, 65 N.H. 473 (1817).

12. *Id.* at 132, 65 N.H. at 639. This rejected Jeremiah Mason's argument that Lord Coke thought Magna Carta bound Parliament. 65 N.H. at 493. American judges knew it did not. *Vanhorne v. Dorrance*, 2 U.S. (2 Dall.) 304, 308; In the matter of *John and Cherry Streets*, 19 Wend. 659, 676 (N.Y. 1839) ("the charter [Magna Carta] is no more than a statute; and never was understood to stand absolutely in the way of the legislature."). See Goldberg, *supra* note 2, at 639-41.

for traveling in his sleigh on the Lord's day "not from necessity, nor to attend public worship, nor to visit the sick, nor to do any office of charity." The detention was "without writ and warrant from a magistrate," but it was in accordance with the relevant statute. Mayo attacked the statute authorizing such summary detention as unconstitutional under the law of the land clause of the state constitution. Citing Lord Coke to equate law of the land and due process, the court held that the law of the land clause was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law.<sup>13</sup> Conversely, a sheriff was not liable for the escape of a prisoner held on a writ of execution when the writ had not been issued under the seal of the court. The constitution required the seal. Therefore, an unsealed writ was not in accordance with "[t]he law of the land" [which] here means process warranted by law." Even an act of the legislature, directing our courts to issue writs without seal, would be repugnant to the constitution and void.<sup>14</sup>

The apparently common-sense reading of law of the land or due process to mean that the legislature could make any law the law of the land or any process due process of law; unless restrained by some other provision of the constitution, was not destined to survive. It was challenged as early as 1794 in a dissenting opinion in South Carolina.

If the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right [to trial by jury], which the constitution had expressly declared, should for ever be inviolably preserved. This is too absurd a construction to be the true one.<sup>15</sup>

This disregard of the effect of other express provisions of the constitution could be dismissed as antique hyperbole except that it resurfaced in Jeremiah Mason's unsuccessful argument before the New Hamp-

---

13. *Mayo v. Wilson*, 1 N.H. 53, 57 (1817). This may have been orthodox doctrine. Alexander Hamilton said in 1787:

The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature.

R. BERGER, *GOVERNMENT BY JUDICIARY* 194 (1978) [hereinafter cited as BERGER]. Berger there makes the point that no contrary statement appears in "any of the constitutional conventions, in the First Congress, nor in the 1866 debates" on the fourteenth amendment. Assuming that he is correct, Hamilton's remarks do not reflect some seventy years of later constitutional development and were challenged shortly after the adoption of the fourteenth amendment. Cong. Globe, 41st Cong., 3rd Sess. 1245 (1871) (remarks of Rep. Lawrence); A. AVINS, *THE RECONSTRUCTION AMENDMENT DEBATES* 479 (1967) [hereinafter cited as AVINS].

14. *Hutchins v. Edson*, 1 N.H. 139, 140 (1817).

15. *Lindsay v. East Bay Street Comm'rs*, 1 S.C.L. (2 Bay) 38, 59 (1794). No specific constitutional restriction was involved, and the judge was thus exaggerating his earlier similar statement in *Zylstra v. Charleston*, 1 S.C.L. (1 Bay) 382, 391 (1794), which did involve a specific provision assuring trial by jury.

shire court in the *Dartmouth College* case<sup>16</sup> and was reiterated in Daniel Webster's successful argument before the United States Supreme Court, a blend of what we would now call procedural due process, substantive due process, equal protection, and separation of powers.

Have the plaintiffs lost their franchises by the 'due course and process of law?' On the contrary, are not these acts 'particular acts of the legislature, which have no relation to the community in general, and which are, rather, sentences than laws?' By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, 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, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country.<sup>17</sup>

No wonder my favorite Anglican cleric, the Reverend Sydney Smith, called Webster "a steam engine in trowsers." Webster did not have much confidence in the point on which he eventually prevailed, the violation of the impairment clause, and so he emphasized more general principles of limitation on legislatures.<sup>18</sup> And as law of the land or due process as a limitation he had some authority in *University v. Foy*.<sup>19</sup> This decision had, *sub silentio*, overruled the anonymous North Carolina case and announced the utterly unhistorical proposition that not

---

16. 65 N.H. at 493-94.

17. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581-82 (1819). On Webster's adoption of Mason's argument see C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835*, 383, 395 (1945) [hereinafter cited as HAINES I]; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 479 (rev. ed. 1926). Cooley said that this was the most quoted definition of due process, was "apt and suitable" and "entirely correct." T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 353, 354 (1868) [hereinafter cited as COOLEY]. See *Kalloch v. Superior Court*, 56 Cal. 229, 237-38 (1880).

18. HAINES I, *supra* note 17, at 397.

19. 5 N.C. (1 Mur.) 58 (1805), cited by Webster by name, 17 U.S. (4 Wheat.) at 575, and by substance, *id.* at 599.

only was the law of the land clause a substantive restriction on the legislature, it was a restriction on the legislature only.<sup>20</sup>

Webster's argument on due process and law of the land was not mentioned by the United States Supreme Court, but nevertheless, it bore fruit in various forms of statement. Its influence can be seen in *Vanzant v. Waddel*<sup>21</sup> where Catron, J., later to be a justice of the United States Supreme Court, said of the law of the land clause in Magna Carta:

Its infraction was a leading cause why we separated from that country [England], and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason for its adoption as part of our [Tennessee] constitution.<sup>22</sup>

And the influence can be detected in the well-known cases, *Hoke v. Henderson*<sup>23</sup> and *Taylor v. Porter*.<sup>24</sup>

Those terms 'law of the land' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated.<sup>25</sup>

The words 'by the law of the land' . . . do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense.<sup>26</sup>

Thus Justice Curtis wrote of the fifth amendment in *Murray v. Hoboken*:

The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.<sup>27</sup>

By 1855 he was stating what had already become and has remained a fundamental doctrine of American constitutional law. In *Taylor v. Porter* when Justice Bronson said: "Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people."<sup>28</sup> He was stating a fundamental philosophy and was not merely engaging in judicial exegesis of law of the land or due process. As early as 1793 in *Kemper v. Hawkins*,<sup>29</sup> upholding the doctrine of judicial review, one

---

20. 5 N.C. (1 Mur.) at 87-88. On the overruling see *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 16 (1833).

21. 10 Tenn. (2 Yer.) 259 (1829).

22. *Id.* at 271. "Our entire approbation is accorded to the decisions cited in. . . Dartmouth College v. Woodward. . . ." *Id.* at 270.

23. 15 N.C. (4 Dev.) 1 (1833).

24. 4 Hill 140 (N.Y. 1843).

25. 15 N.C. (4 Dev.) at 15.

26. 4 Hill at 145.

27. 59 U.S. (18 How.) 272, 276 (1855).

28. 4 Hill at 144.

29. 3 Va. (1 Va. Cas.) 20 (1793).

judge denounced "the supposed 'omnipotence of parliament'" as "an abominable insult upon the honour and good sense of our country."<sup>30</sup> And Justice St. George Tucker, responding to the argument that the legislature was the sole judge of the constitutionality of its acts, said:

This sophism could never have obtained a moment's credit with the world, had such a thing as a written Constitution existed before the American revolution . . . . Now since it is the province of the legislature to make, and of the executive to enforce obedience to the laws, the duty of expounding must be exclusively vested in the judiciary. But how can any just exposition be made, if that which is the supreme law of the land be withheld from their view?<sup>31</sup>

Tucker reiterated his views in the first of the "thoughtful 'Appendices'" to his American edition of Blackstone:

But the American revolution has found a new epoch in the history of civil institutions . . . an original written compact . . . in which the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.<sup>32</sup>

Tucker's Blackstone was a significant work. There is some question as to whether it was the most important of the native treatises,<sup>33</sup> or whether Tucker was merely a "significant minor figure" who had "none of the transforming impact of Kent or Story."<sup>34</sup> But whatever his rank, he was correct both as a historian and as a prophet.

Limitation of the legislature is obvious enough to us as long as specific limitations in a constitution are involved as in *Kemper v. Hawkins* which concerned the organization of state courts. But what happens when a legislative act appears to a court to be offensive but violates no specific restriction in the constitution? Here we encounter the conflict between what has been called the "interpretive model," which justifies judicial review by reference to the text of the constitution, and the "noninterpretive model," which overtly applies unwritten ideals and values.<sup>35</sup> And since some provisions of the constitution are treated a

---

30. *Id.* at 20 (Tyler, J.).

31. *Id.* at 24. There are other early cases stating essentially the same. *E.g.*, *Vanhorne v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795); *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787).

32. 1 W. BLACKSTONE, COMMENTARIES \*91, app. n.A-4 (St. G. Tucker ed. 1803). "Here the sovereign and absolute power resides in the people." *Holden v. James*, 11 Mass. 396, 404 (1814).

33. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 285 (1973); J. HURST, THE GROWTH OF AMERICAN LAW 256-57 (1950).

34. Cover, Book Review, 70 COLUM. L. REV. 1475, 1476 (1970). This describes the differences between Tucker's and Blackstone's theories of sovereignty. *Id.* at 1477-81. On the novelty of the American conception of sovereignty in the people and its link to our unique institution of judicial review see 2 D. BOORSTIN, THE AMERICANS, 406-16 (Vintage Books ed. 1965).

35. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary*



open-ended "broad standards of fairness" which "by their very nature, allow a relatively wide play for individual legal judgment," but others are treated as specifics which give no such scope,<sup>36</sup> the nature of the conflict can be obscured. History illuminates but does not resolve the problem.

*Calder v. Bull*<sup>37</sup> is a good illustration of the difference in approach. The question was whether "a resolution or law" of the Connecticut legislature granting a new trial after the time for appeal had run, violated the United States Constitution, specifically, the *ex post facto* clause. The act was upheld on the ground, and this is the proposition the case is usually cited for, that the *ex post facto* clause applies only to criminal matters and not to civil matters or probate, involved in *Calder*.<sup>38</sup> The Federal Constitution does not prohibit a state from exercising judicial powers through its legislature.<sup>39</sup> The interest of the case is the difference between the *dicta* of Justices Chase and Iredell. Chase said:

I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. . . . The nature, and ends of legislative power will limit the exercise of it. . . . There are acts which the federal, or state legislature cannot do, without exceeding their authority. . . . An act of the legislature (for I cannot call it a law), contrary to the great first prin-

---

*Thought*, 30 STAN. L. REV. 843, 844 (1978); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 708 (1975).

36. *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring).

37. 3 U.S. (3 Dall.) 386 (1798).

38. This holding has always been somewhat controversial. Justice Paterson concurred, but it went against his grain. "I had an ardent desire to have extended the provision in the constitution to retrospective laws in general. . . . [T]hey neither accord with sound legislation, nor the fundamental principles of the social compact." 3 U.S. (3 Dall.) at 397. This was also the hope of Justice Johnson in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 286 (1827). In a long note to *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 681-86, 2 L.Ed. 561-64 (1829), he contended that *Calder* could not be accepted as a holding on *ex post facto* but held merely that the state court could, under the Connecticut practice, be under a general supervisory control of the legislature. See also *Marcello v. Bonds*, 349 U.S. 302, 319-20 (1954) (Douglas, J., dissenting); J. ELY, *DEMOCRACY AND DISTRUST* 210-11 (1980) [hereinafter cited as ELY] (critical of both the *ex post facto* and natural law aspects of *Calder*).

39. Legislative grants of new trials were attacked as "utterly inconsistent with every principle of judicature" but, nevertheless, were said to be constitutional where the state constitution had "imposed no limits on the legislative power." *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. 1811). Although Cooley said such grants were unconstitutional, COOLEY, *supra* note 17, at 95, 392-93, the practice continued in Connecticut at least to 1877, 2 J. THAYER, *CASES ON CONSTITUTIONAL LAW* 1443 (1895). Whatever the constitutional guaranty of a republican form of government assures, it does not require the separation of powers within the states. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974); *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (executive determination of duration of imprisonment under indeterminate sentence law upheld). Thus the California Constitution of 1879, article IV, section 25, paragraph 5, until its general revision in 1966, specifically forbade legislative divorces; for such divorces were not prohibited by the United States Constitution, *Maynard v. Hill*, 125 U.S. 190 (1888), despite Cooley's disapprobation, COOLEY, *supra* note 17, at 109-14.

principles of the social compact, cannot be considered a [rightful] exercise of legislative authority.<sup>40</sup>

And, in language reminiscent of *Dr. Bonham's Case*,<sup>41</sup> he gave some examples of "acts of legislation" that would be void as "against all reason and justice" and prohibited by "[t]he genius, the nature and the spirit of our state governments." These were:

[a] law that punished . . . for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts . . . a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B.<sup>42</sup>

And he concluded:

To maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.<sup>43</sup>

Justice Iredell concurred in the result but dissented from the foregoing and said:

If . . . the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.<sup>44</sup>

If the constitution imposes no limits on the legislative power, every act of legislation:

would be lawfully enacted, and the judicial power, could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government any court of justice would possess a power to declare it so.<sup>45</sup>

Iredell's position is said to be "the orthodox doctrine of American

---

40. 3 U.S. (3 Dall.) at 387-88.

