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NATURAL LAW IN AMERICAN JURISPRUDENCE:

CALDER VS. BULL AND CORFIELD V. CORYELL AND THEIR PROGENY

by

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DEDICATION

This work is dedicated to my parents, Lois and Donald (1936 – 2009) Mock and to my wife, Delsa.

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This work is dedicated to the memory of my father, Donald Mock (1936 – 2009), who would be more excited than I am that his son got a Ph.D. I want to thank my advisor Professor Judith Swanson of the Boston University Political Science Department. She skillfully guided me through this process, and her comments on my drafts were always insightful. My thoughts were much more precisely and clearly stated because of her feedback. I definitely made the right choice in selecting her. Professor James Fleming of the Boston University School of Law made tremendous improvements in my work. I benefited from his deep learning in the fields of natural and constitutional law and he shaped much of this project. Dr. David Glick of the Boston University Political Science Department introduced several important perspectives that hadn't occurred to me. I would also like to thank Professor Shep Melnick from Boston College and Professor Patrick McGhee from the University of Bolton (UK) and the Massachusetts Institute of Technology. Professor McGhee was a big help to me on the day of my oral defense.

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ABSTRACT

This dissertation seeks to answer the question of whether and to what extent principles of natural law have figured in Supreme Court jurisprudence in the last two centuries. In the last quarter-century, scholars and judicial analysts have displayed a renewed interest in natural law reasoning and whether justices do or should take cognizance of natural law considerations. The issue became prominent during the 1991 confirmation hearings of Clarence Thomas, who had written and spoken favorably of natural law as a guiding principle in constitutional adjudication.

Two cases and their progeny figure herein. In Calder v. Bull (1798), Supreme Court Justices Samuel Chase and James Iredell discussed whether principles of natural justice placed limits on legislatures beyond which they could not go, or whether judges could rely only on specific constitutional restraints in evaluating legislative acts. In Corfield v. Coryell (1823), Justice Bushrod Washington explained that the Constitution's Privileges and Immunities Clause protects those rights that are "fundamental," and many subsequent commentators and courts have given this statement a natural rights gloss.

This work contributes to existing Supreme Court literature by tracing the entire history of Calder and Corfield, the two cases most frequently cited for potentially having

natural law implications. The paper considers each citation as it is relevant to the natural law debate; cases are excluded only because they are cited for another point. For example, cases that cite Calder for its holding that the Constitution's Ex Post Facto clause only applies to criminal cases are not considered.

The paper concludes that natural law considerations now figure in Supreme Court jurisprudence only in a mediated sense. While several Eighteenth and Nineteenth Century opinions, including Corfield itself, accept natural law principles as interpretative guides, natural law as a free-standing source of adjudication has faded from Supreme Court jurisprudence. Concomitantly, the Privileges and Immunities Clause as a source of rights has been largely discarded in favor of a substantive due-process jurisprudence, with the Court adopting a gradual, common-law type of approach in determining the constitutional limits of government interference with Americans' rights.

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PRELIMINARY INTRODUCTION: *CALDER AND CORFIELD* INTRODUCED

This paper will trace the history of natural law and natural rights in Supreme Court history through the vehicle of two seminal cases, one of them itself a leading Supreme Court opinion, the other a much-cited and discussed judgment rendered by Supreme Court Justice Bushrod Washington in 1823. The first case is *Calder v. Bull* (1798).[1] The second is *Corfield v. Coryell*.[2]

A very brief discussion of those cases and their importance follows; they each will be addressed in much greater detail as follows: First, I will trace the history of natural law[3] as reflected in *Calder* and Supreme Court cases citing *Calder* up to and including the 1899 case of *Atchison, T & S.F.R. v. Matthews*[4]. *Atchison* provides a sensible dividing point for several reasons. First (and somewhat coincidentally), the Court handed down that opinion almost precisely a century after the 1798 *Calder* case. Second, the case is the last of the Nineteenth-Century cases construing the recently enacted Fourteenth Amendment, the constitutional revision that fundamentally altered the American system of federalism. Third, and most importantly, *Atchison* marked the end of a certain type of "natural law" case, those cases emphasizing primarily contractual rights and economic issues. When *Calder* was first cited in the Twentieth Century,[5] nearly half a century after *Atchison*, the

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[1] *Calder v. Bull*, 3 U.S. 386 (1798).
[2] *Corfield v. Coryell*, 6 Fed. Cas. 546 (E.D. Pa 1823).
[3] For brevity purposes, I will use the term "natural law" from this point in this introductory section. It is to be understood that the phrase (unless the context clearly indicates otherwise) includes the related concepts of "natural justice" and "natural rights".
[4] *Atchison, T & S.F.R. Co. v. Matthews*, 174 U.S. 96 (1899).
[5] I am considering *Calder* citations only as they relate to the "natural justice" debate between Justices Chase and Iredell. I am not concerned with *Calder* citations that invoke its *ex post facto* holding. Throughout, when I use a phrase such as "the next *Calder* cite," that qualification should be understood.

focus had shifted to individual liberties, both in the field of criminal law (in considering whether prosecutorial comment on a defendant's silence was constitutionally permissible, for example) and in questions of individual autonomy (is there a constitutional "right to privacy"?).

There is a substantial difference between the principles of natural law on the one hand, and natural rights on the other. John Locke, a key influence on America's founders, would emphasize natural rights in his writings, treating rights as possessions. The founders found Locke useful in emphasizing liberty and self-governance, concepts that do not predominate theories of classical natural law.[6] This work will seek to examine both the natural law and the natural rights traditions.

Second, I will then focus on *Calder's* subsequent history, dating from *Adamson v. California*[7] and continuing to the present day. The Supreme Court or one of its justices most recently cited *Calder*[8] in a "takings" case, *Kelo v. City of New London*[9]. Interestingly, *Kelo* was a property case. There, the Court faced the issue of whether, under the federal Constitution's "Takings Clause,"[10] a municipality that seized private property, could, under certain circumstances, still comply with the "public use" requirement for eminent domain, even where the property was transferred to another *private* party.

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[6] *See infra*, pp. 34 - 36.
[7] *Adamson v. California*, 332 U.S. 46 (1947).
[8] I will be tracing *Calder's* history only as it is cited for the natural law debate between Justices Chase and Iredell. The Court has cited it frequently for its specific holding that the constitutional prohibition on *ex post facto* laws applied only in the criminal law context. For my purposes, anytime I use a phrase like "the next case to cite *Calder*," it is to be understood to mean "the next case to cite *Calder* for *its natural law implications*." I am not concerned with the specific *ex post facto* holding.
[9] *Kelo v. City of New London,* 545 U.S. 469 (2005)
[10] U.S. Constitution, Amendment V. "Nor shall private property be taken for public use without just compensation."

One case does not make a trend however, and it certainly could not be said that *Calder* has come full circle to be applied again to property, contractual and economic issues. Perhaps subsequent future appointments to the Supreme Court will determine that. In February 2016, Supreme Court Justice Antonin Scalia (who will figure herein) passed away, and was replaced by Neil Gorsuch, an apparently like-minded jurist in the seat. But the Court's ideological bent in the near future (it is now closely split) will depend, as always, on which seats become vacant, which president fills those seats, and the Senate's willingness to confirm those presidential appointees.

Finally, I consider *Corfield*, an 1823 lower court case. *Corfield* is unusual in the degree to which it influenced subsequent legal history in the United States without having the status of a U.S. Supreme Court judgment.[11] It is unique to this work in being the only decision considered *not* issued by the U.S. Supreme Court.[12] But it remains the definitive (even if somewhat ambiguous) statement on the Constitution's Privileges and Immunities Clause.[13]

Calder arose from a state-level probate case and a Connecticut statute altering the outcome of a judicial ruling in a will dispute. The probate court for Hartford, Connecticut

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[11] There are a handful of other such cases. *Palsgraf v. Long Island Railroad Co.,* 162 N.E. 99 (N.Y. 1928) comes to mind, for example, a decision of the highest court in New York State, known to any student of torts.

[12] In fact, Bushrod Washington was a Supreme Court Justice at the time he issued his opinion in *Corfield*. But he issued the ruling while "riding circuit," an Eighteenth and Nineteenth Century practice of Supreme Court justices, and Washington was acting in the capacity of a district court judge.

[13] "The citizens of each state shall be entitled to all privileges *and* immunities of citizens in the several states." U.S. Constitution, Article IV, Section 2. The Fourteenth Amendment also includes such a clause: "No state shall make or enforce any law which shall abridge the privileges *or* immunities of citizens of the United States." (emphasis supplied in both cases).

refused, in 1793, to honor a will under which the Bulls inherited from the testator. The Calders inherited instead. The time for appealing that decision lapsed, but the Connecticut legislature passed a law in 1795, granting a new trial and right of appeal, legal remedies that would have been barred by Connecticut law prior to the 1795 statute.[14]

The probate court subsequently *did* honor the will under which the Bulls inherited, and the Calders took an appeal to the U.S. Supreme Court, which faced the issue of whether the 1795 Connecticut statute violated the federal Constitution's prohibition on *ex post facto* laws.[15]

The Court held that the statute did not violate the *Ex Post Facto* Clause, ruling that the Clause applied only to criminal matters. On this issue, the Court was unanimous. *Calder* has been cited frequently for this now-unremarkable (because so well-established) legal principle. *Calder's* more fundamental importance and relevance for this work is the natural law debate in which Justices Chase and Iredell engaged.[16] Specifically, Justice Chase argued that there are certain "fundamental" principles that no legislature may violate, that in fact any such "act" of a legislature could not even be called a "law."[17]

Justice Iredell challenged Chase's approach, classifying it as relying on "natural justice." A court lacks authority, Justice Iredell wrote, to base rulings on its own conception of such principles.[18] Justice Iredell would have agreed, perhaps, that

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[14] *Calder v. Bull*, 3 U.S. 386, 386 (1798).
[15] "no state…shall pass any…ex post facto law." U.S. Constitution, Article I, Section 10.
[16] There was no opinion "for the Court" as there likely would be today. Four justices wrote separate seriatim opinions with a unanimous holding that there was no *ex post facto* violation.
[17] *Calder v. Bull*, 3 U.S. 386, 388 (opinion of Chase, J.) (1798). Chase's argument that a legislative act violating fundamental principles was not "law" at all both reflected and presaged a fundamental dispute among legal theorists regarding the very nature of law.
[18] *Calder v. Bull*, 3 U.S. 386, 399 (opinion of Iredell, J.) (1798).

constitutional drafters should be mindful of natural law principles, but the constitutional commands, and those alone, were controlling insofar as courts were concerned.

In *Corfield*, Justice Washington, "riding circuit" (and thus not speaking for the U.S. Supreme Court) confronted a New Jersey statute that prohibited anyone not an inhabitant of the state from gathering certain types of seafood, including clams and oysters from state waters upon any vessel that was not "wholly owned" by a New Jersey resident or inhabitant.[19] Among other allegations, the petitioner claimed that New Jersey's law violated the Constitution's Privileges and Immunities Clause.

Rejecting the claim, Washington wrote that the Privileges and Immunities Clause did not require a state to offer all the rights belonging to its citizens to non-residents as well. Rather, the Clause referred to those privileges and immunities which were "in their nature fundamental."[20] These fundamental principles were ones that belonged, Washington wrote, by right to "the citizens of all free governments."[21]

Like *Calder, Corfield* has a lengthy subsequent history in opinions of the U.S. Supreme Court, stretching from 1873[22] to 2010.[23] Although Washington's opinion in that case has been said to be based on a now-discarded view of natural law[24] and although the opinion was ambiguous as to several points, including whether states were *required* to afford their citizens these fundamental rights,[25] *Corfield*, like *Calder* has been a

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[19] *Corfield v. Coryell*, 6 Fed. Cas. 546, -- (E.D.Pa. 1823).
[20] Ibid., 6 Fed. Case. 546, -- (E.D. Pa. 1823).
[21] Ibid., 6 Fed. Case. 546, -- (E.D. Pa. 1823).
[22] See *The Slaughterhouse Cases*, 83 U.S. 36 (1873).
[23] See *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
[24] See Upham, David, "*Corfield v. Coryell* and the Privileges and Immunities of American Citizenship," *Texas Law Review*, 83:1483, 1485 (2005).
[25] Ibid. See also *McDonald v. City of Chicago*, 561 U.S. 742, --- (Thomas, J., concurring) (2010).

springboard for broad discussions at the Supreme Court for the application of natural law principles. One obvious difference between the two cases is that *Corfield* interpreted a particular provision of the Constitution, the Privileges and Immunities Clause (in addition to providing fodder for a later constitutional amendment), whereas the Chase-Iredell debate in *Calder* considered the appropriateness of extra-constitutional considerations (or at least so Iredell would have it).

Still, the two cases read together with their extensive subsequent histories work quite well in tandem in analyzing the history of natural law considerations at the Supreme Court. Many of the issues and judicial personalities involved will be common to both case's histories. These include not only natural law issues as such but concerns like the scope of judicial review, the application of the law's "spirit," the nature of fundamental rights and the extent to which the Due Process Clause of the Fourteenth Amendment contains a "substantive" guarantee that certain governmental actions, irrespective of any process employed in their enactment, are, by their nature, off-limits.

Natural law and the American Founding

One question that arose contemporaneously with the ratification of the American Constitution, and has continued to bedevil political historians ever since, is whether good government principles were somehow "natural" in origin, or whether they reflected the principles which early Americans were accustomed to as British subjects. While law might then spring from either a natural or a positivistic source, the latter could be drawn from the former in an English-style constitutional republic. Many positivist scholars would stress the need for a constitution to incorporate principles of

justice derivable from natural law as the *sine qua non* for that constitution to be accorded respect or even, in some theorists' view, to count as "law" at all.[26] Among the American founders, Thomas Jefferson, at least, thought that the creation of a democratic republic was itself a requirement of natural law. In procuring a state of society, Jefferson wrote, men have a right to "regulate and control, jointly indeed with all those who have concurred in the procurement" of that society.[27] A prominent twentieth-century analyst was to make this process of democratic participation the theme of his work.[28]

In *Calder* then, when Justice Chase wrote about the limits of legislative power, was he writing about "fundamental" principles in the sense that those principles are timeless, applying to all nations and discoverable through the use of right reason? Or was he, in a much more limited sense, suggesting that American law inherited these principles from English law, and that those principles became part of the social contract obligating both the people and the government? The answer to that question may never be clear; in fact, some commentators suggest that the political theorists of revolutionary America were themselves muddled:

> Legal historians once widely assumed that the Revolution was instigated and the Constitution ratified, by lawyers who were somehow motivated by a belief in deductive natural law. More recently, historians have tended to suppose that common law tradition, or customary law tradition, or some mixture of the two described by the catch-phrase "rights of Englishmen" was the motivating force. Both of these lines of interpretation attribute much more coherence and intelligibility to revolutionary era legal writings than those writings possess. Revolutionary era lawyers unreflectively conflated reason and custom – which means that, in many

[26] Jacobsohn, "Hamilton, Positivism, & the Constitution," *Polity* (1981) 73.
[27] Quoted in Zuckert, *The Natural Rights Republic* (1996), 234.
[28] Ely, *Democracy and Distrust* (1980).

> respects, we can never draw definitive conclusions about constitutional interpretation from the writings.[29]

It seems that even the most prominent legal commentators of the era were of two minds. That remains true today, with many theorists emphasizing the Constitution's (or the Declaration of Independence's) natural law antecedents (Michael Zuckert is a leading proponent of this viewpoint) while others emphasize British common law antecedents (John Phillip Reid for example). But the point remains that it would be error to attribute too much consistency and coherency to either the pre- or post-revolutionary period. Zuckert, for example, quotes the following passage from Forrest McDonald's work *Novus Ordo Seclorum:*

> When the decision for independence was made, all claims to rights that were based upon royal grants, the common law and the British constitution became theoretically irrelevant. The Americans thus "unequivocally justified" themselves in the Declaration "by an appeal to the Laws of Nature and Nature's God."[30]

While this may have been accurate as far as it goes, it does not go nearly far enough. For McDonald would put the emphasis on the word "theoretically". McDonald, in a section not quoted by Zuckert, went on to explain the founders' influences continued to be many and varied:

> That opened a can of worms. As indicated in fact, and in law, Americans already enjoyed a complex and interrelated variety of property rights, derived from the disavowed British sources, and the same was true of their liberties. Yet, according to *one reading* of the natural-rights theory that was most applicable to their circumstances – that associated with John Locke – declaring independence threw them

[29] Whitman, "Why did the Revolutionary Lawyers Confuse Custom and Reason?," *University of Chicago Law Review*, 58:4 (Autumn, 1991), 1323.
[30] Quoted in Zuckert (1997), *The Natural Rights Republic*, 114.

> temporarily into a state of nature wherein all previously existing law (except the law of nature itself) was nullified. (emphasis supplied).[31]

McDonald went on to note that while the founders could not ignore this theory, they were, nonetheless, a "hard-headed, practical band of men who disdained chimerical theory."[32] Moreover, while whether or not America's Declaration of Independence threw the colonies into a state of nature had practical and not just theoretical implications, early Americans were also divided as to that issue.[33] And as other commentators have pointed out, the Declaration served largely as a brief, in which an advocate makes every argument available, including arguments based on natural law. The language appropriate to a Declaration of Independence, invoking natural rights, might not be appropriate as a basis for governing, and in fact the American Constitution, as originally drafted, was devoid of reference to natural rights (although the Ninth Amendment would soon refer to rights retained by the people).[34]

Prior to the adoption of a written constitution in the late 1780's, the famous dictum of Sir Edward Coke in the celebrated *Bonham's Case* to the effect that acts of the English Parliament that were contrary to "right and reason" were "utterly void"[35] was frequently cited in the writings of American courts and commentators. References to Coke's dictum largely disappeared after the adoption of the Constitution.[36] That Coke's

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[31] McDonald, *Novus Ordo Seclorum* (1985), 59.
[32] Ibid., 59 – 60.
[33] See Ibid., 144 – 152.
[34] Ely, *Democracy and Distrust* (1980), 49.
[35] Quoted in McDowell, "Coke, Corwin and the Constitution," *The Review of Politics*, 55:3 (Summer 1993), 394. As discussed in text, English common law was thought to be a manifestation of reason.
[36] McDowell, "Coke, Corwin and the Constitution," *The Review of Politics*, 55:3 (Summer 1993), *passim*.

influence remained strong, though, is evidenced by the fact that his was the only treatise that Justice Iredell consulted in compiling his handwritten notes on the *Calder* case.[37]

One modern commentator makes much of James Kent's[38] failure, in his *Commentaries*, to "accord…serious consideration (to) Coke's idea that acts of a legislature that contravene 'common right and reason' are to be held void."[39] Indeed, Kent specifically rejected this reasoning in light of the presence of a written constitution. Kent is quoted as holding that statements that laws repugnant to "right or reason" are void meant only that courts should give such laws a "reasonable construction." After all, "the will of the legislature is the supreme law of the land."[40]

But the legislature's will is *not* necessarily the "supreme law of the land" in the United States, a claim that the Constitution makes for itself. So the question returns – again – to the proper method for judicial interpretation of that document. And in *the very next section* after that quoted above, when discussing the "power to declare (laws repugnant to the Constitution) void," Kent cites, approvingly, a 1792 South Carolina case, *Bowman vs. Middleton,* which struck down a state law that "took away the freehold of one man, and vested it in another without any compensation."[41] The Court there, Kent notes (and without a hint of disapproval), did not rule based on "any special provision of the state constitution," but rather found that the act was "against common right and the principles

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[37] Justice Iredell's handwritten notes, at the Duke Library, M – 5355.
[38] James Kent was a prominent American law professor and jurist, and renowned author of the authoritative *Commentaries on American Law*. He was, in a sense, the American Blackstone.
[39] McDowell, "Coke, Corwin and the Constitution, *The Review of Politics*, 53:3 (Summer 1993), 398.
[40] Ibid.
[41] Kent, *Commentaries* (1960 ed.), I, 475.

of *magna charta,"* and violated "those great fundamental principles which support all government and property."[42]

The ambiguity surrounding considerations of natural law in judicial opinions that is reflected in Kent's *Commentaries* is apparent in Supreme Court jurisprudence throughout the years of the Marshall Court, the first third of the Nineteenth Century. Although a series of cases in this era appeared to erect a firm distinction between natural and constitutional law, the Court nonetheless grounded holdings outside the constitutional area on principles of natural justice and infused even its constitutional holdings with natural law principles.[43] Natural law was, then "pertinent to constitutional cases, but not dispositive of them."[44] While it has been said that natural law faded as a jurisprudential influence in the second half of the Nineteenth Century, except as it had been incorporated into positive law,[45] it would still retain its influence in the economic sphere, and, beginning in the middle of the Twentieth Century, in the sphere of personal liberties. Or at least some commentators and jurists have so maintained. But whether the argument is true may depend on the definition of natural law or natural rights that is used.

Natural law defined

One issue with which any commentator on natural law must grapple is the variety of definitions given the term by philosophers over centuries. That variety raises the

[42] Ibid.
[43] White, *The Marshall Court* (1991), 674-675.
[44] Ibid., 675.
[45] Ibid.

question of whether these thinkers have been talking about the same thing. All agree that natural law is a higher sort of law than that which is enacted and man-made and particular to a jurisdiction (i.e., "positive" law). But the unanimity stops there, as philosophers offer numerous other defining characteristics that are often inconsistent, and even mutually exclusive. Trying to define natural law has been likened to a Rorschach Test writ large: Working definitions are "suggestive of well-defined, recognizable images, yet they are so indeterminate that they permit us to see in them what we want to see."[46]

Perhaps natural law is that law which most accords with human nature as it is, with an ultimate view towards promoting peace in society.[47] Commentators, beginning at least as far back as Burlamaqui have made this point, and continue to do so in modern times.[48] The argument that natural law springs from mankind's innate tendency to sociability is a recurring one, figuring in Grotius among others.[49] Others have suggested that natural law is that which seeks to inculcate virtue in man in accordance with the best that is in him,[50] or similarly, the direction of a free and intelligent agent to his proper interest.[51] Thomas Aquinas famously concluded that natural law is man's participation in the Eternal law.[52] While most philosophers have argued that natural law is discoverable

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[46] Hamburger, "Natural Rights, Natural Law and American Constitutions," *Yale Law Journal*, 102 (1993):4, 907.
[47] See, e.g., Burlamaqui, *The Principles of Natural and Politic Law* (2006 ed.), 112.
[48] See, e.g., Finnis, *Natural Law & Natural Rights,* 2nd ed. (2011), 216 – 217.
[49] Zuckert, *Natural Rights* (1997), 137. Similarly, the English philosopher Roger Scruton argues that what distinguishes humans from animals is the "I-You" encounter, our ability to recognize that we are a unified subject of experience and that the "other" is as well. The law of contract and natural law (predominately, the keeping of obligations) flow from this recognition. See Scruton, *The Soul of the World* (2014), 79 – 81.
[50] See, e.g., McInerney, trans. Aquinas, *Selected Writings* (1998), q. 92
[51] Locke, *Second Treatise*, 57.
[52] McInerney, trans. Aquinas, q, 91

by the use of right reason,[53] they disagree over whether it is necessarily God-given law, which is "natural" and right precisely because God commands it. Legal philosophers have disagreed about whether God is even necessary to the existence of natural law: Locke, for example, wrote that the fact of law necessarily implies a lawgiver,[54] while Hugo Grotius argued that a universal law might exist irrespective of God, discerned through using right reason.[55] Pufendorf summarized the different approaches thus:

> Some derive it (the law of nature) from the divine will, and since that is free, they conclude therefrom that God can change the law of nature, nay more, can ordain the opposite of it as is commonly the case in positive law. But others assert that it is founded upon the essential holiness and justice of God, and since that is immutable, they conclude that the law of nature is also immutable.[56]

Other scholars have noted that the essential question here is whether natural law is "immanent," that is part of the "very structure of reality," or whether it is law as will, imposed by a transcendent creator who might have chosen differently.[57] Hobbes advanced the latter viewpoint, assuming one rejects the criticisms of Hobbes that he was secretly an atheist, and his system of society and government manifested his belief in law as will.[58]

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[53] See, e.g., McInerney, trans., Aquinas, q. 91; Locke, s. 6; Pufendorf, *Two Books* (2009 ed.), 324 – 325. The importance of "reason" as a criterion for judicial pronouncement continues to modern times. In *Planned Parenthood v. Casey,* the joint opinion of Justices O'Connor, Kennedy and Souter wrote that courts, in applying substantive content to the Fourteenth Amendment's commitment to liberty in the due process clause must apply "reasoned judgement," (*Planned Parenthood v. Casey*, 505 U.S. 833, 849) (Joint opinion of O'Connor, Kennedy, and Souter), a claim that Justice Scalia derided as one of "philosophical abstraction" (*Planned Parenthood v. Casey,* 505 U.S. 833, 982) (1992) (Scalia, J., dissenting).

[54] One interpretation of Locke is that he viewed natural law as being dependent on God's will, and as not having any ontological existence independent of God, he necessarily also concluded that our reason is God-given. See, Locke, *2nd Treatise* (1960 ed.), s. 11.

[55] Kolakowski*, Is God Happy?* (2013), 246.

[56] Pufendorf (2009), *Two Books*, 215.

[57] Oakley, *Natural Law* (2005), 28 – 31.

[58] Ibid., 31.

Natural rights are a concept that developed apart from natural law, although the "rights" tradition developed within the framework of natural law. The language of rights was to become central to the American Revolution. But the term's meaning evolved over time. Derived from the Latin term *jus,* a right, as St. Thomas explicated the term, referred to justice between parties; one could speak of the "arights" of a relationship in such a way as to make clear that a "right" was not a possession belonging to one or the other party.[59] The turning point in the word's meaning was in the seventeenth century, when Suarez and Grotius made the term "right" modern. In addition to connoting justice, Grotius wrote, *jus* referred to a "moral quality" enabling a person to "have or to do something justly."[60] That is, a "right," became a possession. Or, in other words, a "liberty," although that term was often used in early America to suggest a collective, rather than merely an individual right.

The American founders were familiar with the sometimes-conflicting writings of Pufendorf, Grotius, Blackstone, Locke, Hobbes, Montesquieu, Vattel, Harrington and Burlamaqui, among others.[61] So who influenced them most? McDonald argues for the primacy (aside from Locke) of Vattel and Burlamaqui, pointing out that the latter was frequently reprinted in America after the Revolution and into the Nineteenth Century, whereas Locke was not.[62] Vattel's prominence may have stemmed largely from the fact that his writings emphasized natural law in relationships between states, and thus was

[59] Finnis, *Natural Law & Natural Rights*, 2nd ed. (2011) 206-209.
[60] Quoted in ibid., 207.
[61] See, e.g., McDonald, *Novus Ordo Seclorum* (1985), 60.
[62] Ibid, n.5, citing Harvey, *Burlamaqui.*

suited to the revolutionary arguments the American colonists were making.[63] Other theorists have emphasized Montesquieu's contributions from his seminal work, *The Spirit of the Laws*. Montesquieu's work was taught in America's law schools, and American pamphleteers frequently quoted him.[64] And later Supreme Court opinions which invoked the "spirit" of the constitution would recall Montesquieu.

Ultimately, the question may be unanswerable. A look at the citations of theorists in the published pamphlets leading to the Revolution, and in the constitutional debates after 1787, show that while they cited Locke most frequently, they also read and relied on these other thinkers often.[65] Any attempt to view one thinker's conclusions as definitive would be a misunderstanding of this wide mix of influences from which the founders drew freely. While the Declaration of Independence, authored mostly by Thomas Jefferson in 1776, borrowed from Locke's thought and phraseology heavily, Locke was only one of many natural law theorists with whom the revolutionary generation were familiar.[66] Indeed, many commentators may have overstated the influence of Locke, at the expense of such theorists as Grotius, Vattel and Pufendorf, among others.[67] Adding to the difficulty is the influence of a myriad of other thinkers from writers of the Roman Republic to puritan theology to commonwealth spokesmen from the English Civil War.[68] An important point however is that debates over the relative influence of different

[63] Armitage, *Civil* Wars (2017) 129.
[64] Lamberti, Jean-Claude. *Montesquieu in America*, "European Journal of Sociology," 32:1, 197, 198 (1991).
[65] See Wood, *Pamphlet Debates* (2015), index.
[66] Hutson, "Emergence of the Modern Concept of a Right in America," in Shain, *The Nature of Rights* (2007).
[67] Sigmund, *Natural Law in Political Thought* (1971), 99.
[68] Elkins and McKitrick, *The Age of Federalism* (1993), 6.

thinkers must take a back seat to a recognition that early Americans shared a common approach that reflected a common vocabulary, at least at a certain level of generality.[69]

Iredell's view in *Calder* that "natural justice" did not give rise to judicially enforceable remedies appears to have been the majority view, although certainly not a consensus viewpoint, at least prior to the American Revolution. Talk about both natural law and natural rights was often rhetorical in revolutionary America.[70] Debaters frequently invoked natural law at the Constitutional Convention, but whether they did so as a rhetorical device or whether natural law was meant to have practical significance is disputed.[71] In England the growing sentiment at the time of the American Revolution, a sentiment that was reflected in Locke's writings, was of parliament's omnipotence. The concept of natural law may have been a theoretical and self-enforcing restraint on that body, but nothing more.[72] Even in the United States, at least as far as government at the state level was concerned, lawmakers had the power - if not necessarily the authority - to do most anything, something that Thomas Jefferson implicitly recognized, in his proposed legislation for establishing religious freedom in the Commonwealth of Virginia. In that document, Jefferson wrote that the then-current Virginia legislature could not bind

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[69] Hamburger, "Natural Rights," (1993) 914, FN 24.
[70] Reid, "The Authority of Rights at the American Founding," in Shain, *The Nature of Rights* (2007), 96.
[71] Pearson, "Introduction to the Transaction Edition," in Fletcher, *American Interpretations of Natural Law*, xix (2016). Pearson takes the position that talk of natural law was only rhetorical. *But see* Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* (1987), 1138 (noting that post-revolutionary state courts often invoked natural law); Hittinger, *The First Grace* (2003), 119 – 123 (noting that some speakers at the Convention contemplated judicial review as the power to strike own positive laws that violated fundamental principles).
[72] Wood, *Creation of the American Republic*, 260 (1969). In *Calder*, Justice Iredell made the point that all power is subject to abuse, and that a "salutary confidence" must be placed in a nation's leaders. *Calder v. Bull*, 3 U.S. 386, 400 (Opinion of Iredell, J.) (1798).

future legislatures with its own conceptions of natural rights. In practice, specific legislation would take precedence.[73]

The issue of natural law reasoning was closely connected to the concept of judicial review, after all, because the ultimate question that courts have confronted for centuries is what standards – and whether those standards are to include some concept of natural justice - a reviewing party, that is, a court, will employ in considering a statute's constitutionality. The question took on special importance in the United States, where the courts' authority to strike down legislation as "unconstitutional" has been accepted, with certain well-known exceptions, since at least 1803. As late as 1942, only the United States and Norway had courts with this authority.[74] At least one prominent historian of the early American Republic has recognized that it was not the Constitution's status as fundamental law, nor its ratification by the American people that was the most important American contribution to theories of constitutional law. It was the fact that it was implemented by ordinary courts – that is, the idea of judicial review.[75]

However, several early post-revolutionary state court decisions unapologetically raised natural law considerations and were criticized most commonly not for that reason, but the very fact that courts were reviewing the work of legislatures at all.[76] Although *Madison v. Marbury* is often heralded as the case that established judicial review as a constitutional principle, that idea was hardly new in 1803. Justices in *Calder*

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[73] See McConnell, "Natural Rights and the Ninth Amendment," *New York University Journal of Law & Liberty*, 5 (2010):1, 17.
[74] Goldstein, "Constitutionalism as Judicial Review," in Kautz, et.al, ed., *The Supreme Court and the Idea of Constitutionalism* (2009), 78.
[75] Wood, *The Creation of the American Republic* (1969), 291.
[76] Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* (1987), 1138.

had contemplated that very point, as noted above, and delegates to the Constitutional Convention openly discussed the concept. James Wilson seemed to argue, and James Madison seemed to agree, that judges could refuse to give effect to, and indeed, to declare void, laws that were inconsistent with the Constitution.[77] In fact, several speakers spoke to the point, and while a majority of those speakers (although, again, nothing approaching a consensus) seemed to agree that courts would have the authority to declare "unconstitutional" laws void, even they disagreed as to whether "unconstitutional" referred merely to inconsistency with the document they were drafting, or more broadly, to positive laws that violated more "fundamental" law.[78]

One reason that natural right or natural justice did not play a major role in the American Constitution in 1787 was that the federal government – unlike the states – was not designed to possess general police powers. While state legislatures might appropriately pass laws relating to moral conduct, the primary question for the federal government was whether a particular power even existed, and only secondarily how that power might be exercised.[79] This is an especially important point to keep in mind prior to the ratification of the Fourteenth Amendment. The drafters of the original Constitution were constructing a government with very limited powers, and were addressing pragmatic and prudential concerns.[80] After the Fourteenth Amendment was ratified, however, natural law considerations became more pronounced in Supreme Court opinions, as we will see when

[77] Ibid., 1159.
[78] Snowiss, *Judicial Review* (1990), 39 – 40.
[79] Hittinger, *The First Grace* (2003), 119 – 123.
[80] Pearson, "Introduction to the Transaction Edition," *American Interpretations of Natural Law*, xxii (2016).

looking at the increasing number of cases citing *Calder* beginning in 1870.

