

NATURAL LAW AND CONSTITUTIONAL LAW

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ANCIENT Chinese philosophers were wont to distinguish the passive and active elements of Being, called respectively *Yin* and *Yang*. If I may be permitted to employ this locution for a moment, the “yang” element of American Constitutional Law is Judicial Review, the power, and corresponding duty of a court to pass upon the validity of legislative acts in relation to a higher law which is regarded as being binding on both the legislature and the court. By the same token the “yin” element is the aforesaid higher law. Today this role is ordinarily filled by a constitutional document, the Constitution of the United States being the supreme example; but earlier, Natural Law or some derivative concept took the part of “yin.” Hence the purpose of this discourse — which is to demonstrate how very large a part of its content American Constitutional Law has always owed, and still owes, to its Natural Law genesis. As the matrix of American Constitutional Law, the documentary Constitution is still, in important measure, Natural Law under the skin.

Of “Natural Law” there is no end of definitions, as a casual examination of Sir Thomas Erskine Holland’s

Elements of Jurisprudence suffices to show. I venture to quote a few passages from the 13th edition: ¹

Aristotle fully recognizes the existence of a natural as well as of a legal Justice. He mentions as an ordinary device of rhetoric the distinction which may be drawn between the written law, and "the common law" which is in accordance with Nature and immutable.

The Stoics were in the habit of identifying Nature with Law in the higher sense, and of opposing both of these terms to Law which is such by mere human appointment. "Justice," they say, "is by Nature and not by imposition." "It proceeds from Zeus and the common Nature."

The same view finds expression in the Roman lawyers. "Law," says Cicero, "is the highest reason, implanted in Nature, which commands those things which ought to be done and prohibits the reverse." "The highest law was born in all the ages before any law was written or State was formed." . . . "We are by Nature inclined to love mankind, which is the foundation of law." . . .

S. Thomas Aquinas: "Participatio legis aeternae in rationali creatura lex naturalis dicitur."

Grotius: "Jus naturale est dictatum rectae rationis. . . ."

For our purposes it is not essential to choose nicely among these definitions of what Cicero and St. Thomas call *lex naturalis* and Grotius terms *jus naturale*. We are concerned only with certain juristic connotations of the

¹ HOLLAND, *Elements of Jurisprudence* 32-4 (13th ed. 1924).

concept: first, that Natural Law is entitled by its intrinsic excellence to prevail over any law which rests solely on human authority; second, that Natural Law may be appealed to by human beings against injustices sanctioned by human authority.

I — *Natural Law Into Natural Rights*

In a famous passage in the *Rhetoric*, Aristotle advised advocates that when they had "no case according to the law of the land," they should "appeal to the law of nature," and, quoting from *Antigone* of Sophocles, argue that "an unjust law is not a law."² While this advice scarcely reveals any deep devotion on Aristotle's part to the Natural Law concept, it does evidence the short step, which even at that date existed in men's minds, between the concept and the idea of a *juridical* recourse to it. Three hundred years later we find Cicero in his *De Legibus* contrasting "*summa lex*" and "*lex scripta*"; "*summum jus*" and "*jus civile*"; "*universum jus*" and "*jus civile*"; and on one occasion appealing in the Senate to "*recta ratio*" against the "*lex scripta*."³

It was during the Middle Ages, however, that the conception of Natural Law as a code of human rights first took on real substance and importance. This was so even on the Continent,⁴ albeit institutions were lacking

² *Id.* at 32 n.4.

³ *Id.* at 33 n.6; see also, the present writer's book, CORWIN, *Liberty Against Government* 15-7 (1948), and accompanying notes.

⁴ See GIERKE, *Political Theories of the Middle Ages* 80-1 (Maitland's trans. 1927).

there through which such ideas could be rendered effective practically. In England, on the other hand, this lack was supplied by the royal courts, administering the Common Law. The impregnation of the Common Law with higher law concepts proceeded rapidly in the Fourteenth Century under Edward III. Of the thirty-two royal confirmations of the Charter noted by Sir Edward Coke, fifteen occurred in this reign; and near the end of it, in 1368, to the normal form of confirmation the declaration was added by statute that any statute passed contrary to Magna Carta "*soit tenuz p'nul*," words which seem clearly to have been addressed to the royal officials, including the judges.⁵

Here, to be sure, Magna Carta fills the role of Natural Law, but it is a Magna Carta already infused with Natural Law content, as is shown by Bracton's earlier designation of Chapter 29 as "*constitutio libertatis*"; and in the Fifteenth Century the "*lex naturae*" has completely replaced "Magna Carta" in the juristic equation. This is notably so, for example, in the pages of Fortescue's famous *In Praise of the Law of England* (*De Laudibus Legum Angliae*), which was but one of many similar encomia. As Father Figgis has written of this period: ⁶

The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God

⁵ The preceding sentence is taken from CORWIN, *op. cit. supra* note 3, at 26.

⁶ As quoted in CORWIN, *op. cit. supra* note 3, at 28.

in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law which men set up as an object of worship. The Common Law is the perfect ideal of law; for it is natural reason developed and expounded by a collective wisdom of many generations . . . Based on long usage and almost supernatural wisdom, its authority is above, rather than below that of Acts of Parliament or royal ordinances, which owe their fleeting existence to the caprice of the King or to the pleasure of councillors, which have a merely material sanction and may be repealed at any moment.