41. 77 Eng. Rep. 638, 652 (1609).

42. 3 U.S. (3 Dall.) at 388.

43. *Id.* at 388.

44. *Id.* at 398-99.

45. *Id.* at 398. Iredell's position is consistent with that which he took as counsel for the plaintiff in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). There he argued successfully that a statute requiring a summary dismissal on the defendant's motion unconstitutionally infringed upon the specific constitutional guaranty of a jury trial. He got his trial by jury and lost.

constitutional law"<sup>46</sup> and to represent "the received opinion."<sup>47</sup> But:

[W]hile Iredell's view has enjoyed in the final upshot a *formal* triumph, the substance of victory has gone to Chase in what, on this very account, became in due course the most important field of American constitutional law.<sup>48</sup>

The truth is that Iredell's tenet that courts were not to appeal to natural rights and the social compact as furnishing a basis for constitutional decisions was disregarded at one time or other by all of the leading judges and advocates of the initial period of our constitutional history. . . .<sup>49</sup>

The mechanics of disguising Chase as Iredell are revealed in *University v. Foy*.<sup>50</sup> In 1789 and 1794 the legislature had granted, escheated and confiscated properties to the state university. In 1800 it repealed the grant and declared all such property not yet sold reverted to the state. The act of 1800 was held unconstitutional as a violation of the law of the land clause in the state Bill of Rights. The court's basic premise was that the purpose of the Bill of Rights was to put those rights "beyond the control of the Legislature."<sup>51</sup> It was argued, however, that the law of the land clause did "not impose any restrictions on the Legislature, who are capable of making the law of the land, and was only intended to prevent abuses in the other branches of the government."<sup>52</sup> This argument was perfectly permissible under *State v. —*,<sup>53</sup> but was rejected, and *State v. —* was overruled *sub silentio*. The court said the law of the land clause was intended "as a restraint upon some branch of the Government."<sup>54</sup> It would be "absurd" to consider it a restraint on the executive, since its powers were limited elsewhere in the constitution. And it would be "idle" to apply it to the judiciary, "[f]or the judiciary are only to expound and enforce the law, and have no discretionary powers enabling them to judge of the propriety or impropriety of laws."<sup>55</sup> Thus the law of the land clause "is applicable to the Legislature alone, and was intended as a restraint on their acts (and

---

46. Dodd, *Extra-Constitutional Limitations Upon Legislative Power*, 40 YALE L.J. 1188, 1190 (1931).

47. BERGER, *supra* note 13, at 252.

48. E. CORWIN, LIBERTY AGAINST GOVERNMENT 63-64 (1948) (a revision of Corwin, *The Doctrine of Due Process Before the Civil War* (pts. 1 & 2); 24 HARV. L. REV. 366, 460 (1911)) [hereinafter cited as CORWIN I].

49. CORWIN I, *supra* note 48, at 66.

See also Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366, 376 (1911) [hereinafter cited as Corwin II].

50. 5 N.C. (1 Mur.) 57 (1805).

51. *Id.* at 59.

52. *Id.* at 62.

53. 2 N.C. (1 Hayw.) 50 (1794). See text accompanying note 9 *supra*.

54. 5 N.C. (1 Mur.) at 63.

55. *Id.*

to presume otherwise is to render this article a dead letter)."<sup>56</sup> The clause means that neither corporations nor individuals shall be deprived of their liberties or property:

unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution.<sup>57</sup>

Ignoring the circularity in the last quotation, the transformation of Iredell to Chase is as follows: (1) the legislature has power to enact laws except as limited by the constitution; (2) the law of the land clause or its equivalent, the due process clause, is a restriction on the legislature; (3) the scope of the restriction is to be determined by the courts according to the common law, said *University v. Foy*, and according to the "social compact," and "the genius, the nature, and the spirit of our state governments," said Justice Chase in *Calder v. Bull*.<sup>58</sup>

This recapitulation seems to make it obvious that Chase could have answered Iredell by referring to the law of the land clause or the due process clause as the constitutional limitation the latter required. But this is not so. *Calder v. Bull* was a writ of error from a state court which had already held the act granting the new trial constitutional under the state's law, and Chase recognized that he was bound by the state court's ruling on state law.<sup>59</sup> Nor had the elastic properties of due process been yet appreciated. Thus Chase referred to the compensation clause of the fifth amendment as a restriction on the states in addition to the *ex post facto* clause but did not mention its due process clause.<sup>60</sup> It took a court "possessed of a more enterprising spirit . . . to discover some clause of the written instrument of sufficiently indefinite content to accomplish the task"<sup>61</sup> of preserving the form and altering the substance.

Although *University v. Foy* had as early as 1805 shown the way "law of the land" or "due process" could be used as a constitutional limitation of indefinite scope on legislative authority, it was followed by a number of cases which found such a limitation without reference to any constitutional provision. These cases have been so thoroughly canvassed that repetition at length would be mere supererogation.<sup>62</sup> I

---

56. *Id.*

57. *Id.*

58. Hereinafter I sometimes refer to these and like expressions as "natural justice" or "natural law" without particularization because "[a] collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment law which offend their notions of natural justice would fill many pages." *Griswold v. Connecticut*, 381 U.S. 479, 511 n.4 (1965) (Black, J., dissenting).

59. 3 U.S. (3 Dall.) 305, 310-11 (1798).

60. *Id.* at 311.

61. *Corwin II*, *supra* note 49, at 381.

62. An illustrative rather than a complete list follows: Horace Gray's notes to the *Writs of*

shall, therefore, only note the few I consider particularly significant to introduce the point that when Congressman Bingham, "the Madison of the first section of the fourteenth amendment,"<sup>63</sup> was asked: "[W]hat do you mean by 'due process of law'?" and he answered: "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go read their decisions."<sup>64</sup> Bingham, if not Congress as a whole, may have had in mind a limitation far broader and vaguer than the restricted meaning Raoul Berger attributed to the founders of the republic.<sup>65</sup> In short due process in 1866 meant something quite different from what it meant in 1791 when the fifth amendment was adopted.<sup>66</sup>

Perhaps the first case disregarding Iredell's "orthodox doctrine" is *Fletcher v. Peck*,<sup>67</sup> generally understood to stand for the proposition that a grant by a state comes under the protection of the contract clause. Actually the case was decided on alternative grounds, *i.e.*, not only was the grant secured by the contract clause, it was also secured by natural law. Chief Justice Marshall put a question and almost answered it:

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

---

*Assistance Case*, Quincy (Mass.) 527-29, nn.30, 39 (1865); CORWIN I, *supra* note 48, at 58-115; C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) [hereinafter cited as HAINES II]; Berger, "Law of the Land" Reconsidered, 74 NW. L. REV. 56 (1979); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583 (1930); Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) [hereinafter cited as Nelson]. I found Nelson's article particularly instructive.

63. *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

64. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866), AVINS, *supra* note 13, at 157.

65. BERGER, *supra* note 13, at 250-54.

66. *N.B.* This is not a suggestion that due process means one thing in the fifth amendment and another in the fourteenth amendment. *Adamson v. California*, 332 U.S. 46, 66 (1947); *Hurtado v. California*, 110 U.S. 517, 534-35 (1884); Note, *Dissimilarities in Content Between the Two Due Process Clauses of the Federal Constitution*, 29 COLUM. L. REV. 624 (1929).

67. 10 U.S. (6 Cranch) 48 (1810). The case involved the effort of the Georgia Legislature to undo a land fraud but originated in the federal court in Massachusetts. Its political circumstances were exceedingly complicated. They explain Justice Johnson's cryptic references to a "mere feigned case" and why he found it necessary to state his confidence in the "respectable gentlemen" who had been counsel. 10 U.S. (6 Cranch) at 82. See HAINES I, *supra* note 17, at 314, 321-22. On Marshall's possible personal interest in the case see note 77 *infra*.

other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.<sup>68</sup>

He thereafter used the eleventh amendment to draw an inference that states were restrained either "by the general principles of our political institutions, [or] by the words of the constitution from impairing the obligation of its own contracts."<sup>69</sup> The eleventh amendment would not have been necessary if a state could defend itself before its passage by passing a law "absolving" itself from its own contracts.<sup>70</sup> And then he gave the Court's answer to his question:

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, *either* by general principles which are common to our free institutions, *or* by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.<sup>71</sup>

Marshall's questioning of legislative power suggests Chase's statement in *Calder v. Bull* that there were acts of the legislature he could not call laws and anticipates Webster's argument that "everything that may pass under the form of an enactment is not . . . to be considered law of the land."<sup>72</sup> It is consistent with *University v. Foy*. Similarly, Marshall's reference to the principles of "our free institutions" suggests Chase's reliance on the legislative restraints inherent "in our free re-

68. 10 U.S. (6 Cranch) at 75-76.

69. *Id.* at 78.

70. *Id.* He later explained the eleventh amendment as intended to protect a state from its creditors and give it the "full power of consulting its own convenience in the adjustment of its debts." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821).

71. 10 U.S. (6 Cranch) at 78 (emphasis added). Did he put the restraints of "general principles" before those of the "particular provisions" because the former were more important? Justice Johnson concurred only on the ground of general principles.

I do not hesitate to declare, that a state does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity. . . . [M]y opinion. . . is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.

*Id.* at 143, 144.

72. The idea that laws transgressing certain fundamental principles are not laws "properly so called" has been attributed to John Locke. C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 40 (1932) [hereinafter cited as HAINES III]; HAINES II, *supra* note 62, at 22-23. In fact the idea is older than Locke. Sir Thomas Egerton (Baron Ellesmere), in "the first distinct account of statutory interpretation in England" wrote before 1567:

The seconde case wherein an estatute shalbe taken against the wordes is *vt euietetur iniquum*, for statutes come to stablyshe lawes, & yf iniquitye shulde be gathered of them they doe not so muche as deserve the name of lawes.

T. EGERTON, *A DISCOURSE UPON THE EXPOSITION & UNDERSTANDINGE OF STATUTES* 75, 98, 162 (S. Thorne ed. 1942). Some of Locke "may justly be said to have become a maxim in the law, by which may be tested the authority and binding force of legislative enactments." COOLEY, *supra* note 17, at 392.

publican governments." Iredell grouped such generalities under the catch-all label of "natural justice." Thus one might depict Marshall as an advocate of natural law as a restriction on the states. But Marshall's reference to natural law was dismissed by Justice Frankfurter as "not much more than literary garniture . . . and not a guiding means for adjudication."<sup>73</sup> Marshall's dissent in *Ogden v. Saunders*,<sup>74</sup> his concurrence in *Satterlee v. Matthewson*,<sup>75</sup> and his opinion in *Barron v. Baltimore*<sup>76</sup> all show that Frankfurter was correct. Marshall was to reach his results by an expansive interpretation of the contract clause rather than by attempting to enforce natural law judicially.<sup>77</sup>

Other judges, however, invoked natural law for more than aesthetic purposes. Horace Gray and James Bradley Thayer characterized these appeals to external sources of constitutional limitations as *dicta* and said the cases could be explained on other grounds.<sup>78</sup> But the state-

---

73. Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 225 (1955).

74. 25 U.S. (12 Wheat.) 213 (1827). "In our system, the legislature or a State is the supreme power, in all cases where its action is not restrained by the constitution of the United States." *Id.* at 347. "[A]ll the power of society over it resides in the State legislatures, except in those special cases where restraint is imposed by the constitution of the United States." *Id.* at 348.

75. 27 U.S. (2 Pet.) 380 (1829). After quoting a part of the language in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-36, Justice Washington concluded:

It is nowhere intimated in that opinion [*Fletcher v. Peck*], that a state statute, which divests a vested right, is repugnant to the constitution of the United States, and the case in which that opinion was pronounced, was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court.

27 U.S. at 413-14. Thus unlike *Calder v. Bull*, in *Fletcher v. Peck* the Supreme Court was not restricted by a prior state court determination of a state constitutional question. See 3 U.S. (3 Dall.) 305, 310-11 (1798). Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

76. 32 U.S. (7 Pet.) 180 (1833).

77. Justice Johnson took exception to Marshall's extension of "obligation" of contracts to include grants or conveyances. "Now, a grant or conveyance by no means necessarily implies the continuance of an obligation, beyond the moment of executing it." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 145 (1810). And Marshall's further extension to include corporate charters was criticized as unhistorical and invasive of the states' authority.