In designing a federal government of limited powers, American founders, especially the Federalists, believed that this was a relatively easy task in contrast to laying out a theory of natural law and natural rights. The latter path would inevitably lead to the problem of "underspecified rights," claimed rights that were so indeterminate in their meaning as to allow for arbitrary interpretation and application.[81] Iredell's concurring opinion in *Calder* alluded to this exact issue in pointing out that a "natural justice" standard was "no fixed" one. (Arbitrary laws were also the linchpin of tyranny as Locke argued, for which see discussion below.) Moreover, Edmund Randolph, who served on the Committee on Detail (charged with the actual drafting of the Constitution, based on the decisions the members of the Constitutional Convention reached) pointed out that the Committee elected to forego a philosophical statement of the ends of the Constitution (in making this claim, Randolph overlooked the Constitution's preamble, which *is* philosophical in nature) because they were not dealing with mankind in its natural state, but with a mediated condition, mediated by society, and the already-existing states in the colonies.[82]

Another limit to natural law was that the colonists believed, prior to adopting their own constitution, that they were a party to an "original" contract, involving mutual duties, obligations and benefits, between the English monarch and his subjects.[83] (This original contract is not to be confused with the Social Contract of Hobbes and Rousseau, delineating

[81] Hittinger, *The First Grace* (2003), 129 – 130.
[82] Levy, *Original Intent* (1998), 149.
[83] Wood, *The Creation of the American Republic* (1969), 282 – 283.

why people entered society in the first instance. While those theorists placed greater emphasis on the contract that the people entered into among themselves, the "original contract" aspect of the social contract was concerned more with the rulers' contract with the ruled. Hobbes and Rousseau did not believe that rulers were bound by any "contract."[84]) Thus, the law to which they were subject was contractual in nature, and not, as implied in the "natural law," a timeless set of principles applicable in any society. Happily, all sides viewed it as axiomatic that the English Constitution was to be revered, full of "marvelous excellence," and well able to preserve the liberties of the English nation.[85] It was because of their reverence for certain English rights that the American founders placed such an emphasis on such principles as freedom of the press and freedom of religion.[86]

Still, even such an authority as Blackstone argued specifically (and similarly to Iredell's argument in *Calder*) against natural law, as such, as a determinative interpretive aid to the original contract. To argue that the terms of the original contract were "deducible by reason and the rules of natural law" ignored the fact that these deductions would result in "understandings (that) very considerably differ."[87] Thus, it was "judged proper to declare these duties expressly,"[88] he wrote. The original contract was reduced to writing, in other words, much as the American Constitution was soon to be, in a single

[84] Gottlieb, *The Dream of Enlightenment* (2016), 130.
[85] Elkins and McKitrick, *The Age of Federalism* (1995), 7.
[86] Ross, "A Natural Rights Basis for Substantive Due Process," *Universal Human Rights,* 2:2 (April – June 1980), 61, 77.
[87] Blackstone, *Commentaries*, I (1983), 226.
[88] Ibid.

document.[89] The obvious point that different theorists and statesmen would draw different inferences from natural law, often overlooked in natural law writings, was highlighted in Willoughby's seminal 1896 study, *The Nature of the State*, a work that some have argued contributed to the demise of natural law theorists, at least among political scientists (if not the courts).[90]

This disagreement as to the source of rights Americans enjoyed was described by the legal theorist Alexander Bickel as a dispute between "Contractarians" and "Whigs," the former arguing that the American Constitution embodied certain timeless principles, including "natural rights" that the Constitution reflects. Rejecting this view, the Whigs believed that the culture and values of a particular society determine its citizens' "rights."[91] Leo Strauss would characterize this as the "historicist" view; philosophy in general, and political philosophy in particular, assumes a level of historical insight that either does not exist at all or at the least is impossible to access because our attempt to access it is necessarily conditioned by the paradigms of our own time and place.[92] That "natural law" principles have appeared to alter over time is evidence, some would argue, that it doesn't exist at all. Or perhaps, as others would have it, our understanding of natural law's timeless principles is what evolves. But if these principles are known to us or

[89] The idea that the Constitution should be interpreted as a contract or compact was to figure prominently in one of the Supreme Court's most notorious opinions, *Dred Scott vs. Sandford.* Chief Justice Taney made much of the theory that the African-American race was not a party to the original compact forming the United States and thus not entitled to take advantage of the country's legal machinery. See 60 U.S. 393, 409 – 411 (1857).
[90] Pearson, "Introduction to the Transaction Edition," in Fletcher, *American Interpretations of Natural Law*, xxiii (2016).
[91] McAffee, *Constitutional Interpretation*, "Brigham Young University Studies," 27:3, 158 (1987).
[92] Strauss, *Natural Right and History* (1965), 23 – 33.

at least discoverable through reason, in the pragmatic sense that we might be able to apply them, what does it say about the efficacy of our reason if our conclusions regularly change? Or as one scholar has recently put it, if the principles Jefferson laid out in the Declaration of Independence were so "self-evident," why have we argued for centuries about their meaning and application?[93] The point is that too often, thinkers are inclined to conclude that long-held and cherished beliefs are "natural" or "self-evident," where they may instead be the product of convention. Locke's emphasis on property, for example, stems from his belief that a human being "owns" his person, a belief that continental Europeans of the day found startling.[94] And yet this property paradigm was to have long-lasting and immense implications in both British and American jurisprudence.

That one of the leading theorists of the original contract, Locke, is also a leading natural rights theorist, and the one that most directly influenced Thomas Jefferson is paradoxical, a paradox further complicated by the theory that an original contract is itself part of natural law. For, it is in the nature of contracts that they are governed by the intent of the parties.[95] Parties to a contract constructing a state might or might not agree to incorporate natural law principles in granting the state certain substantive powers while denying it others.

No clear line of demarcation separating rights springing from natural law and those springing from the original contract exists though, as the very act of entering into an

[93] Hunt, *Inventing Human Rights* (2007), 20.
[94] Glendon, *Rights Talk* (1991), 20.
[95] Although the principle that the parties' intent is a governing principle in contractual interpretation has obvious practical problems in the context of the social contract.

original contract was itself something that the law of nature required. Without those pacts, "human society could not be preserved at all."[96] On the other hand, Hume, anticipating the Utilitarian critique of natural law, suggested that the preservation of society, rather than a moral adherence to a timeless, God-given law, was the very point. Principles that conduced to society's long-term preservation, including the promotion of justice, had no moral independent standing, Hume argued. They were not "natural," principles, but conventional and pragmatic ones.[97]

In fact, when American orators explicitly appealed to natural law, leading natural law scholars in America often repudiated such reasoning, arguing that rights sprung from the British common law and the British Constitution.[98] The point tended frequently to get muddled, however. Much of the verbiage surrounding "rights," "liberties," and "natural law" was susceptible of multiple interpretations, so that the terms got caught up in questions of Great Britain's sovereignty, and the colonists' duties to the mother country.[99] The term "liberties" was usually used to denote a privilege the king conferred upon a colony, rather than as a quality emanating from natural law or even the British Constitution.[100]

For Locke, Rousseau, Pufendorf, Grotius and others, the "state of nature" was where natural law was operative. So did the social contract remove us from the state of

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[96] Pufendorf, *Two Books* (2009), 210.
[97] Sigmund, *Natural Law in Political Thought* (1973), 142 – 143.
[98] McDonald, *Novus Ordo Seclorum* (1985), 57 – 58. In Great Britain the term "Constitution" was (and is) a much broader concept than in the United States, referring to a series of acts and traditions rather than to a single document. *See* Sherry, "The Founders Written Constitution," (1989),1130.
[99] White, *Law in American History* (2012), vol. 1, 127.
[100] Ibid., 135.

nature, and did the original contract to which the American colonists were a party arguably remove abstract considerations of natural law as the primary source of rights? Perhaps the leading expositor on natural rights among the colonists was James Otis (for whom Locke was primary) and Otis discussed this point:

> In order to form an idea of the natural rights of the colonists, I presume it will be granted that they are men, the common children of the same creator with their brethren of Great Britain. Nature has placed all such in a state of equality and perfect freedom, to act within the bounds of the law of nature and reason without consulting the will or regarding the humor, the passions or whims of any other man, *unless they are formed into a society or body politic* (emphasis added).[101]

There was, however, a further issue complicating the matter for Otis, his suspicion regarding whether this "state of nature" was a true historical epoch, or whether, as Hume had argued, it was nothing more than a paradigm (which Hume did not find very useful). Locke appeared to believe that the state of nature existed once as an historical fact,[102] an argument that Edmund Burke, among others, found ridiculous.[103] Kent was especially harsh in his dismissal of any supposed "state of nature," writing that the supposition that it ever existed was "innocence and simplicity, a mere dream of the imagination."[104] Burlamaqui, a bit less dogmatic, wrote that the existence of society and civil government were "almost coeval" and that discussion regarding the state of nature is necessarily "reduced to conjectures that have more or less probability."[105] But whether the state of nature ever actually existed or not seemed to make no material difference to Otis. It

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[101] Otis, "The Rights of the British Colonies," *The American Revolution: Pamphlet Debates, 1764 – 1772* (2015), 69.
[102] Locke, *Second Treatise* (1960), 101.
[103] Figueroa, *Traditional Natural Law* (2014), 91.
[104] Kent, *Commentaries,* vol. 2 (2009), 317.
[105] Burlamaqui, *The Principles of Natural and Politic Law* (2006), 277.

was at least a hypothetical contract. As he pointed out, no one at the time he wrote was born into that state or even existed in that state unless it would be two people stranded on a desert island.[106]

Like Locke, however, Otis can be read in more than one way. Did he consider that citizens had surrendered their natural rights – i.e., those rights they possessed in a state of nature – by entering into the "original contract"? And if so, to what extent? Does it matter that (as Hume and Otis were both at pains to point out) no living individual in England or America (at the time he wrote) had actually voluntarily entered into a "contract"? And didn't this fact render the idea of a contract, whether social or original, a fiction, even if it might be a useful fiction for political theorists?

Stirring language to the contrary notwithstanding, Otis *would* concede that natural rights had been ceded to an extent under the social contract, for by entering society, colonists had not renounced their natural liberties "*in any greater degree* than other good citizens."[107] (emphasis supplied.) Hamburger argues that early Americans understood that they retained their natural rights only to the extent permitted by constitutional and civil law.[108] That a right might be designated "natural" had no bearing on whether or not it was retained after the formation of government.[109] And to what extent had they surrendered their rights? To the extent that government was entitled to act for the common good: "The

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[106] Otis, "The Rights of the British Colonies," Wood, ed., *Pamphlet Debates, 1764 – 1772* (2015), 69.
[107] Ibid., 71.
[108] Hamburger, "Natural Law," *Yale Law Journal* (1993) 909. This position is essentially that of Iredell's.
[109] McConnell, "Natural Rights and the Ninth Amendment," *New York University Journal of Law & Liberty*, 5:1, 16 (2010).

Colonists…are not to be restrained, in the exercise of any of these rights, but for the evident good of the whole community."[110] In fact, in revolutionary America, the only word invoked more frequently than the phrase "the common good" was "liberty."[111] The debate over the extent to which citizens surrender their pre-existing rights to government has continued to this day. Some theorists contend that certain rights *cannot* be delegated to government[112] while others argue that any right, including the right to life, liberty and property, can be infringed by government under certain circumstances, and acting for the common good.[113]

This view that natural rights were surrendered to empower government to act on behalf of the common good was Lockean. Locke's argument that individuals united into society for the protection of life, liberty and property, has often been misunderstood and misapplied. Leaving aside his definition of "property" which was considerably broader than the narrow sense in which we use the term today, Locke's writings offered a broad mandate for the governmental role in securing the common, or what Locke called the "public" good. This theme recurs throughout his writings too frequently to be doubted. The legislature had the power, he wrote, to make whatever laws the public good may require, and, in fact, subjects owed their obedience to these laws.[114] The legislature was charged with protecting the society, but protection of individuals within society was a

[110] Wood, ed. Otis, *The Rights of the British Colonies,* "Pamphlet Debates, 1764 – 1772," (2015), 71.
[111] Wood, *The Creation of the American Republic* (1969), 55.
[112] See, for example, Nozick, *Anarchy, State and Utopia*, (1974).
[113] See, for example, Ross, "A Natural Rights Basis for Substantive Due Process," *Universal Human Rights*, 2:2 (April-June 1980) 61, 62.
[114] Locke*, Second Treatise* (1960), 89.

duty *only so far as consistent with the public good*.[115] In this and other points, the influence of Aquinas on Locke was manifest: Like Locke after him, Aquinas argued that natural law was discoverable through reason, must always be ordered to the common good, and must be promulgated.[116]

Locke's concern with the public or the common good is often underappreciated by his critics. One has argued that Locke's theory of the original contract rests upon English legal tradition, the "*entire emphasis* of which has always been the rights of the individual rather than on rights of the people considered in mass." (emphasis supplied).[117] Typical, too, is Rommen's take in his classic work, *The Natural Law*. Under Locke's reasoning, according to this line of thought, "(t)he state is the utilitarian product of individual self-interest, cloaked in the solemn and venerable language of the traditional idea of the natural law." [118] Moreover, this thought of Locke's implies that "the common good is nothing real, that it is merely the sum of the particular goods or interest of individuals."[119] The suggestion is that Locke's idea of the public good was what some commentators would call an "aggregative" one, difficult to distinguish from utilitarian concerns[120]: Assuming a sufficient definition of the public good, ascertaining whether a government was serving that end would be little more than a matter of arithmetic, adding the utility of the several, discrete individuals of the society and subtracting any off-setting detriments. Of course,

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[115] Ibid., 131, 134.
[116] McInerny, trans., *Aquinas: Selected Writings* (1998), q. 90, 612 – 617.
[117] Corwin, *The Higher Law Background of American Constitutional Law* (1955), 63.
[118] Rommen, *The Natural Law* (1998), 79.
[119] Ibid.
[120] See, for example, Murphy, *Natural Law in Jurisprudence* (2006), 63 – 65.

it has long been recognized that the phrase often substitutes for a particular policy preference; moreover, it is not intuitively clear what makes a good "public."[121]

So was Locke really (as Romnen implies) a pre-Bentham and pre-Mill utilitarian? More importantly for our purposes, were the American founders? To conclude so with respect to Locke is to ignore a wide swathe of his writings, not only those from *the Second Treatise* but from those of an earlier date. Utilitarianism, after all, disparages the idea that there are any "natural rights" at all, let alone inalienable ones.[122] Locke emphasized individual rights too frequently to miss that point. There is thus a paradox, but a paradox best explained by what has been called a "paradox of charity," where Locke's defense of individual right is at least partly instrumental, the most effective way to achieve a higher-order good, that works to the benefit of the community.[123] For Locke made clear repeatedly that the state of mankind, the community, was paramount in his thought.[124] "Nature," he wrote, "willeth the preservation of all mankind, as much as is possible."[125] To the extent that he could be classified as a utilitarian, it was because he argued that, as a result of "sanctions" (which could be legal, social, theological, or even physical) imposed when one did not perform one's obligations with respect to the public good, it was in the individual self-interest to act in such a matter.[126]

In addition to his analysis of the public good, Locke focused

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[121] Tuckness, *Locke and the Legislative Point of View* (2002), 58.
[122] See Lyons, "Utility and Rights," in *Theories of Rights,* Waldron, ed (1984)., 114 – 116.
[123] Forde, *Locke, Science and Politics* (2014), 181.
[124] See Locke, *Second Treatise*, s. 6, 7, 128, 135, 182. See also Forde, *Locke, Science and Politics* (2013), 181.
[125] Locke, *Second Treatise* (1960), 182.
[126] Brogan, "John Locke and Utilitarianism," *Ethics* (1959) 88.

on preventing arbitrariness as a limit to governmental power. Government was instituted for the preservation of life, liberty and property, Locke argued repeatedly (and given his other statements, this should be taken as being the equivalent of acting for the public good). Governmental action that was not aimed at these ends was, by definition, arbitrary. Arbitrary exercise of power was also a justification for revolution.[127]

Locke's concern with "arbitrary" power later became a defining feature of American jurisprudence, specifically in cases applying substantive due process. In 1884, for example, the Court reasoned that "broad and general maxims of liberty and justice" had a broader application in limiting governmental power here than those maxims did in England. In the United States, arbitrary legislation is prohibited by the Bill of Rights and those limitations did not merely guarantee particular forms of procedure, but instead, the "very substance" of (in a clear reference to Locke) "individual rights to life, liberty and property."[128] As with Locke, the Court suggested that arbitrary legislation was legislation that was not prompted by the general will, for the general good, and was thus not consistent with the spirit of a government instituted for those same purposes.[129] Subsequent due process jurisprudence found such government action to be arbitrary in more than one sense.[130] Not only could government action infringe certain "fundamental rights," but it might also be so contrary to "those canons of decency and fairness which express the notions of justice of English-speaking peoples" so as to "shock the conscience."[131]

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[127] Ibid, 221, 222.
[128] *Hurtado v. California*, 110 U.S., 516, 532 (1884).
[129] Ibid., 110 U.S. 516, 532 (1884).
[130] Rubin, "Square Pegs and Round Holes," *Columbia Law Review*, 103: 4 (May, 2003), 833, 844 – 846.
[131] *Rochin v. California*, 342 U.S., 165, 169 (1952).

And how could the theory of an original contract between the government and the governed be justified in the absence of actual consent, aside from those rare few who were actually parties to voting on a new, written, single-document constitution? Locke argued that, in addition to *express* consent (which would be only rarely given), citizens could be *presumed* to consent, that they did so *tacitly* when they enjoyed the benefits of the government's dominion.[132] Consent thus bestowed, citizens surrendered their natural liberty to the sovereign. In Locke's England, this was the Parliament. The sovereign was to act on behalf of the public good.

Locke's repeated references, later borrowed by Blackstone, as to the supremacy of parliament in England, were not taken to heart in the United States. Congress here did not hold such an exalted position. Rather, America's "fundamental law" was the Constitution, a document the provisions of which do not admit of self-evident or self-executing applications. Nor is the American Constitution, unlike acts of the English Parliament, easy to alter or amend. Vigorous judicial interpretation in a manner that would not have been necessary in England (where the "fundamental law" could evolve by means other than such judicial interpretation) is thus justified. [133]

While Locke's concerns, discussed above, centered on why a society would abrogate a contract with its government, such as through repeated arbitrary governmental actions, Thomas Jefferson addressed how an individual could do so:

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[132] Locke, *Second Treatise* (1960), 119.

[133] For "narrow originalism, if scrupulously practiced, would be a poor form of constitutional maintenance. It would shackle us to the relatively concrete original meanings or original expected applications of the framers and ratifiers." Fleming, *Fidelity to our Imperfect Constitution* (2015), 174.

> (O)ur ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness.[134]

Jefferson thus viewed an *individual's* "natural right" as withdrawing his consent to the original contract and relocating to another jurisdiction. This was common enough among early American theorists. In his "Inquiry into the Rights of the British Colonies," Richard Bland, in addition to arguing that the original contract implied the surrender of one's natural rights to the sovereign, and that the English Constitution was based on the natural law, sought to mitigate any harshness by providing this remedy. That is one could withdraw his consent, leave the country, and enter into another society.[135] Burlamaqui argued the same, writing that "it is a right inherent in all free people that every man should have the liberty of removing out of the commonwealth."[136] Locke would agree that a citizen (or at least one who owned land) had a right to withdraw tacit consent to the original contract, but the right of withdrawal did *not* obtain where actual, that is, *express* consent was given. In the latter instance, the subject was "perpetually and indispensably obliged to be and remain unalterably a subject" to that government, except where the government itself was dissolved.[137] This issue of consent and the withdrawal of consent as affecting the mutual obligations between the citizen and the state would be revisited by Justice

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[134] Peterson, ed. Jefferson, *Writings* (1984), 105 – 106.
[135] Gordon Wood, ed. Richard Bland, "An Inquiry into the Rights of the British Colonies," *The American Revolution: Pamphlet Debate, 1764 – 1772* (2015).
[136] Burlamaqui, *The Principles of Natural and Politic Law* (2006), 366.
[137] Locke, *Second Treatise* (1960), 121.

Iredell in an early Supreme Court case in which Iredell (in a *seriatim* opinion) argued that there were limitations on in individual's right to expatriate. An individual's private will alone was not dispositive,[138] but the judgment of the people was, as Locke held that the "body of the people" was the "proper umpire."[139]

Jefferson was often viewed as paradigmatic for an emphasis on individual rights and liberties. Many have argued that the Declaration of Independence which he was primarily responsible for authoring, was a natural rights document, and ought to be considered part of America's constitutional order.[140] While it might be easy to remember that Jefferson wrote about the "consent of the governed," focusing on the contractual nature of government, is it too often forgotten that this consent extended only to government exercising "just powers".[141] In other words, was government constrained by natural law, irrespective of the specific terms of the "Contract"? Jefferson could potentially be read this way. But again, there is perhaps an attempt among analysts to impose a rigorous philosophical consistency on thinkers whose primary aim was rhetorical. In his "Summary View of the Rights of British America," Jefferson seemed to indicate that his objection to oppressive British rule had nothing to do with any perceived injustice done to "natural rights" in an individualistic sense; America's grievance was collective and jurisdictional in nature. Jefferson again:

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[138] *Talbot vs. Jansen*, 3 U.S. 133, 162 (1795). Hall and Klosko, *Political Obligation and the United States Supreme Court*, The Journal of Politics (1998), 472.
[139] Locke, *Second Treatise* (1960), 242.
[140] See Barnett, *Our Republican Constitution* (2016), 41 - 45. Barnett also argues that the Declaration relied heavily on the Virginia Declaration of Rights.
[141] Ibid., 41.

> (W)e do not point out to his majesty the injustice of these acts, with intent to rest on that principle the cause of their nullity; but to shew that experience confirms the propriety of those political principles which exempt us from the jurisdiction of the British parliament. The true ground on which we declare these acts void is, that the British parliament has no right to exercise authority over us.[142]

One of a mind to do so can easily assemble a collection of quotations from leading theorists suggesting that natural law principles *as such*, are necessary complements to constitutional adjudication, but a more reasonable interpretation of all the available evidence is that while natural law principles animated and helped develop English (and derivatively, American) constitutional principles, they have not had independent standing, at least so far as the federal Constitution was concerned. But several Supreme Court Justice have relied on natural law in their opinions, at least arguably and some have accused others of having done so. Beginning, of course, with Justice Iredell in *Calder*.

CALDER V. BULL IN THE NINETEENTH CENTURY

INTRODUCTION

The written Constitution of the United States dates from its drafting in 1787 and ratification in 1788. For much of that 229-year history, the United States Supreme Court has been the ultimate arbiter of its meaning and interpretation. While several interpretive approaches have developed over two centuries,[143] only a select few justices have ever

[142] Peterson, ed. Jefferson, "A Summary of the Rights of British America," *Writings* (1984), 110.
[143] See, e.g., Bloom, ed., *Confronting the Constitution passim* (1979); Fleming, *Fidelity to Our Imperfect Constitution* (2015), 2 – 19 (arguing that even within the school known as "originalism," there are several divergent views).

suggested that natural law or natural justice should influence the decision whether to hold that a legislative enactment, state or federal, is void as unconstitutional.[144] Still, natural law's role in judicial interpretation was discussed thoroughly as recently as 1991, when members of the United States Senate Judiciary Committee extensively questioned Supreme Court nominee Clarence Thomas about his views. This was after a prominent Harvard Law Professor penned a New York Times editorial suggesting that, as a justice, Thomas might base his opinions on natural law.[145] And more recently, it has been argued that at least two Supreme Court justices, Thomas and Antonin Scalia[146] have relied on "higher law" precepts in performing their judicial duties.[147] On the other hand, a prominent commentator has recently argued, more accurately, that Justice Scalia did *not* recognize the Constitution as protecting natural rights, while expressing the hope that the newest addition to the Supreme Court, Neil Gorsuch, would correct that "misunderstanding."[148]

This section will consider natural law considerations by tracing a century of the cited history of a single case that was the first Supreme Court opinion to join clearly the

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[144] For examples of cases in which individual justices (although not the Court as a whole) have seemed to employ natural law reasoning, see Justice Field's dissent in *Knox v. Lee,* 79 U.S. 551, 634 (1871) (arguing for certain "unchangeable principles or right and morality" and "fundamental principles of eternal justice") (Field, J., dissenting), and Justice Douglas's dissent in *Poe v. Ullman,* 367 U.S. 497, 509 (1961) *(*arguing that certain rights are "indispensable in a free society") (Douglas, J., dissenting).

[145] Tribe, "Clarence Thomas and 'Natural Law,'" *The New York Times*, July 15, 1991. http://www.nytimes.com/1991/07/15/opinion/clarence-thomas-and-natural-law.html. Accessed December 31, 2016.

[146] Scalia passed away in February, 2016.

[147] Murray, Anthony, "When Judges Believe in Natural Law," *The Atlantic,* January 27, 2014. http://www.theatlantic.com/national/archive/2014/01/when-judges-believe-in-natural-law/283311/. Accessed December 31, 2016.

[148] Will, "Gorsuch's Chance to Correct Scalia on the Constitution," *The Washington Post*, February 1, 2017.

debate about the appropriateness of using natural law in judicial review – *Calder v. Bull*.[149]

This section is then a "biography" of *Calder*, and its methodology will be governed by that fact. All cases to be considered in depth are selected because one or more opinions, whether the opinion for the Court, a concurring opinion, or a dissenting opinion, cited *Calder* specifically for the natural law debate in which Justices Chase[150] and Iredell engaged. These are both necessary and sufficient factors for my analysis. Moreover, the cases discussed herein are also exhaustive. Every Supreme Court case that relied on one of the opinions in *Calder* up to the dawn of the Twentieth Century for the natural law debate is included.

This section seeks to contribute an important component of the answer to the question whether, and if so, to what extent, natural law (or, to use Justice Iredell's term, "natural justice") figured in Supreme Court jurisprudence in the century following *Calder*. *Calder* is an appropriate case to use in this analysis, since it became paradigmatic for natural law analysis as a result of the Chase-Iredell exchange.[151] This research will thus contribute to the existing literature by isolating a single case's progeny. That case, *Calder*, is the best vehicle for this approach, which has the advantage of focusing the discussion on a single objective variable: whether the Court's opinion or a justice's opinion cited either Chase or Iredell, or both, for natural law considerations. There is thus no subjectivity in

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[149] *Calder v. Bull*, 3 U.S. 386 (1798).
[150] The "Justice Chase" (Samuel) writing for the Court in *Calder* should not be confused with the "Chief Justice Chase" (Salmon) who figured in later, post-civil war cases. Both are discussed extensively herein.
[151] *See*, e.g., Levy, *Original Intent and the Framers' Constitution* (1988), 134-145; Hall, ed., *The Oxford Companion to the Supreme Court of the United States,* 2nd ed. (2005), 135; White, *Law in American History, Vol. 1* (2012), 202.

selecting cases. For that reason, the work cannot pretend to be an exhaustive history of natural law: cases that might otherwise be selected for inclusion will not be considered.[152]

Ultimately, as we will see, a case could be made that "natural law" has been a focus in this line of cases, but usually (with a few noteworthy exceptions) indirectly. Natural law (or "rights," a different but related concept) has been overtaken by Americans' views as to the proper role of government as derivative from a sort of macro-agreement between citizens and governing authorities, that was, in turn, influenced by natural law considerations. In other words, our republican institutions may have incorporated natural law or natural rights precepts, but the resulting positivistic law governs exclusively. Natural law and natural rights considerations have been subsumed within that positive law, to the extent relevant for judicial interpretation. This is *not* to discount the importance of natural law and natural rights in Supreme Court jurisprudence. For as "(m)ost everyone knows, or should know...these rights were formulated in light of natural law theories."[153] Thus there arguably is a need, in judicial constitutional interpretation to take cognizance of natural law and natural right theories.[154]

One such natural right was particularly important to America's founding

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[152] An obvious example is *Terrett v. Taylor*, 13 U.S. 43 (1815). The unanimous opinion written by Justice Story struck down a Virginia statute confiscating church lands after the disestablishment of the Episcopalian church in that state. Story wrote that the statute was inconsistent with principles of "eternal justice," and "natural justice" and "utterly inconsistent with a great and free republican government." 13 U.S. 43, 50, 51 – 52 (1815). Commentators have argued that he was relying on natural law, but that case is not included herein because Story did not cite *Calder*. *See* Levy, *Original Intent and the Framers' Constitution* (1988) 135 – 136.

[153] Hittinger, "Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?," *The Review of Politics,* 55 (1993):1, 5, 14.

[154] Ibid., (1993), 15.

generation: the right to property.[155] That right was (along with the rights to life and liberty) "one of the great triad of inalienable natural rights."[156] Thus, one sees that laws impairing the obligation of contract were one of the few original constitutional restrictions on the states,[157] and a prohibition on taking private property except for a public purpose, and then only with just compensation was memorialized in the Bill of Rights.[158] Justice Chase in *Calder* defined a "right" as the "power to do certain actions."[159] Interestingly, Chase did not defend property rights as being "natural." Instead, he specifically argued that they were the product of a compact, express or implied, and were thus conferred by society.[160] The point is crucial, because Iredell's opinion suggested that Chase was relying on concepts of "natural justice."

Instead of invoking natural rights, based on natural law, America's founders might have been invoking rights based on our history as British subjects.[161] There is evidence, however, that natural law has occasionally had a more direct impact on Supreme Court jurisprudence. The Court's decision in *Loan Association v. Topeka,*[162] for example, did not

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[155] *See*, Smith, Rogers " The Politics of Rights Talk, Then and Now," in Shain, ed., *The Nature of Rights at the American Founding and Beyond* (2007), 308.
[156] Rakove, *Original Meanings* (1997), 290.
[157] U.S. Constitution, Article I, Section 10, Clause 1.
[158] U.S. Constitution, Amendment V. The Bill of Rights also enshrines other "rights" early Americans viewed as natural, such as their right to be governed under the rule of law, as reflected in the Due Process Clause of the Fifth Amendment. But early American rhetoric often blurred the lines between "natural" and other types of rights, those rights that came from their prior status as British subjects. That is reflected also in the Bill of Rights. Was the right to be represented by counsel (U.S. Constitution, Amendment VI) a "natural" one, for instance?
[159] *Calder v. Bull*, 3 U.S. 386, 394 (Opinion of Chase, J.) (1798).
[160] Ibid., 3 U.S. 386, 394 (Opinion of Chase, J.) (1798).
[161] The United States was unusual in that its Constitution, at least since 1788, has been a single written document. The term "constitution" had previously often been used in a much broader sense, incorporating several historical documents, beginning with *Magna Charta*, as well as the rights of the English as established by several centuries of common law.
[162] *Loan Association v. Topeka*, 87 U.S. 655 (1874).

rely on *any* specific constitutional provision and one encounters objections to legislation that "no judge in Christendom" would sanction a particular law.[163]

A word about the analytical differences between natural law and natural rights: Since Thomas Aquinas wrote systematically on the subject of natural law, theorists have commonly asserted that natural law is that law which is discoverable by reason.[164] In fact, the point arguably goes back as far as Aristotle.[165] When Aquinas wrote about the natural law and used the term "right" (or the Latin *jus*), he was referring to the nature of relationships; "rights" were not meant as "possessions," an important shift that one commentator has attributed to Hugo Grotius,[166] although others trace it to William of Ockham or even to earlier medieval theorists.[167] Locke meant "rights" to refer to possessions under the natural law (in Locke's case, the right to life, liberty and property). Locke's interpretation was crucial for the American founders, who emphasized liberty and self-governance rather than the constraining norms inherent in classical natural law doctrine.[168] A Twentieth-Century political philosopher, Jacques Maritain, noted that while the doctrine of natural rights springs from natural law, "the power of the State and of social interests cannot impose itself upon this universe (of natural rights)."[169]

After considering the *Calder* opinions, I will trace the history of the Chase-Iredell debate regarding natural justice considerations as reflected in subsequent Supreme Court

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[163] *Knox v. Lee,* 79 U.S. 457, 669 (Field, J., dissenting) (1871).
[164] *See* Locke, *Second Treatise* (1960 ed.), 25, 56.
[165] See Sinclair, trans., "Aristotle: The Politics" (1962) Book III, Section XVI, p. 226.
[166] *See* Finnis, *Natural Law and Natural Rights*, 2nd ed. (2011), 206 – 209.
[167] Oakley, *Natural Law, Law of Nature, Natural Rights* (2005), 89 – 97.
[168] *See* Strauss, Leo, *Natural Right and History (1965),* 202 et.seq.
[169] Maritain, *Natural Law: Reflections on Theory & Practice* (2001), 75.

opinions, where we will see a reliance on one justice's opinion or the other has been used to justify a variety of judicial judgments regarding the power of Congress, the power of state legislatures, and the power (or authority) of the Court to regulate, especially (in the Nineteenth Century) in matters of economics and business.

A careful review of Supreme Court jurisprudence as circumscribed by those cases that have continued the "natural law" debate begun in *Calder v. Bull*, will yield several related conclusions. *First,* the Court speaking as a court, has never specifically advocated that natural law precepts, *as such*, are controlling in federal adjudication. Some individual justices have come close, and some justices have (with respect to fellow justices) argued, along with legal commentators, that natural law has influenced judicial thinking, but those are different matters. Moreover, any attempt to "filter out" natural law influences and to consider them in isolation just won't work. For there is little doubt that natural law has often served as a mediating influence in considering even explicit constitutional provisions.

Second, and notwithstanding the first point, natural law has had a substantial influence in American jurisprudence. That influence was seen – and often specifically acknowledged – in *state* constitutions[170] and in America's Declaration of Independence, and natural law precepts often figured in the rhetoric of America's founders, although that was mingled with, and often predominated by, language holding that Americans' rights and liberties were an inheritance from their English forebears. One often finds rhetoric that

[170] Indeed, numerous state constitutions contained some sort of explicit natural law grounding, but it must be kept in mind that state powers were not limited – at least not originally – in the same way the founders limited the power of the *federal* government. The states had a general "police" power that the federal government lacked.

America's founding documents were based on timeless principles or precepts that are common to every republican government, but it appears that, to the extent those principles and precepts are operable in courts, it is only because they have been subsumed within the positive law. This idea that the law is, at least in part, a function of a larger construct, including a society's historical influences, is what Montesquieu had in mind when he referred to the "spirit of the laws," a phrase that Supreme Court justices frequently employed in early opinion-writing. And for both the American founders and their English precursors, the most salient feature of natural law was reason. It is in man's nature to be *reasonable* in the highest sense of that term, and law (especially constitutional law) was routinely thought to be the embodiment of right reason.