Thus the Common Law becomes higher law, without at all losing its quality as positive law, the law of the King's courts and of the rising Inns of Court. Nor does Fortescue fail to stress its dual character. Asserting the identity of "perfect justice" with "legal justice," and the subordination of the King to the law, i.e., the law courts, he proceeds to counsel his Prince as follows: ⁷

. . . there will be no occasion for you to search into the arcana of our laws with such tedious application and study . . . It will not be convenient by severe study, or at the expense of the best of your time, to pry into nice points of law: such matters may be left to your judges . . . ; furthermore, you will pronounce judgment in the courts by others than in person, it being not customary for the Kings of England to sit in courts or pronounce judgment themselves (*proprio ore nullus regum Angilae judi-*

⁷ *Id.* at 30.

cium proferre uses est). I know very well the quickness of your apprehension and the forwardness of your parts; but for that expertness in the laws which is requisite for judges the studies of twenty years (*viginti annorum lucubrationes*) barely suffice.

In short, Natural Law has become a craft mystery — the mystery of Bench and Bar — what it has remained, now in greater, now in lesser measure ever since.

A century and a half later we find Lord Coke, Chief Justice of the Common Pleas, describing a scene ⁸ which reads like a re-enactment of that imagined by Fortescue. But to his predecessor's work of edification, Coke adds official recognition that judicial custodianship of the Common Law signifies the power and duty of the law courts to apply its measure both to the Royal Prerogative and to the power of Parliament. The latter claim appears in his famous "dictum," so-called, in *Dr. Bonham's Case*,⁹ which reads: ¹⁰

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void. . . .

And this was said, it should be noted, at the end of a

⁸ 12 Rep. 63-65, 77 Eng. Rep. 1341-1343 (1609).

⁹ 8 Rep. 113b, 77 Eng. Rep. 646 (1610).

¹⁰ *Id.*, 8 Rep. at 118a; see also Proclamations, 12 Rep. 74, 77 Eng. Rep. 1352 (1611).

century in which the thesis of Parliament's absolute power to alter and abrogate any and all laws had been asserted again and again;¹¹ and not only asserted but demonstrated by its part in the Tudor ecclesiastical and religious revolution.

Eighty years after *Dr. Bonham's Case*, "The great Mr. Locke" produced his second *Treatise on Civil Government*, in which the dissolution of Natural Law into the natural rights of the individual — the rights of "life, liberty and estate" — is completed through the agency of the Social Compact. Of judicial review, to be sure, Locke appears to have no inkling. He relied for the protection of the individual's inherent and inalienable rights on: first, Parliament; second, the right of revolution. Even so, Locke's contribution to both the doctrinal justification of judicial review and to the theory of its proper scope is first and last a very considerable one.

Coke and Locke are the two great names in the common Anglo-American higher law tradition, and the contribution of each is enhanced by that of the other. Locke's version of Natural Law not only rescues Coke's version of the English constitution from a localized patois, restating it in the universal tongue of the Eighteenth Century, it also supplements it in important respects. Coke's endeavor was to put forward the historical *procedures* of the Common Law as a permanent restraint on power, and especially on the power of the English crown. Locke, in the limitations which he im-

¹¹ See CORWIN, *op. cit. supra* note 3, at 32-3 and notes.

poses on legislative power, is looking rather to the security of the *substantive* rights of the individual — those rights which are implied in the basic arrangements of society at all times and in all places. While Coke extricated the notion of fundamental law from what must sooner or later have proved a fatal nebulosity, he did so at the expense of archaism. Locke, on the other hand, in cutting loose in great measure from the historical method of reasoning, opened the way to the larger issues with which American Constitutional Law has been called upon to grapple in its latest maturity.¹²

II — *Natural Law and Judicial Review*

The *fons et origo* of both the doctrine and the practice of judicial review in the United States is Coke's invocation in *Dr. Bonham's Case* of "common right and reason," which as explained by the Sixteenth Century author of *Doctor and Student*, was the term used "by them that be learned in the laws of England" in place of the term "law and nature."¹³ Commended by two Lord Chief Justices, Hobart and Holt, the dictum had won repeated recognition in various legal abridgments and digests before the outbreak of the American Revolution.¹⁴ In the early 1700's it was relied on by a British colonial law officer as affixing the stigma of invalidity to an act of the Barbadoes assembly creating paper

¹² Parts of the above paragraph are taken from CORWIN, *op. cit. supra* note 3, at 50-1.

¹³ See CORWIN, *op. cit. supra* note 3, at 35; *Id.* at n.40.

¹⁴ *Id.* at 39 n.43.

money.¹⁵ In 1759, we encounter a casual reference by Governor Cadwalader Colden of the Province of New York to "a judicial power of declaring them [laws] void."¹⁶

But just as Coke had forged his celebrated dictum as a possible weapon for the struggle which he already fore-saw against the divine rights pretensions of James I, so its definitive reception in this country was motivated by the rising agitation against the Mother Country. The creative first step was taken by James Otis in February, 1761, in his argument for the Boston merchants against an application by a British customs official for a general warrant authorizing him to search their cellars and warehouses for smuggled goods. An act of Parliament "against natural Equity," Otis asserted, was void. "If an Act of Parliament," he continued, "should be made in the very Words of this Petition, it would be void," and it would be the duty of the executive courts to pass it "into disuse."¹⁷ Four years later, according to Governor Hutchinson of Massachusetts, the prevailing argument against the Stamp Act was that it was "against Magna Charta and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void," testimony which is borne out by a contemporaneous decision of a Virginia county court.¹⁸ On the very eve of the Declaration of

¹⁵ See II CHALMERS, *Opinions of Eminent Lawyers* 27-38 (1814).