This general expression [the contract clause] has been stretched to embrace every possible case, and has been construed into a most fruitful source of federal jurisdiction. In fact, it has laid all the local and internal policy of the State government prostrate at the feet of the Supreme Bench; who do not seem to acknowledge that the history of a Law furnishes any key to its construction.

T. COOPER, TWO ESSAYS ON THE FOUNDATION OF CIVIL GOVERNMENT AND ON THE CONSTITUTION OF THE UNITED STATES 50 (1826). (On "that extraordinarily versatile gentleman, Thomas Cooper," see B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 307 (1931)). See also B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 43 (1938). "According to the established principles of the common law no obligation inheres in a contract which is executed." HAINES I, *supra* note 17, at 407.

But

Marshall was personally profoundly interested in the 'stability of personal obligations.'

The title to the Fairfax estate in which he and his brother had an important stake had been put in jeopardy by acts of the Virginia legislature.

HAINES I, *supra* note 17, at 315. And he was personally familiar with charter rights of college administrations having defended the college in *The Rev. John Bracken v. The Visitors of William & Mary College*, 7 Va. (3 Call.) 573, 579 (1790). On the expansion of the contract clause see A. MASON & W. BEANEY, AMERICAN CONSTITUTIONAL LAW 341-45 (6th ed. 1978).

78. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 133 (1893) citing Gray in Quincy at 529 (Mass. 1865) [hereinafter cited as Thayer]. See

ments, even though they may be no more than props or alternative grounds of decision, show the degree to which natural law was expressly involved in early constitutional thinking.

The opinion of Chief Justice Kent, in *Dash v. Van Kleeck*<sup>79</sup> is a familiar example. The holding was that a legislative act of 1810 could not relieve a sheriff of his personal liability for the escape of a civil prisoner, a debtor, in 1808. Such "retrospective law" would divest the plaintiff creditor of a previously acquired right.<sup>80</sup> *Holden v. James*<sup>81</sup> held that despite its constitutional authority to suspend the operation of laws, the legislature could not suspend the statute of limitations against a particular administrator.<sup>82</sup> *Terrett v. Taylor*,<sup>83</sup> a frequently cited opinion of Justice Story held that under the Virginia Constitution the legislature could not expropriate the cultivable lands of the Episcopal

---

note 62 *supra*. Justice Frankfurter said that if he had to pick one article on constitutional law, he would pick Thayer's. H. PHILLIPS, FELIX FRANKFURTER REMINISCES 299-300 (1960). He gave it to Justice Harlan with the remark, "Please read it, then reread it, and then read it again and then think about it long." H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 182 (1981).

Gray thought *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (1792) was an actual holding, but Thayer thought Gray was wrong. The case involved the validity of an act of the colonial assembly in 1712 confirming a land title in one group of claimants. The court held this act "was against common right, as well as against magna charta." *Id.* at 254. In 1712 South Carolina was under the Carolina Charter of 1665 which required the colony's laws to be "consonant to reason, and as near as may be conveniently, agreeable to the laws and customs of this our realm of England." 7 W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 377 (1978). So Thayer may be correct even though the court did not mention the old charter as an express limitation.

79. 7 Johns. 477 (N.Y. 1811).

80. Kent applied natural law without using the expression:

It is not pretended that we have any express constitutional provision on the subject, nor have we any for numerous other rights dear alike to freedom and justice. An *ex post facto* law, in the technical sense of the term, is usually understood to apply in criminal cases. . . yet laws impairing previously acquired civil rights are equally within the reason of that prohibition, and equally to be condemned. . . . [T]here is no distinction in principle nor any recognized in practice, between a law punishing a person criminally for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other.

7 Johns. at 499.

Kent cited *Dr. Bonham's Case*, 77 Eng. Rep. 638 (1608), *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and *Ham v. M'Claws*, 1 S.C.L. (1 Bay) 93 (1789). The last used *Bonham* to justify a strained construction, not as a rule of constitutional law as did Kent. Kent frankly admitted that his method was to master the facts and when he "saw where justice lay and moral sense decided the issue" to search the authorities where he "almost always found principles suited to [his] views." Kent, *An American Law Student of a Hundred Years Ago* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 845 (1907). As my teacher, Edmund M. Morgan, used to say, "There is no proposition, however silly, but what if you look hard enough, you cannot find in a reported opinion."

81. 11 Mass. 396 (1814).

82. It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied all others under like circumstances.

*Id.* at 405.

83. 13 U.S. (9 Cranch) 23 (1815).



Church and convey them to a county for support of the poor.<sup>84</sup> He repeated his views in *Wilkinson v. Leland*,<sup>85</sup> to uphold the validation of the acts of a New Hampshire administrator by the Rhode Island Legislature.<sup>86</sup> *Bank of the State v. Cooper*<sup>87</sup> invalidated a special procedure for settling the accounts of a failed bank; natural law was a ground.<sup>88</sup> And even in California, to cite a less well known case, *Billings v. Hall*,<sup>89</sup> the Settlers' Act of 1856 was held unconstitutional because it would have required land owners whose title antedated the act to pay evicted trespassers for the improvements they had made.<sup>90</sup> These examples

---

84. The obvious basis for decision was that Virginia had no legislative jurisdiction. Its act of expropriation was passed in 1801. The lands were then in the District of Columbia and "under the exclusive jurisdiction of congress." *Id.* at 29. Nevertheless, Justice Story expatiated on its natural law basis. "The state itself succeeded only to the rights of the crown; and we may add, with many a flower of the prerogative stricken from its hands." The Revolution created "no forfeiture of previously vested rights of property," a principle "equally consonant with the common sense of mankind and the maxims of eternal justice." A contrary conclusion would be "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired." He was not "prepared to admit" that the legislature could simply abolish a private corporation and take its property.

[W]e think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of the most respectable judicial tribunals, in resisting such a doctrine.

13 U.S. (9 Cranch) at 27-29.

85. 27 U.S. (2 Pet.) 627, 656 (1829) (writ of error to federal circuit court in Rhode Island which did not yet have a written constitution).

86. The nub of the decision was that the rights of the complaining heirs were incumbered by the liens against the decedent and all Rhode Island did was recognize them. *Id.* at 658. But Justice Story again discoursed in natural law terms:

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred . . . [A] different doctrine is utterly inconsistent with the great and fundamental principle of republican government . . . . We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held to be a constitutional exercise of legislative power, in any state in the Union.

*Id.* at 657-58.

87. 10 Tenn. (2 Yer.) 599 (1831). The holding was that a creation of a special court was contrary to the law of the land clause which forbade special legislation. *Id.* at 605, 614, 621. Equating law of the land to due process, the case is a precursor of how "the due process clauses of the fifth and fourteenth amendments have been held to yield norms of equal treatment indistinguishable from those of the equal protection clause." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 992 (1978) [hereinafter cited as TRIBE]. The equation of "due process" with "general" as opposed to "particular" laws goes back at least to Daniel Webster's argument in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819). *Holden v. James*, 11 Mass. 397, 405 (1814), based the inhibition on special laws on natural justice, and one judge in *Cooper* derived it from Lord Coke. 10 Tenn. (2 Yer.) at 621.

88. [T]here are eternal principles of justice which no government has a right to disregard. It does not follow, therefore, because there may be no restriction in the constitution prohibiting a particular act of the legislature such act is therefore constitutional. Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. The common law, says Lord Coke, (8 Co. 118a (Dr. Bonham's Case)) adjudgeth a statute so far void . . . .

*Id.* at 603.

89. 7 Cal. 1 (1857).

90. The principal opinion was by Chief Justice Murray whom Stephen J. Field included in

show both the pervasiveness of natural law thinking and the variety of contexts in which it was employed. It may be true that: "The notion that out beyond [the written constitutions] lay a higher law to which the judge *qua* judge was responsible was never a part of the mainstream of American jurisprudence."<sup>91</sup> However, one would never know it from reading these cases.

But the tradition of reliance on natural rights to invalidate legislation was waning,<sup>92</sup> and the substitution of the due process or law of the land formulas began as early as the argument of Jeremiah Mason to the New Hampshire Court in *Dartmouth College v. Woodward*.<sup>93</sup> There were at least two reasons why the formulas were accepted as replacements. One is the public hostility to the judiciary which came to the fore as part of Jacksonian Democracy with its emphasis on an elected judiciary and desire for codification—the idea that the courts are not to make the law but simply apply it, and that liberty could exist only under written law.<sup>94</sup> The other is that the abolitionists were beginning to make natural law a basis for arguments against slavery.<sup>95</sup>

Mason's technique was simply to establish the due process clause as a restriction on the legislature and then make it all-encompassing.<sup>96</sup> Although Mason and later Webster may have relied on due process only to raise a federal question,<sup>97</sup> the argument showed how the courts

---

his list of "The judges who brought the greatest reproach to the bench." Graham, *Four Letters of Mr. Justice Field*, 47 YALE L.J. 1100, 1101 (1938). Murray was satisfied that common law, equity and the constitution and law of California since 1849 entitled the "lawful owner who has been dispossessed . . . upon recovery, both to the profits and improvements." 7 Cal. at 7-9. He examined the act to see "how far it trenches upon the principles of natural justice and the [California] Constitution." *Id.* at 9. He characterized as erroneous the proposition "that the Legislature of a State might do any act, except what was expressly prohibited by the Constitution," and found limits in "the great and fundamental principles of the social compact," which he fortified with a somewhat dubious quotation from John Locke. *Id.* at 11-12. Cf. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§135-138 (P. Laslett rev. ed. 1963). And concluded:

[T]he Legislature cannot pass a law divesting vested rights. . . . It is a law as immutable as those of nature, that States and nations, like individuals, are bound to obey the principles of natural justice in all their dealings with their subjects and others . . . .

7 Cal. at 14, 15.

91. R. COVER, JUSTICE ACCUSED 29 (1975) [hereinafter cited as COVER].

92. Nelson, *supra* note 62, at 532.

93. 65 N.H. 473, 492-95 (1817).

94. BERGER, *supra* note 13, at 252 n.15 (the codification movement); P. MILLER, THE LIFE OF THE MIND IN AMERICA 233-37, 239 (1965) (movement for popular election of judges and emphasis on written law). On Andrew Jackson's resistance to the judiciary see HAINES III, *supra* note 72, at 322.

95. COVER, *supra* note 91, at 93-99, 156; Nelson, *supra* note 62, at 534-36, 551.

96. "This provision of the Bill of Rights [law of the land clause] was unquestioningly designed to restrain the legislature, as well as the other branches of government, from all arbitrary interference with private rights." 65 N.H. at 492.

97. The idea that a corporate charter was a contract a state could not impair was something of a novelty, 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 476 (rev. ed. 1926), and Webster did not consider it "a particularly strong argument," HAINES I, *supra* note 17, at 397. He wished to argue general principles of restraint of legislative power and attempted to initiate the case in the federal courts so that it would resemble *Fletcher v. Peck* rather than *Calder*

could acknowledge due deference to the written constitution and thus legitimate judicial review while at the same time exercise authority as ample as it would be by overt reliance on natural law.

*Hoke v. Henderson*,<sup>98</sup> according to Kent, a case “replete with sound constitutional doctrine,”<sup>99</sup> held that a court clerk had a species of “property” in his office of which he could not be deprived by a statute transferring the office to a different person.<sup>100</sup> Once public offices were defined as property, even though “they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things,”<sup>101</sup> the way was open to apply the law of the land clause to hold the statute unconstitutional.

Corwin attributed the shift from reliance on natural law to reliance on a constitutional text to the “enterprising spirit” which impelled the North Carolina court “to discover some clause of sufficiently indefinite content” to reconcile the institution of judicial review with the “creed of popular sovereignty.”<sup>102</sup> But as early as 1833 the slavery issue may have colored the decision. *Allen v. Peden*<sup>103</sup> is cited as holding that “an act of the Legislature emancipating a slave against the will of his owner, was plainly in violation of the fundamental law of the land and so void.”<sup>104</sup> This remained the law in North Carolina<sup>105</sup> but was rejected a generation later in New York where a statute declaring a slave transiently present to be free was upheld on the ground that “slavery is repugnant to natural justice and right, and has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government.”<sup>106</sup> With this sort of possibility foreshadowed

---

*v. Bull.* HAINES I, *supra* note 17, at 397-98. This failed, and presumably to assure that general principles could be raised as a federal question, Mason argued that the “5th article of amendments of the constitution of the United States” was equivalent to the law of the land clause of Magna Carta and that “the legislature of this state is as much bound by this provision, in the constitution of the United States, as they would be, were it contained in our own constitution.” *Dartmouth College v. Woodward*, 65 N.H. 473, 494 (1817).

98. 15 N.C. (4 Dev.) 1 (1833).

99. 1 J. KENT., COMMENTARIES 624 n.(c) (10th ed. 1860).

100. 15 N.C. (4 Dev.) at 16.