Third, the issue often collapses into the debate surrounding that of judicial review. A plausible case may be made that Americans, forming a new government and entering into a new "original contract," expected their leaders to respect certain natural rights and to be governed by a higher law, but the question of whether the *judiciary* had the power or authority to make that happen was a step removed from that. And the extent that the judiciary did or did not have the power to enforce natural law precepts will figure in every judicial opinion contained herein.

Fourth, the ratification of the Fourteenth Amendment in 1868, in the immediate aftermath of the Civil War, fundamentally altered the nature of American Government. Prior to that amendment's ratification, there was scant textual basis for national review of individual state's actions. The federal Constitution, by its own terms, limited federal governmental authority, not the authority of individual states. In addition to making the

United States a single unit, that is a nation (so that "the United States are" was replaced by "the United States is"), the Fourteenth Amendment required states (as opposed to just the federal government) to provide "due process of law." The Due Process Clause has been interpreted as containing a "substantive" component, a guarantee that state legislatures cannot pass certain types of legislation, irrespective of the process employed. Not surprisingly, most "natural law" debate about Supreme Court opinions in the Twentieth Century and beyond, has taken place in the context of "substantive due process."

Fifth, Supreme Court opinions have tended to follow the relative values and mores of the age. While judicial theorists have disputed whether or not the Supreme Court has functioned as a leading indicator (that is an institution molding public opinion), or a "Republican Schoolmaster,"[171] the fact is that courts have often reflected contemporary beliefs. Thus, when in American history, economic liberty and property interests, as reflected in the government's laissez-faire approach to the economy, predominated, courts were keen to invoke legal principles (whether "natural" or not is beside the instant point) that bolstered those interests. When individual liberty and autonomy became a more pronounced value, the courts' protection of those interests was heightened.

These issues cannot easily be separated. The Supreme Court's common-law approach to constitutional adjudication and of the nature and limits of judicial review are, for example, closely related problems.[172] Supreme Court justices of every philosophical

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[171] The reference is to Lerner, "The Supreme Court as Republican Schoolmaster," *The Supreme Court Review,* Vol. 1967 (1967), 127 – 180. Lerner argued that, in the Supreme Court's early years of "circuit-riding," justices made a conscious effort to educate people in the principles of good citizenship and republican government.

[172] *See* Strauss, *The Living Constitution* (2010), 46 – 47 (addressing criticisms that judicial review is undemocratic when combined with the common law approach).

persuasion have argued for a limiting principle on judges' discretion, recognizing two important facts. First, federal judges are not elected and thus the federal judiciary is representative only in the indirect sense that federal judges are appointed by presidents and confirmed by the Senate. Second, federal judges serve for life, not removable except by the rarely-used impeachment process. Moreover, while a judicial ruling construing statutory law may be reviewed and reversed by legislative bodies, where a court authoritatively construes the Constitution, there is no review, save for a higher court – which is to say in the case of the Supreme Court, no review at all.

Something akin to the modern American concept of judicial review existed in Enlightenment England, although the strict separation-of-power doctrine which pervades American jurisprudence (in which the final conclusion on an act's constitutionality is the province of the judicial branch of government, and the legislative and executive branches do not share in the exercise of judicial functions) was not present.[173] It took one of England's greatest legal innovators, Lord Coke, to establish the principle that the King did not have the authority to judge as between subject and subject, but even Coke recognized an important judicial role for the English Parliament.[174] It is well to remember that the process of judicial review developed differently in the United States where the legislative body did not have the same attributes of supremacy that Coke and Locke and others attributed to the English Parliament, and where the judicial branch was charged with fidelity to the Constitution.

[173] Corwin, *The Higher Law* (1955), 38 – 39.
[174] Ibid., 51.

Calder v. Bull: The Facts and the Chase-Iredell Exchange

It is surprising that *Calder v. Bull*[175] became constitutional law and natural law canon. The facts in this case were pedestrian, involving as they did a relatively simple dispute over probating a will. The respondents, the Bulls, lost in probate court, attempting to take property under a will that the state probate court refused to record.[176] Under Connecticut law at the time, the judgment of the probate court became final with no further avenue of appeal. But two years later, in 1795, the Connecticut legislature passed a "resolution or law" granting a new hearing with the right of appeal. The Bulls won the subsequent case and the Calders appealed to the U.S. Supreme Court, which faced this single issue: Was the law passed by the Connecticut Legislature *ex post facto*, thus violating the constitutional prohibition against any state passing such laws?[177]

The Supreme Court found no constitutional violation. The traditional understanding of the term "*ex post facto,"* as reflected in Blackstone's *Commentaries*, the *Federalist Papers*, state constitutions and state ratifying conventions, was that the doctrine protected persons from state-inflicted punishment for acts that were legally unobjectionable when committed. The concept also prohibited the state from imposing more severe punishments than were available at that time.[178] In other words, the constitutional prohibition was against not all retroactive laws, but only against those imposing criminal sanctions. Justice Chase, in his *seriatim* opinion,[179] explicitly cautioned

[175] *Calder v. Bull,* 3 U.S. 386 (1798).
[176] The opinion does not make clear why the probate court considered the will invalid.
[177] U.S. Constitution, Article I, Section 10
[178] *Calder v. Bull,* 3 U.S. 386, 390 – 392 (opinion of Chase, J.) (1798).
[179] The Court did not then follow its current practice of issuing an opinion "for the Court" (i.e., an

against construing the *Ex Post Facto* Clause to have a wider application; such an interpretation would, he wrote, "greatly restrict the power of the federal and state legislatures; and the consequences of such a restriction may not be foreseen."[180]

Countless subsequent federal courts have relied on *Calder* for its relatively straightforward explanation of the *Ex Post Facto* Clause. On this point, the Court was unanimous. But the opinion has become canonical for a different reason. Justice Chase and Justice Iredell, who each wrote separate opinions, disagreed as to whether extra-constitutional considerations, something other than applicable positive law,[181] could be considered. Justice Iredell referred to this extra-constitutional source as "natural justice"[182] but to avoid question-begging, we will not use that terminology yet. Justice Chase wrote a famous extended passage on the limits of legislative power, discussed below. The *federal* constitutional limits on state power were very few (in addition to the federal prohibition on *ex post facto* laws, state legislatures could not make laws impairing the obligation of contract, an issue we will revisit below). Still, it seems likely that Justice Chase would not have agreed that he was making a case for natural justice as being primary over constitutional law. Justice Iredell claimed, on the contrary, that courts were limited to applying specific provisions of the Constitution. The debate, although taking different forms and using different verbiage, continues to this day.

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opinion endorsed by a majority of the justices). In *Calder*, each justice spoke separately, although the specific holding (but not the reasoning) was unanimous.

[180] *Calder v. Bull,* 3 U.S. 386. 393 (opinion of Chase, J.) (1798).

[181] I am assuming a "constitution" counts as "positive" law, but even that point has been disputed. See Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* (1987), 1127, 1146.

[182] *Calder v. Bull,* 3 U.S. 386, 398 (opinion of Iredell, J.) (1798).

Justice Chase's language unquestionably was *dicta*, language not necessary to the holding. Despite suggesting that the judicial branch would strike down legislative acts that worked a "manifest injustice,"[183] the Court upheld this law, so Chase and the Court had no occasion to exercise this judicial power. (Although the 1803 case of *Marbury v. Madison*[184] contains the first Supreme Court holding that the Court had the power to declare an act of the legislative branch void, that power is clearly contemplated in *Calder*, particularly in Justice Iredell's concurring opinion that the Court would exercise this power, although only in a "clear and urgent case."[185])

As the *Calder* Court considered a state law, it was unconcerned with the enumerated powers principle that the federal government could act only pursuant to a specific grant of power. Under the federal Constitution, drafted at the Constitutional Convention in 1787 and subsequently ratified in state conventions, "enumerated powers" was the interpretative rule: a power not specifically granted by the Constitution was denied the federal government. The same was not true at the state level, where governmental authority was plenary, unless cabined either by the *state* constitution,[186] or by one of the few provisions of the federal Constitution limiting the states.

That there was otherwise no constitutional restraint[187] on governmental power at the state level notwithstanding, Chase wrote that he could not "subscribe to the

[183] *Calder v. Bull,* 3 U.S. 386, 388 (opinion of Chase, J) (1798).
[184] *Marbury v. Madison,* 5 U.S. 137 (1803).
[185] *Calder v. Bull,* 3 U.S. 386, 399 (opinion of Iredell, J.) (1798).
[186] McDonald, *Novus Ordo Seclorum* (1985), 269 – 270; Rakove, *Original Meanings* (1997); 191 – 192; Levinson, *An Argument* (2015), 323 – 324.
[187] The term "constitutional" used here in the more limited American sense and not in the broad English sense.

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."[188] Chase explicitly argued for a more fundamental law restraining state action, certain "vital principles" of republican government that legislatures must honor. Government authority could not authorize "manifest injustice" or "take away that security for personal liberty, or private property for the protection whereof the government was established."[189] Any such acts, Chase wrote, could not even be dignified with the name "law."[190] They would be "contrary to the great first principles of the social compact."[191] Interestingly, Chase included among his examples of actions that would violate "vital principles" of republican government several things that specific constitutional provisions prevented the states from doing, including impairing contracts, passing ex post facto laws,[192] and taking private property without compensation.[193]

In his concurrence, Iredell took issue with Chase's putative adjudicative method. State legislation that violated either the federal or state constitutions would unquestionably be void, he wrote. But the Court lacked the authority to strike down a law merely because

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[188] *Calder v. Bull,* 3 U.S. 386, 387 – 388 (opinion of Chase, J.) (1798).
[189] *Calder v. Bull,* 3 U.S. 386, 388 (opinion of Chase, J.) (1798).
[190] Ibid.
[191] *Calder v. Bull*, 3 U.S. 386, 388 (Opinion of Chase, J.) (1798). Chase's argument stemming from the "first great principles of the social compact" was nearly a direct quote from Madison's writing in the *Federalist.* In *Federalist* 44, Madison condemned bills of attainder, ex-post-facto laws and laws impairing the obligation of contract. Even though some states did not have specific constitutional prohibitions against such laws, all such laws violated the "spirit and scope" of those state charters. *The Federalist,* 44 (1979), 299.
[192] Both the Contracts and the Ex Post Facto Clause are found in U.S. Constitution, Article I, Section 10.
[193] The Takings Clause is found in U.S. Constitution, Amendment V.

that law violated its idea of "natural justice," a concept "regulated by no fixed standard."[194] Iredell did not go so far as to argue that a legislature could pass a law that violated natural justice (he left that issue open), but he did claim that the judiciary had no authority to strike down legislative action on that basis, citing Blackstone for that principle.

The cited section from Blackstone's *Commentaries* posits that no court has the power to strike down a law because that law is contrary to "common reason,"[195] and Iredell perhaps tries to make Blackstone's argument bear too much weight. Blackstone approached the relationship between law and reason differently from John Locke, who suggested that natural law was discoverable through reason,[196] and who went so far as to argue that reason *is* the law in the state of nature.[197] Blackstone took a more limited view of reason's efficacy. Reason, he wrote, is corrupt, clouded, and subject to other limitations,[198] and the true law of nature was discoverable only through divine revelation. Blackstone, as we'll see, also highlighted a major difficulty with natural law analysis, namely that its principles were not self-effecting or self-executing. When putting principles into policy, disagreements inevitably would arise as to their proper application. This was the primary reason why English lawyers of Blackstone's time began also to emphasize the virtue of *obedience*, as conflicting views of reason's dictates led naturally to the question of *whose* views would control.[199]

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[194] *Calder v. Bull,* 3 U.S. 386, 399 (opinion of Iredell, J) (1798).
[195] Blackstone, *Commentaries*, I (1983), 91.
[196] Locke, *Second Treatise* (1960 ed.), 25, 56.
[197] Ibid., 6.
[198] Blackstone, *Commentaries*, I (1983) 42.
[199] See Hamburger, *Law and Judicial Duty* (2008), 24 – 32.

Still, the equation of law with reason, or the argument that law is dependent on reason (as opposed simply to will or opinion) has a long pedigree, stretching at least as far back as Aristotle, who concluded that law is "reason without passion."[200] Aquinas, who openly appropriated Aristotle, argued that law is a system of commands and prohibitions and that reason is the rule and measure of all human acts, because it is the first principle of human acts.[201] Hobbes argued, like Locke, that a "law of nature is a dictate of right reason," and for Hobbes (who also wrote that the right to defend one's life was one right not surrendered to the sovereign) what was "reasonable" was whatever tended to preserve one's life as long as possible.[202] English paeans to their common law as embodying the highest reason, were soon to reach exalted heights. Seventeenth and Eighteenth-Century theorists would write that their common law was the "highest expression of human reason," the "absolute perfection of reason," that it consisted in "supernatural wisdom" such that its tenets were above the laws of parliament, and that its precepts were the "most favorable to civil liberty, standing the nearest to the divine law."[203]

This rhetoric equating law with reason was common enough among America's founders as well, although perhaps a bit more understated. Samuel Adams, for example, apropos of the Stamp Act the British Parliament passed in 1765, claimed that the "leading principles of the British Constitution have their foundation in the Laws of Nature and

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[200] See Corwin, *The Higher Law* (1955), 8. Corwin relies on the Weldon translation of 1905; other translations use the word "intelligence" instead of reason. See Sinclair, trans., "Aristotle: The Politics" (1962) Book III, Section XVI, p. 226.
[201] McInenry, trans. *Aquinas: Selected Writings* (1998), q. 90, 612 – 613.
[202] See Stewart, *Nature's God* (2014), 140 – 141.
[203] See Corwin, *The Higher Law* (1955), pp. 34 – 35, n.94 - 96.

universal Reason. British Rights are in great measure, unalienably, the Rights of the colonists and *of all Men else"* (irregular capitalization in original; emphasis supplied).[204] Reason, after all, is not provincial.[205]

But Blackstone was correct that the conclusions reason compels are often not self-evident. Locke, when discussing what we know apart from divine revelation, would distinguish between things we know immediately, that is through sense perception (that an apple is red, for example) from things we know only through reason, that is mediately. Reason, then, provides the connection (through "sagacity" and "illation" or "inference") for the intermediate ideas between the extremes of sense perception and ultimate conclusion.[206] It is too plain for argument, however that people vary widely in their "sagacity" and ability to draw inferences, and there is no widely-accepted definitive standard for concluding what reason dictates. The operative question is, "who decides?"

In addition to highlighting reason's limitations, Blackstone's argument for denying to the judiciary the right to declare an act of Parliament void was that to grant such a right would be "to set the judicial power above that of the legislature, which would be subversive of all government."[207] To grant the judiciary the power of "judicial review" would be, in Blackstone's judgment, to place the judicial branch of government over the legislative; although he insisted on the absolute nature of English rights to liberty, it appears that he

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[204] Quoted in Goetzmann, *Beyond the Revolution* (2009), 20 –21.
[205] The emphasis on reason continued through to the Constitution's ratification. Madison was to write in the *Federalist* that it is the "reason alone...that ought to control and regulate the government." Madison, *The Federalist* 49 (1979), 340. *See also* Mansfield, *America's Constitutional Soul* (1991), 212.
[206] Rogers, "Boyle, Locke, and Freedom," *Journal of the History of Ideas,* 27:2 (April – June, 1966), 205, 213.
[207] Blackstone, *Commentaries* I (1983), 91.

thought the legislative branch must police itself, or that it would correct errors in its application of natural law principles when the judiciary or others brought those errors to its attention.[208] Blackstone, of course, believed in parliamentary supremacy, and was roundly criticized by many of America's founders, including Thomas Jefferson and James Wilson, as being no friend of liberty.[209] Different considerations might well obtain in the United States, where Congress was not considered supreme, and where placing the judiciary over the legislature, at least in matters of constitutional interpretation, might not be so "subversive of all government." Still, early American courts often assumed that statutes were passed to effect natural justice, that this indeed was their very purpose.[210]

An aside on Iredell's using the term "natural justice" as opposed to "natural law": Early American theorists used the former term infrequently. In fact, *Eliot's Debates*, a relatively comprehensive compendium of American political thought from the time of the American Revolution, uncovers only three instances of the exact term prior to its use by Iredell.[211] Blackstone also used the term three times in his *Commentaries*, always to denote the duties that parties owe to each other,[212] consistent with Blackstone's apparent view that the concept of justice is subsumed within the natural law.[213] More recent commentators have argued that "natural justice" was synonymous with the term "natural law" until the 17th Century, after which the term's limited use was meant to convey the use of natural law

[208] Sigmund, *Natural Law in Political Thought* (1971), 100 – 101.
[209] Lubert, "Sovereignty and Liberty," (2010) *Review of Politics*, 271, 272.
[210] See Helmholz, *Natural Law in Court* (2015), 165 and cases cited therein.
[211] Elliot's Debates, http://memory.loc.gov/ammem/amlaw/lwed.html. Accessed June 14, 2016.
[212] Online Library of Liberty, *Blackstone's Commentaries*, http://oll.libertyfund.org/search/title/2140?q=%22natural+justice%22. Accessed June 14, 2016.
[213] See Blackstone, *Commentaries*, vol I. (1983), 40.

only in the administration of justice.[214] For our purposes, we may assume that Iredell viewed "natural justice" as being a part of "natural law" regardless of whether he viewed the terms as synonymous.

In his *Calder* opinion, Iredell was answering a question with which modern political and legal theorists continue to grapple: "Is every 'settled' legal rule and legal solution settled by appeal exclusively to 'positive' sources such as statute, precedent and custom? Or is the correctness of some legal decisions determinable only by appeal to some 'moral' ('extralegal') norm?"[215] Iredell's answer was "yes," to the former question, and "no" to the latter.

Iredell's own history on this point was checkered however. He was not completely averse to natural justice considerations as a member of the North Carolina ratifying convention some years earlier. Instead, he was on record as saying that, in the absence of an "express Constitution," the powers of state legislatures would have been absolute, so long as they did not pass acts "inconsistent with natural justice."[216] While at least one commentator has argued that the quoted language made clear that Iredell did not consider the "written constitution…the sole source of fundamental law,"[217] and that he "viewed a written constitution as supplementing natural law rather than as replacing it with a single instrument,"[218] the language is equally susceptible of the interpretation that Iredell thought

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[214] Razi, "Natural Justice by H.H. Marshall," *The American Journal of Comparative Law* (1960), vol 9, no 3.
[215] Finnis, *Natural Law and Natural Rights,* 2d edition (2011), 290.
[216] Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review*, 54:4, (1987); 1127, 1144.
[217] Ibid.
[218] Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review,* 54:4 (1987); 1127, 1144.

that whatever natural justice principles should be considered were taken into account by the state and federal constitutions, and that those written documents *did* supersede any other natural justice considerations. This interpretation has the benefit of being consistent with his *Calder* opinion.[219] Still, the addition of a Bill of Rights (in 1791), emphasizing as it does that governmental authority is to be limited, might have indicated a presupposition that the Constitution was to be in accord with natural law.[220] Iredell himself had opposed a Bill of Rights in the North Carolina ratifying convention, arguing that it would dangerously suggest that any right not enumerated had been given up to the government, under the principle of construction that to express some things is to exclude others: *expressio unius est exclusio alterius.*[221]

In claiming that Chase was reasoning from a natural justice perspective, Iredell made the same assumption about a fellow justice's opinion that Justice Black was later to make frequently in the Twentieth Century.[222] But Chase, like later justices, did not use the term, or any of its then common synonyms, such as "natural law" or "eternal justice." There were instead, "fundamental" and "vital" principles inherent in the nature of free, republican governments, founded by an "express compact," he argued,[223] principles which must serve as an interpretative aid in determining whether legislative action, at either the state or federal level, was a legitimate exercise of governmental power. Famously, among

[219] See Wood, *Creation of the American Republic* (1969), 542.
[220] Hittinger, *The First Grace* (2003), 116.
[221] McConell, "Natural Rights and the Ninth Amendment," *New York University Journal of Law & Liberty* (2010), 10.
[222] *See* Simon, *The Antagonists* (1989), 72.
[223] *Calder v. Bull,* 3 U.S. 386, 388 (opinion of Chase, J) (1798).

Thomas Jefferson's fundamental points in the Declaration of Independence, were that certain rights, among them the right to life, liberty and the pursuit of happiness, were "unalienable"; one could not give them up *even if one wanted to.*[224] The logical corollary was that citizens could not "contract" away these natural rights to a sovereign, and the original contract should not be interpreted as if they had. Iredell's reasoning was that Chase's "fundamental" and "vital" principles were the same as "natural" ones. At a minimum, these principles were inherent in a free republican government and there was a presumption against interpreting the Constitution inconsistently with them.

At least one commentator argues that Chase did *not* have natural law in mind. Claims that he did are "curious, if not utterly baseless,"[225] and Chase's reference to principles of "law and reason" was a reference to *common* law,[226] not *natural* law.[227] And it is true that early Americans viewed the common law, in Kent's words, as "the perfection of reason."[228] Common law analysis was prominent in Chase's opinion, the commentator noted, citing Justice Stevens' opinion for the Court in the 2000 case *Carmell v. Texas.*[229] The citation is problematic, however, since in *Carmell,* Justice Stevens (writing for the Court) focused on Chase's analysis of the *Ex Post Facto* Clause's meaning. In analyzing that Clause, Chase did discuss common law interpretations at length, and concluded that,

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[224] Barnett, *Our Republican Constitution* (2016), 38. One recent commentator has argued that Chase, in writing of the "social compact" was referring to the Declaration of Independence. Jaffa, *Storm Over the Constitution* (1999), 4.
[225] Edlin, "Judicial Review Without a Constitution," *Polity* (2006), 361.
[226] Blackstone defined common law as general customs, specific customs and "certain particular laws…adopted and used by some particular courts of pretty general and extensive jurisdiction." Blackstone, *Commentaries*, I (1983), 67.
[227] Edlin, "Judicial Review Without a Constitution," (2006), 360.
[228] Kent, *Commentaries*, I (2016), 464.
[229] *Carmell v. Texas*, 529 U.S. 513 (2000).

in English common law, the phrase "*ex post facto*" was used to denote laws that imposed criminal penalties. But that point doesn't determine whether Chase's separate discussion of "law and reason" was also based on common law. Even if it were, this would not establish that Chase's extended discussion on the limits of legislative power was limited to common law principles. Using common law to determine a constitutional clause's meaning is quite a different matter from arguing that constitutional interpreters were constrained by common law and only by common law.

Chase, recall, argued against the "omnipotence of a State Legislature or that it is absolute and without control".[230] The terms of the social contract determined the proper objects of legislative power, and the "nature" of legislative power in a "free Republican government" would limit its exercise.[231] *Calder* was an appropriate case in which to raise the issue of whether a state legislature was "omnipotent" unless restrained by a specific constitutional command: Those fears evidently were heightened when the state legislature passed a law obviously intended to thwart a court's ruling in a specific case. Separation-of-power concerns were at the forefront of the case, as the American system had a clear-cut division between legislative and judicial authority. Although the separation-of-powers issues were not precisely the same in England, they were similar. Sir Edward Coke, as long ago as 1608, felt compelled to inform King James I that he (the king) lacked the power to give judgment in his realm, as that power was reserved to the courts.[232] Interestingly,

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[230] *Calder v. Bull*, 3 U.S. 386, 387 (opinion of Chase, J) (1798). It is an under-appreciated fact of this case that the usual method of review had been reversed here: as Chase's opinion notes, the *legislature* in this case was effectively attempting to overrule the *judiciary*.
[231] *Calder v. Bull*, 3 U.S. 386, 388 (opinion of Chase, J.) (1798).
[232] Corwin, *The Higher Law* (1955), 38 – 39.

Coke later instructed the king that he could not, by proclamation, "make a thing unlawful which was permitted by the law before,"[233] a caution that mirrors one concern mentioned in *Calder*. With the one difference that it was the Connecticut legislature attempting to exercise king-like powers in the administration of justice, its seems probable that Chase had Coke's counsel in mind in his *Calder* opinion.

A plausible reading of Chase's argument was that it was intended to provide assurances that *Calder* did not stand for the idea that a state legislature would become all-powerful. In this case, what the legislature did was consistent with common law. The evidence Chase adduced clearly established that "*ex post facto"* historically referred to criminal laws. But Chase went further, claiming that legislatures are limited in their exercise of power by the social compact which was, in turn, informed by other "vital" principles. Although Iredell was to infer that Chase was referring to "natural" principles, Chase was careful to make repeated references to principles inherent in "free republican governments." That is, he explicitly referred to the reasons the people of the United States "erected *their* constitutions or forms of government,"[234] and "fundamental principle(s) that flo(w) from the very nature of our free republican governments."[235] Most pointedly, he was to write that "the obligation of a law in governments *established on express compact and on republican principles* must be determined by the nature of the power on which it is founded."[236] Chase's language seems to suggest that there are certain principles that pertain

[233] Ibid., 43.
[234] *Calder v. Bull*, 3 U.S. 386, 388 (opinion of Chase, J.) (1798) (emphasis supplied).
[235] Ibid.
[236] *Calder v. Bull,* 3 U.S. 386, 388 (opinion of Chase, J.) (1798) (emphasis supplied).

to the republican government that the American people created, as opposed to principles that were timeless and universal, and thus natural.

If Chase were claiming that the judiciary's power to strike down acts of state legislative bodies was based on (in addition to inconsistency with the federal and state constitutions) common law, he chose a very roundabout way of saying that. Further, on this reading, he was arguing that the legislative power was subordinate to common law. Such an argument would be startlingly inconsistent with what was established law at the time and ever since, namely that the legislative power is free to alter the common law. It is worth re-examining the full context in which Chase used the phrase "law and reason." He wrote that "it is against all reason and justice for a people to entrust a Legislature with such powers (to pass laws contrary to the social compact), and therefore, it cannot be presumed that they have done it. 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."[237]

So, if Chase's reference to "law and reason" here was a reference to the common law, he was contending that common law controls acts of the legislature. And yet, while it is a legal commonplace that statutes in derogation of the common law are to be strictly construed,[238] it was a well-recognized legal maxim *before Calder* that the legislative power included the authority to alter the common law, rather than the other way about. Thus, "where the common law and a statute differ, the common law gives place to the statute."[239]

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[237] *Calder v. Bull*, 3 U.S. 386, 388 (opinion of Chase, J.) (1798).
[238] Kent, *Commentaries,* I (2016), 464.
[239] Blackstone, *Commentaries*, I (1983), 89.

Moreover, as Justice Souter was to explain in a later Supreme Court opinion, early Americans did not believe that the common law controlled their constitutional heritage. Souter wrote that "it is clear that the adoption of English common law in America was not taken for granted, and that the exact manner and extent of the common law's reception were subject to careful consideration by courts."[240]

If Chase *was* referring merely to common law principles, his extended, stirring passage regarding the invalidity of laws working a "manifest injustice," would have been peculiarly out-of-place.[241] He could have limited himself to challenging the well-accepted principle that statutory law supersedes common law. The argument that early American legal authorities did *not* view statutory law as superior to common law[242] is unpersuasive, relying as it does on examples of courts (at both the federal and state levels) striking down statutes that happened to be, even if incidentally, inconsistent with common law. Were the inconsistency with common law a sufficient reason for a court to declare a statute void, statements such as those found in Blackstone about the legislature's authority to overrule common law would be flatly wrong. Surely no court would strike down a law *merely* because of its inconsistency with common law. There must have been some additional reason why *particular statutes* were declared void (or, as in the case of *Calder,* brought into question although still upheld), and either the principles of natural law or the character of a particular society, the laws of which have a particular "spirit" might provide that

[240] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 132 (Souter, J., dissenting) (1995).
[241] Unless he was merely engaging in a philosophical exercise with Justice Iredell, as opposed to commenting on the power of judicial review. John Hart Ely takes this position. *See* Ely, *Democracy and Distrust* (1980), 209 – 211, n. 41.
[242] See Edlin, "Judicial Review Without a Constitution," *Polity* (2006), 356 – 358.

reason. It is unsurprising that such laws would also be inconsistent with English or American common law.[243]

Chase appears to have been dealing with an argument that allowing the state legislature to effectively overrule a specific court ruling would be to grant the legislature absolute power. He responded that the legislative act in this case did "not go that far" because it was consistent with common law. In this case, the common law, frowning as it did on *ex post facto* laws only in the criminal context, provided a "check" on any claim that the Connecticut legislature was asserting absolute power. But with respect to his claim that legislatures did not have unbridled power, Justice Iredell, at least, asserted that Chase was relying on natural law principles.[244]

Chase's opinion is ambiguous on the point, however. In arguing that there were certain things that no legislature could do, irrespective of whether or not there was a specific constitutional restraint, he emphasized the binding nature of the original social compact. It could not be presumed, he reasoned, that in a "free republican government" the people would have consented to permit the government to act in a manifestly unjust way.[245] Does this imply that in other types of governments, acts of manifest injustice might

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[243] Though one should not make the error against which Madison warned, an error having its source "in the changed meaning of words and phrases." See Corwin, *The Higher Law* (1955), 42. The term "common law," despite similar dictionary definitions, appears to have been much more exalted in England than it would later be in the United States. Whereas in England, the common law was often referred to as the perfection of reason, here, the term often suggests legal traditions that have been kept despite being unmoored from their original justifications. See Holmes, *The Common Law* (2004), passim.

[244] Iredell's rhetorical disparagement of Chase's "natural justice" reasoning has been disputed, of course. *See, e.g.,* Edlin, *Judicial Review* (2006), 361 (referring to the "conspicuous absence of any reference to natural law, natural rights or of the law of nature anywhere in Justice Chase's opinion [or in the opinion of any other justice who decided *Calder."]).*

[245] *Calder v. Bull*, 3 U.S. 386, 388 (opinion of Chase, J.) (1798).

not be barred, and that such acts might deserve (unlike an act in a free republican society) to be called "law"? The answer is unclear, although it is clear that in forming a *just* government, certain antecedent liberties may or may not be compromised, so that it would be impossible to make an all-encompassing abstract statement about what a just government may or may not do.[246]

A plausible reading of Chase's opinion is that he viewed the principles of natural law as an interpretive tool of considerable weight, but only in the sense that the constitutional drafters relied on natural law in forming their express contract.[247] The argument that it "cannot be presumed" that the people in a free republic would grant a legislature powers to pass unreasonable and unjust laws, suggests that the "presumption" might be overcome, as that is the nature of presumptions. Chase might merely have been responding to the peculiarity of the Connecticut law at issue,[248] although an obvious objection to this interpretation is the categorical language he used.

Calder's Subsequent History

Despite its having acquired canonical status due to Chase and Iredell's natural justice debate, it was over three-quarters of a century later before the Supreme Court or a Supreme Court justice cited *Calder* in a way that is relevant for our purposes. While subsequent decisions frequently relied on the case for its specific *ex post facto* holding, the

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[246] Ross, "A Natural Rights Basis for Substantive Due Process," *Universal Human Rights*, 2:2 (April – June 1980), 61, 77.
[247] Hamburger, *Law and Judicial Duty* (2008), 500.
[248] Ibid. Connecticut's constitutional structure was unique in early America as the state used the "customary constitutional" system; rather than adopting an express constitution as the other colonies had done, it relied on its "ancient charter" from Charles II, a charter making the legislature supreme, and relying on the right of the people to alter that legislature to provide constitutional protections. *See* Hamburger, *Law and Judicial Duty* (2009), 496-501.

Court did not again engage its "natural justice" component until 1870, in *McVeigh v. United States*.[249] *McVeigh*, decided in the American Civil War's aftermath and the 1868 ratification of the Fourteenth Amendment to the United States Constitution, inaugurated a new era (the first of two) of relatively sustained discussion of the natural law issues the Chase and Iredell opinions raised in *Calder*. Concomitantly, the Court frequently faced "substantive" due process issues under the Fourteenth Amendment, which contained a Due Process Clause similar to that found in the Fifth Amendment, but (unlike that of the Fifth Amendment) applied as against the states.[250]

An interesting trend emerges in this first collection of cases. With the possible and limited exception of *McVeigh*, where the Court addressed fair procedures in judicial proceedings, all these opinions dealt with financial, economic or contractual issues. Even *McVeigh* resulted from a law depriving a petitioner of property. No cases dealt with what we would now call "civil liberties," no cases addressed personal autonomy, and no cases alleged that state action violated anyone's "civil rights." This is consistent with early Twentieth-Century Fourteenth Amendment jurisprudence, applying the Due Process Clause to strike down state economic regulation.[251]

This early emphasis on property and contractual rights springs from the fact that those considerations were paramount in early America. Since medieval times, private property and contracts have been the two most fundamental legal institutions.[252] Both of

[249] *McVeigh v. United States,* 78 U.S. 259 (1870).
[250] U.S. Constitution, Fourteenth Amendment.
[251] See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).
[252] Corwin, *The Higher Law* (1955), 21. See also Helmolz, *Natural Law in Court* (2015), 154 – 155.

these institutions, it was believed, flowed out of the natural law in the state of nature and did not owe their existence to government.[253] Blackstone, whose writing was not typically poetical, became rhapsodical when discussing property. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property," he wrote.[254] The right was a natural one, Blackstone claimed, echoing Locke, traceable back to the beginning of the world, when the Creator gave man dominion over the earth.[255]

Hobbes identified keeping contracts as being the linchpin of justice, while Locke would argue for the preservation of property as the focal point of legitimate government.[256] Other theorists emphasized the importance of holding real property in the formation of good political citizens.[257] Those economic-related concerns figured prominently in America's founding. Some historians have argued that the protection of economic interests was the primary motivation behind the constitutional convention of 1787.[258] Philosophers continue to emphasize the relation of law, reason and contracts; one has argued that natural law, emanating from human reason, "issues precisely from our disposition to bind ourselves in free agreements."[259]

This concern with property rights was manifest in judicial opinions throughout the

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[253] Ibid.
[254] Blackstone, *Commentaries*, II (1983), 2.
[255] Ibid.
[256] Locke's emphasis on the limits of government was anti-democratic in the sense that the right of the minority must be protected against majority passions. The drafters of the Constitution recognized the need to control those passions. *See* Mansfield (1991), *America's Constitutional Soul*, 211 – 212.
[257] Pocock, *Virtue, Commerce, and History* (1985), 68.
[258] See Holton, *Unruly Americans* (2008), passim; Beard, *An Economic Interpretation of the Constitution of the United States* (2004), passim.
[259] Scruton, *The Soul of the World* (2014), 81.

late Nineteenth and early Twentieth centuries.[260] It was present also at the Constitutional Convention, where the primary fear regarding democracy was the damage that the masses might do, and had done, to those rights.[261] Perhaps the 1937 cases upholding the creation of the National Labor Relations Board and state minimum wage laws marked the turning point,[262] but the trend toward upholding economic legislation and breaking the tie between property rights and natural law, is unmistakable by the middle of the Twentieth century, at least as measured by *Calder* citations.