¹⁶ II N. Y. HIST'L SOCIETY COLLECTIONS 204; see also, CHALMERS, *Political Annals* in I N. Y. HIST'L. SOCIETY COLLECTIONS 81 (1868).

¹⁷ Adams' report of Otis' argument in *Paxton's Case*, Quincy (App. I) 474 (Mass. 1761).

¹⁸ Quincy (App. I) 519 n.18 (Mass. 1761).

Independence, Judge William Cushing, later to become one of Washington's appointees to the original bench of the Supreme Court, charged a Massachusetts jury to ignore certain acts of Parliament as "void and inoperative" and was congratulated by John Adams for doing so.¹⁹

And meantime, in 1772, George Mason had developed a similar argument against an act of the Virginia assembly of 1682, under which certain Indian women had been sold into slavery. The act in question, he asserted, "was originally void of itself, because contrary to natural right."²⁰ And, he continued:²¹

If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth . . . All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice.

¹⁹ V McMASTER, *History of the People of the United States* 395 (1905).

²⁰ *Robin v. Hardaway*, Jeff. 109 (Va. 1772).

²¹ *Id.* at 114.

Mason concluded by citing Coke and Hobart. The court adjudged the act of 1682 repealed.²²

Nor did the establishment of the first American constitutions cause this course of reasoning to be abandoned. To the contrary, the most eminent judges of the first period of American Constitutional Law, which comes to an end approximately with the death of Marshall in 1835, appealed freely to natural rights and the social compact as limiting legislative power, and based decisions on this ground, and the same doctrine was urged by the greatest lawyers of the period without reproach. Typical in this connection is the case of *Wilkinson v. Leland*,²³ which was decided by the Supreme Court in 1829. Attorney for the defendants in error was Daniel Webster. "If," said he, "at this period there is not a general restraint on Legislatures in favor of private rights, there is an end to private property. Though there may be no prohibition in the constitution, the Legislature is restrained . . . from acts subverting the great principles of republican liberty and of the social compact. . . ." ²⁴ To this contention his opponent William Wirt responded thus: "Who is the sovereign . . . ? Is it not the Legislature of the State, and are not its acts effectual . . . unless they come in contact with the great principles of the social compact?" ²⁵ The act of the Rhode Island legislature under review was upheld, but said Justice Story

²² *Id.* at 114, 123.

²³ 2 Pet. 627, 7 L. Ed. 542 (1829).

²⁴ *Id.*, 2 Pet. at 646.

²⁵ *Id.*, 2 Pet. at 652.

speaking for the Court: "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."²⁶ Indeed, fourteen years before this the same Court had unanimously held void, on the basis of these same principles, an act of the Virginia legislature which purported to revoke a grant of land.²⁷

In short, *judicial review initially had nothing to do with a written constitution*. In point of fact, the first appearance of the idea of judicial review in this country antedated the first written constitution by at least two decades. Judicial review continued, moreover, in a relationship of semi-independence of the written constitution on the basis of "common right and reason," Natural Law, natural rights, and kindred postulates throughout the first third of the Nineteenth Century. But meantime, a competing conception of judicial review as something anchored to the *written constitution* had been in the process of formulation in answer to Blackstone's doctrine that in every State there is a *supreme, absolute power*, and that this power is vested in the *legislature*. From this angle judicial review based on "common right and reason," or on Natural Law ideas, was an impertinence, as Blackstone took pains to point out in his *Commentaries*.²⁸

²⁶ *Id.*, 2 Pet. at 657.

²⁷ *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650 (1815).

²⁸ 1 BL. COMM. *46, 91.

But suppose that the supreme will in the State was not embodied in the *legislature* and its *acts*, but in the *people at large* and their *constitution* — what conclusions would follow from this premise? In *The Federalist*, No. 78, Hamilton suggested an answer to this question, and in 1803, in *Marbury v. Madison*,²⁹ Chief Justice Marshall elaborated the answer: it is the duty of courts when confronted with a conflict between an act (i.e., a *statute*) of “the mere agents of the people” (that is, of the ordinary legislature) and the act of the people themselves (to wit, the constitution), to prefer the latter.

The inevitable clash between the two conceptions of judicial review was first unfolded in the case of *Calder v. Bull*,³⁰ decided by the Supreme Court in 1798. There it was held that the Ex Post Facto Clause of Article I, section 10 of the Constitution applied only to penal legislation and hence did not protect rights of property and contract from interference by a state legislature; but Justice Samuel Chase endeavored to soften this blow to proprietary interests by citing the power of the state courts to enforce extra-constitutional limitations on legislative power, such as many of them were in fact already doing. Said he: ³¹

I cannot subscribe to the *omnipotence* of a *state Legislature*, or that it is *absolute and without controul*; although its authority should not be *expressly* restrained by the *constitution*, or *fundamental law*,

²⁹ 1 Cranch 137, 2 L. Ed. 60 (1803).