101. *Id.* at 15.

102. CORWIN I, *supra* note 48, at 84-85; CORWIN II, *supra* note 49, at 381.

103. 4 N.C. (2 Car. L. Rep. 638) 332 (1816).

104. 15 N.C. (4 Dev.) at 14.

105. *Bryan v. Wadsworth*, 18 N.C. (1 Dev. & Bat.) 383, 387-88 (1835) (“[E]ven the Legislature cannot emancipate a slave without the assent of his master.”) *Allen v. Allen*, 44 N.C. (Busb.) 71, 73 (1852) (“We admit that no person, nor the Legislature even, can set a slave free without the consent of his owner.”). See also *Southern Ry. Co. v. Cherokee County*, 177 N.C. 86, 97, 97 S.E. 758, 764 (1919).

106. *Lemmon v. People*, 20 N.Y. 562, 617 (1860). A writ of error was brought in the United States Supreme Court, and the opponents of slavery were fearful that the principle of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857) (that Congress denied due process of law when it forbade slavery in the territories), would be extended to the states. Nelson, *supra* note 62, at 546-47. But *Lemmon* was never argued and “lost most of its meaning in the onrushing secession crisis.” D. FEHRENBACHER, THE DRED SCOTT CASE 444-45 (1978). *Lemmon* epitomizes a much

by the arguments of the abolitionists, small wonder that the North Carolina court refused to rely on the "principles of what is called natural justice [which] are so uncertain, that they cannot be referred to as a sure standard of constitutional power"<sup>107</sup> and found it more expedient to explain *Hoke v. Henderson* as involving a public office which was "a subject of property to a certain extent."<sup>108</sup>

The North Carolina cases illustrate verbal techniques for enlarging the law of the land clause. *University v. Foy* manipulated the meaning of liberty to give a corporation the rights of a "freeman,"<sup>109</sup> a precursor of the similar expansion of the word "person" in the fourteenth amendment.<sup>110</sup> And *Hoke v. Henderson* enlarged the clause by expanding the scope of property. These techniques were not to be forgotten.<sup>111</sup> And an even more expansive possibility is shown by *Taylor v. Porter* which defines "law" in the law of the land clause:

The words 'by the law of the land' . . . do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense.<sup>112</sup>

It seems equal nonsense to say that the courts, not the legislature, are the ultimate authority on the difference between right and wrong and to persist in saying that the courts simply enforce the law but do not make it. Assuming the court used the word "construction" artfully to accord with Francis Lieber's then recently published *Legal and Political Hermeneutics*, "Lieber's safe rules of construction, especially as applied to constitutions, turn out to be nothing less than a political philosophy."<sup>113</sup>

---

older mode of expression. A decade before he became a judge, Lemuel Shaw recognized that "American professions of the 'purest principles of natural and civil liberty' were contradicted by practices whereby 'a large proportion of human beings are utterly deprived of all their rights.'" See LEVY, *supra* note 1, at 59-60. Later he wrote, "[B]y the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and plain principles of justice." *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 210 (1836). The Pennsylvania statute of 1780 freeing slaves brought voluntarily into the state seems to have been regularly enforced. *Ex parte Simmons*, 22 F. Cas. 151 (C.C.E.D. Pa. 1823); *Butler v. Hopper*, 4 F. Cas. 904 (C.C.D. Pa. 1806). The free status conferred by such statutes was recognized in some slave states. LEVY, *supra* note 1, at 63.

107. *Raleigh & Gaston R.R. v. Davis*, 19 N.C. (2 Dev. & Bat.) 431, 439 (1837).

108. 19 N.C. (2 Dev. & Bat.) at 448.

109. 5 N.C. (1 Mur.) 58, 87 (1805).

110. See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938); 48 YALE L.J. 171 (1938).

111. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 439 (1926); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

112. 4 Hill 140, 145 (N.Y. 1843).

113. COVER, *supra* note 91, at 139. Lieber was involved in the "swing from the ideology of natural rights toward the 'engrossing political state.'" COVER, *supra* note 34, at 137. On Lieber as editor of the *Encyclopaedia Americana* and Story as a contributor of legal articles and advocate of

*Wynehamer v. People*,<sup>114</sup> the case that held that the New York prohibition law was unconstitutional because it deprived saloon keepers of their property, is the clearest example of the change from natural law language to due process language. It is a strange case, and the scholars have had difficulty describing it consistently. Corwin called it a "great case"<sup>115</sup> but then said it was conclusively refuted "from the point of view of both history and logic."<sup>116</sup> Berger acknowledged it was "the *locus classicus* of substantive due process"<sup>117</sup> but proceeded to belittle it as "a sport."<sup>118</sup> And Professor Friedman said it "would be only a historical curiosity except that its daring use of the due process clause became so popular."<sup>119</sup> Of course, nothing is important about this curious and refuted sport except what follows Friedman's "except."

The actual holding was that the law which forbade the sale of liquor owned at the time the law went into effect deprived the owners of property without due process of law. This holding never had much of a following and went out the window under the fourteenth amendment.<sup>120</sup> It was based on the following interpretation of the words "the law of the land" or "due process of law" by Justice Comstock in the principal opinion:

Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence.<sup>121</sup>

If a different meaning were given to "law of the land" and "due process of law,"

The constitution would then mean, that no person should be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away, . . . then the legislature is omnipotent.<sup>122</sup>

This reliance on due process to limit the legislature followed a rejection of natural law for the same purpose.

It has been urged upon us, that the power of the legislature is re-

---

some codification *see* C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES *The Taney Period 1836-64* 344 (P. Freund ed. 1974).

114. 13 N.Y. 378 (1856).

115. CORWIN I, *supra* note 48, at 101.

116. CORWIN I, *supra* note 48, at 110.

117. BERGER, *supra* note 13, at 55.

118. BERGER, *supra* note 13, at 255.

119. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 314 (1973).

120. *Mugler v. Kansas*, 123 U.S. 623, 665-74 (1887) (*Wynehamer* cited in argument, *id.* at 631, 649); BERGER, *supra* note 13, at 255-56; CORWIN I, *supra* note 48, at 107-10. *But cf.* *State v. Mugler*, 29 Kan. 181, 194 (1883) (Brewer J., concurring, later to be a justice of the United States Supreme Court).

121. 13 N.Y. 378, 393 (1856).

122. *Id.*

stricted, not only by the express provisions of the written constitution, but by limitations implied from the nature and form of our government . . . and that the act in question is void, as against the fundamental principles of liberty, and against common reason and natural rights.<sup>123</sup>

Justice Comstock then quotes Chief Justice Marshall in *Fletcher v. Peck*, "I think that there would be great difficulty and great danger in attempting to define the limits of this [legislative] power,"<sup>124</sup> and continues:

[B]ut the danger was less apparent then than it is now, when theories alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed.<sup>125</sup>

And he concludes:

There is no process of reasoning by which it can be demonstrated that the 'Act for prevention of intemperance, pauperism and crime' is void, upon principles and theories outside the constitution, which will not also, and by an easier induction, bring it in direct conflict with the constitution itself.<sup>126</sup>

The "subversive" theories feared by Justice Comstock were obviously the abolitionists' uses of natural law to attack slavery.<sup>127</sup> The extent of his fear is shown by his short dissent in *Lemmon v. People*<sup>128</sup> where he would have held that New York could not emancipate a slave voluntarily brought into New York only temporarily in the course of transit. Whether his fear was prompted by sympathy for slave owners, by concern for preservation of the Union, or his political principles, cannot be discerned from the face of the opinions.<sup>129</sup> But whether for one or all of these possibilities, *Wynhamer* explicitly demonstrates the influence of slavery on judicial thinking.

Even though *Wynhamer* never flourished in its particular holding of protecting barkeepers, its general principles thrived rapidly. Almost a

---

123. *Id.* at 390.

124. 10 U.S. (6 Cranch), 87, 135-36 (1810).

125. 13 N.Y. at 391-92.

126. *Id.* at 392.

127. COVER, *supra* note 91, at 93-99, 156; Nelson, *supra* note 67, at 534-36, 551.

128. 20 N.Y. 562, 644 (1860).

129. "Judge Comstock was an uncompromising Democrat." Kenneson, *George Franklin Comstock* in 6 GREAT AMERICAN LAWYERS 209 (W. Lewis ed. 1909). Thus in *Wynhamer* he may have been trying to adhere to the Jacksonian faith in written laws. Nevertheless, he complained that the New York "Code is ruining the bench faster than it is the bar." *Id.* at 201. Justice Story, a Federalist, had earlier approved of some codification. COVER, *supra* note 91, at 139. But, "a foolish consistency is the hobgoblin of little minds."

year to the day after *Wynehamer* it was applied by Chief Justice Taney without attribution, in *Dred Scott*:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property [his slave], merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with name of due process of law.<sup>130</sup>

This clear example of substantive due process may have been in Congressman Bingham's mind when he declined to define due process and said "go read [the] decisions."<sup>131</sup> Berger's suggestion that it was not, because *Dred Scott* "was universally execrated by the abolitionists, and also decried by Lincoln," is unsupported.<sup>132</sup> The abolitionists may not have linked *Dred Scott's* result, but that does not prove that they thought it was wrong as a matter of law. Indeed, it has been said, with a like absence of documentation, "President Johnson and many others believed it was a good law."<sup>133</sup> And Bingham's colleague, William Lawrence cited *Wynehamer* shortly after adoption of the fourteenth amendment in support of his argument that a jury trial was constitutionally required in condemnation proceedings in the District of Columbia.<sup>134</sup> That this contemporaneous construction was later held erroneous<sup>135</sup> does not prove that it was not in the minds of the framers of the amendment.

A more substantial demonstration of *Wynehamer's* influence is one use of it by Thomas Cooley in his *Constitutional Limitations*, a work of "unprecedented popularity" surpassing "even those of Kent and Story in prestige and authority."<sup>136</sup> Cooley wrote:

Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.<sup>137</sup>

Cooley was fond of maxims as devices to expand constitutional limita-

---

130. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

131. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866), AVINS, *supra* note 13, at 157.

132. BERGER, *supra* note 13, at 204 n.36.

133. D. HUTCHINSON, THE FOUNDATIONS OF THE CONSTITUTION 339 (F. Lundberg ed. 1975).

134. Cong. Globe, 41st Cong., 3d Sess. 1245 (1871), AVINS, *supra* note 13, at 479-80.

135. *Georgia Power Co. v. 138.30 Acres of Land*, 596 F.2d 644, 647 (5th Cir. 1979), approved *en banc* 617 F.2d 1112, 1113 (5th Cir. 1980), *cert. den.* \_\_\_ U.S. \_\_\_, 101 S.Ct. 314 (1981); FED. R. CIV. P. 71A(h), (k). To say now that Lawrence was "wrong" would justify an accusation of presentism, *i.e.*, evaluating a conclusion in its own time by whether it was vindicated later. Scheiber & Parrish, *Book Review*, 17 AM. J. LEGAL HIST. 303, 307 (1973).

136. C. JACOBS, LAW WRITERS AND THE COURTS 29 (1954). "The most influential treatise ever published on American constitutional law." CORWIN I, *supra* note 48, at 116.

137. COOLEY, *supra* note 17, at 356.

tions,<sup>138</sup> and he could have cited as authority for using them Story's reference to the "maxims of eternal justice" in *Terrett v. Taylor*<sup>139</sup> and to "the fundamental maxims of a free government" in *Wilkinson v. Leland*.<sup>140</sup> But the reference he gave was "*Wynehamer v. People*, 13 N.Y. 432 per Selden, J."<sup>141</sup> The page Cooley cited has on its face no reference to maxims either of law or anything else, but Cooley meant it for he repeated the reference in later editions.<sup>142</sup> And Selden's opinion bears him out. Selden concurred in holding the act unconstitutional and took particular exception to one feature. The statute prohibited sales of liquor, but did "not prohibit the safekeeping of spiritous liquor or the giving it away in a private dwelling." Nevertheless, it made proof of delivery *prima facie* evidence of an unlawful sale. This evidentiary effect of a delivery outraged Selden.

No one, therefore, can in his own house give a glass of wine to a friend, without thereby affording *prima facie* evidence to convict him[self] of a misdemeanor.<sup>143</sup>

He thought that the *prima facie* provision violated "that fundamental rule of justice which holds that every man shall be presumed innocent," which was "virtually incorporated into the constitution itself" and, therefore, violated due process.<sup>144</sup> And he did not limit himself to the presumption of innocence:

But I am prepared to go further, and to hold that all those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course in their nature unchangeable.<sup>145</sup>

The presumption of innocence is no more than a maxim of "policy and practical sense; it is not founded on any notion that defendants generally are free from blame."<sup>146</sup> But Selden was a true prophet even

---

138. "Maxim of republican government . . . allowed very little force," COOLEY, *supra* note 17, at 169; "the maxims of Magna Charta and the common law are the interpreters of constitutional grants of power . . .," COOLEY, *supra* note 17, at 175; due process defined by "settled maxims of law," COOLEY, *supra* note 17, at 356; Locke's requirement of general laws has "become a maxim in the law" to test constitutionality, COOLEY, *supra* note 17, at 392; "maxim of law" that "no one ought to be a judge in his own cause" bears on constitutionality, COOLEY, *supra* note 17, at 410.