The Court's opinion in *McVeigh* did not rely on the Fifth Amendment's Due Process Clause, or any other specific constitutional provision.[263] It might be said that it was a straightforward application of natural law reasoning. The petitioner, who held public office under the Confederate Government, fell victim to an 1862 federal law confiscating, after public warning and other procedural safeguards, certain real and personal property of persons in rebellion against the United States.[264] The procedural safeguards did *not* include permitting the property's owner to answer the "libel" filed against the property: The Confiscation Act of 1862 provided that proceedings under the law should be treated as *in rem,*[265] that is as against property.

Notwithstanding the plaintiff's rebel status, the liability of being sued, the Court

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[260] See Glendon, *Rights Talk* (1991), 26 – 27.
[261] Madison, *Notes of Debates in the Federal Convention* (1985), 542 - 543; see also Glendon, *Rights Talk* (1991), 28 – 29.
[262] Glendon, *Rights Talk* (1991), 28; citing *National Labor Relations Board vs. Jones & Laughlin Steel Corp.,* 301.S. 1 (1937); *West Coast Hotel vs. Parrish,* 300 U.S. 379 (1937).
[263] Although the Court's opinion was issued after its ratification, the facts giving rise to the case, as well as the lower court proceedings, both pre-dated the Fourteenth Amendment.
[264] *McVeigh v. United States,* 78 U.S. 259, 259 (1870).
[265] *Miller v. United States*, 78 U.S. 268, 271 (1870).

said "carries with it the right to use all the means and appliances of defense."[266] The matter admitted of no doubt, the Court ruled. It cited *Calder* and held that any other decision would be "contrary to the first principles of the social compact and of the right administration of justice."[267] It was this latter phrase that Iredell equated to "natural justice" in his *Calder* opinion.

The lower court in *McVeigh* had heard the case, and issued the forfeiture in 1862, during the Civil War. The Supreme Court issued its ruling in 1870, five years after the War had ended and two years after the ratification of the Fourteenth Amendment providing, *inter alia*, that no state could deny any person due process of law. But the Court was faced with a federal law, and could simply have relied on the Fifth Amendment's Due Process Clause; it did not. So it is unclear what the exact basis for its ruling was. It was a strain to introduce social compact and "right administration of justice" *Calder* concerns after all those years had passed, when a straightforward due process analysis might have sufficed.

The point is illustrated nicely in the next series of cases to cite *Calder*. The opinions known collectively as the "Legal Tender Cases" were among the most discussed cases of the second half of the Nineteenth Century.[268] It was in *Knox v. Lee* that Justice Chase's dictum regarding "the great first principles of the social compact" was first tied to the "spirit" of the Constitution.[269] In a double irony, the author of this dissenting opinion was a later Justice Chase, in this case Chief Justice Salmon Chase, who, as President Lincoln's

[266] *McVeigh v. United States*, 75 U.S. 259, 268 (1870.)
[267] Ibid., 75 U.S. 259, 267 (1870).
[268] Dam, *The Legal Tender Cases*, The Supreme Court Review (1981), 367.
[269] *Knox v. Lee, 79 U.S.* 457, 581 (Chase, C.J., dissenting) (1871).

Secretary of the Treasury was largely responsible for designing the banking system at issue in the case.

Congress, with then-*Secretary* Chase's approval, had passed the Legal Tender Act in 1862 ("the Act").[270] The Union Government in the midst of the Civil War sought to raise money without raising taxes, and issued bonds payable in specie (precious metal). When bank reserves of specie fell precipitously, the Union Government issued demand notes that were *not* redeemable in specie, but became themselves "legal tender for all debts, public and private."[271]

In dissenting from the Court's holding that Congress had power under the Constitution to make legal tender of "greenbacks," or notes not backed by precious metals – "specie" – Chief Justice Chase relied on the first Justice Chase's opinion in *Calder*. Since the Act at issue here arguably (this *was* Chase's argument) transferred property from one individual to another, by lessening the value of debts that had been contracted prior to the Act, there was an impairment of contract, something that the first Justice Chase had opined would be "contrary to the great first principles of the social contract."[272] The states were constitutionally prohibited from "impairing the obligation of contract," but there was no such explicit prohibition on the federal government.[273] Writing in Federalist 44, Madison

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[270] Act of February 25, 1862, 12 Stat. 345.
[271] S. 1, 12 Stat. 345.
[272] *Knox v. Lee,* 79 U.S. 582 (Chase, C.J., dissenting) (1871).
[273] Levy, *Original Intent* (1998), 125 – 128; U.S. Constitution, Article I, Section 10. Interestingly, there was some discussion at the Constitutional Convention that *retrospective* impairment of contracts was covered by the *Ex Post Facto* Clause. The Contract Clause was initially voted down at the Convention before being re-inserted by the Committee on style. Levy, *Original Intent* (1998), 125 – 126. No less a constitutional scholar than James Madison himself made that suggestion, as recorded by Madison in his notes on the Convention. Madison, *Notes on Convention* (1966), 543. For self-

also argued that laws impairing the obligation of contracts were "contrary to the first principles of the social compact" and thus also "prohibited by the spirit and scope" of the various state constitutions.[274]

Chief Justice Chase invoked the "spirit of the Constitution," recalling the famous passage from *McCulloch v. Maryland*, in which Chief Justice Marshall wrote upholding the constitutionality of the Bank of the United States. If the end of congressional action was legitimate, Marshall said, the means, if not prohibited by the Constitution and consistent with the "letter and the spirit of the Constitution," were also legitimate.[275] The Court itself, speaking through Justice Strong, invoked the "spirit" of the Constitution no fewer than four times: 1) in framing the issue as whether the Act was "forbidden by the letter or spirit of the Constitution;"[276] 2) in rejecting the argument that the spirit of the Constitution was violated because the Act "indirectly impair(ed) the obligation of contracts;"[277] 3) in dismissing the claim that the Act violated the spirit of the Fifth Amendment's prohibition on taking private property without just compensation,[278] and finally, 4) in concluding that there were no further arguments to be made that the Act violated the spirit of the Constitution.[279] Perhaps, as some commentators have suggested, these references to the "spirit" of the Constitution suggest that natural justice ought to be

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professed "originalists," this would call into question *Calder's* central holding that the Clause applied only to criminal matters.

[274] *The Federalist Papers* 44 (1979), 299.
[275] *McCulloch v. Maryland,* 17 U.S. 316, 421 (1819).
[276] *Knox v. Lee,* 79 U.S. 457, 544 (1871).
[277] Ibid., 79 U.S. 457, 547 (1871).
[278] Ibid., 79 U.S. 457, 551 (1871).
[279] Ibid., 79 U.S. 457, 552 (1871).

an animating principle of constitutional interpretation,[280] although Hamilton repudiated the idea that the Constitution granted judges the power to consider its spirit.[281]

The *Knox* Court explicitly overruled the 1870 decision in *Hepburn v. Griswold*,[282] and in holding the Act constitutional, joined fundamental debates raging since colonial-era America. The proper scope and function of government and its limits – and whether it was limited by the vital principles that Chase had laid out in *Calder*, were issues the *Knox* Court met head-on. In *Hepburn*, Justice Miller criticized the majority for its reliance on the Constitution's spirit, arguing that such a standard was too abstract and intangible.[283]

Justice Strong's majority opinion, for example, asserted that the Constitution granted the federal government certain powers that were *un*enumerated, powers granted via the Constitution's Necessary and Proper Clause.[284] The "means or instrumentalities

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[280] Jacobsohn, "Hamilton, Positivism & the Constitution," *Polity* (1981), 81.
[281] *The Federalist Papers* 81 (1979), 541. The idea that the Constitution or the entire American legal edifice may be said to have a spirit was a product of Montesquieu's work (among others). A system of laws *does* have an edifice and individual laws are not solely a product of "caprice or fancy." Particular applications flow naturally from first principles and "every particular law is connected with another law." Montesquieu, *The Spirit of the Laws* (1890), xxxi. The search for this larger context is what Montesquieu meant by the law's "spirit." Similarly, a modern commentator was to discuss the spirit of republicanism, when, in a book by that name, he suggested that the "three most important pillars" that supported the Founding Fathers' moral vision were derived from Locke. These included Nature or "Nature's God, " property, and the dignity of the individual. Pangle, *The Spirit of Modern Republicanism* (1988), 2. But Montesquieu was no natural law theorist. While he did seek to lay a "natural" foundation for governmental rule, his work listed several factors, including climate, religion and local history, that would constitute what that spirit was. *See* Makari, *Soul Machine* (2015), 220. His argument was *not* that there are a particular set of moral principles that obtain in all times and in all places. Such a notion put him directly at odds with Coke's dictum that "the law of nature is immutable and cannot be changed." Quoted in Corwin, *The Higher Law* (1955), 48. To the extent that judicial opinion writers have invoked the law's spirit in the Montesquieu sense, those references are better understood as principles informing the American Constitution, as derived from British constitutional principles, but built out beyond British principles on our own soil over time – and not as timeless principles relying on natural law.
[282] *Hepburn v. Griswold,*75 U.S. 603 (1870).
[283] *Hepburn v. Griswold*, 75 U.S. 603, 608 (1870).
[284] *Knox v. Lee* 79 U.S. 457 (1871); U.S. Constitution, Article I, Section 8, Clause 18.

referred to in that clause and authorized, are not enumerated or defined" because that would have been, Justice Strong wrote, "impossible."[285] In a statement that, focusing as it did on the limits of the ends of government, Locke probably would have agreed to, the Court held that the government could use "every means, not prohibited, necessary for its preservation and for the fulfillment of its acknowledged duties."[286] Justice Strong also reasoned that the whole of the federal government's power was greater than the sum of its parts, arguing that specific governmental powers, while "neither expressly specified nor deducible from any one specified power, or ancillary to it alone" still "grew out of the aggregate of powers conferred upon the government or out of the sovereignty instituted."[287] In a distinctly un-Lockean statement, Justice Strong wrote that "property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government."[288] This is one late-Nineteenth Century case in which the Court, at a cursory glance, seemed to denigrate property rights. Such a view would be too narrow, however. The same concerns that animated Chief Justice Chase when he was Secretary of the Treasury, namely those dealing with the entire nation's economic health, also informed the Court's decision to uphold this Act. As the United States became more commercial and more of a "united" nation in the Civil War's aftermath, the need for an easier and more liquid method of finance and exchange became paramount.[289]

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[285] *Knox v. Lee,* 79 U.S. 457, 534 (1871).
[286] Ibid., 79 U.S. 457, 534 (1871).
[287] *Knox v. Lee,* 79 U.S. 457, 535 (1871).
[288] Ibid., 79 U.S. 457, 551 (1871).
[289] See White, *Law in American History* (2016), vol. II, 205 – 206.

In addition to Chief Justice Chase, Justices Clifford and Field also wrote dissenting opinions in *Knox*, the latter opinion also relying on the first Justice Chase's opinion in *Calder*. Justice Field wrote that whereas Congress had the undoubted power to change the value of its coinage, it indisputably could not force a creditor to accept the dollars at a lesser value than they held at a contract's inception. Imagine, Field argued, forcing a debtor to pay a far greater amount than originally agreed to, by the stratagem of re-valuing the currency. This would be a "monstrous wrong" that "no judge in Christendom" would sanction.[290] "For acts of flagrant injustice such as those mentioned there is no authority in any legislative body, even though not restrained by any express constitutional prohibition," Field wrote.[291] This was because there are certain "unchangeable principles of right and morality" without which "men would be but wild beasts preying upon each other," as well as "fundamental principles of eternal justice...upon which...all constitutional government is founded."[292]

The disagreement between Strong and Chase raised the same issues that Thomas Jefferson and Alexander Hamilton had debated in their Eighteenth-Century dispute over whether Congress had the authority to create a Bank of the United States. (Not coincidentally, Justice Strong's broad construction of the Necessary and Proper Clause recalled Marshall's opinion in *McCulloch*, the opinion upholding the constitutionality of the Bank.) In a paper responding to then-Secretary of State Jefferson's attack on the bank as beyond Congress's power to create, Hamilton claimed that if the Constitution vested a

[290] *Knox v. Lee,* 79 U.S. 457, 669 (Field, J., dissenting) (1871).
[291] Ibid., 79 U.S. 457, 670 (Field, J., dissenting) (1871).
[292] Ibid.

power in Congress, any means not specifically prohibited by the Constitution were legitimate.[293] He added one caveat however: The means could not be "immoral" or "contrary to the essential ends of political society."[294] It was Hamilton's reasoning that found its way into Chief Justice Marshall's opinion for the Court in *McCulloch*. While adopting Hamilton's argument as to Congress's power to effect means to bring about constitutionally-sanctioned ends, Marshall omitted any language about whether particular means were "immoral" or "contrary to the essential ends of political society." *Unless* this is what he meant by focusing instead on the Constitution's "spirit". Jefferson urged President Washington to veto the bill creating the Bank and disparaged the reasoning that Congress was free to employ means not specifically prohibited: Congress could employ only those means that were "proper" *and* "necessary" to achieve legitimate, that is constitutionally approved, ends.[295] In other words, Jefferson emphasized the "necessary" half of the equation. The Constitution, by inference, permitted means that were *essential* to effect constitutionally-sanctioned ends, a much stricter test than "not specifically prohibited."

Chief Justice Chase had written the majority opinion in *Hepburn*, but changes in court personnel, as well as a congressionally-created addition of a seat to the Court[296] resulted in Chase being in dissent in *Knox*, a case that presented the same issue. In *Hepburn,* the later (Chief) Justice Chase made a similar argument to the first Justice Chase's

[293] Hamilton, "Opinion on the Constitutionality of a National Bank," *Writings* (2001), 613.
[294] Ibid.
[295] Jefferson, "Opinion on the Constitutionality of a National Bank," *Writings* (1984), 418-419.
[296] Nevin, *Chase: A Biography* (1995), 438.

about the importance of natural justice, drawn more narrowly. In holding that the part of the Legal Tender Act making government-issued notes legal tender for all debts was unconstitutional, Chief Justice Chase wrote that, except in the "scarcely supposable" case where a "statute sets at naught the plainest precepts of morality and social obligation," the Court is obliged to uphold any law that is not repugnant to the Constitution.[297] But he went on to write, citing Chief Justice Marshall, that the Court's interpretation of the Constitution must be leavened by its "spirit," reasoning that

> Among the great cardinal principles of that instrument no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of disputation, especially in its relation to contracts.[298]

Chase's odd claim that there was no dispute about the "establishment of justice" especially as it related to contracts was rhetorical excess. There was heated debate at the Constitutional Convention (to say nothing of the various state ratifying conventions) about the nature of Congress's power to impair the obligation of contracts and there was, as indicated above, no explicit constitutional restraint on the *federal* government's power to do so.[299] That the issues in these cases so closely touched the protection of property and contractual relations, and that the Court was sharply split as to such fundamental issues as whether there was a general power of sovereignty in the United States Government revived a debate about the nature of that government's power that had been dormant for nearly seventy years. The Court was also facing an increasingly powerful and active federal

[297] *Hepburn v. Griswold,* 75 U.S. 603, 607 (1870).
[298] Ibid., 75 U.S. 603, 622 (1870).
[299] Levy, *Original Intent* (1998), 125 – 127.

government after the Civil War, as well as Chief Justice Marshall's broad interpretation of the Necessary and Proper Clause in *McCulloch*. *Calder*, it will be recalled, involved legislation at the *state* level. As the federal government was designed to have limited powers, the natural law debate was not as vigorous at the Constitutional Convention as it might otherwise have been. So the Court was engaging it now.

Calder made its next appearance in another post-Civil War case, this one involving a contract that had allegedly been "impaired" by the Thirteenth Amendment, prohibiting involuntary servitude throughout the United States. In *Osborn v. Nicholson,* the parties entered into a contract providing for the sale of a slave in 1861; the buyer then refused to pay the agreed-upon $1,300 sales price after the slave was freed by an act of the United States government, that is, the Thirteenth Amendment.[300] In holding that the contract for the sale of a slave remained good even after the slave's legally-mandated emancipation, the Court, Justice Swayne writing for the majority, noted that several intervening factors might interfere with a purchaser's enjoyment of a contract's full benefits. In this case, the slave might have, after the contract's execution, become ill and died. In a contract for the sale of real property, the state might eventually seize the property through eminent domain. In any such instance, the seller's right becomes vested when the contract is entered into, and while the parties might address the risk of loss in the contract itself, that didn't happen here. Moreover, the Court held, there was no impairment of contract in this case, because the slave's emancipation affected the property itself (the slave), and not the contract.[301]

[300] *Osborn v. Nicholson*, 80 U.S. 654 (1871).
[301] Ibid., 80 U.S. 654, 660 (1871).

"All contracts are inherently subject to the paramount power of the sovereign and the exercise of such power is never understood to involve their violation," the Court wrote.[302]

The majority opinion cited *Calder* in holding that contractual rights, once completely vested, and acquired by deed, will or contract, are enforceable even if the statutes under which those rights vested are no longer in force. A contrary rule, the Court reasoned, would not accord with principles of "universal jurisprudence" and lead to a "flood tide of intolerable evils."[303]

The citation to *Calder* seems especially ironic here. In the earlier case, one party's right to inherit under the law *had* vested until Connecticut's legislature retroactively changed the law. Justice Chase made his famous *dictum* that courts ought not to uphold legislation that worked a "manifest injustice," while *upholding* the Connecticut law at issue. The logical conclusion is that Chase did not understand Connecticut's action in *Calder* to be manifestly unjust, or contrary to principles of natural justice. But the *Osborn* Court, relying on *Calder* for this very point, concluded that construing the Thirteenth Amendment as unsettling a seller's right to collect a debt for the sale of a slave *would* have led to a manifest injustice. In both cases, parties had settled expectations under existing law.[304] The conclusion in *Osborn* might reflect the Nineteenth-Century tendency of American courts to associate natural law with economic principles. And it might also support Iredell's contention point that natural law reasoning admits of no fixed principles.

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[302] Ibid., 80 U.S. 654, 660 (1871).
[303] Ibid., 80 U.S. 654, 661 (1871).
[304] The *Calder* opinions do not explain *why* the will at issue was deemed invalid. Thus, the underlying facts of the dispute might have influenced Chase's judgment that the decision was in accord with principles of justice.

The majority opinion in *Osborn* identified another possible natural law principle at issue in the case. Not deterred by the patent hypocrisy, the buyer argued that the slave trade was against "natural justice and right" and that contracts involving the trade could be sustained only by positive law. When positive law prohibited slavery, contracts for selling slaves shouldn't be enforced.[305] The Court's opinion acknowledged that slavery was "contrary to the law of nature (though) it was recognized by the law of nations."[306] Still, the Court held that principles of "universal jurisprudence" favored the enforcement of contractual rights.[307] The Court did not make clear why the latter "principle of universal jurisprudence" trumped the former "law of nature." The opinion did allude briefly, however, to the compromises regarding slavery without which the Constitution would not have been ratified.[308] It was thus a reminder of the uneasy relationship that document had with natural law principles; in fact, the argument that the United States government was based on natural law principles would become one of the leading claims of Nineteenth-century abolitionists. [309] While it might be difficult to make the case that the written Constitution, with its compromises on the slavery question, was a natural law document, the case is a little easier with respect to the Declaration of Independence, dating from 1776; Abraham Lincoln would rely heavily on the Declaration's principles of the natural equality of persons[310] and those principles animate our human rights philosophy to this day.[311]

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[305] *Osborn v. Nicholson*, 80 U.S. 654, 661 (1871).
[306] Ibid.
[307] *Osborn v. Nicholson,* 80 U.S. 654, 661 (1871).
[308] *Osborn v. Nicholson*, 80 U.S. 654, 661 – 662 (1871).
[309] White, *Law in American History* vol. 1 (2012), 342 – 343.
[310] Maier, *American Scripture* (1997), 205.
[311] Tsesis, *For Liberty and Equality* (2012), 313.

Chief Justice Salmon Chase's dissenting opinion implied that a contract contrary to principles of natural justice would not have been upheld absent support for the underlying transaction in the positive law.[312] Positive law did not sanction slavery when the case was brought, but it did when the parties executed the agreement. In Chase's view, the inviolability of contracts did not override the principle that slavery was contrary to natural justice.

The Court faced yet another "impairment of contracts" case in the post-Civil War era, *Gunn v. Barry*.[313] The Court, per Justice Swayne, cited *Calder* here but in a surprising manner. A creditor brought this case in Georgia state court, complaining that the State's post-war Constitution impaired the obligation of contract and thus violated the federal Constitution. Specifically, the Georgia Constitution substantially increased the amount of property that a debtor could exempt from execution. Consequently, the plaintiff-creditor in this case, in seeking to satisfy the debt, could not seize property that could have been seized at the date of the contract in 1866.[314] The result, Justice Swayne wrote in a unanimous opinion, was effectively to transfer one person's property to another without any compensation, contrary to the principles of reason and justice. *Calder* was cited for this point, but the Court went on, in the next sentence, to write, "(b)ut we must confine ourselves to the constitutional aspects of this case."[315] The Court then held that the *obligation* of contract *was* impaired by this retroactive application of the Georgia

[312] *Osborn v. Nicholson*, 80 U.S. 654, 663 (1871).
[313] *Gunn v. Barry*, 82 U.S. 610 (1872).
[314] Ibid., 82 U.S. 610, 621-622 (1872).
[315] *Gunn v. Barry*, 82 U.S. 610, 623 (1872).

Constitution, reasoning that the *remedy* in existence at the time the contract was entered into was part of its *obligation*. To the extent a change in the state law regarding remedies impaired a substantial right, that change was "utterly void."[316]

Now this was an odd approach. The Court favorably cited Justice Chase's opinion in *Calder*, before essentially taking Justice Iredell's side in the *Calder* dispute ("we must confine ourselves to the constitutional aspects"). The favorable citation to *Calder* might have made sense if Swayne simply wanted to express his view that natural law principles would provide an alternative ground for striking down the Georgia law. But in the very next sentence, the opinion expressly disclaims the Court's power to act on those principles; the Court *must* be confined to what the constitution says. Justice Swayne could appropriately have written that the Court didn't *need* to take extra-constitutional considerations into account (as it struck down the law at issue anyway), but instead he wrote that the Court *could not* take such considerations into account. He favorably cited Justice Chase's *Calder* opinion, while rejecting its conclusion. One possible explanation is that Swayne modified his opinion to keep the Court unanimous.

The Court's decision in *Loan Association v. Topeka*[317] seems to have been as straightforward an application of natural law principles as that body ever delivered. Unusual in the Court's annals, the opinion did not make even a pretense of applying a federal question, constitutional, statutory, or otherwise. At least one scholar has argued that *Loan Association* was a Fourteenth Amendment case, and that the Court was implicitly

[316] Ibid., 82 U.S. 610, 624 (1872).
[317] *Loan Association v. Topeka*, 87 U.S. 655 (1874).

holding that the Fourteenth Amendment guaranteed individual liberties as against state action at the state level.[318] It's not clear, however, why the Court would choose to interpret the Fourteenth Amendment *sub silentio.*

In *Loan Association,* the State of Kansas had authorized the city of Topeka to issue bonds payable to a private company, in this case, an iron-works company. The company was to use the money to make internal improvements, including the building of iron bridges.[319] The plaintiff in the case was the holder of interest coupons and brought this action against the City of Topeka to collect on the coupons. The Court held that the Kansas statute authorizing this scheme was unconstitutional, reasoning that taxation must always be for the public good and that this bridge-building project was not of a public character, but instead for private profit and gain.[320]

The Court cited no constitutional provision for its assertion that there are "rights in every free government beyond the control of the state." A government which recognized no such rights was "after all but a despotism….it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism,"[321] the opinion read, but again, one searches in vain for a specific constitutional provision. Instead, this limitation on a state's power grew out of "the essential nature of all free governments…implied reservations of individual rights, without which the social compact could not exist and which are respected by all governments entitled to the name."[322] The

[318] White, *Law in American History*, vol. 2 (2016), n.27, 604.
[319] *Loan Association v. Topeka*, 87 U.S. 655, 656 (1874).
[320] Ibid., 87 U.S. 655, 659 (1874).
[321] *Loan Association v. Topeka*, 87 U.S. 655, 662 (1874).
[322] Ibid. 87 U.S. 655, 663 (1874).

similarity to Justice Chase's reasoning in *Calder* is obvious, although the Court did not cite the case. Most strikingly, Justice Miller, writing for the majority, wrote that the law at issue was "not legislation. It is a decree under legislative forms."[323] The language echoes that of Justice Chase in *Calder* when he wrote that certain legislative acts did not even deserve the name "law".[324]

That the Court was adopting Justice Chase's *Calder* reasoning did not escape dissenting Justice Clifford, however, who *did* cite the case, casting his lot with Justice Iredell. Clifford ridiculed the notion, which he attributed to the Court, that the Court was a guardian of a "general latent spirit supposed to pervade or underlie the Constitution."[325] The language recalled that of Chief Justice Marshall in *McCulloch*, and subsequent cases, discussed above. Clifford, too, appeared to be using the language of the "spirit" of the constitution as a shorthand for principles of natural law, attacking the majority for striking down the statute here because it violated "natural justice." While a state constitution could restrict the power of the state legislature, Clifford wrote, where there was no violation of the federal constitution, a federal court could not. Pointedly disagreeing with the majority and with Justice Chase's opinion in *Calder,* Clifford argued that the power of state legislatures was absolute in the absence of a constitutional prohibition on its power, whether or not a law was in accordance with natural justice.[326]

Clifford made an explicit criticism that was to resonate strongly in certain justices'

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[323] Ibid., 87 U.S. 655, 664 (1874).
[324] See n.190, *supra*, and accompanying text.
[325] *Loan Association v. Topeka,* 87 U.S. 655, 669 (Clifford, J., dissenting) (1874).
[326] Ibid., 87 U.S. 655, 668 (Clifford, J., dissenting) (1874).

writings in the twentieth century and beyond. Ruling according to the Court's ideas of natural justice would, he wrote, amount to a judicial despotism; moreover, it would amount to making the Court sovereign over not only the Constitution, but the people themselves.[327] Although he did not make the point explicit, Clifford's reasoning seemed to rest on the assumption that there are no fixed standards regarding the principles of natural justice, or of the spirit of the Constitution. For a Court ruling in accord with the principles of one or the other could not reasonably be said to be an exercise of sovereignty - as opposed to reasoned judgment.[328]

The Court was faced with another of the "Legal Tender Cases" in 1884, called on to pass once again on the constitutionality of Civil War-era legislation making government notes legal tender for all debts.[329] Holding unanimously that this case was indistinguishable from the earlier legal tender cases, the Court reaffirmed its prior opinions with Justice Field reiterating his earlier dissent.[330] Field, responding to the Court's holding that the federal government had an implied power as sovereign to legislate with respect to currency, argued that it was once thought "axiomatic" that the federal government did not possess the power to make legal tender of its notes.[331] Citing *Calder*, and forecasting much "evil likely to follow," Field would have held that the legislation was beyond the Congress's authority, and that there is "no such thing as inherent sovereignty in the government of the

[327] Ibid. 87 U.S. 665, 669 (Clifford, J., dissenting) (1874).
[328] Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (Joint opinion of O'Connor, Kennedy and Souter) (courts evaluating substantive due process claims must exercise reasoned judgment) (1991).
[329] *Legal Tender Cases* 110 U.S. 421 (1884).
[330] *Legal Tender Cases*, 110 U.S. 421, 451 (Field, J., dissenting) (1884).
[331] Ibid., 110 U.S. 421, 455 (Field, J., dissenting) (1884).

United States."[332] The Court's opinion had concluded that the United States government had the authority to make its notes legal tender as this was a "power universally understood to belong to sovereignty."[333]

The majority opinion and the dissent here both framed the issue as one of sovereignty. The concept had perhaps been underappreciated in *Calder* and previous cases relying on *Calder*. Hobbes perceptively would have seen the very notion that a government of limited powers was "sovereign" as an absurd contradiction in terms, a point that Justice Field's dissent seems to get. Sovereign power is granted by consent, Hobbes argued, and that consent necessarily confers power and authority on the sovereign to do whatever he will, as the idea that anyone could limit or overrule a sovereign is a logical contradiction.[334] Moreover, to withdraw consent would be to violate one's contractual obligations, which for Hobbes, was the definition of injustice. A government limited by an enumerated powers doctrine, whether those powers were granted pursuant to some theory of natural justice or not, would not be sovereign. Hobbes specifically identified the power to coin money as one of the attributes of sovereignty.[335] For Hobbes, though, the end of government was to provide for peace and justice,[336] a different approach from Locke's protection of life, liberty and property.

Field argued instead that sovereignty in the United States rested with the people, and that the people, through the Constitution, granted certain circumscribed powers to the

[332] Ibid., 110 U.S. 421, 467, 470 (Field, J. dissenting) (1884)
[333] *Legal Tender Cases,* 110 U.S. 421, 447 (1884).
[334] Hobbes, *Leviathan* (2004), 109 – 111.
[335] Ibid., 114.
[336] Ibid., 114.

government. Field was attacking the majority opinion as being Hobbesian, in recognizing a nearly unlimited sovereignty in the federal government. Field argued finally that the numerous constitutional limits on power, both at the state and the federal level, evinced an intention to prevent oppression and injustice, and concluded, in a manner recalling the first Justice Chase's opinion in *Calder,* that legislation promoting either was inconsistent with the letter and spirit of the Constitution.[337] Ironically, Field's own opinion had Hobbesian aspects, especially in linking justice with the keeping of contracts. Reiterating no fewer than five times his position that laws must be "just" to be consistent with the letter and spirit of the Constitution, he had the sanctity of contracts in mind every time. But ultimately, his reasoning was drawn from Locke. The reason contracts and the preservation of the obligation of contracts was so important, he wrote, was because "a large proportion of the property of the world exists in contracts."[338]

In fact, Justice Field's methodology appears virtually indistinguishable from Justice Chase's in *Calder*. Since, unlike in *Calder*, a federal law was at issue here, Fields could simply have opined that no enumerated power enabled Congress to make its notes legal tender. He went well beyond that in reasoning that unjust laws were beyond the authority of both the federal government, and the states. Moreover, while Field's extended discussion on the nature of enumerated powers was standard fare in making the point that the powers not explicitly granted the federal government were denied to it (the whole point, after all, of the Tenth Amendment), it did little to take into account a half-century of jurisprudence

[337] *Legal Tender Cases,* 110 U.S. 421, 468 (Field, J. dissenting) (1884).
[338] *Legal Tender Cases, 110* U.S 421, 460 (Field, J., dissenting) (1884).

following Chief Justice Marshall's explication of the implied power doctrine and broad interpretation of the Necessary and Proper Clause.[339] Nor did he adequately answer the majority's point that a delegate at the Constitutional Convention moved to prohibit the federal government (and not just the states) from impairing the obligation of contract, and this motion failed even to receive a second,[340] the implication being that the drafters of the Constitution intended to leave open the possibility that the *federal* government *could* impair contracts. In short, he took care to argue that his dissent was based on the theory that American governments, at any level, could not, consistent with the spirit of the Constitution, pass unjust laws – laws that violate natural justice.

The final case in the first line is *Atchison, T & S.F.R. Co. v. Matthews*.[341] It is also the first case in the *Calder* progeny that explicitly engaged the Fourteenth Amendment. (Recall that it has been argued that *Loan Association v. Topeka* was also a Fourteenth Amendment case, although if this were true, the Court itself made no mention of it.)