³⁰ 3 Dall. 386, 1 L. Ed. 648 (1798).

³¹ *Id.*, 3 Dall. at 387-9.

of the state . . . There are certain *vital* principles in our *free Republican governments*, which will determine and overrule an *apparent and flagrant* abuse of *legislative* power . . . The *genius*, the *nature*, and the *spirit* of our state governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason* forbid them.

To hold otherwise, it was stated, would be "political heresy, altogether inadmissible." ³²

Chase belonged to the older generation of American lawyers and had been brought up on Coke-Littleton, having received much of his legal education in London in the Inns of Court. Alongside him on the Supreme Bench, however, sat a very different type of lawyer, one of "that brood of young lawyers," characterized by Jefferson as "ephemeral insects of the law," who had imbibed their law from Blackstone's *Commentaries*. This was James Iredell of North Carolina, who demurred strongly to Chase's natural rights doctrine. "True," said he, "some speculative jurists" had held "that a legislative act against natural justice must, in itself, be void; but the correct view, he stated, was that: ³³

If . . . a government, composed of legislative, executive and judicial departments, were established, by a Constitution, which imposed no limits on the legislative power . . . whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power, could never interpose to

³² *Ibid.*

³³ *Id.*, 3 Dall. at 398-9.

pronounce it void . . . Sir William Blackstone, having put the strong case of an act of parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case, "there is no court that has power to defeat the intent of the legislature when couched in such evident . . . words. . . ."

The debate thus begun was frequently renewed in other jurisdictions; and long before the Civil War, *Iredell* had won the fight — but as we shall see, more in *appearance* than in *reality*. In 1868 Judge Cooley, in considering the circumstances in which a legislative enactment may be declared unconstitutional, wrote: ³⁴

The rule of law upon this subject appears to be, that, except 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. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.

Yet, six years later we find the Supreme Court of the United States pronouncing a statute of the State of Kansas void on the very grounds that had been laid down in *Chase's* dictum. Speaking for an all but unanimous Court, Justice Miller said: ³⁵

³⁴ COOLEY, *Constitutional Limitations* 168 (3d ed. 1874).

³⁵ *Citizens' Savings & Loan Ass'n. v. Topeka*, 20 Wall. 655, 662, 22 L. Ed. 455 (1874).

It must be conceded that there are . . . rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

One Justice dissented, asserting that such views tended to "convert the government into a judicial despotism."³⁶

But vastly more important is the fact that in the very process of discarding the doctrine of natural rights and adherent doctrines as the basis of judicial review, the courts have contrived to throw about those rights which originally owed their protection to these doctrines the folds of the documentary constitution. In short, things are not always what they seem to be, even when they seem so most.³⁷ The indebtedness of the institution of judicial review and of the rights protected by it to Natural Law ideas is by no means sufficiently summed up in the glib statement that nowadays judicial review is confined to the four corners of the written constitution.

³⁶ *Id.*, 20 Wall. at 669.

III — *How Natural Law Doctrines Were Used to Fill a Gap in the Written Constitution*

It is a commonplace that the doctrine of natural rights was conveyed into the American written Constitution by bills of rights, the earliest example of which was the Virginia Declaration of Rights of June 12, 1776. This commonplace is, however, only a half of the truth, and indeed the lesser half. As has been indicated, the type of judicial review which stemmed from Coke's dictum supplied a second avenue for natural rights concepts into the constitutional document. In this section I shall first illustrate this proposition with the doctrine of vested rights.

Not all the early state constitutions were accompanied by bills of rights. Moreover, the availability of such bills of rights as existed as a basis for judicial inquiry into the validity of legislative measures was sharply challenged at times. Even more important was the fact that, as it came early to be appreciated, bills of rights or no bill of rights, the early state constitutions left proprietary interests in a very exposed position vis a vis the new popular assemblies, for which the prerogatives of the British Parliament itself were sometimes claimed.³⁷

The formidable character of legislative power in these early instruments of government as regards the property

³⁷ See e.g., COOLEY, *op. cit. supra* note 34, at 174-6, where the principle of the separation of powers is made to do duty for Natural Law concepts.

³⁸ See COXE, *An Essay on Judicial Power and Unconstitutional Legislation* 223 *et seq.* (1893); V HAMILTON WORKS 116 (Lodge ed. 1904); VII *id.* at 198.

interest, was exhibited in more ways than one. In the first place, in the prevailing absence of courts of equity, legislative assemblies interfered almost at will with judicial decisions, and particularly those involving disputes over property. The case of *Calder v. Bull*,³⁹ mentioned earlier, affords an example of this sort of thing. The Connecticut courts, having refused to probate a certain will, were to all intents and purposes ordered to revise their decision, which they did, with the result that the heirs at law to an estate were ousted, after a year and a half of possession, by the beneficiaries of the will. A second and highly impressive proof of early state legislative power is afforded by the ferocious catalogue of legislation directed against the Tories, embracing acts of confiscation, bills of pains and penalties, even acts of attainder. One sample of such legislation came under the scrutiny of the United States Supreme Court in 1800, in the case of *Cooper v. Tel-fair*.⁴⁰ Said Justice Washington: "The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."⁴¹ On this ground and one or two others, the Georgia act was sustained, although Justice Chase opined that with the Federal Constitution now in effect such an act would be clearly void; but this act was passed during the Revolution. Thirdly, with the general collapse of values early in 1780, every state legislature became a scene of vehement agitation on the part of the widespread farmer-

³⁹ Note 30 *supra*.