139. 13 U.S. (9 Cranch) 23, 27 (1815).

140. 27 U.S. (2 Pet.) 627, 657 (1829).

141. COOLEY, *supra* note 17, at 356 n.2.

142. See T. COOLEY, CONSTITUTIONAL LIMITATIONS 436 (5th ed. 1883).

143. 13 N.Y. 378, 444 (1856).

144. *Id.* at 446.

145. *Id.* at 447.

146. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 552 (1898).



though he has not been honored as an authority. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."<sup>147</sup> Like the other unarticulated maxims, such as that requiring proof beyond a reasonable doubt in criminal cases and invalidating trials before an interested judge,<sup>148</sup> it has been "virtually incorporated into the constitution itself" as Selden would have had it.

Cooley's resort to extraneous unarticulated maxims makes his work truly confusing. He wrote:

[E]xcept where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. . . . Any legislative act . . . must be enforced, unless restrictions upon the legislative power can be pointed out in the constitution, and the case shown to come within them.<sup>149</sup>

This is a fair synopsis of Justice Iredell in *Calder v. Bull*.<sup>150</sup> But then Cooley pulls the rug:

It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. . . .<sup>151</sup>

. . . The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power. . . .<sup>152</sup>

"[H]aving ostentatiously expelled Chase's 'speculative views' [in *Calder v. Bull*] by the door, Cooley prepares a window for their readmission in different guise."<sup>153</sup> Thus Tribe now characterizes Cooley as a "strong advocate of judicial review of state legislation infringing upon 'natural law' rights. . . ,"<sup>154</sup> despite Cooley's disclaimer.

Perhaps the clearest example of the absorption of natural law into the law of the land and then into due process is the law of eminent domain. The due process clause of the fifth amendment is followed immediately by the compensation clause: "nor shall private property be taken for public use, without just compensation." The presence of these two clauses in immediate juxtaposition prompts the questions: (1) is the compensation clause a redundancy? or (2) strange as it

---

147. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

148. *In re Winship*, 397 U.S. 358 (1970); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Goldberg*, *supra* note 2, at 637-38.

149. COOLEY, *supra* note 17, at 168.

150. 3 U.S. (3 Dall.) 386, 398-99 (1798); *see note 45 supra*.

151. COOLEY, *supra* note 17, at 174.

152. COOLEY, *supra* note 17, at 175.

153. CORWIN I, *supra* note 48, at 67-68.

154. TRIBE, *supra* note 87, at 429 n.15.

may seem to us, can it be that the right to compensation is not part of due process? Applying the rules of constitutional interpretation that no clause "is intended to be without effect,"<sup>155</sup> and that "no word was unnecessarily used, or needlessly added,"<sup>156</sup> the answers are that the compensation clause is not redundant and was necessary to give a right in addition to whatever rights were included in due process.<sup>157</sup> This being so, explain what is now hornbook law:

[S]ince the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.<sup>158</sup>

The explanation, of course, is that in the seventy-seven years between the adoption of the fifth amendment and the adoption of the fourteenth the meaning of due process had changed.

The compensation clause of the fifth amendment was not considered a redundancy originally. Justice Chase wrote only seven years after its adoption:

The restraint against making any *ex post facto* laws was not considered by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, 'that private property should not be taken for public use, without compensation,' was unnecessary.<sup>159</sup>

The clause was necessary because at common law and in some, if not most, of the colonies there was no right to compensation except as it was granted as a matter of statutory grace. This necessity cannot be proved by the legislative history of the compensation clause which is

---

155. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 400-01 (1821).

156. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840).

157. The argument that a different rule applies to the amendments than the body of the constitution because the amendments vary in character from each other and were proposed from different quarters and with different objects, *id.* at 540, 555, was answered a century later by Frankfurter, J.:

Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider 'due process of law' as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.

*Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

158. *Scott v. Toledo*, 36 F. 385, 395-96 (1888) cited with approval in *Chicago, Burlington R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

159. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798). Since he was writing of the prohibition of *ex post facto* laws by the states under article I, section 10, clause one, rather than the parallel prohibition against the United States under article I, section nine, clause three, it is clear that he thought the fifth amendment applicable to the states.

“quite unilluminating.”<sup>160</sup> Indeed, that history is so obscure that as early as 1803 the most St. George Tucker said of the clause is that it was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.<sup>161</sup>

The common law, however, shows that the compensation clause was necessary if compensation was to be a matter of constitutional right rather than legislative benevolence. Blackstone, in a passage elevated by some American cases to a rule of constitutional law, asserted that the eminent domain power could be exercised only pursuant to an enabling statute, and

how does it [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him full indemnification and equivalent for the injury thereby sustained. . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price. . . .<sup>162</sup>

Boiling Blackstone's orotund style down to its essence, all this says is that the owner gets the compensation allowed by the statute.<sup>163</sup> Conversely, if the statute fails to provide for compensation, none may be had.<sup>164</sup> And nothing has been found to indicate that in England the law of the land clause of Magna Carta was ever held to be a statutory

---

160. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 7, 192-93 nn.10-13 (1977).

161. 1 W. BLACKSTONE, COMMENTARIES app. 305-06 (St. G. Tucker ed. 1803). Is it only a coincidence that Justice Black used a hypothetical taking without compensation for defense purposes to illustrate the dangers of the idea that there are no “absolute” constitutional rights and the balancing approach? Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 877-78 (1960).

162. 1 W. BLACKSTONE, COMMENTARIES \*139 (1765).

163. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 473 (1837).

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage on the ground that his land is ‘injuriously affected,’ unless he can establish a statutory right.

*Sisters of Charity v. The King*, [1922] 2 A.C. 315, 322 (P.C. Canada).

Ironically, in England, where the right to compensation is merely statutory, the courts were more generous to condemnees than in the United States, where the right is constitutional. Instead of fixing value on the assumption of a willing seller and willing buyer, the usual American rule, 4 P. NICHOLS, EMINENT DOMAIN §12.2[1], at 12-71 (3d rev. ed. 1980) the English courts assumed an *unwilling* seller, a “sympathetic hypothesis that . . . led to an almost punitive measure of damages . . . the customary practice of adding 10% to the value . . .” Widdicombe & Moore, *A General Survey of English Law in COMPENSATION FOR COMPULSORY PURCHASE* 18 (J. Garner ed. 1975). This was remedied by the Acquisition of Land Act 1912, *id.*, but a limited “sweetener” was restored for farms and homes in 1973. C. CRIPPS, COMPULSORY ACQUISITION OF LAND ¶ 1-008, at 17 (11th ed. 1962); Garner, *Compensation for the Compulsory Acquisition of Land in COMPENSATION FOR COMPULSORY PURCHASE* 6 (J. Garner ed. 1975).

164. Some things . . . are no longer open to discussion . . . . The remedy of the party who suffers the loss is confined to recovering such compensation as the Legislature has thought fit to give him. *Caledonian Ry. Co. v. Walker's Trustees*, 7 App. Cas. (H.L.) 259, 293 (1882). *See also* *Edgington v. Swindon Corp.* [1939] 1 K.B. 86, 90; *British Cast Plate Mfrs. v. Meredith*, 100 Eng. Rep. 1306, 1307 (K.B. 1792).

provision for compensation.<sup>165</sup>

The practice in the colonies reflected the common law rule that without a statute there was no compensation. From New England to the south, land was taken for roads without payment.<sup>166</sup> This practice continued even after the ratification of the Constitution. "Even by 1829 a majority of the original states had not enacted constitutional clauses providing for compensation for land taken."<sup>167</sup> The justification for the practice may have been in the colonial charters;<sup>168</sup> or the rationalization that as to unimproved lands, of which there was an abundance, the person affected need simply find other unimproved lands,<sup>169</sup> or, as in somewhat later cases, the hairsplitting explanation that when a road was opened the land was not "taken" because title remained in the owner who could still use the land as he pleased subject only to the easement in the public;<sup>170</sup> or on the tautological ground that all property was held subject to the power of the state to take it, an authority "paramount to all private rights," analogous to the taxing power, and "all private rights were held and enjoyed, subject to this condition."<sup>171</sup>

---

165. "The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured." See *Metropolitan Asylum Dist. v. Hill*, 6 A.C. 193, 203 (1881). Nor has any suggestion been found that Magna Carta entitled a condemnee to a jury trial to fix compensation. See *Boyfield v. Porter*, 104 Eng. Rep. 346 (K.B. 1811) (condemnee restricted to compensation fixed by justices of the peace).

But in Canada as in England, where the legislatures can, if they so choose, take private property without compensation, such power is very seldom exercised. It was the result of a long period of the growth of legal ideas and of a combination of extraordinary economic and political conditions that turned American constitutional law in this field along lines different from the prevailing practice of the world.

HAINES II, *supra* note 62, at 136.

166. Fuller treatment of the early practice is unnecessary because of the excellent discussion of "The Slow Emergence of the Just Compensation Principle" in M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 63-66 (1977) [hereinafter cited as HOROWITZ]. For other collections of early cases, some of which relate the colonial practices, see 3 P. NICHOLS, *EMINENT DOMAIN* §8.1[1], at (8-7)-(8-8) (3d rev. ed. 1980), 15 *CYCLOPEDIA OF LAW AND PROCEDURE Eminent Domain* 639-40 (1905).

167. HORWITZ, *supra* note 166, at 64.

168. See generally *Lindsay v. East Bay Street Comm'rs* 1 S.C.L. (2 Bay) 38 (1796) (argument that taking land for a street without compensation merely continued a practice going back to 1686-87, the days of the "lords proprietors," *id.* at 47-48, and that a demand for "compensation for the soil" was unprecedented, *id.* at 49-50).

169. *Feree v. Meily*, 3 Yeates 153, 155 (Pa. 1801).

170. *Livermore v. Town of Jamaica*, 23 Vt. 121, 122 (1851).

171. 1 S.C.L. (2 Bay) at 56. The uncompensated severance here may have been less Draconian than it seems. The land was submerged intermittently by the tides and valueless until the new street was opened (argument). *Id.* at 18. Thus the result may have been no more than a rough and ready way of offsetting damages by benefits. Cf. *Livermore v. Town of Jamaica*, 23 Vt. 121, 123 (1851). Uncompensated takings for roads continued in South Carolina, *State v. Dawson*, 21 S.C.L. (3 Hill) 50, 52 (1836), and offsetting of benefits continued after a compensation clause was adopted. "In many instances, the building of a highway through lands is the very thing that gives them value and brings them into market." *Wilson v. Greenville County*, 110 S.C. 321, 96 S.E. 301, 304 (1918). The Ohio constitution required "compensation in money," which one judge would have held prevented compensation in benefits, but which may have been intended only to preclude the early practice of compensation in land. *Symonds v. City of Cincinnati*, 14 Ohio 147, 183 (1846). Compare *Collier v. Merced Irrigation Dist.*, 213 Cal. 554, 566, 2 P.2d 790, 794 (1931)

The Pennsylvania Supreme Court recognized the obvious when it said that the denial of compensation may in some cases "be hard and severe," but it was quite wrong when it said "let the evils attending on the law be what they may, the legislature only are competent to give relief."<sup>172</sup>

There were at least two ways the courts could relieve uncompensated takings: (1) derive a right to compensation from "natural law" or general external principles;<sup>173</sup> and (2) "reinterpret," actually rewrite, the law of the land or due process clauses to include the right to compensation.<sup>174</sup> Both were followed, and the latter prevailed with the result that natural law reappeared as a requirement of due process of law.

The most cited case on the proposition that natural law requires compensation even in the absence of an express constitutional provision is *Gardner v. Newburgh*,<sup>175</sup> an opinion by Chancellor Kent at *nisi prius*. The village of Newburgh, in the course of providing a public water supply, was about to divert a stream flowing across the plaintiff's land. The statute made no provision for compensation, and there was no expressly applicable state constitutional provision.<sup>176</sup> Nevertheless, Kent held that the plaintiff was entitled to an injunction. The plaintiff's "right to a stream of water is as sacred as a right to the soil over which it flows" from which he cannot be disseized "but by lawful judgment of his peers, or by due process of law" as provided by Magna Carta and the statute declaring rights of citizens of New York.<sup>177</sup> The legislature has the power to take private property, but cannot validly exercise that power unless "a fair compensation . . . be previously made," as is "admitted by the soundest authorities, and is adopted by all temperate and

---

(requiring irrigator to accept assurance of substitute water supply is not compensating him in "chips and whetstones").