The Fourteenth Amendment to the United States Constitution, ratified in 1868, was one of three post-Civil War Amendments adopted as a direct result of that conflict. Among its key provisions were clauses making all persons born or naturalized in the United States citizens of the United States,[342] prohibiting states from abridging the "privileges or immunities" of citizens of the United States,[343] depriving a person of life, liberty or

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[339] *McCulloch v. Maryland*, 17 U.S. 316 (1819).
[340] *Legal Tender Cases,* 110 U.S. 421, 444 (1884). One possible answer that had been previously raised was that the power to regulate bankruptcy was delegated to the federal government, and that bankruptcy laws obviously impaired contractual obligations; a prohibition in the federal government would thus have been inappropriate.
[341] *Atchison, T & S.F.R. Co. v. Matthews,* 174 U.S. 96 (1899).
[342] U.S. Constitution, Amendment XIV, Section 1, Clause 1
[343] U.S. Constitution, Amendment XIV, Section 1, Clause 2.

property without due process of law,[344] or denying any person within its jurisdiction the equal protection of the laws.[345]

The Fourteenth Amendment was unique in American legal history in its method of ratification. Congress, by statute (the first Reconstruction Act), required Southern states who had seceded from the Union to ratify this Amendment as a condition for being re-admitted to the Union.[346] Often classified as an effort to force the states, as opposed to the federal government alone, to honor the civil rights of freed African-American slaves, the Amendment did more than this: By forbidding states from abridging the "privileges or immunities" of citizens of the United States, it extended its reach far beyond racial matters, but to an entire panoply of rights Americans held traditionally.[347] Arguably, the language of the Amendment was deliberately broad, allowing for Congress to protect rights, both those that predated and post-dated its passage.[348] Importantly, the Supreme Court had held in *Barron v. Baltimore*[349] that the protections of the Bill of Rights did not bind the state governments, and the passage by southern states of "Black Codes" denying basic rights to African-Americans after the Civil War prompted the Fourteenth Amendment.[350]

Twentieth-Century Supreme Court cases would bring debate about whether the

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[344] U.S. Constitution, Amendment XIV, Section 1, Clause 3.
[345] U.S. Constitution, Amendment XIV, Section 1, Clause 4.
[346] Amar, *America's Unwritten Constitution* (2012), 80.
[347] White, *Law in American History,* vol. 2 (2016), 22. Justice Scalia would have limited the Amendment's scope to historical practice. For a broader interpretation of the 14th Amendment, *see* Fleming, *Fidelity to our Imperfect Constitution* (2015), 20-21 (arguing that a moral reading of the Constitution requires honoring our people's aspirational principles rather than merely following historical practice); Amar, *America's Unwritten Constitution* (2012), 108.
[348] Amar, *America's Unwritten Constitution* (2012), 108.
[349] *Barron v. Baltimore,* 32 U.S. 243 (1833).
[350] Hall, ed., *The Oxford Companion to the Supreme Court* (2005), 2nd ed. 359.

Fourteenth Amendment "incorporated" the Bill of Rights as against the states, whether the broad language of the Amendment reflected a philosophy of natural law, and whether the result was certain "substantive due process" guarantees, a promise that governmental power could not be exercised for certain ends, irrespective of whether the "process" "due" was followed. Early interpretations of the Amendment distorted its purpose, turning it into a "too(l) of laissez faire, shielding American commerce and industry from controls adopted by the voters' elected representatives."[351] But some of the first applications of the Amendment, responsible for fundamentally transforming the way the United States governed itself, were more pedestrian.

Atchison is among those cases, hardly well-remembered today. In *Atchison,* the victim of an alleged denial of equal protection was a railroad company. Pursuant to a Kansas statute, the trial court held the company strictly liable for damages caused by a fire, the liability incurred by the plaintiff showing merely that the company caused the fire and that damage resulted. In short, the Kansas legislature statutorily amended the common law elements of a cause of action in tort for negligence so as to eliminate any need to find a breach of a duty.[352] In addition to creating an unusual type of liability, the Kansas legislature had also provided that the companies had to pay attorney's fees to prevailing plaintiffs, although there was no commensurate award of attorney's fees for the railroad companies if a suit brought against them were unsuccessful.[353]

The Court upheld the Kansas statute. Lockean concerns figured in its Fourteenth-

[351] Yarbrough, *Judicial Enigma* (1995), 162.
[352] *Atchison v. Matthews* 174 U.S. 96, 99 (1899).
[353] Ibid., 174 U.S. 96 (1899)

Amendment analysis, as the Court was faced here, it held, with a statute that served a public purpose and was not, moreover, purely arbitrary,[354] both conditions a *sine qua non* for Locke's legitimate legislation. The legislation was not arbitrary, according to the Court, because operating railroads caused a heightened risk of damage from fire.[355] Justice Harlan dissented.

Harlan, the "Great Dissenter," would have found an equal protection violation. In citing *Calder*, though, he went well beyond straightforward equal protection analysis. The law (which would have unquestionably been struck down, Harlan argued, had it awarded attorney's fees to the defendant in the event of a successful defense, while denying fees to a successful plaintiff) led not only to an inequality, but to an "injustice."[356] This injustice resulted from the Kansas legislature's awarding an advantage to one party in litigation as against its antagonist. Such a law violated "the spirit" of state government, Harlan argued, and was, moreover, not an appropriate exercise of a state's "police power" whereby it could legislate for the health, safety and morals of its citizens.[357] The award, though labeled "attorney's fees," was merely an arbitrary fine placed on a corporate defendant for exercising its right to defend itself in court.[358] Harlan would soon become an early advocate for the idea that the Fourteenth Amendment "incorporated" the Bill of Rights, the first ten amendments to the Constitution, and thus bound the states to honor those constitutional guarantees.[359]

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[354] Ibid., 74 U.S. 96, 101 (1899).
[355] Ibid., 74 U.S. 96, 98 (1899).
[356] *Atchison v. Matthews,* 74 U.S. 96 – (Harlan, J., dissenting) (1899).
[357] Ibid., 74 U.S. 96 – (Harlan, J., dissenting) (1899).
[358] Ibid., 74 U.S. 96 – (Harlan, J., dissenting) (1899).
[359] Yarborough, *Judicial Enigma* (1995), 182 – 183.

After *Atchison*, the Supreme Court did not again cite *Calder* for its natural law implications for nearly half a century. *Calder* never again made an appearance in the Court's jurisprudence in a business or economic context. The Twentieth – and Twenty-First – century applications of *Calder* were to arise first in the criminal law context and then in cases involving personal and individual liberties.

Calder's natural law debate, if it was that, figured in the jurisprudence of several Supreme Court justices throughout the last quarter of the 19th Century, in seven different reported cases: *McVeigh* (in the Court's opinion), *Knox* (in both Chief Justice Chase's and Justice Field's dissent), *Osborn* (in the Court's opinion), *Gunn* (in the Court's opinion), *Loan Association* (in Justice Clifford's dissent), the *Legal Tender Cases* (in Justice Field's dissent), and *Atchison* (in Justice Harlan's dissent). The citations were typically favorable to Chase's opinion claiming that there are "fundamental" and "vital" which no "free, republican" government may violate. The one exception was Justice Clifford's dissent *Loan Association v. Topeka,* which sided with Iredell. In that case, the Court's opinion, as we have seen, closely tracked Justice Chase's *Calder* opinion without citing the case.

In all these cases, justices were deliberately alluding to natural law principles, or at least to those principles inherent in free, republican governments, and it is noteworthy that, in none of majority opinions, did it seem necessary to invoke the *Calder* debate. *McVeigh* might have been a straightforward due process case under the Fifth Amendment. In *Knox* and the *Legal Tender Cases,* the dissents might have stopped at the argument that the federal government had no enumerated power to make legal tender of paper money. In *Osborn,* the Court relied on the common-law principle that a contract for the sale of

property, once executed, bound the buyer, even where a subsequent event impaired the value of the buyer's purchase. That principle alone would have decided the case. The citation to *Calder* here was especially strong evidence of the great value the late-Nineteenth Century Court placed on contracts, as here the sanctity of contract argument won out over the natural law's prohibition on slavery, a prohibition that both the majority opinion and Justice Harlan's dissent recognized. In *Atchison*, Justice Harlan relied on the Equal Protection Clause.

There was only one case in which the dissent accused the majority of relying on natural law. In *Loan Association*, Justice Clifford convincingly demonstrated that the Court's opinion did not rely on any specific constitutional provision, and accurately pointed out that Justice Miller's opinion for the Court sounded a lot like Justice Chase's opinion in *Calder*. His citation seemed apt.

It is no coincidence that *Calder*'s natural law debate lay dormant until 1870. For it was precisely then that the United States was becoming an industrialized nation, as opposed to a mostly agrarian one.[360] The importance of contractual and property rights is heightened in a nation driven by increasing commerce and interdependence, and protecting economic interests was a major concern of American Government in the Civil War's aftermath. The Supreme Court was not immune to those pressures. It seems clear that Supreme Court justices deliberately revived the *Calder* debate in the last thirty years of the Nineteenth Century. Chase's opinion in *Calder* and Locke's emphasis on property rights

[360] See Mayer, "Forging a Nation," in Schlesinger, ed., *The Almanac of American History* (2004), 300-301; Faulkner, *American Economic History,* 8th ed. (1960), 391 –392.

were both readily available to the Court as aids in securing the economic and legal foundation for America's industrial expansion. For of the seven cases citing *Calder* from 1870 to 1899, all seven addressed economic, property and contractual issues. This was a trend that would continue into the early Twentieth Century.

CALDER V. BULL **IN THE TWENTIETH CENTURY AND BEYOND**

Introduction

This section will consider the Twentieth and Twenty-first Century history of natural law in Supreme Court jurisprudence by looking at those Supreme Court opinions, whether they be Court holdings or concurring or dissenting opinions, that have cited either Justice Chase's or Justice Iredell's opinion in *Calder v. Bull.*[361] To reiterate our previous discussion, *Calder* was a late Eighteenth-Century Supreme Court case where litigants challenged a law that retroactively altered the outcome in a dispute over a will. The Court faced the issue whether the state law's retroactive effect violated the *Ex Post Facto* Clause of the federal Constitution.[362]

In holding that the *Ex Post Facto* Clause applied only to criminal law cases, the Supreme Court upheld the Connecticut law. In this holding, the Court was unanimous. But Justices Samuel Chase and James Iredell engaged in a now-famous dispute over the judiciary's authority to consider what Iredell called principles of "natural justice"[363] In his opinion, Chase argued that

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[361] *Calder v. Bull*, 3 U.S. 386 (1798)
[362] "No State shall...pass any...ex post fact Law." U.S. Constitution, Article I, Section 10.
[363] *Calder v. Bull,* 3 U.S. 386, 399 (Opinion of Iredell, J.) (1798).

> 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 constrained by the constitution or fundamental law of the state...the purposes for which men enter into society will determine the nature and terms of the social compact...there are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power.[364]

To which Iredell responded that a court is not entitled to strike down legislation as void "merely because it is in its judgment contrary to the principles of natural justice."[365] He noted that the "ideas of natural justice are regulated by no fixed standard."[366]

Calder v. Bull has become one of the most famous Supreme Court cases in American jurisprudence because of this exchange between Chase and Iredell.[367] Although no Supreme Court justice cited the case for its natural law implications until 1870,[368] there followed a series of cases that cited either Chase's or Iredell's opinion in the last quarter of the Nineteenth Century, invariably tying natural justice considerations to matters of economics, property and contracts.[369] This section will consider the second wave of *Calder's* biography by looking at citations to *Calder* - whether Chase's opinion or Iredell's - for the "natural justice" debate. Any case (from the beginning of the Twentieth Century to today) in which the Court itself, or one of the justices (whether in a concurring or dissenting opinion) cites the case for this purpose is considered herein. Cases that cite *Calder* for its *ex post facto* holding are beyond the scope of this study.

Several conclusions can be made from such an analysis. *First*, it will become

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[364] *Calder v. Bull*, 3 U.S. 386, 388 (Opinion of Chase, J.) (1798).
[365] *Calder v. Bull*, 3 U.S. 386, 399 (Opinion of Iredell, J.)(1798).
[366] Ibid., 3 U.S. 386, 399 (Opinion of Iredell, J.) (1798).
[367] For a more in-depth discussion of *Calder, see supra,* pp. 42 – 58.
[368] That case was *McVeigh v. United States*, 78 U.S. 259 (1870).
[369] *See supra,* pp. 82 - 83.

apparent that the *Calder* debate was active throughout the second part of the Twentieth Century and until today, although in a very different context than it was in the Nineteenth Century. While Nineteenth Century cases citing *Calder* were, without exception, economic, property or contractual cases, one finds no such cases beyond the Nineteenth Century. Rather, beginning in the middle of the Twentieth Century,[370] one finds *Calder* citations predominately in cases involving civil liberties.

Second, the natural law debate in Twentieth and Twenty-First Century cases (as reflected by *Calder* citations) has largely been subsumed within the debate about the nature of substantive due process. Several opinions discussed herein either rely on or reject substantive due process arguments with Justice Black especially arguing that the concept – as well as the process of selective Fourteenth Amendment "incorporation" - lends itself to justices imposing their own values, based on extra-constitutional considerations.

Third, in its substantive due process jurisprudence, the Court has adopted an approach akin to the common-law approach of gradual change, with precept building upon precept. This sort of common-law constitutional adjudication is especially appropriate in light of the Constitution's once-unique status as a single document. Whereas the English judiciary relied on a multitude of written guarantees, in addition to legal opinions in interpreting legislative acts, the American judiciary was bound, at least in theory, by that single written document. As the American Constitution is difficult to amend, its meaning and application have been determined by judicial opinions, including the courts' authority

[370] There was nearly a half-century gap between the last case to cite *Calder* (for the Chase - Iredell debate on natural justice) in the Nineteenth Century (*Atchison, T & S.F.R. v. Matthews,* 174 U.S. 96 [1899]), and the first to do so in the Twentieth (*Adamson v. California*, 332 U.S. 46 [1947]).

to strike down laws that violate the constitution, that is are "unconstitutional." Other approaches to substantive due process have been proposed; for example, that it is limited to the specific guarantees included in the Bill of Rights (the first ten amendments to the Constitution)[371], or that it is limited to specific rights that have a deeply rooted history in American traditions,[372] but the common law approach has dominated.[373]

Adamson v. California[374] was the first case in the Twentieth Century to feature a *Calder* citation. The Court in *Adamson* splintered four ways in applying the Fourteenth Amendment to state action in a criminal trial. Specifically, there were four different approaches as to the incorporation of the Bill of Rights into the Fourteenth Amendment, which prohibited state government action against a citizen's privileges and immunities, and which also prevented state governments from denying due process of law, the same guarantee made effective as against the federal government by the Fifth Amendment.[375] Justice Black's opinion, in dissent, explicitly and pointedly objected to what he presented as the other justices making recourse to natural law in interpreting the Fourteenth Amendment.

The Fifth Amendment guarantees that no defendant in a criminal trial may be compelled to be a witness against himself. Although it is now well-established law that a

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[371] *See* Justice Black's dissenting opinion in *Adamson v. California*, 322 U.S. 46, 69 (Black, J., dissenting) (1947).
[372] *See* Justice Scalia's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 980 – 981 (Scalia, J., concurring in the judgment in part and dissenting in part) (1991).
[373] *See* Strauss, *The Living Constitution* (2010), 41 – 42 (arguing that the common law approach to constitutional interpretation is both more workable and more justifiable than an "originalist" approach).
[374] *Adamson v. California,* 332 U.S. 46 (1947).
[375] U.S. Constitution, Amendment V.

prosecutor violates the Fifth Amendment by commenting on a defendant's silence,[376] this was still an open question at both the state and federal levels at the time of *Adamson*.[377]

The State of California, unlike most other states, *did* permit a prosecutor to comment on a defendant's silence.[378] The State accused the defendant of murder, and the defendant was convicted and sentenced to death. Consistent with California law, the trial court gave instructions, and the prosecuting attorney made comments regarding the defendant's silence. The defendant (the "appellant" in the Supreme Court case) raised two related Fourteenth Amendment issues: First, he argued that the comments state actors made about his silence at trial violated his privileges and immunities as a United States citizen.[379] Second, the California statute permitting comment on a defendant's silence violated his right to a fair trial, a Fifth Amendment Due Process right incorporated as against the states by the Fourteenth Amendment.[380]

The first claim was settled by the Court's holding in *Twining v. New Jersey,* [381] in which the Court ruled that the Fifth Amendment right against self-incrimination was not incorporated as against the states, either through the Privileges and Immunities Clause or through the Due Process Clause. It logically followed from this holding that the rights granted (or reserved) to citizens through the Bill of Rights were not necessarily also

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[376] *Griffin v. California,* 380 U.S. 609 (1965).
[377] *Adamson v. California*, 332 U.S. 46, 50 (1947). The Court here assumed, without deciding, that prosecutorial comment *would* violate a defendant's Fifth Amendment rights.
[378] ibid., 332 U.S. 46, 55 (1947).
[379] The Court had already ruled that the Fourteenth Amendment did not empower federal courts to protect a citizen's privileges and immunities as a citizen of an individual state. *See Adamson v. California*, 332 U.S. 46, 52 (1947).
[380] *Adamson v. California* 332 U.S. 46, 53 (1947).
[381] *Twining v. New Jersey*, 211 U.S. 78 (1908)

"privileges and immunities" of citizens of the United States, which the Fourteenth Amendment required each state to protect. As there was, then, no federal protection against compelled self-incrimination in a state court, there was, *ipso facto*, no protection against a prosecutor's comment on the defendant's silence.

The Court also dispensed with the appellant's second argument, that prosecutorial comment on a criminal defendant's silence violated his right to a fair trial, and thus due process. The Due Process Clause of the Fourteenth Amendment does not incorporate all the rights listed in the Bill of Rights, the Court held,[382] noting that this contention was raised and rejected in *Palko v. Connecticut*.[383] In *Palko,* the Court, in permitting a state to appeal a second-degree murder conviction and a life sentence, and to gain a first-degree murder conviction and death sentence on retrial, refused to extend the Fifth Amendment's prohibition of double jeopardy to the states. In short, it refused to use the Fourteenth Amendment's Due Process Clause or Privileges and Immunities Clause to "incorporate" the Fifth Amendment as protection against an individual state's action. There are, the Court said, certain guarantees in the Bill of Rights that are "implicit in the concept of ordered liberty" and it is only those that receive protection under the Fourteenth Amendment from state action.

Justice Black dissented from these holdings in *Adamson*. It is worth considering his dissent in some depth, because it would presage a long career (Black remained on the Court until 1971) of discussion about natural law and incorporation. In fact, Justice Black

[382] *Adamson v. California*, 332 U.S. 46, 53 (1947).
[383] *Palko v. Connecticut*, 302 U.S. 319 (1937).

would later refer to his dissent in *Adamson* as his "most important opinion."[384]

The Court (as reflected in the majority opinion in this 5 to 3 decision) was using, Justice Black complained, a natural law approach that was an "incongruous excrescence on our Constitution."[385] Black included a lengthy appendix to his dissent, the upshot of which was that the drafters of the Fourteenth Amendment had in mind that the entirety of the Bill of Rights would be incorporated as against the states. Black would have straightforwardly overruled *Twining.* That case, Black wrote with great rhetorical flourish, entailed that the "Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what, at a particular time, constitutes 'civilized decency' and 'fundamental liberty and justice.'"[386] In a manner recalling Justice Iredell's concurring opinion in *Calder,* Black (like Iredell, a thoroughgoing and unapologetic positivist) contended that the constraints and dictates of natural law are not determinate, and that reliance on natural law theory would cede to "this Court a broad power which we are not authorized by the Constitution to exercise."[387]

Black did not cite (for he could not) any portion of the majority opinion that invoked natural rights or natural law, but instead relied on a claimed similarity between the Court's arguments in *Adamson* and natural rights/natural law arguments that the Court rejected in the *Slaughterhouse* cases.[388] The Court in *Slaughterhouse* was faced with a Fourteenth

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[384] Newman, *Hugo Black*, 352 (1994).
[385] *Adamson v. California*, 322 U.S. 46, 75 (Black, J, dissenting) (1947).
[386] Ibid., 322 U.S. 46, 69 (Black J., dissenting) (1947).
[387] Ibid., 322 U.S. 46, 70 (Black, J., dissenting) (1947).
[388] ibid., 322 U.S. 46, 76 (Black, J., dissenting) (1947). *Slaughterhouse Cases*, 83 U.S. 36 (1871).

Amendment claim that a Louisiana statute requiring that all slaughtering of animals in New Orleans take place in one central location, and granting an exclusive franchise to one business to provide the services, violated the Privileges or Immunities Clause.[389] The plaintiffs in *Slaughterhouse* did not cite any particular provision of the Bill of Rights, but instead argued that a person had a "natural right" to "do business and engage in his trade or vocation."[390] These natural law arguments in *Adamson* were much like those that the Court "flatly rejected" in *Slaughterhouse,* Black contended. The Court in *Adamson* was adopting, in Black's view, the same sort of natural justice criteria - including notions of "civilized standards," "canons of decency," and "fundamental justice" – in determining which provisions of the Bill of Rights were enforceable against the states and which were not.[391]

For Black – although not for the majority, and not for Justice Murphy in his own dissenting opinion – the issue was easy. The Fourteenth Amendment extended the protections of the first eight amendments to the Constitution (the relevant provisions of the Bill of Rights) to citizens against state infringement of those rights. Such a methodology would constrain judges from roaming far afield, attempting to define the ill-defined principles and applications of natural law in giving content to "liberty" in the Due Process Clause or determining what the privileges or immunities are. Citing *Calder*, and specifically Justice Iredell's concurring opinion, Black wrote that "to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of

[389] Urofsky, *Dissent and the Supreme Court*, 84 – 85.
[390] *Adamson v. California*, 332 U.S. 46, 77 (Black, J., dissenting) (1947).
[391] Ibid., 332 U.S. 46, 78 (Black, J., dissenting) (1947).

Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law,' deemed to be above and undefined by the Constitution, is another."[392] Black feared also that a court unconstrained by the Bill of Rights' specific guarantees would, using a natural law formula, both fail to prevent state violations of civil liberties and "roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."[393] He attached a lengthy appendix to his opinion, outlining in detail the legislative history of the Fourteenth Amendment, including statements by one of the Amendment's principal authors, Ohio Congressman John Bingham, indicating that Bingham, at least, intended to make the Bill of Rights apply to the states.[394] Justice Black was joined in dissent by Justice Douglas, whose own writings would later figure prominently in the natural law debate.

Justice Frankfurter, in a concurring opinion, said that *Twining* was "one of the outstanding opinions in the history of the Court."[395] Arguing that it would be reasonable for a jury to draw negative inferences from a defendant's failure to testify, Frankfurter wrote that "the notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.'"[396] Perhaps more importantly, Frankfurter blasted Black's incorporation theory of the Fourteenth Amendment, relying on the

[392] Ibid., 332 U.S. 46, 91 (Black, J., dissenting) (1947) (citing *Calder*).
[393] Ibid., 332 U.S. 46, 90 (Black, J., dissenting) (1947).
[394] Ibid., 332 U.S. 46, 92 (Black, J., dissenting) (1947).
[395] *Adamson v. California*, 332 U.S. 46, 59 (Frankfurter, J., concurring) (1947)
[396] Ibid. 332 U.S. 46, 59 (Frankfurter, J., concurring) (1947).

arguments of his former student,[397] Charles Fairman, who would, two years later, publish a famous article arguing that the Fourteenth Amendment did not make the Bill of Rights binding on the states. Fairman focused on the historical practices of the states at the time of the Amendment's ratification, rather than on statements by Congressman Bingham.[398]

In addition to Black, Justice Murphy, joined by Justice Rutledge, also dissented, agreeing with most of Justice Black's own dissent, agreeing that the Fourteenth Amendment fully incorporated the Bill of Rights, but disagreeing with Black's conclusion that the Due Process Clause of the Amendment was limited in application to the specific protections of the Bill of Rights. "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights," Murphy wrote.[399] Since his reference was explicitly directed to "standards of procedure" (as opposed to substance), it is unclear whether Justice Black's criticism that the majority was employing natural law considerations would also apply to Murphy's statement. As Murphy's opinion differed from Black's only in arguing that the Fourteenth Amendment's application to the states might be broader than the specific guarantees in the Bill of Rights (an approach Black disdained) and since Justice Douglas was to employ precisely this reasoning in later cases, it is not obvious why Douglas should

[397] Frankfurter was a Harvard Law Professor before joining the Court. For the relationship between Fairman and Frankfurter, and an unflattering review of Frankfurter's *Adamson* concurrence, see Aynes, "Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment," *Chicago-Kent Law Review*, 70: 3 (1995), 1197, 2105 – 1215.
[398] Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review,* 2:1 (1949), 5 – 139.
[399] *Adamson v. California* 332 US. 46, 124 (Murphy, J., dissenting) (1947)

have joined Black's opinion rather than Murphy's. Perhaps there simply was an evolution in his own thinking.

Adamson was the first, and as of this writing, remains the only Supreme Court criminal law case to cite *Calder* for its natural law debate.[400] While the economic and contractual concerns which often dominated political discourse in the second half of the Nineteenth Century and the first half of the Twentieth as well as the personal liberty and individual autonomy issues that figured prominently from the latter part of the Twentieth Century, both had their share of *Calder* citations, the mid-Twentieth Century line of cases, strengthening many protections for criminal defendants, did not.

The Court would revisit the Fourteenth Amendment and fundamental principles in the next cases citing *Calder* which are similar enough to treat as a kind. In fact, they involved the same Connecticut state statutes. But the Court reached differing conclusions in its opinions. The cases were *Poe v. Ullman*[401] and *Griswold v. Connecticut.*[402] But before considering those cases from the 1960's, we must briefly examine a 1952 case. Although none of the opinions in *Rochin v. California*[403] rely on any of the *Calder* opinions, the case is too central a link in the natural law/incorporation debate of the mid-Twentieth Century to omit.

The facts are straightforward. California state police, having "some information"

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[400] *In re Winship*, discussed below, raised criminal-law-type issues, specifically the constitutional status of the "beyond the reasonable doubt" standard, but involved juvenile adjudication rather than criminal conviction.
[401] *Poe v. Ullman*, 367 U.S. 497 (1961).
[402] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[403] *Rochin v. California,* 342 U.S. 165 (1952).

that a person was selling narcotics, forced their way into the bedroom he was sharing with his wife. The suspect swallowed two capsules that were on his nightstand, which later proved to contain morphine. The police found this out, however, only after they directed a doctor to forcibly insert a tube into the suspect's stomach, causing him to vomit.[404]

The Court, faced with these facts, ruled that California violated the Due Process Clause of the Fourteenth Amendment because its officers' conduct "shocked the conscience."[405] Although later Court opinions and commentators would suggest that Justice Frankfurter had proposed "conscience-shocking" as a constitutional test, this is not a fair summary of what he wrote. Mindful of Justice Black's *Adamson* dissent (and Black's concurrence in this case), Frankfurter disputed the idea that the search for substantive due process was merely a revival of natural law. Instead, he proposed a constitutional common law approach that is similar to what Justices Harlan and Souter would later develop. Noting that the Due Process Clause was the "least specific and most comprehensive protection of liberties,"[406] Frankfurter stressed the need for "disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated" as necessary to accommodate both continuity and change in a "progressive society."[407] It was surprising that Frankfurter wrote in terms of "science," since he contemplated a moral inquiry, such as whether stomach-pumping "shocks the conscience."

Judges, Frankfurter wrote, were not free under such a methodology to roam at large.

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[404] Ibid., 342 U.S. 165, 166 (1952).
[405] Ibid., 342 U.S. 165, 172 (1952).
[406] Ibid., 342 U.S. 165, 170 (1952).
[407] Ibid., 342 U.S. 165, 172 (1952).

Nor were they free simply to apply their own notions of natural law; although due process considerations could not simply be frozen at some "fixed state of time or thought," (a method that would permit "inanimate machines" to judge), due process judgments still must be anchored to "the notions of justice of English-speaking peoples" and "deeply rooted in reason and in the compelling traditions of the legal profession."[408] This case was easy for Frankfurter, because the police action - including an illegal entry, a struggle to keep the suspect from swallowing capsules, and an invasive procedure designed to extract the contents of his stomach - were "shocking," leaving no doubt that the notions of justice of English-speaking peoples were violated.

Justices Black and Douglas both wrote concurring opinions, agreeing with the Court's judgment but not its reasoning. Both Black[409] and Douglas[410] would have relied on the Fifth Amendment's protection against compelled self-incrimination.[411] Both, obviously, thought that the Fourteenth Amendment had incorporated the Fifth Amendment's protections as against the states. Black, reasonably enough, questioned why, if the Court was to search for "fundamental" and "immutable" principles of justice, it should limit itself to seeking those of the English-speaking peoples.[412] The answer, of course, was that it was *English* traditions that American courts had taken cognizance of since the time of America's founding, and that there was much to be said for the argument that it was

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[408] Ibid., 342 U.S. 165, 168 – 170 (1952). Note again that Frankfurter here is proposing moral tests such as "justice" and "tradition," and not scientific reasoning.
[409] *Rochin vs. California*, 342 U.S. 165, 174 (Black, J., concurring)
[410] *Rochin vs. California*, 342 U.S. 165, 177 (Douglas, J., concurring)
[411] "No person...shall be compelled in any criminal case to be a witness against himself." U.S. Constitution, Amendment V.
[412] *Rochin vs. California,* 342 U.S. 165 176 (Black, J., concurring) (1952).

English common law on which American courts could legitimately search for and apply principles of justice. Put another way, Black assumed that his colleagues were reasoning from natural law, which relies on immutable principles, and cannot be limited to a particular time or country.

The Court in *Rochin* was condemning, too, "arbitrary" governmental action, but in a broader sense than that the state action was merely "irrational". Here, it was brutal and despotic, and some commentators have argued that the case established a fundamental liberty interest, the liberty against despotic state action.[413] In other words, this particular arbitrariness test should not be confused with the "rationality" test that any state action must pass.

To return to *Poe* and *Griswold.* The Connecticut laws at issue applied to both individuals using contraception-preventing devices and to those, including medical practitioners, seeking to "assist, abet, counsel, cause, hire or command" others in using contraception.[414] The laws, passed in 1879, had gone unenforced, and there appeared to be little or no threat that anyone would be prosecuted under them,[415] although that point was disputed.[416]

Calder was cited in both cases, and in multiple opinions. In the earlier case, *Poe*, Justice Harlan (the second Justice Harlan, the grandson of the first) dissented after the Court dismissed the appeal as not justiciable, as it did not involve a live case or controversy;

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[413] *See* Rubin, "Square Pegs and Round Holes," *Columbia Law Review,* 103: 4 (May, 2003), 833, 846-847.
[414] *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).
[415] *Poe v. Ullman*, 367 U.S. 497, 501 – 502 (1961).
[416] *Poe v. Ullman*, 367 U.S. 497, 510 (Douglas, J., dissenting) (1961).

the State of Connecticut had deliberately allowed the law to go unenforced.[417] Justice Black would have decided the case on the merits. One may conclude based on his previous and subsequent writings that Black would have upheld the law.

However, it is Justice Harlan's and Justice Douglas's dissents that concern us here. Douglas's dissent did not cite *Calder,* and while it would thus otherwise be outside the scope of this paper, his was one the one opinion in *Poe* that might most persuasively be pegged as relying on natural law. Douglas wrote philosophically, citing Immanuel Kant and John Stuart Mill, among others.[418] He argued that the Constitution, through the Fourteenth Amendment, guaranteed certain liberty interests beyond those that were listed in the Bill of Rights, pointedly disagreeing with the Black position that the Bill of Rights limited the liberties the Fourteenth Amendment protected.[419] Among those was the right to privacy, which was "implied" in a free society, Douglas argued. Although not made an explicit constitutional guarantee as such, the right "emanated" from the totality of the "constitutional scheme under which we live."[420]

Harlan would have had held that the laws were inconsistent with the Fourteenth Amendment as an "intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[421] Justice Brandeis' dissenting opinion in *Olmstead v. United States*[422] foreshadowed this suggestion that the federal

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[417] Ibid., 367 U.S. 497, 509 (Douglas, J., dissenting) (1961).
[418] Ibid., 367 U.S. 497, 513, 514 (Douglas, J., dissenting) (1961)
[419] Ibid., 367 U.S. 497, 516 (Douglas, J., dissenting) (1961).
[420] Ibid. 367 U.S. 497, 522 (Douglas, J., dissenting) (1961).
[421] *Poe v. Ullman*, 367 U.S. 497, 539 (Harlan, J., dissenting) (1961).
[422] *Olmstead v. United States*, 277 U.S. 438 (1927); *see* Urofsky, *Louis D. Brandeis*, 628 – 632.

Constitution contained a right to privacy and it would later provide the basis for the Court's holding in *Griswold*. Finding such a right under the Fourteenth Amendment's Due Process Clause, Harlan recalled Locke in arguing that the clause offered not merely *procedural* guarantees, but that it also guarded against *arbitrary* legislation by the state.[423] Harlan cited Chase's opinion in *Calder*, for the principle that a Court must enforce those rights, the security of which men entered society in the first instance. In brief, Harlan's position was that the Fourteenth Amendment ensured, against infringement from the several states, certain fundamental rights inherent in free republican governments.

Justice Harlan gave perhaps the most comprehensive and influential defense to that date of substantive due process under the Fourteenth Amendment.[424] Rejecting Justice Black's argument that the Due Process Clause of the Fourteenth Amendment is limited in application to the specific guarantees of the Bill of Rights, he noted the Due Process Clause of the *Fifth* Amendment (binding the federal government) would have been mere surplusage if interpreted the same way:

> The fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.[425]

As if addressing Justice Iredell's *Calder* opinion, as well as Justice Black's methodology laid out in a series of cases, Justice Harlan rejected the claim that a search for

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[423] *Poe v. Ullman,* 367 U.S. 497, 541 (Harlan, J., dissenting) (1961), citing *Hurtado v. California*, 110 U.S. 516 (1884).
[424] In fact, his opinion in *Poe* has been called the "most influential in modern substantive due process." Rubin, "Square Pegs and Round Holes," *Columbia Law Review*, 103:4 (May, 2003), 833, 845.
[425] *Poe vs. Ullman*, 367 U.S. 497, 542 (Harlan, J., dissenting) (1961).

a substantive due process was indeterminate, of no fixed standard, and allowed judges to roam freely in applying their own philosophical predilections. His opinion is worth quoting at some length:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that, through the course of this Court's decisions, it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[426]

Harlan made the case that a substantive due process jurisprudence that encompassed more than the specific guarantees of the Bill of Rights could be based on something other than the Court's own notion of "fundamental" law, whether that fundamental law has its roots in natural law or not. His argument recalls those early Americans who believed that the United States' fundamental law was that which the new country derived from its English antecedents.[427] It also serves as a counterpoint to Justice

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[426] Ibid., 367 U.S. 497, 542 (Harlan, J., dissenting). Harlan's approach was to be adopted in *Planned Parenthood v. Casey*, 505 U.S. 833 (joint opinion of O'Connor, Kennedy and Souter) (1991) and by Justice Souter in his concurrence in *Washington v. Glucksberg*, 702 U.S. 702, 752 (Souter, J., concurring in the judgment) (1997).