⁴⁰ 4 Dall. 14, 1 L. Ed. 721 (1800).

⁴¹ *Id.*, 4 Dall. at 18.

debtor class in favor of paper money laws and other measures of like intent. For the first time, the property interest was confronted with "the power of numbers," and, in the majority of cases, the power of numbers triumphed.

Could the state bill of rights withstand the flood? It soon transpired that they were an utterly ineffective bulwark of private rights against state legislative power. And so the movement was launched which led to the Philadelphia Convention of 1787. That abuse by the state legislatures of their powers had been the most important single cause leading to the Convention was asserted by Madison early in the course of its deliberations, and others agreed.⁴² So far as we are concerned, the most important expression of the Convention's anxiety to clip the wings of the high-flying local sovereignties is to be found in the opening paragraph of section 10 of Article I, which reads:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The provision which here claims attention is the prohibition of *ex post facto laws*. What did those who urged their insertion in the Constitution think these words

⁴² See I FARRAND, *The Records of the Federal Convention* 48, 133-34, 255, 424, 525, 533; II *id.* at 285 (1937).

meant? Some of them, we know, thought the clause would rule out *all* "retrospective" legislation, meaning thereby legislation which operated detrimentally upon existing property rights.⁴³ But as we have seen in *Calder v. Bull*, the clause was confined to penal legislation, to statutes making criminal an act which was innocent when done. That the Court was thoroughly aware of the breach it was thus creating in the Constitution, the opinions of all the Justices, except that of the Blackstonian Iredell, make amply apparent; and going beyond apology, Chase sought to show how the gap could be stopped by the local judiciaries by recourse to extra-constitutional limitations, "the spirit of our free republican governments," "the social compact," considerations of "natural justice," and the like. The local judiciaries responded to the suggestion with varying degrees of alacrity, and the sum total of their efforts was one of the most fertile doctrines of American Constitutional Law, the doctrine of vested rights, the practical purport of which was that the effect of legislation on existing property rights was a *primary* test of its validity, and that by this test legislation must stop short of curtailing existing rights of ownership, at least unduly or unreasonably.⁴⁴

But in fact, Chase's dictum only stimulated a movement already begun. Three years prior to *Calder v. Bull*, we find Justice Paterson charging a federal jury in a case involving vested rights in these words:⁴⁵

⁴³ On this point see CORWIN, *op. cit. supra* note 3, at 60-1 n.4.

⁴⁴ *Id.* at 72 *et seq.*

⁴⁵ *VanHorne's Lessee v. Dorrance*, 2 Dall. 304, 310, 1 L. Ed. 391 (1795).

. . . the right of acquiring and possessing property and having it protected, is one of the natural, inherent and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society . . . The preservation of property . . . is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law.

Indeed, a majority of the cases of judicial review after the Cokian model, referred to in Section II of this paper, involved property rights. Nor should the great name of Chancellor Kent be overlooked in this connection. First as judge, then as Chancellor in his home state, and finally as author of the famed *Commentaries*, Kent developed the doctrine's fullest possibilities and spread its influence fastest and farthest.

Yet even as Kent was vaunting private property as an instrument of God for realizing his plans for the advancement of the race, it was becoming less and less practicable to urge such considerations on American judges. The old-type Cokian judge had about disappeared — Blackstone was in the saddle in the law offices and in the court houses. What is more, with the accession of Jackson to the Presidency there took place an immense resurgence of the doctrine of popular sovereignty. Of the numerous corollaries into which the doctrine proliferated, two are relevant to our interest: first, the Constitution was an ordinance of the people, and its supremacy sprang from the fact that it embodied

their will; second, of the three departments of state government, the legislature stood nearest the people. It followed that the courts had better go slow in holding state legislative acts invalid; and that on no account must they do so except for a plain violation of the Constitution, i.e., of the people's will as there expressed.

Bench and Bar were confronted with a dilemma: either they must cast the doctrine of vested rights to the wolves or they must bring it within the sheepfold of the written Constitution. The second alternative was adopted in due course. Ultimately the doctrine found a home within the Due Process Clause, "no person shall be deprived of life, liberty, or property without due process of law." The original significance of the clause was purely procedural — nobody should be punished without a trial by jury or "writ original of the Common Law." In the revamped clause the term "due process of law" simply fades out and the clause comes to read, in effect, "no person shall be deprived of property, period." Thus was the narrow interpretation which was planted on the Ex Post Facto Clause in *Calder v. Bull* revenged in kind.⁴⁶

This achievement was consummated in the famous case of *Wynehamer v. People*,⁴⁷ in which, in 1856, the New York Court of Appeals set aside a state-wide prohibition law as comprising, with regard to liquors in existence at the time of its going into effect, an act of destruction of property not within the power of govern-

⁴⁶ See CORWIN, *op. cit. supra* note 3, at 84-115.