172. *Fere v. Meily*, 3 Yeates 153, 155 (Pa. 1801).

173. 3 P. NICHOLS, EMINENT DOMAIN §8.1[1] (8-6)-(8-7) (3d rev. ed. 1980) ("the legislature is bound by unwritten restrictions"); 1 P. NICHOLS, EMINENT DOMAIN §4.8, at 4-33 (3d rev. ed. 1980).

174. [A]s the modern and sounder tendency to disregard restrictions not found in the constitution made itself felt, the right to compensation was ascribed to the clause of the declaration of rights which provided that no person should be deprived of his property but by the law of the land.

1 P. NICHOLS, EMINENT DOMAIN §4.8, at 4-34 (3d rev. ed. 1980).

175. 2 Johns. Ch. 161 (N.Y. 1816). Counsel for the successful plaintiff was one Burr. If this was Aaron Burr, Kent let principle prevail over personality. In 1814, 10 years after Burr fatally wounded Alexander Hamilton in their duel,

Kent encountered Burr on Nassau Street in Lower Manhattan, and, shaking his cane in Burr's face, blurted out: 'You are a scoundrel, sir!—a scoundrel!' Burr allegedly replied that the opinions of the learned Chancellor of New York were always entitled to the highest consideration.

G. WHITE, THE AMERICAN JUDICIAL TRADITION 39 (1976).

176. New York had no compensation clause until 1821. *People v. Priest*, 206 N.Y. 274, 289, 99 N.E. 547, 552 (1912); see N.Y. CONST. of 1821, art. VII, §7; 7 W. SWINDLER, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 187 (1978).

177. 2 Johns. Ch. at 164.

civilized governments, from a deep and universal sense of its justice."<sup>178</sup>

But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it [the compensation clause] is made a part of the constitution of the United States, 'that private property shall not be taken for public use, without just compensation.' I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property.<sup>179</sup>

Kent's reliance on the fifth amendment is one reason Thayer could write that he knew of no case where natural law "was the single and necessary ground of decision."<sup>180</sup> That the fifth amendment was not only not a necessary ground of decision but an improper one was not to be revealed for 16 years.<sup>181</sup>

In fact, references to natural law were more frequent than references to the United States Constitution. In New Hampshire the constitution provided:

But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.<sup>182</sup>

This simply meets Blackstone's requirement that there must be statutory authority to exercise the power of eminent domain<sup>183</sup> but does not expressly require compensation. Nevertheless, "natural justice speaks on this point where our constitution is silent," and it requires compensation.<sup>184</sup> The New Hampshire court, if it was consistent, could not rely on the law of the land clause to require compensation because it had already held that clause was not a restriction on legislative authority.<sup>185</sup> So it found a restriction outside the constitution.

In Virginia an act requiring long-established millers to keep their dams in repair for the benefit of a newly-established navigation com-

---

178. *Id.* at 167. Kent later retreated as to the requirement of payment in advance, "first pay." HOROWITZ, *supra* note 166, at 290, n.10.

179. *Id.* Another is that *Gardner* can be read as holding only that the legislature had inadvertently omitted a provision for compensation. But the idea that the statute did not represent the true legislative intent is ignored in the later cases.

180. Thayer, *supra* note 78, at 133.

181. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

182. 3 CONSTITUTIONS OF THE UNITED STATES, New Hampshire at 11 (F. Grad director 1975).

183. W. BLACKSTONE, COMMENTARIES \*139 (1765).

184. See *Bristol v. New-Chester*, 3 N.H. 524, 534-35 (1826). The New Hampshire Bill of Rights "has always been understood necessarily to include [compensation] as a matter of right and as one of the first principles of justice . . ." *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66 (1834).

185. See notes 10-13 and accompanying text *supra*.

pany was held unconstitutional on the alternative grounds of violation of the state Bill of Rights and of violation of the practice of parliament described by Blackstone which was elevated to a rule of natural law with a force at least equal to the written constitution.<sup>186</sup>

All three grounds, natural law, a generalized application of the state Bill of Rights, the United States Constitution and more appeared in the trial court opinion in *Barron v. Baltimore*.<sup>187</sup> *Barron* was what today would be called a case of inverse condemnation.<sup>188</sup> The plaintiff owned a wharf accessible to vessels of deep draft. The city diverted various streams in the course of establishing street grades. The diversions caused sand and earth to be deposited so as to lessen the depth at the wharf and thereby impaired its value. After the city refused any compensation, the plaintiff sued and recovered a jury verdict for \$4,700. The trial court held that the plaintiffs had a right to compensation. (1) The state Bill of Rights,<sup>189</sup> described by the court as "a literal copy of the 29th chapter of Magna Charta,"<sup>190</sup> was a limitation not merely on the executive but also on the legislature.<sup>191</sup> It protected the plaintiff's "easement appurtenant to his land, which constituted a great portion of its value."<sup>192</sup> (2) Natural law forbade the legislature to authorize the city to take "private property for the public service without providing a just indemnity."<sup>193</sup> (3) Under "our declaration of rights"

---

186. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828).

The Bill of Rights forbade deprivation of "the means of acquiring and possessing property" and the "enjoyment of life and liberty." "Liberty itself," said one judge, in what seems to be the prevailing opinion, "consists essentially, as well in the security of private property, as of the persons of individuals." *Id.* at 276. See note 160 *supra*. Another judge went further:

[T]o render the exercise of this power [of eminent domain] lawful, a fair compensation must always be made to the individual, under some equitable assessment established by Law. This is laid down by the writers on Natural Law, Civil Law, Common Law and the Law of every civilized country.

He then quoted Blackstone and concluded:

"I must declare it as my solemn conviction, that whether we judge this Law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void."

*Id.* at 264-65. The reference to the "Federal Constitution" seems to be to the impairment clause, which the other judges did not rely on, rather than to the compensation clause of the fifth amendment. *Id.* at 275-76.

187. 2 Am. Jurist 203 (1829).

188. That is, one begun by the condemnee rather than the condemnor. *People ex rel. Dep't Pub. Works v. Romano*, 18 Cal. App. 3d 63, 71, 94 Cal. Rptr. 839, 844 (1971).

189. MD. CONST. of 1776, art. XXI. 4 W. SWINDLER, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 372-75 (1975).

190. 2 Am. Jurist at 207.

191. *Id.* at 211.

192. In this easement he had certainly a property, against the disturbance of which the law could protect him, and of which he could not be deprived but by the judgment of his peers or the law of the land. *Id.* at 207.

193. The right of the citizen to indemnity for such force

is the law of natural equity and justice; the one is consequent upon the other, and like the shadow follows the substance. This restriction upon all legislation has a deeper foundation in all free governments than constitution or laws; it rests upon the universal sense which all mankind feel of its equity and justice. It is some centuries since an English

a person may be deprived of his property only "by the due process of law, that is by indictment, presentment or by due process of original writ." If he is deprived other than by "due process of law," he is entitled to compensation.<sup>194</sup> (4) The fifth amendment to the United States Constitution requires compensation. The second through the eighth amendments were not merely to limit the powers of the United States but were also "to secure to the people of the Union, as one nation, certain rights essential to their existence as a free government." These seven amendments "are general, and in my apprehension bind all." They are like "our bill of rights, declaring principles, and prohibiting their violation. The same idea is maintained by Rawle on the Constitution."<sup>195</sup>

The city appealed and procured a unanimous judgment of reversal without an opinion.<sup>196</sup> Barron's writ of error to the United States Supreme Court was "dismissed for want of jurisdiction,"<sup>197</sup> *i.e.*, on the

judge had the temerity to say that a statute of the kingdom against equity and justice was void. I consider this declaration as the common law of the English nation, which modern judicial practice has abrogated, and the law of this land. It is peculiarly applicable to free governments, instituted to protect the life, liberty, and property of the citizen.

*Id.* at 210. See 77 Eng. Rep. 638, 652 (1609). See note 88 *supra*.

194. 2 Am. Jurist at 211.

195. *Id.* The reference seems to be to W. RAWLE, A VIEW OF THE CONSTITUTION 120, 133-34 (2d ed. 1829).

196. See *Cumberland v. Wilson*, 50 Md. 138, 151, 154 (1878).

197. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 180, 185 (1833). Chief Justice Marshall wrote: "These amendments (the first eight) contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them." *Id.* at 185. Why not? Only the first amendment and one clause of the seventh indicate an intention to apply exclusively to the United States. 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1057 (1953). Why does Marshall seem to have been more concerned with what people had said about the amendments than with what the amendments said, a process which Justice Frankfurter later decried? *Adamson v. California*, 332 U.S. 46, 64 (1947) (concurring opinion). Why did he disregard the implication in *Calder v. Bull*, 3 U.S. (3 Dall.) 305, 311-12 (1798), that the fifth amendment applied to the states? Or his own question in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 48, 76 (1810):

It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

Or Daniel Webster's reliance on the fifth amendment in behalf of Dartmouth College, 17 U.S. (4 Wheat.) 518 (1819) or Chancellor Kent's, 2 Johns. Ch. 161 (N.Y. 1816). Or Justice Story's laudation of natural law, 13 U.S. (9 Cranch) 43 (1815). See note 86 *supra*.

*Barron* implemented the suggestion in *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413-14 (1829), that a state law which divests a vested right is not necessarily "repugnant to the constitution of the United States," and it was immediately recognized as having done so.

[T]his court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property.

*Watson v. Mercer*, 33 U.S. (8 Pet.) 75, 110 (1834).

And shortly thereafter Chief Justice Taney reiterated that vested rights received no federal constitutional protection except under the contract and the *ex post facto* clauses, *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 539-40 (1837), apparently rejecting the argument based on *Calder v. Bull* that "[t]he legislative power is restrained and limited by the principles of natural justice." *Id.* at 452.

By avoiding the due process and compensation requirements of the fifth amendment and the natural law implications, the Court kept out of the already festering slavery issue. COVER, *supra*



now familiar ground that the first eight amendments do not of their own force bind the states. "The absence of an opinion [from the Court of Appeals of Maryland] in so important a case stating the grounds of decision is of course to be regretted."<sup>198</sup> Nevertheless, *Barron* can be explained to show how natural law and law of the land and due process survived in the state courts to require compensation. The injury claimed was the diversion of traffic, *i.e.*, that Barron's wharf had "ceased to be useful for vessels of any important burthen."<sup>199</sup> The explanation later advanced was that this was not a *taking* in the constitutional sense, since Barron remained in possession of the wharf, but was merely one of consequential damage for which the state constitution required no remedy.<sup>200</sup> Or it may have been, as was argued by Messrs. Taney and Scott for the city, that the diversions improved navigation elsewhere in the harbor and that Barron's "easement" was junior to the state's public easement of navigation.<sup>201</sup>

The most obvious example of survival of the right to compensation despite the absence of a compensation clause even after the prop of the fifth amendment had been removed is, of course, Maryland itself. In a decision of the Chancellor, from which no appeal was taken, the right to compensation was based on "a principle of right and justice inherent in the nature and spirit of the social compact;" on Kent's statement in his Commentaries that "though it be not a constitutional principle, yet

---

note 91, at 93-94; Nelson, *supra* note 62, at 534-36, 551. Was this Marshall's and Story's purpose? Despite the pejoratives flung at Crosskey, "perverse and devious," 2 D. BOORSTIN, *THE AMERICANS* 493 (Vintage Books ed. 1965), "eccentric," L. Levy, *Judicial Review, History and Democracy in JUDGMENTS, ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 26 (1972), and "condemned to the ninth circle of hell," G. GILMORE, *THE AGES OF AMERICAN LAW* 117 n.3 (1977), was he right when he said "the doctrine of *Barron v. Baltimore* . . . appears to have been a sham"? 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 1081 (1953).

It is a striking fact that this last of Marshall's opinions on this branch of law should have been delivered in limitation of the operation of the Constitution, whose undue extension he had been so long charged with seeking.

I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 780-81 (rev. ed. 1926).

198. *Cumberland v. Wilson*, 50 Md. 138, 154 (1878).

199. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 180, 180 (1833).

200. *Cumberland v. Wilson*, 50 Md. 138, 147-49 (1878). At the time of *Barron*, compensation for consequential damages was a lively issue. *E.g.*, *Charles River Bridge v. Warren Bridge*, 24 Mass. (7 Pick.) 344, 472 (1829) (no compensation for diversion of traffic); *Lansing v. Smith*, 4 Wend. 9 (N.Y. 1829) (construction changed nature of wharfinger's business, but he remained in possession. Held, no taking; the construction was *damnum absque injuria*.) These and similar cases responded to the desire to reduce the cost of public improvements. HORWITZ, *supra* note 166, at 70-74 ("The Breakdown of the Principle of Just Compensation"). In California diversion of traffic is not compensable except by statute. *People ex rel. Dep't Pub. Works v. Romano*, 13 Cal. App. 3d 63, 73-74, 94 Cal. Rptr. 839, 846-47 (1971).