[427] It has been argued that Harlan's substantive due process jurisprudence was a conservative one, and was tied to specific procedural guarantees, such as the Fourth Amendment's protection from unreasonable searches and seizures. Thus, Harlan's primary objection to the Connecticut statute at issue was the sort of procedures the state would have to employ for effective enforcement. See Schroeder, "Keeping Police out of the Bedroom," *Virginia Law Review*, 86:5 (Aug., 2000), 1045, *passim*. This claim is unpersuasive as it ignores Justice Harlan's own language explaining

Clifford's dissenting opinion in *Loan Association v. Topeka*.[428] In that case, dissenting Justice Clifford had argued that permitting judges to base rulings on "natural justice" would be to make the judiciary sovereign. Harlan here was making an argument from substantive due process, a fact that distinguishes this case from *Loan Association*, but his response is still apt. A decision of the Court that radically departed from established tradition could not long survive, he wrote. His point was that judges were not free to simply incorporate their own philosophical predilections into constitutional law. Instead, judgements must take into account American traditions.

If he was correct about this, Justice Clifford's claim about judicial sovereignty was *not* apt. For a sovereign might, per Locke, be bound under threat of revolution to honor the ends of government. And it might, per Hobbes, not be bound by its subjects at all. But surely it could not be bound or limited by its country's traditions. That would be to lack sovereignty altogether. Clifford's point was that a court, when, going beyond specific constitutional text, would be exercising will as opposed to judgment.[429] Harlan disputed this, suggesting that courts must necessarily be constrained by the people's tradition, and that discerning that was an act of judgment, not will.

Substantive due process was not new to the Court's jurisprudence. Some scholars trace it as far back as Chief Justice Taney's opinion for the Court in *Dred Scott v.*

(persuasively) why the Due Process Clause cannot be limited to other specific constitutional guarantees.

[428] *Loan Association v. Topeka,* 87 U.S. 665. 668 (Clifford, J., dissenting) (1874)

[429] cf. Hamilton, *The Federalist* 78 (1979) (The judicial branch has "neither force nor will, but merely judgement"), 520.

Sandford,[430] where Taney condemned the Missouri Compromise by saying that the specific law at issue – one that deprived a citizen of his "property" (in that case, slaves, of course) because of the simple expedient of his having moved that property to another state - could not be dignified with the adjective "due."[431] While in the immediate aftermath of the Civil War (and thus also in the immediate aftermath of the ratification of the Fourteenth Amendment), the courts tended to reject substantive due process claims in upholding state regulation on business, the idea that the state's police powers might be limited in regulating business affairs gained traction in the late 1870's and the decade of the 1880's.[432] The Court in these cases was borrowing from the idea of vested rights, as laid out by Justice Chase in *Calder*, and giving it a specific constitutional mooring that it had previously lacked.[433]

Later, the Court would strike down state laws under a Fourteenth Amendment theory of liberty of contract. These cases that do not cite *Calder* are outside the scope of this paper, but bear mentioning (though not an extended treatment) as part of a complete understanding of the historical progression of the arguments that played out in *Calder* and

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[430] *Dred Scott v. Sandford*, 60 U.S. 393 (1857)

[431] Of course, not everyone would agree that Chief Justice Taney's opinion in *Dred Scott* was the origin of substantive due process. While Judge Robert Bork famously made this claim, it has been disputed by (among others) Henry Jaffa, a fellow proponent of "original intent." See Jaffa, *Storm Over the Constitution* (1999), 8 –9. In *Dred Scott*, Taney stressed the explicit textual provisions in the original constitution contemplating protection of property in slaves, not "unenumerated" rights implicit in "liberty." The *Casey* opinion cited *Mugler v. Kansas,* 123 U.S. 623 (1887) as the first case invoking the doctrine. *See Planned Parenthood v. Casey,* 505 U.S. 833, 846 (joint opinion of O'Connor, Kennedy and Souter) (1992).

[432] Kelly and Harbison, *The American Constitution* (1948), 517 – 519.

[433] Ibid., 516.

the cases subsequently citing it. A brief digression is in order here, before proceeding to *Griswold*.

SUBSTANTIVE DUE PROCESS

The substantive due process cases that identified the concept of due process with "vested rights" in the Court's jurisprudence in the latter part of the Nineteenth Century were of two kinds. First, in the immediate aftermath of the Civil War, those cases were concerned primarily with the system of federalism, the intricacies of the relationship between and the respective powers of the federal and state governments. Second, beginning in about 1890 (with the death of Justice Miller, the author of the opinion upholding state regulation in the *Slaughterhouse Cases)* the primary concern became economic laissez-faire, the protection of property rights, specifically in the context of big business.[434]

This era of substantive due process marks a fundamental shift in jurisprudence that arguably leant a textual basis for the sort of jurisprudence that the first Justice Chase had advocated in *Calder*. Up to that point

> A majority of the Court was drawing the doctrine of vested rights from the "essential nature of all free governments," as it had done years before in *Calder v. Bull.* Should it ever decide, however, that due process of law itself constituted a limitation upon the police power of the state, then the doctrine of vested rights would be tremendously strengthened. For the immunity of vested rights from legislative interference would then be supported by the authority of a specific clause in the Constitution of the United States, rather than by some vague conception of the nature of compact government. All that was necessary, in other words, was to tie the doctrine of vested rights to the due process clause of the Fourteenth Amendment. Were that done, the police power of the states would be seriously impaired.[435]

[434] Ibid., 517 – 519.
[435] Ibid., 516 – 517.

The problem remained that the Due Process Clause is abstract, and must itself be infused with substantive content. That task would involve a different methodology than the task of searching for natural law principles, but is just as susceptible to differing interpretations.

The *Slaughterhouse Cases*[436] and *Munn v. Illinois*[437] illustrated the Court's concern with the federal government's power vis-a-vis the several states. In the former case, as discussed above, the Court refused to hold that the state regulations of slaughterhouses which, *inter alia*, awarded an exclusive to one favored private business, violated the Fourteenth Amendment's Due Process Clause. In *Munn*, the Court upheld, as against a Fourteenth Amendment Due Process challenge, Illinois's act of setting limits that a private company could charge for the storage of grain. Noting that the grain storage units at issue served a public interest, the Court held that where private property is devoted to a public use, it is subject to regulation.[438]

As he had in *Slaughterhouse*, Justice Field penned a dissent in *Munn*, and would have held that the private company here had been deprived of its property without due process of law. "The same liberal construction which is required for the protection of life and liberty," Field wrote, "should be applied to the protection of private property."[439] Field was not suggesting that this (as he saw it) impairment of private property rights was unconstitutional merely because the state did not provide the process that was "due," but that the state lacked the power, under any circumstances, to pass this sort of legislation. In

[436] *Slaughterhouse Cases,* 83 U.S. 36 (1873).
[437] *Munn v. Illinois,* 94 U.S. 113 (1879).
[438] Ibid., 94 U.S. 113, 130 (1879).
[439] *Munn vs. Illinois,* 94 U.S. 113, 142 (Field, J., dissenting) (1879).

other words, the Due Process Clause was not merely "procedural"; instead it prohibited government from passing certain types of laws - those denying fundamental rights - regardless of the process used.

GRISWOLD **AND THE RIGHT TO PRIVACY**

To return now to those cases explicitly citing *Calder,* after *Poe v. Ullman*, we are faced again, in *Griswold v. Connecticut*[440] with the same Connecticut statute regulating the use of contraceptives. That statute prohibited the use of contraceptives, even among married couples, and also prohibited any person, including medical practitioners, from assisting or counseling with respect to contraceptive use.[441] *Griswold* was a case of such importance that six of the justices wrote opinions; in addition to Justice Douglas's opinion for the Court, Justices Goldberg, Harlan and White wrote separate concurrences, and Justices Black and Stewart wrote dissents.

Even most casual students of constitutional law will be familiar with Justice Douglas's famous, often-mocked line from the majority opinion: "(s)pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[442] Justice Douglas pre-emptively dealt with any suggestion that he was inventing substantive due process rights a la *Lochner v. New York*.[443] He

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[440] *Griswold vs. Connecticut*, 381 U.S. 479 (1965).
[441] Ibid., 381 U.S. 479, 480 (1965).
[442] Ibid., 381 U.S. 479, 485 (citing *Poe vs. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion).
[443] *Lochner v. New York*, 198 U.S. 45 (1905) was the Supreme Court case that famously held that New York's labor law regulating the number of hours bakery employee employees could work was unconstitutional as violating a "liberty of contract" that is nowhere mentioned in the Constitution.

disclaimed any intention on the part of the Court to act as a "super-legislature," charged with determining the wisdom or propriety of legislation. This case though directly affected the "intimate relation of husband and wife," and was different from *Lochner* for that reason.[444] In fact, Justice Douglas relied, in his first draft of the opinion, on the First Amendment's (implied) right of association, but Justice William Brennan dissuaded him from that course.[445]

Partly as a result of Brennan's intervention, but building on his earlier dissent in *Poe*, Douglas grounded his opinion, and the Court's finding of a Fourteenth Amendment violation, on the right to privacy. The right to privacy was "older than the Bill of Rights," Douglas wrote, speaking for the Court.[446] Later critiques of the *Griswold* opinion notwithstanding, the "right to privacy" was not invented *ex nihilo* in that case. The "right to be left alone" was recognized (albeit in a criminal case) at least as far back as Justice Brandeis's opinion in *Olmstead* and had been proposed in 1890 in a *Harvard Law Review* article by none other than Brandeis himself.[447] But was this privacy right "fundamental"? In his concurring opinion, Justice Goldberg seemed to suggest so,[448] although the Court itself, through Justice Douglas, did not quite go that far.[449]

Douglas's opinion was subject to the criticism that it was incoherent. On the one hand, with his language about "penumbras, formed by emanations," it could be, and has

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[444] *Griswold vs. Connecticut* 381 U.S. 479, 482 (1965).
[445] *See* Ball and Cooper, *Of Power and Right* (1991), 287; Stern and Wermiel, *Justice Brennan* (2010), 285.
[446] *Griswold vs. Connecticut*, 381 U.S. 479, 486 (1965).
[447] Stern and Wermiel, *Justice Brennan* (2010), 281.
[448] *Griswold v. Connecticut,* 381 U.S. 479, 486 (Goldberg, J., concurring) (1965).
[449] *See* Fleming and McClain, *Ordered Liberty* (2013), 250.

been, argued that he was basing his reasoning on rights that were merely instrumental, that is to say a means to secure other rights specifically enumerated.[450] On the other hand, his language about the "right to be let alone," and its status as predating the Bill of Rights would call this reasoning into question. Surely, Douglas suggested that the right of privacy had a standing *independent* of any specific enumeration in the Bill of Rights – notwithstanding that one commentator called his opinion in *Griswold* a "possibl(e) exception" to substantive due process holdings where the authors claimed to be merely recognizing preexisting (although not enumerated) rights.[451]

Justice Black, in his dissent, argued that the Court's decision was based on natural law, because there was no specific constitutional text that prohibited the state law.[452] In this sense, Black's dissent was rhetorically identical to Iredell's opinion in *Calder*. In his *Calder* opinion, Chase did not mention "natural justice," just as the majority opinion in *Griswold* did not mention "natural law." But Iredell and Black attributed this to Chase (in *Calder)* and to Douglas, Harlan and Goldberg (in *Griswold*) in order rhetorically to condemn what they were doing. One straightforward interpretation is that Douglas was referring to the long-established rights that Americans had inherited from their English forebears. This debate about the nature and source of American's rights was as old as the Republic itself. Strikingly, the best evidence that Douglas may have had natural rights in

[450] In fact, at least one Supreme Court justice has argued that Justice Douglas's language suggesting reliance on specific guarantees in the Bill of Rights (even if through penumbras and emanations) means that *Griswold* was not a substantive due process case at all. See *Lawrence vs. Texas* 539 U.S. 558, 586 (Scalia, J., dissenting) (2003).
[451] Ross, "A Natural Rights Basis for Substantive Due Process," *Universal Human Rights*, 2:2 (April – June, 1980) 61, 67).
[452] *Griswold v. Connecticut,* 381. U.S. 479, 510 (Black, J., dissenting) (1965).

mind comes not from the language of the opinion, but from Douglas's memoir. There, he wrote that the "penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied from the very nature of man as a child of God."[453] And Justice Black, in his dissent, cited a Georgia Supreme Court case for the proposition that the right to privacy is derived from natural law.[454]

Justice Harlan developed his common-law theory of constitutional adjudication at some length in his *Griswold* concurrence.[455] Although he concurred in the judgment of the Court, he refused to join the Court's opinion, arguing that it displayed the same flaw as Justice Black's and Justice Stewart's dissents. Both the majority and dissenting opinions, he wrote, relied on the theory that the Fourteenth Amendment's Due Process Clause was bottomed on the Bill of Rights; just as Black could not find any "right to privacy," in the first eight amendments to the Constitution, so the majority opinion felt the need to justify its holding based on "some right assured by the letter or penumbra of the Bill of Rights."[456] Justice Harlan would instead have held that the statute prohibiting contraceptive use violated the Due Process Clause of the Fourteenth Amendment because it violated the basic values "implicit in the concept of ordered liberty," the standard laid out in *Palko v. Connecticut.*[457] A law might be so repugnant to American traditions, or so inappropriate to free, republican governments, Harlan argued, that the Due Process Clause, *standing*

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[453] Quoted in Ball and Cooper, *Of Power and Right*, 286. Recall also Douglas's dissenting opinion in *Poe v. Ullman.*
[454] *Griswold v. Connecticut,* 381 U.S. 479, 527, n. 6 (Black, J. dissenting) (1965).
[455] *Griswold v. Connecticut*, 381 U.S. 479, 499 (Harlan, J., concurring in the judgment) (1965).
[456] Ibid., 381 U.S. 479, 499 (Harlan, J., concurring in the judgment) (1965).
[457] *Griswold v. Connecticut*, 381 U.S. 479, 500 (Harlan, J., concurring in the judgment) (1965) (quoting *Palko v. Connecticut,* 302 U.S. 319, 325).

alone (not tied to another, more specific constitutional text) was offended. Or to put it another way, the Due Process Clause "stands on its own bottom," as Harlan famously put it.[458]

Justice Black's dissent must be discussed at considerable length, for there is much that is relevant to this discussion, and it is this opinion that contains the most detailed criticism in Supreme Court history of supposed natural law jurisprudence. No opinion in *Griswold* claimed to rely on natural law or natural justice, but Black did make this claim, repeatedly, not only about the opinions in that case, but regarding the opinions in a host of other cases. His opinion provides an excellent opportunity to consider the history of the issue in some depth. It was a dissent that he was to call his "most difficult," because he found the law at issue "abhorrent, just viciously evil, but not unconstitutional."[459]

Black's insistence that his brethren, both in Justice Douglas's opinion for the Court and in the several concurring opinions, were invoking natural law, was emphatic and repeated to the point of dogmatism. His tone was sharp, and he was frequently sarcastic. The concurring justices "did not bother" to cite *Lochner*, Black wrote acidly, although Black thought that the substantive due process methodology used here could not be distinguished from that discredited opinion.[460] No fewer than eleven times he wrote that one opinion or the other relied on the justice's own application of "natural law" or "natural justice" principles.[461] This included citing at some length Justice Iredell's opinion in

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[458] *Griswold v. Connecticut,* 381 U.S. 479, 500 (Harlan, J., concurring in the judgment) (1965).
[459] Newman, *Hugo Black* (1994), 597.
[460] *Griswold v. Connecticut*, 381 U.S. 479, 515 (Black, J., dissenting) (1965).
[461] Ibid., 381 U.S. 479, 511, 515, 516, 521, 523, 524, 525, 527 (n. 3, n. 4) (Black, J., dissenting) (1965).

Calder, for it was the Iredell approach that Black adopted.[462] Black objected to standards such as finding that laws might violate "fundamental principles of liberty and justice" or are contrary to the "traditions and conscience of our people."[463]

Thus, for example, in responding to Harlan's and Byron White's concurring opinions, he wrote that those justices would vest the Court with power to void any state law it considered "arbitrary, capricious, unreasonable, or oppressive," or laws that were not rational or were "offensive to a 'sense of fairness and justice'".[464] These formulas were based on "natural justice," Black argued, although neither Harlan nor White made that claim.[465] Natural law principles were "mysterious and uncertain,"[466] and subject to no limiting principle except that which might be self-imposed.[467]

Black's own limiting principle was the same that he laid down in *Adamson,* namely that the Fourteenth Amendment's Due Process Clause protected those rights secured to Americans by the Bill of Rights. The specific guarantees of that document were all included against infringement by any state; on the other hand, no other unenumerated rights were. "(T)o pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing," Black wrote, but "to invalidate statutes because of application of 'natural law' deemed to be above

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[462] Ibid., 381 U.S. 479, 524 – 525 (Black, J., dissenting) (1965).
[463] Ibid., 381 U.S. 479 519 (Black, J., dissenting) (1965). Black's argument here foreshadows that made by Justice Scalia in *Planned Parenthood*, in which he argued that the Court's "undue burden" test was a "verbal shall game" to "conceal raw judicial policy choices." *Planned Parenthood v. Casey*, 505 U.S. 833, 987 (Scalia, J., concurring in the judgment in part, and dissenting in part) (1992).
[464] *Griswold v. Connecticut*, 381 U.S. 479, 511 (Black, J., dissenting) (1965).
[465] Ibid., 381 U.S. 479, 511 (Black, J., dissenting) (1965).
[466] Ibid., 381 U.S. 479, 521 (Black, J., dissenting) (1965).
[467] Ibid., 381 U.S. 479, 524 (Black, J., dissenting) (1965).

and undefined by the Constitution is another."[468]

One difficulty with the Black position was laid out by Justice Goldberg in his concurring opinion, which focused on the Constitution's Ninth Amendment. The Ninth Amendment provides, in full, that "the enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[469] Although Justice Douglas referred to the Ninth Amendment in his opinion for the Court, Justice Goldberg would have relied on it explicitly, not as an independent basis for striking down the legislation, but as an interpretive tool, indicating that the Constitution's drafters believed that there are fundamental rights entitled to constitutional protection although not specifically mentioned in the Bill of Rights. To say that a state may infringe on the marriage relationship because that relationship is not protected by specific constitutional guarantees, was to make a nullity of the Ninth Amendment.[470] Numerous commentators have agreed with this.[471]

Black's position, at its base, was that the Court and concurring justices were simply applying natural law value judgments dressed up with stirring phraseology. The due process and Ninth Amendment arguments were just claims that the Court had the power to strike down laws which it found irrational, unreasonable or offensive.[472] Similar language, which various justices cobbled together from a long line of substantive due process cases – language condemning laws that violate "fundamental principles of liberty and justice" or

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[468] Ibid., 381 U.S. 479, 525 (Black, J., dissenting) (1965).
[469] U.S. Constitution, Amendment IX.
[470] *Griswold v. Connecticut*, 381 U.S. 479, 491 (Goldberg, J., concurring) (1965).
[471] *See*, for example, Fleming, *Fidelity to our Imperfect Constitution* (2015), 80.
[472] *Griswold v. Connecticut*, 381 U.S. 479, 511 (Black, J., dissenting) (1965).

are contrary to the "traditions and conscience of our people"[473]- were also simply alternative ways to describe individual notions of natural law and natural justice, according to Black.

Justice Black's contribution to the natural law debate in the context of the Fourteenth Amendment made its final appearance in *In re Winship,*[474] a case involving the well-known "beyond a reasonable doubt standard." The Court here grappled with a New York statute that replaced that standard with a "preponderance of the evidence" standard (one more commonly associated with civil cases) in juvenile proceedings. Specifically, before a juvenile could be adjudicated for an act that would have been the criminal offense of larceny had it been committed by an adult, New York state required only a finding under the lesser standard.

The Court, with Justice Brennan writing for the majority, held two things. First the Constitution's Due Process Clause mandated the "beyond a reasonable doubt" standard for every fact necessary to constitute the crime with which the accused was charged.[475] Second, where a state delinquency proceeding threatened, as in this case, a juvenile with confinement for six years, the same heightened standard was also required.[476]

Justice Harlan joined the Court's opinion and wrote a concurring one of his own, emphasizing that the "beyond a reasonable doubt" standard embodied a "fundamental value determination of our society" that it is better to let a guilty defendant go free than to convict

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[473] Ibid, 381 U.S. 479, 519 (Black, J., dissenting) (1965).
[474] *In re Winship,* 397 U.S. 358 (1970).
[475] Ibid., 397 U.S. 358, 364 (1970).
[476] Ibid., 397 U.S. 358, 368 (1970)

an innocent one.[477] He also expressed, again, his exasperation with Justice Black's Fourteenth Amendment approach. He criticized Black's claim that the Fourteenth Amendment does not embody a requirement for "fundamental fairness" in judicial proceedings, but protects only those specific procedural guarantees listed in the Bill of Rights.[478] Black's opinion was contrary to "an unbroken line of opinions" as well as "uncontroverted scholarly research" showing that the Fourteenth Amendment's Due Process protections were not so limited, Harlan wrote.[479]

In dissent, Justice Black, predictably, resorted to his position that the Constitution's specific text controlled. To his mind, "due process of law" meant simply that courts must comply with the "law of the land," that is, the existing promulgated law.[480] He rejected as overly broad the suggestion found in a previous Court opinion that, in interpreting due process, courts must be guided by "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors,"[481] and he also rejected the Court's opinion in *Twining v. New Jersey* that "no change in ancient procedure can be made which disregards...fundamental principles."[482] It was for this latter point that Justice Black cited *Calder* in a footnote, but it was Justice *Iredell's* and *not* Justice Chase's opinion that he relied on. This reasoning (found in *Twining*) contained "the kernel of the 'natural law due process' notion by which this Court frees itself from the limits of a

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[477] *In re Winship*, 397 U.S. 358, 372 (Harlan, J., concurring).
[478] Ibid., 397 U.S. 358, 375, n. 5 (Harlan, J., concurring).
[479] Ibid., 397 U.S. 358, 375, n. 2 (Harlan, J., concurring) (1970).
[480] *In re Winship*, 397 U.S. 358, 379 (Black, J., dissenting) (1970).
[481] Ibid., 397 U.S. 358, 380 (Black, J. dissenting) (1970), (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 276) (1856).
[482] *In re Winship*, 397 U.S. 358, 381 (Black, J., dissenting) (1970) (quoting *Twining v. New Jersey*, 211 U.S. 78, 101) (1908).

written Constitution," Black wrote.[483] And yet it was Justice Chase, and not Iredell that arguably relied on natural law in *Calder*. Black's citation to the Iredell opinion, arguing for the controlling nature of the written constitution was preceded by the signifier "cf.," from the Latin "confer," and evidently Black meant to suggest that Justice Iredell's reasoning should be compared favorably to the reasoning the Court employed in more recent cases, including *Twining*.

Black's discussion of the nature of a written Constitution was crucial to his opinion in this case and in considering his reasoning generally. He conceded that his limited view of the Fourteenth Amendment's reach might seem a bit cramped. But to view it this way was to misunderstand the revolutionary nature of the American form of government, where the powers of that government were spelled out in a single written document that formed our "constitution."[484] The fundamental law of our nation was thus consolidated in a comprehensive sense in a single location, keeping constitutional expositors from having to search for our governing principles. In other words, and to reiterate, to the extent that natural law obtained in the United States, it was incorporated into existing law, including the single-document Constitution, and did not provide a separate, free-standing, source of law, permitting the judiciary a wide expanse for interpretation. Or so felt Justice Black. That the specific rights enumerated in the Bill of Rights provided the only substantive limitations on state legislation under the Fourteenth Amendment was an argument that Black made with such force and frequency over more than a quarter-century, that Justice

[483] Ibid. 397 U.S. 358, 381 (Black, J., dissenting) (1970).
[484] Ibid., 397 U.S. 358, 383 (Black, J., dissenting) (1970).

Potter Stewart was later to label it "Pavlovian."[485] Black made a mark over the same several decades arguing that fellow justices applied natural law in their judicial opinions as a means of augmenting their authority. *Winship* proved to be his last such case. Whether the right claimed in the case was one of substantive, as opposed to procedural, due process is not clear.[486]

Calder took a completely different trajectory when it next made an appearance. It was a quarter of a century later, and the case did not involve economic regulation, as most *Calder* cases in the Nineteenth century had, neither did it focus on civil liberties or criminal procedure, as the mid Twentieth century cases had. Instead, issues of sovereignty appeared again, this time under the auspices of the Eleventh Amendment to the Constitution.

Seminole Tribe

The Case was *Seminole Tribe of Florida v. Florida*[487] and arose under the Indian Gaming Regulatory Act ("the Act"). The framers of the Constitution had granted Congress the power to "regulate commerce...with the Indian Tribes."[488] Pursuant to this authority, Congress had passed the Act, which provided, *inter alia*, that states have a duty to negotiate with Indian tribes "in good faith" toward the formation of a compact allowing for the conduct of certain gaming activities.[489] The Seminole Tribe of Florida, using that part of the Act permitting it to sue to enforce its provisions, claimed that the State of Florida ("the State") had violated its duty to negotiate in good faith. Specifically, the state had refused

[485] *Williams v. Florida*, 399 U.S. 78, 144 (1970) (Stewart, J., dissenting).
[486] See Rubin, "Square Pegs and Round Holes," *Columbia Law Review,* 103:4 (May 2003), 833, 848.
[487] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[488] U.S. Constitution, Article I, Section 8, Clause 3.
[489] 25. U.S.C. section 2710 (d)(3)(A).

to enter into any negotiation at all regarding some proposed gaming activities.[490] The State pleaded sovereign immunity, the principle that the state (here, I use the term in the broader sense of "the government") may not be sued by its own citizens. The majority opinion (authored by Chief Justice Rehnquist) and the primary dissenting opinion (authored by Justice Souter) used the occasion to debate the nature of the common law and its effect on constitutional adjudication. *Calder* was cited (in Justice Souter's dissent), although whether it was natural law that had any effect on the Court's opinion that the Constitution did not authorize Congress to do away with the State's sovereign immunity in this case, or whether the Court's extra-constitutional source was common law, is subject to debate. This was the same debate scholars held in evaluating Justice Chase's opinion in *Calder*.

Was the principle of sovereign immunity incorporated in the Constitution, and if it was, did the Constitutional grant of power to Congress to regulate Indian Commerce abrogate that immunity? As Justice Souter recognized in dissent, the issue was complicated by the nature of sovereignty in the United States, where, *contra* Hobbes, sovereignty was spread among different levels of government. [491] Certainly the states were not sovereign with respect to the powers that the founders had specifically granted to the federal government.

In the Eighteenth-Century case *Chisholm v. Georgia*,[492] the Supreme Court ruled that states enjoyed no immunity against suits in federal court. Those suits might arise in one of two ways: 1) from a federal question, or 2) under diversity jurisdiction, the power

[490] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 52 (1996).
[491] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 -- (Souter, J., dissenting) (1996).
[492] *Chisholm v. Georgia*, 2 U.S. 319 (1793)

of a federal court to hear cases between citizens of different states or between a state and another state's citizen.[493] In response, the Eleventh Amendment to the Constitution was swiftly ratified, providing that the judicial power of the United States would not be construed as applying to suits filed against one of the United States by citizens of another state.[494]

Subsequently, in *Han v. Louisiana*,[495] the Court held that the Eleventh Amendment also barred a state's citizen from suing his state in federal court under federal question jurisdiction. The Court reasoned that it would have created an anomaly if the federal courts could entertain suits by a citizen against his own sovereign, but not by non-citizens of a state suing that state. The Eleventh Amendment, in other words, addressed the precise issue raised in *Chisholm*, whether a non-citizen of a state could sue that state in federal court; a state's sovereign immunity as against its own citizens was assumed.[496] Or at least the *Han* Court so ruled.

Perhaps, as Justice Souter argued in his *Seminole Tribe* dissent, the more plausible reading of the Eleventh Amendment was that its drafters intended only to strip federal courts of diversity jurisdiction and *not* of federal question jurisdiction.[497] Also left unanswered in *Hans* was the question of the extent to which specific constitutional grants of power to the federal government deprived the states of sovereign immunity in those

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[493] The Constitution provided for federal jurisdiction in suits between a state and a citizen of another state. U.S. Constitution, Article III, Section 2.
[494] U.S. Constitution, Amendment XI.
[495] *Hans v. Louisiana*, 134 U.S. 1 (1890)
[496] Ibid., 134 U.S. 1, 4 (1890).
[497] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 100 (Souter, J., dissenting) (1996).

instances. In a plurality opinion, four of nine justices signing onto the reasoning had stated that the Interstate Commerce Clause gave Congress the power to abrogate state sovereign immunity with respect to interstate commerce,[498] but the *Seminole Tribe* Court overruled that case, and held also that the Indian Commerce Clause did not give Congress the power to abrogate state sovereign immunity.

Justice Souter in dissent provided the citation to *Calder*, and it was perhaps the most stinging rebuke of Chase's opinion that appeared in a Supreme Court opinion. Souter accused the Court's majority in *Seminole Tribe* of constitutionalizing a common law rule, namely that a sovereign could not be hauled into court against its will by one of its subjects, and giving it priority over an explicit constitutional command, namely Congress's plenary power to regulate Indian Commerce.[499] "I know of only one other occasion on which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision," Souter wrote.[500] He was referring, of course, to Justice Chase's opinion. That opinion, Souter stated flatly, was inconsistent with American constitutional principles, as much in 1798 as it is today. Justice Iredell recognized this well, and his view has been vindicated, according to Justice Souter, who seems to have been in little or no doubt about the matter.

Other justices, including Souter himself, have cited Chase's opinion more favorably and would do so again after *Seminole Tribe.* And Souter's claim may have been a bit

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[498] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1991).
[499] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 109 (Souter, J., dissenting) (1996).
[500] Ibid., 517 U.S. 44, 167(Souter, J., dissenting) (1996).

overbroad. First, Chase did not vote to strike down the Connecticut law in *Calder.* So whatever the extent of Chase's hypothetical musings in that case, they were, at any rate, *dicta,* although Chase did cite the *Ex Post Facto* Clause as reflecting one of the "vital" principles to which he referred. Second, he was not referring to the possibility of a *constitutional* provision being inconsistent with natural justice (or "the great first principles of the social compact"), but rather to a legislative act being contrary to those principles. Chase was arguing that the "plain text of the Constitution is subordinate to judicially discoverable principles" only in the very broad sense that, by "the "plain text" Souter was referring to the interpretative principle that state legislatures possess plenary power except where a specific power was excluded. It seems a bit much to refer to this as "the plain text of the Constitution." Third, Chase's argument was that it *could not be presumed* that the people had granted government the power to pass unjust laws; any constitutional provision explicitly authorizing an unjust law - which would seem to be required to sustain a claim that it was in the Constitution's "plain text" - would not involve any "presumptions," and thus would not have been subject to Chase's rule.

Seminole Tribe was a one-of-a-kind case in the *Calder* biography. It was neither a business/economic/contractual case, as we saw frequently in the latter part of the 19th Century, neither was it a personal liberty or individual autonomy case that we've seen more often in recent years. But Justice Souter gave Justice Chase his due by not characterizing Chase's opinion as relying on natural law, but instead on common law, an argument that, as we have seen, other commentators had made.

From Right-to-Die to Eminent Domain

Justice Souter would reference Chase's *Calder* opinion again in a case that has been popularly, if not precisely, referred to as rejecting a constitutional "right-to-die." The case is *Washington v. Glucksberg*,[501] and arose from a State of Washington law prohibiting anyone from "promoting" a suicide attempt. The law was challenged by terminally ill patients who sought the assistance of physicians in "dying with dignity." The remaining respondents[502] were physicians who (in order to establish their standing to bring this action) claimed that they would have assisted terminally ill patients in ending their lives, but for the Washington law.[503] The trial court had ruled that the law violated both respondents' due process and equal protection rights, although the 9th Circuit appellate court rested its decision only on substantive due process.[504]

The majority opinion, authored by Chief Justice Rehnquist and joined by four other justices,[505] laid out what it characterized as established substantive due process reasoning. Two considerations obtained in substantive due process methodology: First, an analysis of whether an asserted right is "deeply rooted in this Nation's history and tradition,"[506]; second, a careful and precise description of the asserted right's nature. These requirements

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[501] *Washington v. Glucksberg,* 51 U.S. 702 (1997). Souter references *Calder* in support of his and Harlan's general approach to interpreting the Due Process Clause, not his view of the right to die in particular.
[502] The "respondents" in this case were the plaintiffs at the trial court, as the patients and doctors challenging the law had won in an *en banc* decision from the 9th U.S. Circuit Court of Appeals (overturning a three-judge panel decision of the 9th Circuit). 79 F.3d 790 (9th Cir., 1996).
[503] *Washington v. Glucksberg*, 521 U.S. 702, 708 (1997).
[504] Ibid., 521 U.S. 702, 708(1997).
[505] The holding in this case was unanimous, but four justices refused to sign onto the Court's reasoning, each of them filing a separate opinion concurring only in the judgment.
[506] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland,* 431 U.S. 494, 502) (1977).

would ensure that justices were not merely reading personal and subjective preferences into constitutional law. The Court left unexamined the extent to which substantive rights might be expanded (as a matter of constitutional law) as society progresses, an issue that prior opinions had raised. In *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[507] for example, the controlling joint opinion of Justices O'Connor, Kennedy and Souter had rejected the notion that substantive due process "protects only those practices, defined at the most specific level that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[508] Justice Scalia chafed at the claim that this represented his position, writing that he had argued only that, in defining liberty, the Court was not free to disregard an established tradition either recognizing or denying the asserted right, defined at its most specific level.[509]

Rehnquist, expounding further on substantive due process methodology in *Glucksberg*, wrote that the only time the Court would apply a standard of review more stringent than "rational basis" was when the asserted liberty was "fundamental." In the event that a fundamental liberty was implicated, then the Court would apply a "strict scrutiny" standard – in other words, the state must have a compelling interest to justify its interference with the liberty interest and the challenged law must be narrowly tailored to advance that interest.[510] Justice Scalia in a later dissent, was to reiterate that this was the

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[507] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[508] *Planned Parenthood of Southeastern Pennsylvania vs. Casey*, 505 U.S. 833, 847(Joint opinion of O'Connor, Kennedy and Souter) (1992).
[509] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981 (Scalia, J., concurring and dissenting in the judgment, in part) (1992) (quoting *Michael H. v. Gerald D.,* 491 U.S. 110, 127, n. 6) (1989).
[510] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

standard methodology in substantive due process cases.[511] This methodology was questioned not only by Justice Souter in his opinion concurring in the judgment, but by commentators arguing that it is inaccurate as a historical description of the Court's reasoning, in the due process cases protecting rights.[512] In fact, on only one occasion when applying substantive due process to protect a right – in *Roe v. Wade*[513] - had the Court recognized a fundamental right and applied a test of strict scrutiny. And even that case was modified, in pertinent part, in *Casey,* in which the dispositive joint opinion refused to classify the abortion right as "fundamental" and, instead of "strict scrutiny" applied a less stringent "undue burden" test.[514]

The respondents in *Glucksberg*, relying on recent precedent, defined the right they were asserting as being one of "self-sovereignty" and "personal autonomy."[515] The Court denied that it had gone so far as to previously recognize a right to "personal autonomy," pointing out that in previous "right-to-die" cases, it had held only that there was a liberty interest in refusing unwanted medical treatment, a recognition that was entirely consistent with the Nation's history and constitutional traditions.[516] Accordingly, the Court held that there was no "fundamental right" to assisted suicide. Thus, the State had to advance only rational reasons for its ban, not compelling ones.[517] The Court did not need to seek far to

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[511] *Lawrence v. Texas*, 539 U.S. 558, 586 (Scalia, J., dissenting) (2003).
[512] Fleming and McClain, *Ordered Liberty* (2013), 239.
[513] *Roe v. Wade,* 410 U.S. 113 (1973)
[514] Fleming and McCain, *Ordered Liberty* (2013) 238 – 239; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (Joint opinion of O'Connor, Kennedy and Souter) (1992).
[515] *Washington v. Glucksberg*, 521 U.S. 702, 724(1997). For this proposition, respondents cited, in addition to *Planned Parenthood*, *Cruzan v. Missouri Director, Department of Health*, 497 U.S. 261 (1990).
[516] *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).
[517] Ibid., 521 U.S. 702, 728-733 (1997).

find rational reasons for the Washington law, including protection of vulnerable and ill individuals, and the protection of the integrity of the medical profession, among others.