⁴⁷ 13 N. Y. (3 Kern) 378 (1856).

ment to perform “even by the forms of due process of law.” An interesting feature of Judge Comstock’s opinion in the case is his repudiation of all arguments against the statute sounding in Natural Law concepts, like “fundamental principles of liberty,” “common reason and natural rights,” and so forth. Such theories said he — squinting, one suspects, at the anti-slavery agitation — were subversive of the necessary powers of government. Furthermore, there was “no process of reasoning by which it could be demonstrated that the ‘Act for the 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.”⁴⁸

The expansion of the Obligation of Contracts Clause of Article I, section 10, by resort to Natural Law concepts follows a similar, though briefer course. The master craftsman was Chief Justice Marshall, and this time the infusion of the constitutional clause with Natural Law concepts was direct. The great leading case was *Fletcher v. Peck*,⁴⁹ in which, in 1810, Marshall, speaking for the Court, held that a state legislature was forbidden “either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States”⁵⁰ to rescind a previous land grant; while Justice Johnson based his concurring opinion altogether “on the reason and nature of things;

⁴⁸ *Id.* at 392.

⁴⁹ 6 Cranch 87, 3 L. Ed. 162 (1810).

⁵⁰ *Id.*, 6 Cranch at 139.

a principle which will impose laws even on the Deity.”⁵¹ It is true that when, in 1819, the doctrine of *Fletcher v. Peck* was extended to the charters of eleemosynary corporations, the Court contented itself with invoking only the Obligations Clause.⁵² The dependence, however, of the holding on Natural Law premises still remains. The constitutional clause presupposes a *pre-existent* obligation to be protected. Whence, if not from Natural Law, can such an obligation descend upon a public grant?

Of the four great doctrines of American Constitutional Law which the American judiciary developed prior to the Civil War, three (the doctrine of judicial review, the substantive doctrine of due process of law, and the doctrine that the Obligation of Contracts Clause protects public contracts) are products of the infusion of the documentary Constitution with Natural Law, natural rights concepts. The fourth doctrine, that of dual federalism, was the creation of the Supreme Court at Washington under the presidency and guidance of Chief Justice Taney. It, of course, rests on different, highly political considerations. Yet even in this case, Natural Law may claim some credit if, as Thomas Hill Green argues in his *Principles of Political Obligation*,⁵³ the notion of sovereignty is also, in final analysis, rooted in the doctrine of Natural Law. Green, of course, was thinking of “sovereignty” as it is known to Western political

⁵¹ *Id.*, 6 Cranch at 143.

⁵² *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629 (1819).

⁵³ GREEN, *Principles of Political Obligation* (1901)

thought, not the kind of sovereignty that is the offspring of Byzantine absolutism married to Marxian materialism.

IV. *The Bench and Bar Present Us With an Up-to-Date Doctrine of Natural Law*

In 1868, the Fourteenth Amendment was added to the Constitution. The first section of it reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The fifth and final section gave Congress the power "to enforce, by appropriate legislation, the provisions of this Article."

In the understanding of most people at the time, the intended beneficiaries of the Amendment were the recently emancipated freedmen, but in the very first cases to reach the Supreme Court under it, the famous *Slaughter House Cases*⁵⁴ of 1873, this assumption was sharply challenged by counsel, John Archibald Campbell of New Orleans, a former Justice of the Court. No doubt, Campbell argued, the freedmen would and should

⁵⁴ 16 Wall. 36, 21 L. Ed. 394 (1873).

derive benefit from the Amendment, but their doing so would only be incidental to the realization of its much broader purpose, that of giving legal embodiment to the principle of "laissez-faire individualism which had been held by the colonists ever since they came to this soil."⁵⁵ "What," he asked, "did the colonists and their posterity seek for and obtain by their settlement of this continent . . . ? *Freedom, free action, free enterprise — free competition.* It was in freedom they expected to find the best auspices for every kind of human success."⁵⁶

Campbell lost his suit, by the narrow margin of five Justices to four; but he had sown an idea which, in the course of the next thirty years, imparted to judicial review a new and revolutionary extension. In 1878, the American Bar Association was founded from the *elite* of the American Bar. Organized as it was in the wake of the "barbarous" decision — as one member termed it — in *Munn v. Illinois*,⁵⁷ in which the Supreme Court had held that states were entitled by virtue of their police power to prescribe the charges of "businesses affected with a public interest," the Association, through its more eminent members, became the mouthpiece of a new constitutional philosophy which was compounded in about equal parts from the teachings of the British Manchester School of Political Economy and Herbert Spencer's highly sentimentalized version of the doctrine of evolu-

⁵⁵ These words are from Twiss, *Lawyers and the Constitution* 53 (1942).

⁵⁶ *Id.* at 54, quoting Campbell's Brief, pp. 42-4. Emphasis supplied.

⁵⁷ 94 U. S. 113, 24 L. Ed. 77 (1876).

tion, just then becoming the intellectual vogue; plus a "booster" — in the chemical sense — from Sir Henry Maine's *Ancient Law*, first published in 1861. I refer to Maine's famous dictum that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*." ⁵⁸ If hitherto, why not henceforth?

In short, the American people were presented a *new doctrine of Natural Law*, the content and purport of which appear — to take a specific example — in Professor William Graham Sumner's *What Social Classes Owe to Each Other*, which was published in 1883. I quote a passage or two: ⁵⁹

A society based on contract is a society of free and independent men, who form ties without favor or obligation, and cooperate without cringing or intrigues. A society based on contract, gives the utmost room and chance for individual development, and for all the self-reliance and dignity of a free man . . . It follows that one man, in a free state, cannot claim help from, and cannot be charged to give help to, another.