201. 2 Am. Jurist at 204. 2 P. NICHOLS, *EMINENT DOMAIN* §5.7914[1], at 5-332.20 (3d rev. ed. 1980). There is no indication that the state or city had actually granted Barron an easement extinguishable only by compensation. 2 P. NICHOLS, *supra*, §5.7914[2], at 5-341. All that appears is counsel's argument there had been state and city legislation "holding out special encouragement and protection to interests in wharves." *Barron v. Baltimore*, 32 U.S. (7 Pet.) 180, 181 (1833). On the continuing denial of "portside value" as an element of damage see *United States v. Fuller*, 409 U.S. 488, 493 (1973).

it exists with stringent force, independent of any positive provision;" and on the "law of the land" clause and "due process of law," paraphrasing without attribution part of Daniel Webster's argument in the *Dartmouth College Case*.<sup>202</sup>

There are a number of instances prior to the fourteenth amendment where the right to compensation was based either on principles extraneous to the state constitutions or on stretching of their law of the land or due process clauses. In *Railroad v. Davis*,<sup>203</sup> the North Carolina court, which would not look beyond the state constitution because "the sense of right and wrong varies so much in different individuals, and the principles of what is called natural justice are so uncertain,"<sup>204</sup> was, nevertheless, "reluctant to pronounce judicially [its] inability" to find the right to compensation in that constitution.<sup>205</sup> In an acknowledged dictum, because the statute did provide for compensation, it went on to say that the law of the land clause "seems to bear on the point" and may be "restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation."<sup>206</sup> Before the Civil War the same court said that even though there was no express provision for compensation in the constitution, "the justice of making compensation is so obvious," it could be "taken for granted,"<sup>207</sup> and after the war that it is "grounded in natural equity,"<sup>208</sup> and "so grounded in natural law and justice that it is part of the fundamental law of the State."<sup>209</sup>

The technique of reading an express compensation clause as an "enlargement and extension of the words in Magna Carta, ch. 29: 'No freeman shall be disseised of his freehold &c., but by the law of the land,'" appeared in New York where it was also equated with "due process of law" to require notice to abutting owners, who *prima facie* were the owners to the center line of a street about to be closed.<sup>210</sup> And

202. *Harness v. Chesapeake and Ohio Canal Co.*, 1 Md. Ch. 248, 250-52, 262 (1848); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581-82 (1819) (Webster's argument); 2 J. KENT, COMMENTARIES 414, 416 n.b (9th ed. 1858).

203. 19 N.C. (2 Dev. & Bat.) 431 (1837). The court recognized the unavailability of the fifth amendment since *Barron*. *Id.* at 459.

204. *Id.* at 459-60.

205. *Id.* at 460.

206. *Id.* at 439-40. "Had the case demanded it, we cannot doubt . . . the Court would have decided in favor of the restriction" requiring compensation. *State v. Glen*, 52 N.C. (7 Jones) 248 (1859).

207. *Freedle v. Railroad*, 49 N.C. (4 Jones) 97, 98 (1856). The Confederate Constitution had a compensation clause. See *Gatlin v. Walton*, 60 N.C. (Win.) 205, 212 (1864).

208. *Johnson v. Rankin*, 70 N.C. 445, 449 (1874).

209. *De Bruhl v. State Highway and Pub. Works Comm'n*, 247 N.C. 671, 675, 102 S.E.2d 229, 232 (1958).

210. *Matter of John and Cherry Streets*, 19 Wend. 659, 676 (N.Y. 1839). New York had had a compensation clause since 1821. See note 176 *supra*. "Natural right" and the "spirit" of the constitution required takings under this clause to be restricted to those for public rather than private

it emigrated to Arkansas where, in the absence of a compensation clause in the state constitution, natural justice, the implications of the "law of the land" clause in the state declaration of rights, and the early cases were relied on to find a compensation requirement.<sup>211</sup>

At least two states refused to accept the jurisdictional dismissal in *Barron* at face value and continued to refer to the fifth amendment as one, although not the sole, basis for granting compensation.<sup>212</sup> The theory was that the fifth amendment did not create a new right to compensation; it simply declared the existence of a fundamental right derived from the "law of the land clause" of Magna Carta, a "great common law principle" as stated by Blackstone, Kent and Story, based on "natural equity, and . . . laid down by jurists as a principle of universal law."<sup>213</sup> That the fifth amendment "does not create or declare any *new principal of restriction*" on either the states or nation is to be inferred from the preamble to the resolution proposing the first twelve amendments, which refers to both declaratory and restrictive amendments.<sup>214</sup> The compensation clause of the fifth amendment is one that is merely declaratory,<sup>215</sup> and the state court referred to it only because

---

use, thus forbidding what today would be called "excess condemnation" to avoid severance damages. Matter of Albany Street, 11 Wend. 1053, 1054 (N.Y. 1834). The New York Constitution was later amended to allow excess condemnation by some agencies for some purposes. Note, *The Constitutionality of Excess Condemnation*, 46 COLUM. L. REV. 108, 111-12 n.18 (1946). There was a split of authority as to whether takings were limited to those for public use as distinguished from public benefit. Taylor v. Porter, 4 Hill 140 (N.Y. 1843) (taking for private road violated compensation, due process and law of the land clauses). But see Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694, 721 (1832) ("there must be a public use or benefit . . ."); HORWITZ, *supra* note 166, at 260-61. Taking of land to resell for urban redevelopment, "a taking from one businessman for the benefit of another businessman," has been upheld. Berman v. Parker, 348 U.S. 26, 38 (1954) (Douglas, J.). After Douglas' death, a self-described "conservative" columnist recalled his disapprobation of *Berman*. "He [Douglas] rewrote the Fifth Amendment, changing 'use' to 'benefit.' I was then an editor in Richmond. I had our staff cartoonist prepare a cartoon depicting Douglas digging the grave of property rights." Kirkpatrick, *The Many Sides of Justice Douglas*, San Francisco Chronicle, Jan. 24, 1980, at 46, col. 5. Forbearing comment on the columnist's political views, note that he ignored history. Daniel Webster argued that use of the power of eminent domain could lead to "the most levelling ultraisms of Anti-rentism or agrarianism or Abolitionism." He lost. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 521 (1848).

Webster's argument was that the eminent domain power could be used to take from the rich for benefit of the poor. Currently it is that it can be used to take from the poor for the benefit of the rich. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (taking for private factory site—"public use" versus "public purpose"); Wylie, *Poletown, A Neighborhood Dies so GM can Live*, San Francisco Chronicle, This World, August 2, 1981, at 16.

211. *Ex parte Martin*, 13 Ark. 198 (1853).

212. *Young v. McKenzie*, 3 Ga. 31 (1847); *Petition of Mount Washington Road Co.*, 35 N.H. 134, 141-42 (1857) ("We are not prepared to acquiesce in this narrowed construction of a general and unqualified proposition in the constitution, *i.e.*, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 245 (1833) . . . [but rely on a] well established maxim of universal law.")

213. *Young v. McKenzie*, 3 Ga. 31, 43 (1847).

214. 3 Ga. at 44. Twelve amendments were proposed, 1 STAT. c. 27 at 97 (1789), but only 10 were adopted, *id.* at 21 n.(a).

215. [T]he amended Constitution of the United States, which declares 'private property shall not be taken for public use without just compensation,' does not create or declare any *new principle of restriction*, either upon the legislation of the National or State government, but simply recognized the existence of a great common law principles, founded

the constitution of the state was silent and it wished "to make a practical application of the principle to the legislation of the State."<sup>216</sup>

Even when a state constitution contained a compensation clause, it was treated as a redundancy.

The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand of the company to appropriate the same to their use, or the use of the public. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy.<sup>217</sup>

And thus, "nor shall private property be taken for public use, without just compensation," originally a necessity, became a superfluity by 1860.

When the fourteenth amendment was adopted the construction that had been given to the law of the land clauses under state law, the equivalent of due process, was so extensive as to substantively protect a court clerk's right to his office against special legislation, a taverner's right to the continued opportunity to dispense his stock of liquor, and the general right to compensation for private property taken for a public use. If these and the other broad interpretations of the law of the land in the state cases were in the minds of both the framers and adopters of the fourteenth amendment, one could apply the familiar canon of construction that when a new statute adopts the words of a prior statute that have already been judicially construed, the construction is presumed to have been adopted also. Application of the canon would then give an air of historical legitimacy to the use of the due process clause to protect rights not expressly mentioned in the constitution. But the canon cannot be applied with assurance because the due process clause of the fourteenth amendment was derived from the fifth amendment rather than from the state constitutions.<sup>218</sup> *Dred Scott v. Sandford*,<sup>219</sup> and the intimations in two other early cases support a substantive read-

---

in natural justice, especially applicable to all republican governments, and which derived no additional force, as a *principle*, from being incorporated into the Constitution of the United States.

3 Ga. at 44 (emphasis in original). *Contra*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798). See note 159 *supra*. The idea that an amendment might be only declaratory was not new. "[The first eight amendments] fall within the class of restrictions on the legislative power, some of which would have been implied, some are original, and all are highly valuable." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 554 (1840); W. RAWLE, *A VIEW OF THE CONSTITUTION* 120 (2d ed. 1829).

216. 3 Ga. at 45.

217. *Henry v. Dubuque & P. R.R. Co.*, 10 Iowa 540, 543-44 (1860).

218. Cong. Globe, 39th Cong., 1st Sess. 1034, 1089 (1866) (remarks of Rep. Bingham); Cong. Globe, 42d Cong., 1st Sess. 153, app. (1871) (remarks of Rep. Garfield); AVINS, *supra* note 13, at 150, 157, 529.

219. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

ing of federal due process.<sup>220</sup> But the Congressional discussion of the amendment refers only to *Dred Scott* and then only as to its bearing on citizenship of negroes, not to its due process language.<sup>221</sup> The bulk of the Congressional discussion of the fourteenth amendment in the constitutional area is about the effect of its privileges or immunities clause and the extent to which that clause provides for "enforcement," in Congressman Bingham's terms,<sup>222</sup> or "incorporation," as we would say now, of the other provisions of the Bill of Rights by or against the states. Very little was said about due process, and that little is not revealing. Thus rather than applying a convenient presumption of construction, we confront what John Chipman Gray called "one of the most difficult of a judge's duties:"

The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been

---

220. See note 4 *supra*.

221. *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1115-16 (1866); AVINS, *supra* note 13, at 161-62. Other references are indexed in AVINS, *supra* note 13, at 754.

222. [T]his immortal bill of rights embodied in the Constitution rested for its execution and enforcement hitherto upon the fidelity of the States . . . [E]ven States . . . have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality. Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); AVINS, *supra* note 13, at 150.

Following the example of Justice Frankfurter in *Adamson v. California*, 332 U.S. 46, 61 (1947), "I put to one side the Privileges or Immunities Clause of that [the fourteenth] Amendment." I also put to one side the incorporation controversy, "an argument no one can win," J. ELY, UNJUST DEMOCRACY 25 (1980); *In re Winship*, 397 U.S. 358, 382-83 n.11 (1970) (Black, J., dissenting), except for the following. Assume Justice Black's position that the fourteenth amendment incorporates the first eight amendments and only those amendments. It not only incorporates but reiterates the due process clause. Even Justice Black admitted,

There has been much controversy about the meaning of 'due process of law.' Whatever its meaning, however, there can be no doubt that it must be granted. Moreover, few doubt that it has an historical meaning which denies Government the right to take away life, liberty or property without trials properly conducted according to the Constitution and laws validly made in accordance with it. This, at least, was the meaning of 'due process of law' when used in Magna Charta and other old English Statutes where it was referred to as 'the law of the land.'

Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960).

But by the time of the fourteenth amendment, due process was no longer limited to its least meaning. And if that amendment was intended to reflect the then current rather than the historical meaning of the expression, we are trapped in a sort of *renvoi*. Justice Black would have us refer to the security of a written constitution.

For me the only correct meaning of that phrase is that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decision.

*In re Winship*, 397 U.S. 358, 382 (1970) (dissenting opinion).