No justice disagreed with the outcome in this case; there were no dissenting opinions. The specific holding that the Washington statute prohibiting assisted suicide was not invalid on its face (without considering how the statute might be *applied* in an unconstitutional manner) was unanimous. However, four justices refused to sign onto the Court's opinion, and reached their conclusions based on different reasoning. One of the opinions concurring in the judgment was Justice Souter's.

Justice Souter laid out a fairly exhaustive review of the history of substantive due process, and placed Chase's opinion in *Calder* within that history. This is not to say that post-Fourteenth Amendment substantive due process claims must necessarily rely on principles of natural law or natural justice, but if those considerations have figured (and do figure) in constitutional jurisprudence, the vehicle by which they would most suitably be introduced would be substantive due process. It would not be necessary to rely on non-textual or extra-textual considerations where a specific constitutional protection obtains. The Court itself made that clear in *Graham vs. Connor*, 490 U.S. 386 (1989). There, the Court held that substantive due process analysis does not apply where a specific constitutional protection does, although that approach has been criticized as undermining the very rationale of substantive due process.[518]

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[518] See Massaro, "Reviving Hugo Black?" *N.Y.U. Law Review,* 73:4, 1086, 1099 – 1102 (1999). The other constitutional provision which is an obvious candidate for federal constitutional protection of unenumerated rights is the Ninth Amendment, providing that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." the Court noted that the district court had relied on the Ninth Amendment in *Roe v. Wade*, 410 U.S. 113 (1973)

In an unusual and interesting, but reasonable take, Souter characterized Chase's *Calder* opinion as one that "presage(d)...the ratification of the Fourteenth Amendment," in suggesting that the Court had the power to void legislation that was contrary to "important but unenumerated principles of American government."[519] This *favorable* citation to Justice Chase's opinion seems to conflict with Souter's earlier criticism of that same opinion.[520] For while Souter had just one year previously declared that Chase's approach was "in conflict with American constitutionalism," he here portrayed that same opinion in a positive light, as emblematic of a train of thought recognizing that certain general principles necessarily inform free institutions, even where those principles are not specifically enumerated. These seemingly contradictory approaches might support an interpretation that judges make indiscriminate use of their sources in order to support a desired result.

In addition to discussing the pre-Fourteenth Amendment cases, Justice Souter recounted the early days of Fourteenth Amendment substantive due process jurisprudence, where the doctrine was used mostly to enshrine the idea of "liberty" as being primarily economic and property-based. Cases here include *Allgeyer v. Louisiana*[521] and, most

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and Justice Goldberg made it the focal point of his concurrence in *Griswold*, 381 U.S. 479, 486 (1965) although not as an in independent basis on which to strike down a legislature's act. Justice Stewart's response, noting the irony of using an amendment meant to *restrain* the federal government as a vehicle by which to overturn a state statute, 381 U.S. 479, 530 (1965) certainly had some force, and might partially explain why the Ninth Amendment has taken a back seat to the Fourteenth Amendment, which *explicitly* binds the states.

[519] *Washington v. Glucksberg*, 521 U.S. 702, 758 (1997).

[520] See n. 499 -500, *supra*, and accompanying text.

[521] *Allgeyer v. Louisiana,* 165 U.S. 578 (striking down a Louisiana statute voiding a contract and suggesting that the Due Process Clause was not limited to procedure) (1897).

famously, *Lochner.*[522] Finally, were those cases turning to an analysis of individual liberties as being protected against arbitrary governmental sanctions, commencing with *Meyer v. Nebraska,*[523] a case holding that a state statute prohibiting schools from teaching the German language violated the Due Process Clause.[524]

Souter argued that Justice Harlan, in his *Poe* dissent, laid out the proper methodology by which to evaluate substantive due process claims.[525] Justice Harlan's dissent in *Poe* made, according to Souter, three important points. First, was to recognize the importance of substantive due process and the Court's role in implementing it. Second, courts, in addressing substantive due process claims, are not dealing with "extratextual absolutes," but instead resolving competing constitutional principles, each worthy of respect. Courts are thus called on to accord relative weight to these competing principles, not to make deductions from a first premise. Third, explicit attention to detail must be paid in recognizing, precisely specifying, and building on, substantive due process guarantees.[526]

If one is to reconcile Souter's criticism of Chase's *Calder* opinion (in *Seminole Tribe*) with his favorable citation to it in *Glucksberg*, his argument regarding Harlan's second point in *Poe* would seem to be a promising place to start. That is, Souter seems to suggest that Chase was entertaining the possibility of relying on "extratextual absolutes" in his *Calder* dicta, inveighing against absolute legislative power, whether of natural law

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[522] *Lochner v. New York*, 198 U.S. 45 (striking down a New York law limiting bakery employees' hours as violating the Due Process Clause) (1905).
[523] *Meyer v. Nebraska,* 262 U.S. 390 (1923).
[524] *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997).
[525] See footnotes 424 - 427, *supra*, and accompanying text.
[526] *Washington v. Glucksberg*, 521 U.S. 702, 763 (Souter, J., concurring in the judgment) (1997).

or English common law. To the extent that Chase's opinion was suggesting that a specific constitutional command might be subordinated to other considerations, that opinion was worthy of Souter's condemnation. To the extent that two constitutional commands (specific or implied, enumerated or unenumerated) were in tension with each other, the courts were entitled to weigh competing interests in reaching a constitutionally supportable result. Here, Chase's *Calder* opinion was consistent with the remaining substantive due process cases that Souter discusses (although the concept of "substantive" due process *as such* was not a factor in Chase's opinion, of course).

The linchpin of Souter's opinion – relying, as he thought, on Harlan's dissent in *Poe* – was the Court's duty to weigh competing interests where state infringement on individual liberties is said to be arbitrary. The Court's discretion is limited by the fact that the asserted liberty must be consistent with and rooted in the nation's tradition, and also by its recognition of its judicial role. Thus, courts are not free, when reviewing legislation, simply to impose an alternative reasonable reading of the resolution of competing interests. Instead, it is only where the "legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied," that a court is justified in striking it down as violating substantive due process.[527] Put another way, Souter was proposing a different methodology whereby the Court would evaluate claimed "liberty" interests under the Fourteenth Amendment; instead of being bound merely by tradition, the Court would be called on to consider whether a law was arbitrary, when weighed against the individual interest.

[527] Ibid., 521 U.S. 702, 783 (Souter, J., concurring in the judgment).

Ultimately, Souter agreed that the plaintiffs in this case had failed to establish a due process violation, although he reached his conclusion by a different route than the majority. Conceding that there was a long tradition in western law against suicide (a fact that was dispositive of the case for the Court), Souter instead weighed the plaintiff's asserted interest – the traditional right to medical care and counsel – against the state's asserted interest. Evaluating those interests, Souter was persuaded by the State's claim that its law protected terminally ill patients from involuntary suicide and voluntary or involuntary euthanasia.[528]

Souter's use- and the Court's, in substantive due process jurisprudence - of the concept of "arbitrariness," is not markedly different from Locke's in one respect, and the American condemnation of arbitrary lawmaking had its genesis in Locke's theories. According to Locke, arbitrary government is that which is not aimed at the preservation of the life, liberty and property of its subjects.[529] The sorts of "morals" legislation that have often been the subject of substantive due process attacks, including prohibiting contraceptive use by married couples, for example, appear to have scant relationship to protection of life, liberty and property. Hence the Court's insistence on a weighing of the asserted state interest, whether it might be said to be a "compelling" one or at least a rational one, against the asserted liberty interest of the individual, whether it was enumerated or not and whether it was "fundamental" or not. But Locke applied his precept also in a *collective* and not merely an individualistic sense, as he stressed repeatedly that the end of government was the good of "mankind," and not merely the protection of individual

[528] Ibid., 501 U.S. 702, 782 (Souter, J., concurring in the judgment) (1997).
[529] Locke, *Second Treatise* (1960), 171 – 172; 221- 223.

rights.[530] The difficulty, of course, is in a precise description of the state interest involved, and its relative weight as opposed to the asserted liberty interest.

Souter squarely located his methodology within American practice and tradition (a method his colleague Justice Scalia also advocated, although with often drastically different results), and considered it to be conservative in the same way the development of the common law is conservative. Common law adjudication is suspicious, Souter argued, of broad and sweeping new claims, rejecting "all or nothing" analysis, and advocating instead attention to detail. Thus the importance of exact and precise characterization of the rights being claimed.[531] By contrast, Scalia viewed common law constitutional interpretation as a practice of illegitimate "living constitutionalism".[532]

Still, the *Glucksberg* majority did not view Souter's (and by extension, Harlan's) methodology as placing sufficient limitations on judges' discretion. The Court's historic approach of recognizing as "fundamental" only those liberty interests that were "deeply rooted in this nation's tradition and history" so that "neither liberty nor justice would exist if they were sacrificed"[533] - as opposed to Souter's emphasis on "arbitrariness" or "purposeless restraints" - carefully refined those rights by "concrete examples," the Court said.[534] The justices here were again debating the standards by which asserted rights would be identified, just as Chase and Iredell did in *Calder*. And here, it appears that Justice

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[530] Ibid., 229.
[531] *Washington v. Glucksberg*, 521 U.S. 702, 772 (Souter, J., Concurring in the judgment) (1997).
[532] *See* Scalia, *A Matter of Interpretation* (1998), passim.
[533] As to whether the Court's majority accurately described the Court's historic methodology in evaluating substantive due process claims, see notes 133 – 135, *infra*, and accompanying text.
[534] *Washington v. Glucksberg*, 521 U.S. 702, 721(1997) (quoting *Rochin vs. California*, 342 U.S. 165) (1952); (*Palko vs. Connecticut,* 302 U.S. 319) (1937).

Souter, notwithstanding his earlier harsh criticism of Chase's *Calder* opinion, was closer to Chase's position, insofar as Souter saw his role as resolving constitutional principles in tension with each other, whereas he had criticized Chase for relying on, or at least indicating a willingness to rely on, purely extra-constitutional considerations. But Iredell's *Calder* criticism that the principles of natural justice admit of no fixed standard could aptly be made of Souter's "arbitrary" and "purposeless" standard.[535]

The nub of the dispute between the majority and Justice Souter was the manner in which courts would (or would not) recognize "rights" that were not previously afforded judicial protection as against legislative action. And it is difficult to see that any application of natural law would figure prominently in such an analysis. In its essence, natural law embodies principles that are timeless and not culturally bound. The idea that natural law might evolve over time seems inherently contradictory.

But some scholars have suggested that our capacity to reason our way to seeing natural law's principles more clearly has expanded. In fact, James Wilson, one of America's intellectual founders, argued that God gives a "moral sense" to individuals enabling them to grasp the first principles of morality. That people and nations disagree about the requirements of morality does not indicate that morality's principles are not universal or

[535] One analytical difficulty beyond the scope of this paper is the idea that legislative bodies would pass laws that are "purposeless" or not "rational." Unless these standards are meant to suggest that the legislation was passed in a corrupt manner (which is something that Locke did suggest, as when laws were not promulgated for the public good), presumably a great number of individual legislators found the law at issue to have reason and a purpose. On the other hand, one renowned constitutional scholar has argued that "it does not take a lunatic legislature to enact measures that are irrational. It only takes a legislature more than normally whipped up, very intent on the expedient purpose of the moment, acting under severe pressure, rushed, tired, lazy, mistaken, or forsooth, ignorant." Bickel, *The Least Dangerous Branch*, (1962), 39.

timeless; it merely indicates that the moral sense has become corrupted. As Wilson put the point, "the law of nature, though immutable in its principles, will be progressive in its operation and effects."[536]

The idea that America's fundamental principles (as opposed to our perception of timeless principles) *do* change over time is more plausible and straightforward, though. Thomas Jefferson, perhaps one of the greatest "natural rights" theorists among the founders, argued explicitly that each generation must work out for itself its defining parameters. "No society can make a perpetual constitution or even a perpetual law," he wrote, laying this down as a "fundamental principle," in the immediate aftermath of the Constitution's ratification.[537] Jefferson was not questioning the existence of an eternal or "perpetual" law, but rather making the point that each generation must decide for itself which law they are to be bound by. Moreover, he was making a point that others, like Blackstone before him and Iredell after him, were also to make. The principles of natural law, just as the principles of a constitution, are not self-effecting; they require interpretation and implementation in specific circumstances. Whether he was questioning the existence of an eternal law or not, Alasdair MacIntyre, in his groundbreaking work, *After Virtue,* was to argue that the Enlightenment attempt to arrive at timeless principles through reason had failed, and that it had failed because our philosophical traditions and precepts have a specific historical context that often gets overlooked.[538]

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[536] Hall, *Justice, Law and the Creation of the American Republic* (2009), 6. For the same argument, *see* Maritain, *Natural Law: Reflections on Theory & Practice* (2001), 20.
[537] Smith, ed. *The Republic of Letters*, vol. 2, (1995) 631 – 632.
[538] *See* Royal, *A Deeper Vision*, (2015), 101.

But if Iredell and Blackstone were correct (and surely they were) in pointing out that the principles of natural law and natural justice provide no fixed standards, that they would lead to different conclusions, inferences and implementations among different minds, the same criticism could be made to the common-law constitutional approach that Harlan and Souter favored. Justice Scalia has famously criticized the search for judicially defined and constitutionally-protected rights, where those rights arguably do not reflect even a contemporary standard, let alone rights that are deeply rooted in the nation's traditions and history. Thus did he object to Supreme Court cases finding that the Eighth Amendment categorically prohibits the execution of persons who were under the age of eighteen at the time of their crimes, even where numerous states permitted such executions,[539] and to similar holdings that it is "cruel and unusual" for a state to execute even a mildly retarded murder defendant.[540] In the area of substantive due process, Scalia would condemn the Court's conclusion, in 2003, that there was an emerging national consensus that adults had a liberty interest, entitled to "substantial" protection, in conducting their private lives in matters pertaining to sex.[541] That debate was to continue as recently as 2015, in *Obergefell v. Hodges*, [542] where the Court, with Justice Kennedy writing for a 5-member majority, held that the right to marry was a fundamental liberty protected by both the Due Process and Equal Protection Clauses, and that states could not therefore deny marriage licenses to same-sex couples. Justice Scalia, in dissent, called the

[539] *Roper v. Simmons*, 543 U.S. 551, -- (2005) (Scalia, J., dissenting)
[540] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[541] *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).
[542] *Obergefell v. Hodges*, 576 U.S. -- (2015).

decision a "threat to American democracy," dealt by an "unelected committee of nine" which robbed the people of the "freedom to govern themselves."[543]

One final note on Justice Souter's concurrence in *Glucksberg:* it is implicit in his gradualist, common-law type approach to substantive due process, an approach that he shared with the second Justice Harlan, that the sort of formulaic reasoning that would reduce substantive due process analysis to the binary classifications of "fundamental" liberty interest or not and "compelling" as against "rational" justification of state action is not tenable. He envisioned, instead a continuum of liberty interests as well as a continuum of state responses, and, in practice, the Court's cases have not employed the sort of dichotomous analysis that some justices have suggested.[544]

The most recent Supreme Court case, as of this writing, that cites *Calder* is a takings case under the Fifth Amendment. The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation.[545] That the City of New London Connecticut did take private property and did provide just compensation was undisputed in *Kelo v. City of New London*.[546] The issue confronted in the case was whether the taking was for a "public purpose," and both the majority opinion and the principal dissent cited *Calder*.

The private property seized was taken by a government body and then turned over to a private party. The Connecticut Legislature found that the City of New London was a

[543] *Obergefell v. Hodges*, 576 U.S. -- (Scalia, J., dissenting) (2015).
[544] See Fleming and McClain, *Ordered Liberty* (2013), 242 – 243.
[545] U.S. Constitution, Amendment V.
[546] *Kelo v. City of New London*, 545 U.S. 469 (2005)

"distressed municipality" after decades of economic decline. A private development corporation formed by the city submitted a comprehensive redevelopment plan, the cornerstone of which was a huge, private pharmaceutical research company. The City relied on the development corporation's detailed plans, a large planned community in addition to the research company, to include hotels, restaurants, museums and new private homes. The petitioners in this case found their home subject to eminent domain after they refused to sell their property to the private development corporation. There was no allegation that the homes in this action were blighted or in disrepair; on the contrary, the parties agreed that the homes were well-maintained and structurally sound.[547]

Justice Stevens authored the majority opinion upholding the taking, while Justice O'Connor spoke for the four dissenters in the principal dissent (Justice Thomas, while joining O'Connor's opinion, also filed a separate dissent). The Court's opinion reasoned that courts, in interpreting the Takings Clause, had traditionally afforded legislatures wide discretion in defining what constituted a "public purpose." Accordingly, it would not second-guess the city's judgment regarding the efficacy of its redevelopment plan, nor the city's judgment about what properties it needed to claim under its eminent domain power. The City's plan was carefully thought-out, comprehensive and systematic, and was enacted pursuant to a state statute permitting the exercise of eminent domain for economic development – unquestionably a public purpose.[548] Had it taken the property for a private purpose, the action would have been void, the Court said, citing *Calder* for this

[547] Ibid., 545 U.S. 469(2005).
[548] Ibid., 545 U.S. 469 (2005).

unremarkable point.[549] The citation to *Calder* was plainly unnecessary here, and perhaps was a nod to the dissent's citation to the same case in its opening paragraph. For the only citation necessary to that point would have been to the Constitution itself, which provides explicitly that the state may exercise its eminent domain power only for a public purpose.

The Court's second citation to *Calder* was far more interesting, and was to Justice Iredell's, not Justice Chase's opinion. No previous Supreme Court opinion had ever cited this part of *Calder*. In rejecting the argument that the prohibition on *ex post facto* laws extended to civil cases, Iredell analogized those types of cases to eminent domain (or "takings") cases. The comparison is obvious, because one fundamental complaint in the *Calder* case was that the legislature's action in granting a new trial to one litigant was to deprive the other of a property interest. Iredell noted that sometimes "private rights must yield to public exigencies" and cited the example (without using the term) of eminent domain. Clearly, the power might be abused, but that is the very nature of power, Iredell wrote. That the power might be abused is not a warrant for judicial second-guessing. Power cannot always be limited, and where it cannot, we must be content to "repose a salutary confidence," Iredell said.[550]

Justice O'Connor began her dissent with a citation to Chase's *Calder* opinion. This was apt in one sense. Chase had offered a state action in taking the property of one private citizen and giving it to another as an example of a law that would be manifestly unjust, and thus void. On the other hand, the same criticism made above of Steven's citation to Chase's

[549] Ibid., 545 U.S. 469, n.5 (2005).
[550] *Calder v. Bull,* 3 U.S. 386, 400 (opinion of Iredell, J.) (1798).

opinion could be made of O'Connor's. That is, it seemed unnecessary, as O'Connor (and the three justices joining her) plainly thought that the Court had failed to apply the Takings Clause properly. In fact, O'Connor wrote that Chase's dictum (that a law transferring property in that manner would be void) was a "long-held, basic limitation on government power."[551] It is not clear what she meant by that. Chase appeared to be arguing that certain laws might be void even in the *absence* of a specific Constitutional guarantee (although paradoxically, some of the examples he offered were the subject of constitutional guarantees, the taking of property among them). With respect to state legislation (at issue in *Calder*) this is a truism of federal constitutional law in the aftermath of the incorporation process after the Fourteenth Amendment's ratification. It was *not* a truism at the time of *Calder*. Now, there *are* basic limitations on government power, even at the state level, but they arise from the Constitution, and not the sort of extra-constitutional sources that Chase appeared to contemplate.[552]

O'Connor's citation makes sense *only* under one of two circumstances. First, if she was intending to suggest that there was an alternative rationale – over and above the Takings Clause – for striking down the exercise of eminent domain in this case, she would have been following Chase's dictum in its most straightforward sense. In other words, even in the absence of a Takings Clause in the federal Constitution, the action might have been void. But more probably, and consistently with what some have argued is the best

[551] *Kelo v. City of new London*, 545 U.S. 469 (O'Connor, J., dissenting) (2005).
[552] It is possible that Chase assumed that the Fifth Amendment's Taking Clause applied to the states. It was not until 1833 that the Supreme Court explicitly held that the Bill of Rights did not bind the state governments., in *Barron v. Baltimore,* 32 U.S. 243 (1833).

interpretation of *Calder,* she might have been arguing that the Takings Clause should be interpreted in light of natural justice principles animating the Constitution (or as other justices have put it the Constitution ought to be interpreted according to its "spirit."). The whole point of having a Takings Clause, or any other specific limitation on governmental power in the Bill of Rights, would be to implement the natural law ends that the framers (arguably) had in mind.

But the two-centuries' trajectory of *Calder* vividly illustrates the limitations to "natural law" reasoning in judicial opinions. Perhaps it illustrates also a difficulty with the very concept of natural law. For if natural law embodies timeless principles, one of its defining characteristics in the view of all important thinkers who have written about the topic, one might expect that similar issues would recur in Supreme Court jurisprudence. That is not the case. Instead, the late 19th and early 20th Century focus on property rights and economic issues has diminished dramatically from jurisprudential natural-law discourse in the last century. One exception, the *Kelo* case, focused on a specific constitutional provision (the "Takings" Clause), and the appropriateness of *Calder* citations, in both the majority opinion and (especially) the dissent, was questionable.

It would be too much to conclude, relying on *Calder* citations alone, that the trend in natural law jurisprudence (if it *is* that) has turned to issues of personal autonomy. The sample size of cases is simply not nearly large enough to warrant any such conclusion. But the *Poe, Griswold,* and *Glucksberg* cases are all suggestive, and the idea of the constitutional importance of personal autonomy has certainly been engaged (if not always upheld, as in the case of *Glucksberg*) in numerous Supreme Court cases that have not cited

Calder. Examples include, but are by no means limited to *Roe v. Wade*[553] (recognizing a constitutional right to terminate a pregnancy), *Lawrence v. Texas,*[554] (striking down a state law prohibiting same-sex intercourse), and *Obergefell v. Hodges*[555] (holding that states may not limit marriage licenses to opposite-sex couples).

Whether one approves of this trend or not seems to have little to do with natural law considerations. The late emphasis on individual rights and personal autonomy is generally disparaged by some commentators,[556] applauded by others,[557] treated ambivalently by some,[558] and paradigmatically redefined by others.[559] What is indisputable however, is that American jurisprudence now engages those issues as affecting fundamental rights to a much greater degree than it did a century ago. At the same time, the stirring rhetoric about free enterprise and the liberty of contract that once permeated opinions is now largely absent.

The issues surrounding discussions of a "fundamental law" that is not made explicit in the Constitution remain with us today. These include the nature of judicial review and the power of courts, and a legislative body's authority to impinge on fundamental rights,

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[553] *Roe v. Wade,* 410 U.S. 113 (1973).
[554] *Lawrence v. Texas,* 539 U.S. 558 (2003).
[555] *Obergefell v. Hodges,* 576 U.S. – (2015).
[556] See, for example, Glendon, *Rights Talk* (1991), passim (bemoaning the imprecision of defining "rights" and a concomitant failure to emphasize civic duties and responsibilities).
[557] See, for example, Dworkin, *Taking Rights Seriously* (1977), passim (arguing generally that individual rights "trump" the interests of the majority).
[558] See, for example, Scruton, *Soul of the World* (2014), 83 – 85 (arguing against "rights inflation" with respect to "claim rights," [as distinguished from "freedom rights"] but upholding a sphere of personal sovereignty as a *sine qua non* of freely assuming obligations).
[559] See, for example, Rubin, *Soul, Self & Society* (2015), passim (arguing against the notion that our age is beset with undue permissiveness and hedonism, but rather that we have transitioned from an era focusing on the morality of "higher purposes" to one focusing on the morality of "self-fulfillment").

however those might be defined, even in the absence of specific constitutional protections (or in the presence of abstract constitutional provisions). All would agree that America's historical traditions are an important consideration. And those traditions include governments of limited powers, not authorized to act arbitrarily. Whether those traditions sprung directly from the requirements of natural law was obviously a matter of some dispute. But the evolving focus of Supreme Court jurisprudence establishes one thing conclusively: If natural law *does* inform Supreme Court jurisprudence, either natural law has changed (a problematic conclusion) or our understanding of it has. Thomas Jefferson recognized the inability of his founding generation to bind future generations with its understanding of what law was and should be; modern jurists (most notably Justices Harlan and Souter) have implicitly argued for each generation's need to build gradually on what has gone before. Ultimately, that may be the only reasonable – and workable – conclusion.

***CORFIELD* AND PRIVILEGES AND IMMUNITIES**

Introduction

This final section will trace the Privileges and Immunities Clause of Article IV of the Constitution[560] by considering the cited history of *Corfield v. Coryell.* [561] In previous sections, I considered the history of *Calder v. Bull,*[562] in which two Supreme Court justices, Chase and Iredell, debated the nature of constitutional interpretation and whether principles of "natural justice" should inform that process. In this final section, after a brief discussion

[560] U.S. Constitution, Article IV, Section 2, Clause 1
[561] *Corfield v. Coryell,* 6 Fed. Cas. 546 (E.D.Pa. 1823)
[562] *Calder v. Bull,* 3 U.S. 386 (1798)

of the term "privileges and immunities," as it was understood at the time of the 1787 Constitutional Convention, I will take the subsequent history of *Corfield* and consider the specific Constitutional provision of the Privileges and Immunities Clause. If there is an *original* (thus excluding the Bill of Rights and subsequent constitutional amendments) clause in the Constitution that *might* be said to express natural law principles, this is it. The privileges and immunities of Article IV, whatever they might be, are not enumerated, at least not in the Constitutional text.

A note on one key difference between my methodology here contrasted with my methodology in tracing the history of *Calder*: That case could not be tied to a specific constitutional clause. Justice Iredell's whole point was that Justice Chase was arguing for the relevance of extra-constitutional considerations. Justice Washington's opinion in *Corfield,* by contrast, explicitly construed the Privileges and Immunities Clause. The cases considered herein will necessarily also deal with that Clause. Also, an analysis of the Privileges and Immunities Clause will focus on natural rights specifically, as opposed to natural law generally.

It would not be surprising to find some intimation that the Federal Constitution drafted in 1787 (replacing the existing Articles of Confederation) protected Americans' "natural rights" from federal intrusion. It has been argued that the "overwhelming majority of Americans" at the time believed in natural rights doctrine, and that it was "the unspoken assumption that no state could ever justifiably deny to its own citizens their natural rights."[563] On the other hand, it was also explicitly understood that the federal government

[563] Antieu, "Paul's Perverted Privileges," *William & Mary Law Review*, 9:1, 1, 5 (1967).

was one of limited and enumerated powers. It did not have the "police" powers that the states retained to regulate health and morals. That fact provided one reason to exclude a Bill of Rights from the original Constitution (why provide that Congress had no power to restrain speech when Article I, Section 8 never gave them any such power in the first place?).[564] The Ninth Amendment, providing protection for unenumerated rights, along with the rest of the Bill of Rights, was proposed by the first Congress and ratified shortly thereafter.

The Privileges and Immunities Clause provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[565] Like other constitutional clauses, this one is ambiguous on its face. It is not immediately clear, for instance, whether the Clause is meant to constrain states or the federal government or both. The wording is unusual, and unlike that of other constitutional clauses explicitly providing *whose* power is limited. The Constitution provides, for example, that "no *state* shall...pass any law...impairing the obligation of contracts." (emphasis supplied)[566] The First Amendment dictates that "*Congress* shall pass no law...abridging the freedom of speech." (emphasis supplied)[567] By contrast, the Privileges and Immunities Clause provides that citizens of each state are "entitled" to the privileges and immunities of the citizens of the several states, without answering the question "entitled as against whom?" Does the Clause merely bind the states, or does it give the federal government power to protect

[564] Hamilton, *The Federalist,* 84 (1979), 576.
[565] U.S. Constitution, Article IV, Section 2, Clause 1
[566] U.S. Constitution, Article I, Section 10, Clause 1
[567] U.S. Constitution, Amendment I.

certain rights (or "privileges and immunities") against denial by particular states?

A further interpretive question is the meaning of the Clause's final four words, "in the several States." The phrase might mean one of two things: One is that a citizen of a state is entitled to certain unspecified "privileges and immunities" no matter where she might go. In other words, the sense of the Clause could be "A citizen, regardless of which of the several states she may find herself in, is entitled to the privileges and immunities of United States Citizens." But the Clause might just as easily mean something like "A citizen of a state, while in a sister state, is entitled to the same privileges and immunities that the sister state affords its own citizens." In this case, the Clause would be an anti-discriminatory provision; states would be prohibited from favoring their own citizens over the citizens of other states. Commentators and courts have disagreed over which of these is the proper interpretation.[568]

The difference is fundamental. For if the Privileges and Immunities Clause merely limits a state's authority to favor its own citizens, that is, if it only prohibits state-based discrimination, there would be no need to infuse the phrase with any substantive content. The phrase would be given meaning by the substantive laws of the state in which a citizen found himself. On the other hand, if there are certain rights that no state may abridge because they are fundamental, whether because they are entailed by natural law or because they are implicit in a country with free, republican institutions, then the Clause's substantive content becomes a matter of interpretation. That interpretation must

[568] *See*, e.g., David R. Upham, "*Corfield v. Coryell* and the Privileges and Immunities of American Citizenship," *Texas Law Review*, 83 (2005):1483,1498 - 1507.

necessarily be guided by certain mediating principles, and one obvious possibility is the principles of natural law or the related but narrower concept of natural rights, a concept with which the Constitution's drafters were intimately familiar.[569] As one commentator has noted, "any discernment of those rights that belonged to citizens by right...would, in the absence of any clear legislative pronouncement, require an inquiry outside of strictly positive law - i.e., a theoretical inquiry into principles prior to or transcendent of such law."[570]

The relatively few commentators who have written on the topic have differed widely over the proper interpretation of Article IV. (The Privileges and Immunities Clause, it has been noted in a classic understatement, "is not among the more definitively glossed provisions of the Constitution.[571]) One has traced the history of the Privileges and Immunities Clause to the give-and-take over its wording before the Second Continental Congress included it in the Articles of Confederation. The protection of privileges and immunities had two aspects in the Articles, under this line of thought - one assuring "basic, fundamental, natural rights of men - not only citizens, but all inhabitants."[572] The second guarantee was one of interstate comity or equality. The Articles of Confederation version

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[569] *See*, e.g., Wright, *American Interpretations of Natural Law* (1962, 2016), 79 - 82; Stoner, *Common Law & Liberal Theory* (1992), 189 - 194; McDonald, *Novus Ordo Seclorum* (1985), 57 - 63; Zuckert, *Natural Rights and the New Republicanism* (1994), 152- 155; Rakove, *Original Meanings* (1997), 290 - 291.

[570] Upham, "*Corfield v. Coryell*," *Texas Law Review,* 83: 1483, 1497 (2005).

[571] Currie and Schreter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," *The Yale Law Journal*, 69:8 (1960), 1323, 1335-133. *See also* Upham, "*Corfield v. Coryell,*" *Texas Law Review,* 83: 1483, n.6 ("the Founders generally refrained from providing any detailed exposition of this provision, even during the framing and ratification of the Constitution.") (2005).