And again:

All institutions are to be tested by the degree to which they guarantee liberty. It is not to be admitted for a moment that liberty is a means to social ends, and that it may be impaired for major considerations. Any one who so argues has lost the

⁵⁸ MAINE, *Ancient Law* 165 (3d Amer. ed. 1873).

⁵⁹ Extracted from MASON, *Free Government in the Making* 607-8 (1949).

bearing and relations of all the facts and factors in a free state. He is a centre of powers to work, and of capacities to suffer. What his powers may be — whether they can carry him far or not; what his fortune may be, whether to suffer much or little — are questions of his personal destiny which he must work out and endure as he can; but for all that concerns the bearing of the society and its institutions upon that man, and upon the sum of happiness to which he can attain during his life on earth, the product of all history and all philosophy up to this time is summed up in the doctrine, that he should be left free to do the most for himself that he can, and should be guaranteed the exclusive enjoyment of all that he does . . . Social improvement is not to be won by direct effort. It is secondary and results from physical or economic improvement . . . An improvement in surgical instruments or in anesthetics really does more for those who are not well off than all the declamations of the orators and pious wishes of the reformers . . . The yearning after equality is the offspring of envy and covetousness, and there is no possible plan for satisfying that yearning which can do aught else than rob A to give to B; consequently all such plans nourish some of the meanest vices of human nature, waste capital, and overthrow civilization. . . .

It is interesting to compare this new type of Natural Law, and its tremendous exaltation of individual effort, with the ancient type, which was set forth in the texts quoted in Section I of this paper. There are two differences, the first of which approximates that between a *moral* code, addressed to the Reason, and “Natural Law”

in the sense in which that term is employed by the natural sciences. The former operates *through* men; the latter *upon* men, and altogether independently of their attitude toward it, or even of their awareness of its existence. The results of its operation would therefore be of no moral significance, except for one circumstance, the assumption, to wit, that *compliance with it — whether conscious or unconscious — forwarded Progress*. Thus, according to Maine, it was “*the progressive societies*” which had heretofore moved from *status* to *contract*; while with Spencer *progressive societies* were destined to “evolve” from the *military state* into the *industrial society* — a process not yet completed, however, or the State would have vanished. In short, the laissez-faire version of Natural Law contrived, in the end, to combine the *moral* prestige of the older concept with the *scientific* prestige of the newer.⁶⁰

The second difference can be put more briefly, although it is perhaps the more important one. The Natural Law of Cicero, of St. Thomas, Grotius — even of Locke — always conceives of man as *in* society. The Natural Law of Spencer, Sumner, et al., sets man, the supreme product of a highly competitive struggle for existence, *above* society — an impossible station in both logic and fact.

The chief constitutional law precipitate from the new Natural Law, the doctrine of freedom of contract, con-

⁶⁰ Parts of this paragraph are taken from CORWIN, *op. cit. supra* note 3, at 198.

firms and illustrates this fatal characteristic of it. By this doctrine, persons *sui juris* engaged in the ordinary employments were entitled to contract regarding their services without interference from government; as reciprocally were those who sought their services. Endorsed by such writers as Cooley, Tiedemann, James Coolidge Carter, J. F. Dillon, and by a growing procession of state high courts headed by those of New York, Pennsylvania, Massachusetts and Illinois, the doctrine attained culminating expression in 1905 in the famous *Bakeshop Case*.⁶¹ There a New York statute which limited the hours of labor in bakeries to ten hours a day and sixty hours a week was set aside five justices to four as not "a fair, reasonable and appropriate exercise of the police power of the state" but "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty. . . ." ⁶²

How was this result reached? Very simply: it was the automatic result of the conception of an area of individual action *any* interference with which by the state put upon it a burden of justification not required in other cases. On this basis the Court came to operate a kind of "automatic" judicial review, the product of which was labelled by its critics "mechanical jurisprudence." Nor is this type of jurisprudence extinct today, as I shall now point out. Its application has merely been transferred to a different set of values and interests.

⁶¹ *Lochner v. New York*, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

⁶² *Id.*, 198 U. S. at 56.

V. *Natural Law and Constitutional Law Today*

In 1925, in the now famous *Gitlow* case,⁶³ which involved a conviction under the New York Anti-Syndicalist Act, the Supreme Court adopted tentatively the thesis, which it had rejected earlier, that the word "liberty" in the Fourteenth Amendment adopts and makes effective against state legislatures the limitations which the First Amendment imposes upon Congress in favor of "freedom of speech and press." Then in 1940 in the *Cantwell* case,⁶⁴ the Court upset a conviction under Connecticut law of two Jehovah's Witnesses for breach of the peace on the ground that the proselyting activities of the said Witnesses did not under the circumstances constitute a "clear and present danger" to public order; and since then a majority of the Court has gone to the verge, at least, of making the "clear and present danger" formula a direct test of legislation, although in the *Gitlow* case it had rejected the rule as spurious.