But what does the writing secure if it has been interpreted to admit the very natural law ideas which Justice Black opposed? The way out of the dilemma is to find that the interpretation of due process has been wrong *ab initio*, and Justice Black forthrightly said that it was wrong from *Murray v. Hoboken* onward. *Id.* at 379-82.

present.<sup>223</sup>

Indeed we can do no more than guess what was in the mind of "the Madison of the first section of the fourteenth amendment,"<sup>224</sup> for when the question was put to Bingham, "[W]hat do you mean by 'due process of law'?", he answered only, "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go read their decisions."<sup>225</sup>

Bingham did not, so far as I have found, ever state what courts or cases he meant, but we can get a clue from the statements of his Ohio colleague, William Lawrence. Lawrence was a former state judge, an editor of the *Western Law Monthly*,<sup>226</sup> and a "practiced lawyer."<sup>227</sup> Arguing to override President Andrew Johnson's veto of the Civil Rights Act he said, "There is in this country no such thing as 'legislative omnipotence',"<sup>228</sup> which is almost a quotation from *Calder v. Bull*,<sup>229</sup> and cited, among other cases, *Taylor v. Porter*,<sup>230</sup> *Wilkinson v. Leland*,<sup>231</sup> *Terrett v. Taylor*,<sup>232</sup> and even *Fletcher v. Peck*.<sup>233</sup> All of these have language supporting Lawrence's conclusion:

It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.<sup>234</sup>

This is reminiscent of the language of the Iowa court<sup>235</sup> and Kent's Commentaries.<sup>236</sup> I have not established that Lawrence ever heard of the Iowa opinion, but the debates have a number of references to Kent.<sup>237</sup> It seems probable that Lawrence and the court were stating what was then a familiar and accepted constitutional doctrine.

A few years later, arguing that due process required a jury trial in condemnation suits to acquire land for schools in the District of Columbia, Lawrence repeated his views, again cited *Taylor v. Porter* and

223. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 173 (2d ed. 1921).

224. *Adamson v. California*, 332 U.S. 46, 74 (1947).

225. *Cong. Globe*, 39th Cong., 1st Sess. 1089 (1866); AVINS, *supra* note 13, at 157.

226. AVINS, *supra* note 13, at 762.

227. BERGER, *supra* note 13, at 226.

228. *Cong. Globe*, 39th Cong., 1st Sess. 1832 (1866); AVINS, *supra* note 13, at 205.

229. 3 U.S. (3 Dall.) 386, 387-88 (1798).

230. 4 Hill 140 (N.Y. 1843). See notes 24 and 112 *supra*.

231. 27 U.S. (2 Pet.) 627 (1829). See note 85 *supra*.

232. 13 U.S. (9 Cranch) 43 (1815). See note 84 *supra*.

233. 10 U.S. (6 Cranch) 87 (1810). See notes 71 and 197 *supra*.

234. *Cong. Globe*, 39th Cong., 1st Sess. 1833 (1866); AVINS, *supra* note 13, at 206.

235. *Henry v. Dubuque & P. R.R. Co.* 10 Iowa 540, 543-44 (1860).

236. 2 J. KENT, *COMMENTARIES* 414, 416 n.b (9th ed. 1858).

237. AVINS, *supra* note 13, at 755.

embellished his argument by twice citing *Wynehamer v. People*.<sup>238</sup> To say now that Lawrence was “wrong” because he thought due process of law was so “broad and comprehensive” that it required jury trials in condemnation cases,<sup>239</sup> that it applied the seventh amendment to the states,<sup>240</sup> and controlled the size of civil juries,<sup>241</sup> would itself be wrong.<sup>242</sup> The fact is that he expressed a responsible and documented contemporaneous opinion that as early as 1871 due process of law was “spacious language” of “majestic generality.”<sup>243</sup>

Had Bingham directed his attention to due process rather than to privileges or immunities, it seems probable that he would have expressed conceptions of due process similar to those of Lawrence. Bingham at one time proposed a version of the fourteenth amendment which included a compensation clause.<sup>244</sup> Despite the elimination of the compensation clause he continued to think that compensation was required by the fourteenth amendment as passed. A few years after its adoption, arguing for the passage of the Ku Klux Klan Act,<sup>245</sup> he described *Barron v. Baltimore* as a case where

the city had taken private property for public use, without compensation as alleged; and there was no redress for the wrong in the Supreme Court of the United States; and only for this reason, the first eight amendments were not limitations on the power of the States.<sup>246</sup>

Although he thought that *Barron* was “rightfully . . . decided”<sup>247</sup> he then prepared his form of amendment beginning “No State shall . . .” to overrule it.<sup>248</sup> He recited the first eight amendments as “privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State.”<sup>249</sup> Before the fourteenth amendment

---

238. Cong. Globe, 41st Cong., 3d Sess. 1245 (1871); AVINS, *supra* note 13, at 479-80. Lawrence cited *Wynehamer* only as “13 N.Y.R., 393,” and thus it escaped Avins’ table of cases.

239. The United States Constitution does not require either the states or the United States to grant jury trials in condemnation cases. *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 569 (1898); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 694-95 (1897); *Georgia Power Co. v. 138.30 Acres of Land*, 596 F.2d 644, 647 (5th Cir. 1979), *approved en banc*, 617 F.2d 1112, 1113 (5th Cir. 1980), *cert. den.* — U.S. —, 101 S. Ct. 314 (1981); FED. R. Civ. P. 71A(h), (k).

240. *Walker v. Sauvinet*, 92 U.S. 90 (1875). A jury trial in a civil case in a state court is not a privilege or immunity protected by the fourteenth amendment. Bingham had thought that it was. Cong. Globe, 42d Cong., 1st Sess. 84, app. (1871); AVINS, *supra* note 229, at 510.

241. *Colegrove v. Battin*, 413 U.S. 149, 160 (1973) (seventh amendment does not require a civil jury of 12 in the federal courts).

242. See note 135 *supra*.

243. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Bloom v. Illinois*, 391 U.S. 194, 212 (1968). The sixth amendment via the fourteenth requires states to afford a jury in “serious” criminal cases.

244. *Adamson v. California*, 332 U.S. 46, 80 n.9 (1947) (Black, J., dissenting).

245. 17 STAT. 13 (1871) (codified in scattered sections of 18 U.S.C. & 28 U.S.C.).

246. Cong. Globe, 42d Cong., 1st Sess. 84, app. (1871); AVINS, *supra* note 13, at 510.

247. See note 246 *supra*.

248. See note 246 *supra*.

249. See note 246 *supra*.

[t]he States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws. . . . They took property without compensation, and he [the citizen] had no remedy. . . .<sup>250</sup>

But after the amendment

[w]ho dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of rights as these in States and by States, or combinations of persons?<sup>251</sup>

And Bingham's apparent perception of federal protection of the right to compensation was corroborated by Senator Frelinghuysen.<sup>252</sup>

If the privileges and immunities clause of the fourteenth amendment was as encompassing as the proponents of the amendment seem to have regarded it, the due process clause of the amendment would seem to be an unnecessary repetition of part of the fifth amendment. But suppose that the proponents had known that within five years after the adoption of the fourteenth amendment the *Slaughter-House Cases*<sup>253</sup> were to make its privileges or immunities clause technically "superfluous" and "redundant."<sup>254</sup> Had this unknowable fact been present to their minds, what would they have thought? The answer seems obvious; they would have thought that the amendment's due process clause served some of the same purposes, and this has been the case. After all, what is important to a condemnee is that his right to compensation be protected, not whether it is protected by the privileges or immunities clause or the due process clause.<sup>255</sup> But reliance on due process at once leads to the problem of its meaning (not that the meaning privileges or immunities would have been any easier to discover), and that meaning has never been discovered from words alone, not even from the words of the Bill of Rights.

---

250. Cong. Globe, 42d Cong., 1st Sess. 85, app. (1871); AVINS, *supra* note 13, at 511.

251. See note 250 *supra*. Bingham was not arguing that the courts could not enforce the fourteenth amendment without enabling legislation. His argument was that although without legislation the states could and should enforce the amendment, they might fail to do so. Federal legislation was necessary to obviate this anticipated lack of diligence. "[M]ust we wait for their [states'] action? . . . Is it not better to prevent a great transgression in advance . . . ?" See note 250 *supra*.

252. [O]ne part of that amendment [the fourteenth] is, that 'no State shall make or enforce any law that shall abridge the privileges or immunities of a citizen of the United States,' and the right that private property shall not be taken without compensation is among those privileges.

Cong. Globe, 42d Cong., 1st Sess. 499 (1871); AVINS, *supra* note 13, at 541.

253. 83 U.S. (16 Wall.) 36 (1873). ELY, *supra* note 38, at 194 n.52, 195 n.58.

254. TRIBE, *supra* note 87, at 423, 426. "The Fourteenth Amendment's Privileges or Immunities Clause . . . has to all intents and purposes been dead for a hundred years." Ely, *supra* note 38, at 22.

255. Chicago, Burlington R.R. v. Chicago, 166 U.S. 226, 239 (1897). The opinion also invokes "a vital principle of republican institutions," "natural equity," "limits to legislative power," "the social compact" and "the settled maxims of law." *Id.* at 235-40.



For example: in *In re Winship*,<sup>256</sup> Justice Black dissented from the holding that proof beyond a reasonable doubt was required in juvenile proceedings. Following his theory that the fourteenth amendment incorporated the Bill of Rights and no more, he was correct, because the reasonable doubt standard is simply a maxim of common law which is not included in the Bill of Rights. But in *In re Murchison*<sup>257</sup> he applied the common law maxim that no one should be a judge in his own case because “[a] fair trial in a fair tribunal is a basic requirement of due process.”<sup>258</sup> Although this conclusion is unexceptional, one must recognize that it is based on the spirit of the constitution rather than its letter,<sup>259</sup> and that it introduces a subjective element into constitutional determinations. What is “fair?” “What is one person’s fair hearing is another’s inquisition.”<sup>260</sup>

It seems that even Justice Black could not avoid applying that “natural justice” which he repeatedly decried.<sup>261</sup> Of course, “natural justice” is now a term of opprobrium because of its subjective elements. Justice Frankfurter disclaimed reliance on it,<sup>262</sup> and reaffirmed his stand later by quoting Sir Frederick Pollock:

In the Middle Ages natural law was regarded as the senior branch of divine law and there had to be treated as infallible (but there was no infallible way of knowing what it was).<sup>263</sup>

But even he could not avoid a subjective element, and reversed a conviction based on evidence obtained by pumping the defendant’s stomach, because the conduct of the police “shocks the conscience” and was bound “to offend even hardened sensibilities.”<sup>264</sup>

Like it or not, natural law is part of our “inheritance *as authority for legal change*,” whose strength is shown by “the Court’s persistent resort to notions of substantive due process for almost a century.”<sup>265</sup> We can only hope that this inheritance will be used wisely rather than prodigally, that the courts will “know us better than we know ourselves,” and that they will remind us of “our better selves.”<sup>266</sup> Beginning with James Bradley Thayer’s effort to state the proper role in constitutional

---

256. 397 U.S. 358, 377 (1970).

257. 349 U.S. 133 (1955).

258. *Id.* at 136.

259. Goldberg, *supra* note 2, at 636-38.

260. *Ezekial v. Winkley*, 20 Cal. 3d 267, 282, 572 P.2d 32, 41, 142 Cal. Rptr. 418, 427 (1977) (Mosk, J., dissenting).

261. *E.g.*, *In re Winship*, 397 U.S. 358, 381 (1970); *Griswold v. Connecticut*, 381 U.S. 479, 511 n.4, 516, 517 n.10 (1965); *Adamson v. California*, 332 U.S. 46, 70, 90, (1947).

262. *Rochin v. California*, 342 U.S. 165, 171 (1952).

263. Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 225 (1955).

264. *Rochin v. California*, 342 U.S. 165, 172 (1952).

265. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 112, 113 (1976) [hereinafter cited as COX].

266. Cox, *supra* note 265, at 117.

adjudication as the invalidation of only those laws where the legislative mistake is so clear "that it is not open to rational question,"<sup>267</sup> down to John Hart Ely's effort to crystallize it in terms of "keeping open channels of political change," and a "representation-reinforcing theory of judicial review,"<sup>268</sup> I find it impossible to eliminate all subjective elements. Ely points out that the one man, one vote rule enhanced the prestige of the court not because it was in accord with precedent but because it "turned out to be a notion with which most people could sympathize."<sup>269</sup> This corroborates Archibald Cox's appraisal of the role of the court:

But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus. . . .<sup>270</sup>

---

267. Thayer, *supra* note 78, at 144.

268. ELY, *supra* note 38, at 172, 181. Ely's book is as informative and sprightly as any I have seen on constitutional law. But it does not seem to cover the inconsistency between Justice Black's opinions in *Winship* and *Murchison*. He does, however, give a rationalization of the eminent domain power in his terms. ELY, *supra* note 38, at 97-98.

269. ELY, *supra* note 38, at 121. See also the critique of Wechsler's "neutral principles" in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 49 (1962).

[T]he root idea is that the process [of judicial review] is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable . . . . If, in order to be workable in our society as it actually exists, a rule of action must be modulated by pragmatic compromises, then that rule is not a principle; it is no more than a device of expediency.

*Id.* at 58.

270. COX, *supra* note 265, at 117-18.