And what has all this to do with Natural Law? The answer is discovered when we note the rule by which the Court professes to be guided when interpreting the word "liberty" in the Fourteenth Amendment in the light of the Bill of Rights. Not all the provisions of the latter are regarded as having been converted by the Fourteenth Amendment into restrictions on the states, but only those that are protective of the "immutable principles of jus-

⁶³ *Gitlow v. New York*, 268 U. S. 552, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

⁶⁴ *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

tice which inhere in the very idea of free government"; of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; of the "immunities . . . implicit in the concept of ordered liberty"; of principles of justice "rooted in the traditions and conscience of our people"; principles, the violation of which would be "repugnant to the conscience of mankind." ⁶⁵

This is entirely in line with the Natural Law tradition. But does it suffice to elevate the rights it deals with into a *super-constitution*, so that any law touching them is *ipso facto* "infected with presumptive invalidity"? As we have seen, this is precisely what happened in the case of "liberty of contract"; and today, "liberty of contract" thus distended "is all," as they say in Pennsylvania; and may not a like fate overtake freedom of speech, press, and religion in time if the same slide-rule methods are applied to legislation touching them? I am thinking especially of such decisions as those in *Saia v. New York*,⁶⁶ *McCullum v. Board of Education*,⁶⁷ and *Terminiello v. City of Chicago*.⁶⁸ These were very ill-considered decisions to my way of thinking, and in fact the

⁶⁵ *Louisiana v. Resweber*, 329 U. S. 459, 470-72, 67 C. Ct. 374, 91 L. Ed. 422 (1947), quoting from *Holden v. Hardy*, 169 U. S. 366, 389, 18 S. Ct. 383, 42 L. Ed. 780 (1898); *Hebert v. Louisiana*, 272 U. S. 312, 316, 47 S. Ct. 103, 71 L. Ed. 270 (1926); *Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937); *Snyder v. Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

⁶⁶ 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948).

⁶⁷ 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

⁶⁸ U. S., 69 S. Ct. 894 (1949).

first of these has already been repudiated by the Court,⁶⁹ at least four of the five Justices who were responsible for it lugubriously so assert. I contend, in short, that any patent formula or device which relieves the Justices from considering relevant, however recalcitrant facts, or which exonerates them of the characteristic judicial duty of adjusting the universal and eternal to the local and contingent, the here and the now, is to be deplored. I contend further that the "clear and present danger" rule is just such a patent formula.

How are we to assess the importance of the Natural Law concept in the development of American Constitutional Law? What it all simmers down to is essentially this: while that distinctive American institution, judicial review, is regarded today as stemming from the principle of popular sovereignty, it sprang in the first instance from "common right and reason," the equivalent with men of law in the Sixteenth Century England of "Natural Law." What is more, popular sovereignty in the last analysis is itself a derivative from the Natural Law postulate, being neither more nor less than a sort of *ad hoc* consolidation of the natural right of human beings to choose their own governing institutions.

And the indebtedness of American Constitutional Law to Natural Law, natural rights concepts for its content in the field of private rights is vital and well-nigh all-comprehensive. It is, of course, true that not all of the

⁶⁹ The reference is to *Kovacs v. Cooper*, 336 U. S. 17, 69 S. Ct. 448 (1949).

corollaries that the courts have endeavored to attach to their premises have survived; and few have survived without modification. Yet it is a striking fact that while hundreds of constitutional provisions have been adopted since judicial review was established, not one has ever proposed its abolition and only very few its modification. And meantime the American states have continued to incorporate in their successive constitutions, virtually without comment, the constitutional clauses — the Due Process Clause, for example — that today incorporate the principal judicial doctrines which I have traced to Natural Law bases. It is true, as I just remarked, that some of these doctrines have become extinct and others have been qualified; but invariably these results have been achieved by judicial massage, as it were — sometimes a rather rugged massage — and not by legislative or constitutional surgery.

Not that the doctrine of Natural Law itself has escaped disturbing comment at times, even from American jurists. Frequently cited in this connection is the late Justice Holmes' discourse on "Natural Law." "It is not enough," said Justice Holmes in a characteristic passage, "for the knight of romance that you agree that his lady is a very nice girl, — if you do not admit that she is the best that God ever made, you must fight"; and the same demand, he opines, "is at the bottom of the jurist's search for criteria of absolute validity."⁷⁰

We can readily concede that such criteria may never

⁷⁰ HOLMES, *Collected Legal Papers* 310 (Laski ed. 1920).

be established in this far from perfect, and always changing world. Yet that admission does not necessarily discredit the search; perhaps, indeed, it makes it more necessary, as an alternative to despair. Holmes, in fact, exposes himself when he goes on to advance as an argument against Natural Law that the right to life "is sacrificed without a scruple whenever the interest of society, that is, of the predominant power of the community, is thought to demand it."⁷¹ But the answer is plain: The right to life is more than the right to live — it is also the right to spend life for worthwhile ends; and so long as one is guaranteed a free man's part in determining what these ends are, Natural Law has *pro tanto* received institutional recognition and embodiment. But, of course, it is essential to this argument that the free man's part be kept a really vital one.

Our present interest, however, has been in Natural Law as a challenge to the notion of unlimited human authority. American Constitutional Law is the record of an attempt to implement that challenge. The record is a somewhat mixed one, but it is clear that in the judgment of the American people it has been on the whole a record of successes. May it continue to be!

⁷¹ *Id.* at 314.