[572] Antieau, "Paul's Perverted Privileges," *William & Mary Law Review*, 9:1; (1967) 1, 3.

read:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.[573]

The Clause reading "the free inhabitants of each of these states...shall be entitled to all privileges and immunities" - the "natural rights" one - was the one that appeared in the 1787 Constitution. Antieau argues that "the draftsmen of the Constitution, then, were not primarily concerned with protecting peddlers in the interstate peregrinations. They were concerned with protecting human dignity and the basic rights of free men everywhere in the nation."[574] The few passages of the Federalist Papers addressing the Privileges and Immunities Clause do not, however, support this natural rights reading. Hamilton seemed to place great importance on these "peddlers" with their "interstate peregrinations."[575] And subsequent courts have sensibly assumed that the Constitutional clause was a streamlined version of that found in the Articles, and that no substantive change was intended.[576] Moreover, unlike the Articles of Confederation, a document deliberately drafted to provide for a weak central government, the Constitution provided the central government with the

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[573] Articles of Confederation, Article IV.
[574] Ibid., 1, 6 (1967).
[575] *See* Hamilton, *The Federalist* 80 (1979), 535.
[576] *See Austin v. New Hampshire,* 420 U.S. 656, 661 (1975) ("the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent."). *See also Zobel v. Williams*, 457 U.S. 55, 79 (O'Connor, J., concurring in judgment) (1982).

authority to regulate interstate commerce;[577] the second half of Article IV of the Articles of Confederation may be subsumed within that Constitutional power.

At the other end of this spectrum are those who view the Privileges and Immunities Clause as *merely* promoting comity - that is, as prohibiting states from discriminating as between their own residents and non-residents. In accord with Hamilton's later defense of the Clause in the *Federalist*, its purpose, under this reading, was to promote interstate comity by limiting states' authority to discriminate against non-residents.[578] This interpretation has the benefit of consistency with the prefatory clause of the version found in the Articles of Confederation. That clause indicated that the goal was to "secure and perpetuate mutual friendship and intercourse" among the people of the several states. It also accords with some of the concerns that Charles Pinckney, said to be the principal author of the ultimate Constitutional provision, expressed with respect to the weaknesses of the Articles of Confederation and their tendency to disunion.[579] Finally, as the Supreme Court has noted, the Clause appears in Article IV, the Constitution's State Relations Article, the same article containing the Full Faith and Credit Clause and the Extradition Clause, among other clauses clearly meant to promote interstate comity.[580]

The underpinnings of natural law are more fully developed in other writings, including in my own papers discussing *Calder*. Suffice it to say they are typically defined in terms that distinguish natural law from positive law. If positive law is (by definition)

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[577] U.S. Constitution, Article I, Section 8.
[578] *See* Simpson, "Discrimination against Nonresidents and the Privileges and Immunities Clause of Article IV," *University of Pennsylvania Law Review,* 128:2 (1979), 379, 383 - 384.
[579] Beeman, Richard, *Plain, Honest Men: The Making of the American Constitution* (2009), 94 - 97.
[580] *See Baldwin v. Fish & Game Commission of Montana,* 436 U.S. 371, 379 (1978).

man-made, promulgated law, natural law arises from principles that transcend positive law, principles that are universal. All definitions of natural law agree on that much, although they may disagree as to other issues, including whether natural law is necessarily God-given, and whether a positive law that is inconsistent with natural law is a law at all. Those discussions are treated in greater detail elsewhere and need not be reexamined here. For our purposes, a relevant question is whether the U.S. Constitution incorporates principles of natural law. This is one plausible interpretation of the Privileges and Immunities Clause.

Specifically, it has been suggested that the Privileges and Immunities Clause is the "natural rights" provision in the Constitution. While theorists and philosophers have agreed that natural law embodies timeless principles more fundamental than those found in positive, or man-made law, "natural rights" is one part only of natural law theory. Since at least the Seventeenth Century, natural rights have been viewed as possessions held by individuals, possessions that governments are not free to infringe.[581] Thus, while "the philosophical foundation of the Rights of man is natural law,"[582] "the power of the State and of social interests cannot impose itself"[583] on the universe of natural rights.

Supreme Court Justice Bushrod Washington (nephew of George) provided the most famous and oft-cited explication of Article IV's Privileges and Immunities Clause in *Corfield*. Washington's writing was *not* a Supreme Court opinion, as he delivered it in his capacity as a Circuit Court judge. In the Eighteenth and Nineteenth Centuries, Supreme Court justices engaged in the practice of "riding circuit," that is in hearing cases as federal

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[581] *See* Finins, *Natural Law and Natural Rights,* 2nd ed. (2011), 206 – 209.
[582] Maritain, *Natural Law: Reflections on Theory & Practice* (2001), 53.
[583] Ibid., (2001), 75.

trial court judges in their respective areas of jurisdiction (although Supreme Court justices are still assigned particular circuits, they no longer hear cases as trial court judges). It was as a trial court judge that Justice Washington issued his opinion in *Corfield*. *Corfield* was the first reported *federal* case construing the Privileges and Immunities Clause.[584]

The facts of the case are not complicated, and may be stated briefly. The New Jersey legislature passed a law prohibiting non-residents from dredging oysters in the State's waters. The plaintiff alleged that the law violated Article IV, Section 2, of the Federal Constitution - the Privileges and Immunities Clause.[585]

In rejecting that contention, Justice Washington expressed "no hesitation" in limiting the reach of the Privileges and Immunities Clause to those privileges and immunities which were "in their nature fundamental."[586] He then proceeded to list some of those "fundamental" privileges, but stressed that the list was not exhaustive. Somewhat cryptically (especially given the disagreement that subsequent commentators and courts have had in construing his meaning), Washington wrote that it would not be "difficult" to enumerate those privileges, but that it would be "tedious."[587] At a minimum, Washington wrote, he would have "no hesitation" in limiting the Clause's application to those rights that were "fundamental". Those "fundamental" rights could be placed under the following heads: "Protection by the government, the enjoyment of life and liberty with the right to acquire and possess property of every kind and to pursue and obtain happiness and security;

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[584] Meyers, W. J., "The Privileges and Immunities of Citizens in the Several States," *Michigan Law Review,* 1:4 (1903), 286, 290.
[585] *Corfield v. Coryell*, 6 Fed. Case. 546, 553 (E.D.Pa. 1823).
[586] Ibid., 6 Fed. Cas. 546, 551-552 (E.D.Pa. 1823).
[587] Ibid., 6 Fed. Cas. 546, 551-552 (E.D.Pa. 1823).

subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[588]

Several scholars and Supreme Court justices have suggested that Washington was employing natural law reasoning.[589] In other words, there were, in Washington's view, certain fundamental rights retained by the American people that no state was entitled to restrict. But Washington's opinion left open several questions that will be explored over the course of this paper.

The paper's methodology is straightforward. After a brief discussion of the antecedents of the Privileges and Immunities Clause (the source material here is quite limited), I will consider those cases in which the Supreme Court, either as a court or through one or more individual justices (in a concurring or dissenting opinion), has cited *Corfield* for Washington's discussion of the Privileges and Immunities Clause.

The United States Supreme Court (or an individual justice writing a concurring or dissenting opinion) has cited *Corfield* a total of thirty-six times as of this writing. Space limitations prevent me from discussing all thirty-six cases in any detail. Thus, though I have included an appendix with a list of citations to all thirty-six cases, in text, I will, with limited exceptions, not discuss those cases in which only issues of state discrimination are

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[588] Ibid., 6 Fed. Cas. 546, 551-552 (E.D.Pa. 1823).

[589] See, e.g., Upham, *"Corfield vs. Coryell," Texas Law Review* 1483, 1485 (2005); "The Equal Privileges and Immunities Clause of the Federal Constitution," *Columbia Law Review*, 28:3 (1928), 347. Most emphatically, Harvard Law Professor Laurence Tribe wrote that "*Corfield* can be understood as an attempt to import the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause of Article IV." Quoted in Levin, "Reading the Privileges or Immunities Clause," *Harvard Civil Rights-Civil Liberties Law Review*, 35: 569, 579, n. 59 (2015). *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288. n. 10 (1985).

presented.[590] As will become clear (and although different gradations have been proposed), *Corfield* Privileges and Immunities cases fall into two basic categories. First are those cases that do not involve any type of state discrimination against out-of-state residents. An example is *Mugler v. Kansas*.[591] In that case, the Court addressed whether a state law that prohibited the manufacture and sale of intoxicating liquors within the state violated the Privileges and Immunities Clause. The statute there made no distinction between in-state and out-of-state residents. Thus the Court (as in all of these types of cases) necessarily had to reach the issue of whether the Privileges and Immunities Clause was limited to a non-discrimination reading. If all that Clause meant was that each state must provide the same privileges and immunities to non-residents as it did to its own citizens, the Court would have to so conclude and refuse to read any substantive content into the Clause.

If, on the other hand, a case involved state discrimination against non-residents, different considerations obtained. In such cases, a non-discriminatory treatment of *Corfield* would suffice, and the only analysis necessary (assuming the Court was citing *Corfield* favorably) would be whether the discrimination implicated a "fundamental" right.

One further note about *Corfield* citations: many of them are what I refer to as "vicarious," a Court opinion citing *Corfield* merely because the author is summarizing or quoting from either a speech or a previous opinion that itself cited *Corfield*. This occurs frequently especially with respect to the *Slaughterhouse* cases. *Slaughterhouse* (despite its

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[590] The exceptions are *Blake v. McClung*, 172 U.S. 239 (1898), of interest because of Justice Harlan's extended discussion of "fundamental rights," and *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1975), or interest because of the majority opinions discussion of what Washington meant by using the word "fundamental" and because of the dissent's proposal for a new test to replace Washington's "fundamental rights" test.

[591] *Mugler v. Kansas*, 123 U.S. 623 (1887).

much-criticized methodology) remained the definitive interpretation of the Fourteenth Amendment's Privileges or Immunities Clause for decades, and many of the cases citing *Corfield* were really just relying on *Slaughterhouse's* narrow interpretation of the Fourteenth Amendment's scope, which will be more fully discussed below.

The ultimate goal of the paper is to evaluate the extent to which the Supreme Court (or individual justices) has, or has not, employed natural law or natural rights considerations in the past two centuries, as measured by its construction of the Privileges and Immunities Clause of Article IV or the Privileges or Immunities Clause of the Fourteenth Amendment. Such an analysis will not constitute a complete history of natural law or natural rights in Supreme Court jurisprudence, but it will provide one piece of the puzzle. The issue of natural law considerations in Supreme Court deliberations received extensive attention at least as recently as 1991, when it was raised at some length at the Senate confirmation hearings of Clarence Thomas.[592] At least one writer has argued that Justices Thomas and the late Antonin Scalia (a puzzling argument given that Scalia was an avowed positivist) relied on natural law in rendering their opinions.[593]

Moreover, whether or not the Court (or individual justices) has relied on natural law precepts has been an issue the justices themselves have often debated. In *Calder,* the subject of the first two papers in this series, Justice Iredell charged that Justice Chase relied on precepts of "natural justice." And in *Corfield*, Justice Washington gave the most famous

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[592] Tribe, "Clarence Thomas and 'Natural Law,'" *The New York Times,* July 15, 1991. http://www.nytimes.com/1991/07/15/opinion/clarence-thomas-and-natural-law.html. Accessed December 31, 2016.

[593] Murray, Anthony, "When Judges Believe in Natural Law," *The Atlantic,* January 27, 2014. http://www.theatlantic.com/national/archive/2014/01/when-judges-believe-in-natural-law/283311/. Accessed December 31, 2016.

explication of the constitutional clause that might be said to express natural right principles.

Privileges and Immunities in 1787

The Privileges and Immunities Clause was made part of the American constitutional order in 1787, although a similar clause had appeared in the Articles of Confederation. The Articles, a "League of Friendship" governing the United States prior to the ratification of the Constitution, entitled the "free inhabitants" of each state to the privileges and immunities of the "free citizens" of the several states.[594]

The terms "privileges" and "immunities" were not frequently used in either English or American law prior to the Constitutional Convention. Justice Thomas was to argue in 2010 that, Blackstone apparently considered the terms to be synonymous with "rights,"[595] although his cited evidence for that was very scant, limited to a single instance of Blackstone's describing "rights and liberties" as "private immunities" and "civil privileges." Madison's Notes on the Federal Constitution makes no mention of any debate on the Article IV Privileges and Immunities Clause. Subsequent Supreme Court opinions have seemed to equate the term "privilege" with "liberty."[596]

The Article's drafters appeared to be focused on *uniting* the states by prohibiting discriminatory laws (especially with respect to trade and commerce) and requiring states to permit free ingress and egress. Alexander Hamilton made this point in *Federalist* 80, when he cast the Privileges and Immunities Clause as a guard against laws that would

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[594] Articles of Confederation, Article IV, Section 1. Library of Congress: "Primary Documents in American History." https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=127. Accessed May 25, 2017.
[595] *McDonald v. City of Chicago*, 561 U.S. 742, -- (Thomas, J., dissenting) (2010).
[596] *See Colgate v. Harvey*, 296 U.S. 404, 433 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589-592 [1897]) (1935).

"disturb the harmony between the States," in arguing for federal judicial jurisdiction in prohibiting state abridgements of privileges and immunities; he argued that the Clause would serve as the "very basis of union."[597] His hopes, obviously, were frustrated. The Clause's "rather cryptic brevity would prove a source of frustrating ambiguity."[598]

Similarly, James Madison seemed to have in mind state laws that discriminated against others. He wrote in *Federalist* 42 (while also criticizing the confusing verbiage in the Articles of Confederation, which referred, alternately to "free inhabitants," "free citizens," and, simply, "people") that under the Privileges and Immunities Clause of the Articles, more lenient citizenship laws in a sister state might permit a non-citizen resident to obtain citizenship in the sister state and thus elude the stricter requirements in his own state, as his own state would then be required to honor his "privileges and immunities." To guard against this scenario, the new Constitution had wisely provided Congress the power to establish a uniform law of naturalization, but Madison clearly interpreted privileges and immunities as applying to discriminatory laws.[599]

Corfield's Subsequent History

As of this writing, Washington's explanation of the Privileges and Immunities Clause has been cited in a United States Supreme Court opinion (whether an opinion for the Court, or a concurring or dissenting opinion) a total of thirty-six times, but it would be fifty years before the first such citation. This came in 1873, when *Corfield* was cited both by Justice Miller, writing for the majority, and Justice Field, writing in dissent, in the

[597] Hamilton, *The Federalist* 80 (1979), 535.
[598] Smith, Roger, *Civic Ideals* (1999),135.
[599] Madison, *The Federalist,* 42 (1979), 284 - 285.

Slaughterhouse Cases.[600] The *Slaughterhouse Cases* were the first to construe the Fourteenth Amendment, one of three post-Civil War amendments, ratified in 1865 (the Thirteenth), 1868 (the Fourteenth) and 1870 (the Fifteenth). The Fourteenth Amendment was perhaps the most crucial in making the American nation a united one in the Civil War's aftermath. It provided, *inter alia*, that no *state* could abridge the privileges or immunities of citizens of the United States.[601] The Court had occasion to consider the implications of that clause in *Slaughterhouse.*

The State of Louisiana provided that the slaughtering of animals in New Orleans could take place only in a specified area, and it granted, for an extended period of time, an exclusive franchise to a single corporation to carry out that function.[602] The plaintiffs in this case argued that the legislation deprived them of property without due process of law. The plaintiffs included New Orleans butchers who argued that they were being denied the right to practice their trade, by the granting of an exclusive franchise to a single company to slaughter animals within the city. The Court quickly dismissed that argument, focusing instead on the claim that the legislation abridged the plaintiff's privileges and immunities as citizens of the United States, by depriving them of the right to practice their trade.

Prior to the Fourteenth Amendment's ratification, the Court said, there were certain privileges and immunities that citizens enjoyed, both as citizens of the United States and as citizens of particular states. However, with the limited exception of those specific Constitutional prohibitions against certain state actions - e.g., the Impairment of Contracts

[600] *Slaughterhouse Cases*, 83 U.S. 36 (1873).
[601] U.S. Constitution, Amendment XIV.
[602] *Slaughterhouse Cases,* 83 U.S. 36, 57 (1873)

Clause - protection of any rights that citizens enjoyed as citizens of the several states was to be provided by the states and not by federal courts.[603] To hold otherwise would be to transfer a general "police power" to the federal government which was beyond the intent of the drafters of the Amendment.[604] The right asserted in this case, to be free of state regulation in the slaughtering of animals, was not a privilege belonging to a citizen of the United States.

Justice Miller, writing the opinion for the Court, cited *Corfield* for the point that the "privileges and immunities" of citizens of the United States were limited to those rights that were "fundamental" in nature. He did not elaborate further.[605] The Court's methodology in *Slaughterhouse* has been vigorously criticized, although it was perhaps no more harshly attacked than by Justice Field's dissent. Justice Miller argued that "the framers of the Civil War amendments had never meant to disturb the relations of the states to the national government, when in fact that is exactly what they intended to do."[606]

Justice Field also cited *Corfield* in his dissent, while reaching a very different conclusion. Field's concern mirrored that of Justice Chase in *Calder*; he feared that, even after the Fourteenth Amendment's ratification, under the Court's reasoning a state legislature's power would be without restraint. "If exclusive privileges of this character," he wrote, "can be granted to a corporation of seventeen persons, they may, in the discretion

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[603] Ibid., 83 U.S. 36, 76 - 77 (1873).
[604] See also Pendleton, "The Privileges and Immunities of Federal Citizenship and *Colgate v. Harvey,*" *University of Pennsylvania Law Review*, 262, 264- 265 (January, 1939).
[605] *Slaughterhouse Cases*, 83 U.S. 36, 76 (1873).
[606] Urofsky, *Dissent and the Supreme Court*, 90 (2015). For a more sympathetic treatment of Miller's majority opinion, see White, *Law in American History, vol. II,* 32 - 34 (2016).

of the legislature, be equally granted to a single individual. If they may be granted for twenty-five years, they may be equally granted for a century and for perpetuity."[607]

Field's criticism of the Court's opinion was forceful: If the Fourteenth Amendment's protection of privileges and immunities did *not* give federal enforcement rights against state action, but referred only to "such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing."[608] However, "if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."[609]

Field's dissent is one of the most straightforward statements to be found in the annals of Supreme Court opinions respecting natural rights. While he did not make the argument that natural law or natural rights had any standing independent of the Constitution, he did maintain that the principle of natural rights had been incorporated into the Constitution, first through the Privileges and Immunities Clause of Article IV, and then through the Privileges or Immunities Clause of the Fourteenth Amendment. The issue of discriminatory treatment of out-of-state residents did not present itself.

Corfield was next cited in Supreme Court jurisprudence ten years on, and the citation was the first Justice Harlan's in the *Civil Rights Cases*.[610] In the *Civil Rights Cases*

[607] *Slaughterhouse Cases*, 83 U.S. 36, 89 (Field, J., dissenting) (1873).
[608] Ibid., 83 U.S. 36, 96 (Field, J., dissenting) (1873).
[609] Ibid., 83 U.S. 36, 96 (Field, J., dissenting) (1873).
[610] *Civil Rights Cases*, 109 U.S. 3, 47 (Harlan, J., dissenting) (1883).

the Court faced legislation passed by Congress that protected all citizens in their enjoyment of, *inter alia*, inns, public conveyances and theaters.[611] Under the congressional enactment, it was a civil right violation to deny any citizen the full enjoyment of those conveniences "except for reasons by law applicable to citizens of every race and color." In other words, the law sought to prohibit discrimination even by those acting in a private capacity. Congress passed the legislation, known as the Civil Rights Act of 1876, under the authority of the Fourteenth Amendment.

As discussed above, the Fourteenth Amendment prohibited any state from denying citizens due process of law or the "privileges or immunities" of citizens of the United States.[612] Its crucial importance was that it bound states, in a way that the federal Constitution previously had not.[613] The Privileges or Immunities Clause of the Fourteenth Amendment was largely patterned upon the Privileges and Immunities Clause of Article IV; the Amendment's primary author, Ohio Congressman John Bingham, evidently had an expansive view of both Constitutional provisions, and thought that the Article IV Clause had served to incorporate the Bill of Rights (which it antedated) as against the states, long before the "incorporation" debate was joined in the U.S. Supreme Court.[614]

The Court struck down the Civil Rights Act, holding that neither the Thirteenth

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[611] *Civil Rights Cases,* 109 U.S. 3, 9 (1883).
[612] U.S. Constitution, Amendment XIV.
[613] While there were some provisions of the Constitution as it was drafted in 1787 binding the states - the Contract Clause, for example - as a general rule, the original Federal Constitution defined and limited the powers of the Federal Government, and not the individual states.
[614] Aynes, Richard, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal,* 103:1 (1993), 57, 84. See also Justice Black's dissent in *Adamson v. California,* 332 U.S. 46, 68 (Black, J., dissenting) (1947).

Amendment (abolishing "involuntary servitude" in the United States)[615] nor the Fourteenth, authorized Congress to "legislate upon subjects which are within the domain of State legislation."[616] While the Fourteenth Amendment did, in Section Five, give Congress the power to pass "appropriate legislation" to enforce its provisions,[617] this power, the Court held, was a check upon state legislation, and did not endow Congress with a general "police power" that had hitherto been the sole province of the states. Here, dispositively, there was no state action of any kind.[618]

Crucially for our purposes, the Court explicitly declined to answer the question whether a *state* could abridge a "right" to enjoy equal accommodations in inns and public conveyances. The Court did not express an opinion on whether or not this was one of the "essential rights of citizenship,"[619] and thus a "privilege" or "immunity" that the states were bound to protect.[620] In the Court's view, it was unnecessary to do so in the absence of state action.

Justice Harlan dissented. He considered it axiomatic that the Fourteenth Amendment's protection of a citizen's privileges and immunities was at least coextensive with the guarantees of Article IV.[621] Harlan read that Clause the same way Washington

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[615] U.S. Constitution, Amendment XIII.
[616] *Civil Rights Cases*, 109 U.S. 3, 11 (1883).
[617] U.S. Constitution, Amendment XIV, Section 5.
[618] *Civil Rights Cases*, 109 U.S. 3, 13 (1883).
[619] Ibid., 109 U.S. 3, 19 (1883).
[620] While Article IV refers to "privileges *and* immunities," the Fourteenth Amendment refers to "privileges *or* immunities." The difference reflects merely the fact that Article IV is phrased in terms of what citizens enjoy (both privileges and immunities) while the Fourteenth Amendment is phrased in terms of what the state may not abridge (neither privileges or immunities). The phraseology is thus consistent.
[621] *Civil Rights Cases*, 109 U.S. 3, 47 (Harlan, J. dissenting) (1883).

did. He viewed it as guaranteeing rights that are "fundamental in citizenship in a free republican government."[622] He cited *Corfield* for the point that the Privileges and Immunities Clause was intended to bind the states together into a single union (the same argument that Hamilton had made in Federalist 80). Going beyond Hamilton's argument, he interpreted the Clause as a *federal* guarantee that certain rights could not be abridged by a state, regardless of whether out-of-state citizens suffered discrimination or not.

Harlan viewed the requirements of Article IV (as well as the Fourteenth Amendment) as guaranteeing certain fundamental rights irrespective of whether state discrimination of non-residents was involved. Recognizing that a state might merely claim that it afforded privileges and immunities to only certain of its *own* citizens (and that, by extension, the Privileges and Immunities Clause required merely that it treat out-of-state citizens in the same manner), he emphatically would have held that the Article IV Privileges or Immunities Clause afforded African-Americans and freed slaves within a state's jurisdiction every privilege and immunity that such state afforded its white citizens.[623] In other words, Harlan would have given a substantive meaning to the Clause beyond requiring merely that states not discriminate between their own citizens and citizens of other states.

Harlan specifically argued for a broad interpretation of the Fourteenth Amendment (and was consistent in this view; thirteen years later, he was in dissent in *Plessy v. Ferguson,* which case held that Louisiana's system of segregating races in railway

[622] Ibid., (Harlan, J., dissenting) (1883).
[623] Ibid., 109 U.S. 3, 47 (Harlan, J., dissenting) (1883).

cars did not violate that Amendment.)[624] and concluded that the majority's holding violated the "spirit" of the post-Civil War amendment. But Harlan's view, like Field's before him, was in the "natural law" tradition that Washington may be said to have endorsed in *Corfield*; that is, his argument was that there are certain fundamental rights that no government may abridge. He read the Privileges and Immunities Clause to be much more than a simple anti-discriminatory provision. Harlan perhaps labored over his dissent in this case more than he did in any other in a lengthy career; although he announced his disagreement with Justice Bradley's opinion for the Court from the bench at the time the ruling was released, it was only some months later that Harlan released his written dissent, an opinion that has been called "among his most eloquent and forceful...and tightly reasoned."[625]

The Court was later to reach a similar conclusion to its holding in *The Civil Rights Cases* in *Hodges v. United States*.[626] Handed down about a quarter-century after the *Civil Rights Cases*, the *Hodges* opinion again struck down federal legislation making it a crime to "injure, oppress, threaten, or intimidate" citizens in the exercise or enjoyment of their rights or privileges.[627] The Court's citation to *Corfield* was twice removed - it relied on that portion of the *Slaughterhouse Cases* which contained a citation to *Corfield*. The holding with respect to the Privileges or Immunities Clause was simple, as the Court merely concluded that, under the Fourteenth Amendment, Congress could only counter state (and

[624] *Plessy v. Ferguson*, 153 U.S. 537, 552 (Harlan, J., dissenting) (1896).
[625] Yarbrough, *Judicial Enigma*, 149 (1995).
[626] *Hodges v. United States*, 203 U.S. 1 (1906).
[627] Ibid., 203 U.S. 1, 13 (1906).

not private) action. Harlan was again in dissent.[628]

Corfield next made its appearance in *Mugler v. Kansas*.[629] As mentioned above, there the Court reviewed a Kansas statute prohibiting the manufacture and sale of intoxicating liquors within the state. As in the *Slaughterhouse Cases* and the *Civil Rights Cases*, again, no state law discriminating against out-of-state residents (the fact pattern in *Corfield*) presented itself. Still, the plaintiffs, who owned and operated a brewery prior to the law's passage, contended that the law abridged their privileges and immunities. The Court, Justice Harlan writing for the majority, rejected the argument, although it did not reject natural law reasoning. In fact, Harlan's opinion for the Court appeared to embrace the possibility of natural law as a limiting factor on state legislative action. There are, he wrote "of necessity, limits beyond which legislation cannot rightfully go."[630] "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjudge and thereby give effect to the Constitution."[631] The reference to the Constitution notwithstanding, Harlan here appears to contemplate a higher law when he refers to the "fundamental law." For if a state law (especially after the Fourteenth Amendment) violated a specific constitutional provision, it would not matter if it had a "real or substantial relation" to the public health - it would still be unconstitutional. Nevertheless, in this case,

[628] *Hodges v. United States*, 203 U.S. 1, 20 (Harlan, J., dissenting) (1906).
[629] *Mugler v. Kansas*, 123 U.S. 623 (1887).
[630] Ibid., 123 U.S. 623, 661 (1887)
[631] Ibid., 123 U.S. 661 (1887). (emphasis supplied.)

the Court concluded that the right to manufacture intoxicating liquors does not "inhere in citizenship."[632] Put another way, it was not "fundamental." Still, at this date, the Court was contemplating the Privileges and Immunities Clause as providing certain substantive liberty guarantees.

In *Blake v. McClung,*[633] we are concerned again with an opinion written by Justice Harlan, again an opinion speaking for the Court (Harlan's most famous opinions, including those in the *Civil Rights Cases* and *Plessy*, are dissents). *Blake* is one in a long line of cases in which the Court applies the Privileges and Immunities Clause in only its non-discriminatory aspect. The plaintiffs here claimed a violation of both the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment. The Court framed the issue as whether a state may, consistent with the Constitution, exclude citizens of other states from collecting on the assets of an insolvent corporation until the claims of citizens of its own state were satisfied.[634]

In answering "no" to that question, the Court considered *Corfield* at some length. As Harlan noted in his opinion, Justice Washington's enumeration of specific rights that could not be abridged included the right to sue and be sued and to take hold of and possess property. While courts were careful not to specifically delineate the exact parameters of privileges and immunities (a procedure that must take place on a case-by-case basis), the right to institute actions was one specifically mentioned both in *Corfield* and by Justice

[632] Ibid., 123 U.S. 662 (1887).
[633] *Blake v. McClung*, 172 U.S. 239 (1898).
[634] Ibid., 172 U.S. 239, 248 (1898).

Story in his *Commentaries*.[635] This right, was therefore, fundamental.

Interestingly, Justice Harlan here employed the strictly non-discriminatory reading of the Article IV Privileges and Immunities Clause. There was little or no "natural law" or "natural rights" language in this opinion. He quoted *Slaughterhouse* for the proposition that the "sole purpose" of the Fourteenth Amendment's Privileges or Immunities Clause was a non-discriminatory one, to declare to the states that "as you grant or establish (rights) to your own citizens, or as you limit or qualify, or impose restrictions on their exercise the same, neither more nor less shall be the measure of the rights of citizens of other states within your jurisdiction."[636] Harlan, of course, would have disagreed with that, although he quoted it approvingly here, noting that "these principles have not been modified by any subsequent decision of this Court."[637]

In *Maxwell v. Dow*,[638] Justice Harlan was in dissent again. The majority opinion, authored by Justice Peckham, upheld a Utah law allowing a defendant accused of robbery to be charged via an information instead of an indictment, and permitting him also to be tried by a jury of eight instead of twelve. Conceding that these procedures would have violated the Sixth Amendment, had they been used in federal court, the Court here nonetheless upheld the Utah law.[639] This case also involved the issue of "incorporation," that is the question of whether the provisions of the Bill of Rights, either substantially or entirely, were made applicable as against the states through the Fourteenth Amendment.

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[635] Ibid., 172 U.S. 239, 252 (1898).
[636] Ibid., 172 U.S. 239, 252 (quoting *Slaughterhouse* 83 U.S. 77) (1898).
[637] Ibid., 172 U.S. 239, 252 (1898).
[638] *Maxwell v. Dow*, 176 U.S. 581 (1900).
[639] Ibid., 176 U.S. 581, 586 - 587 (1900).

Put another way, were the first eight amendments to the Constitution part of the "privileges and immunities" of citizens of the United States? The Court cited *Corfield* without comment, and relied on *Slaughterhouse* to argue that the Fourteenth Amendment did not fundamentally alter the American system of federalism, and that the primary responsibility for protection of rights remained with the states. The right to a trial by jury, the Court concluded, although protected in federal court by the Sixth Amendment, does not "arise out of the nature or essential character of the National Government."[640]

Justice Harlan's dissent traced the history of the right to trial by jury since the time of King Henry VII of England.[641] He did not here, as he had in the *Civil Rights Cases*, rely on any intimations of natural law; instead he made the sort of incorporation argument that Justice Black, decades later, was to become famous for making: That the Fourteenth Amendment incorporated the Bill of Rights, in its entirety, against the states. The Court's opinion, he wrote, was "very far-reaching in its consequences….(t)o say of any people that they do not enjoy those privileges and immunities (found in the Bill of Rights) is to say that they do not enjoy real freedom."[642]

In *Twining v. New Jersey*,[643] a criminal defendant accused of bank fraud in state court declined to take the stand, and the trial court judge instructed the jury that they were entitled to draw a negative inference from his failure to testify. The Court, with Justice Moody writing for the majority, declined to reach the question of whether the trial court's

[640] Ibid., 176 U.S. 581, 594 (1900).
[641] *Maxwell v. Dow,* 176 U.S. 581, 605 (Harlan, J., dissenting) (1900).
[642] Ibid., 176 U.S. 581, 615 (Harlan, J., dissenting) (1900).
[643] *Twining v. State*, 211 U.S. 78 (1908).

instructions violated the Fifth Amendment's right against compulsory self-incrimination. Instead, the Court dispositively held that the Fifth Amendment right was not binding on the states, that the Fourteenth Amendment did not "incorporate" the Fifth.

The Court specifically addressed the Privileges or Immunities Clause of the Fourteenth Amendment, and found (recalling and relying on the holding in *Slaughterhouse*) that the right against self-incrimination, almost universally established in the States *prior* to the adoption of the Constitution, was thus not a privilege or immunity of United States citizenship (as opposed to state citizenship).[644] Again, the *Corfield* cite was vicarious, coming as it did from an extended quoted passage in *Slaughterhouse*. *Slaughterhouse*'s neat and firm distinction between the privileges of United States citizenship and state citizenship remained good law and limited the reach of the Privileges or Immunities Clause. The irony of the approach taken here - finding that a "privilege" was not protected by the Fourteenth Amendment precisely because it was ancient enough to predate the Constitution - was pointed out over a hundred years later in Justice Thomas's concurrence in *McDonald v. City of Chicago.*[645]

The *Slaughterhouse* standard for federal enforcement of the Fourteenth Amendment's Privileges and Immunities Clause was altered (or at least disingenuously applied), it has been argued, by the Court in *Colgate v. Harvey*.[646] A Vermont statute in that case applied a discriminatory tax on loans made to non-citizens of the state, even where (as here) the loan was made by an in-state corporation. Specifically, a tax of four percent

[644] Ibid., 211 U.S. 78, 95 (1908).
[645] *McDonald v. City of Chicago*, 561 U.S. 742, -- (Thomas, J., Concurring) (2010).
[646] *Colgate v. Harvey*, 296 U.S. 404 (1935). Overruled by *Madden v. Kentucky,* 309 U.S. 83 (1940).

of the interest earned from loans did not apply to loans made to Vermont residents as long as the interest charged on the loan was less than five percent.[647] The case presents an unusual fact pattern in that the discrimination at issue was against an in-state corporation, and not a non-state citizen.

In considering the plaintiffs' Privileges or Immunities claim under the Fourteenth Amendment, *Slaughterhouse's* holding that the federal court could only enforce those privileges arising under the national government was binding precedent, of course. The Court, Justice Sutherland writing for the majority, said that "the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship."[648] The Court went on to note that the privileges of United States citizens had never been comprehensively enumerated, pointing out Justice Washington's reluctance to do so while construing Article IV in *Corfield*.[649] In striking down the discriminatory tax, the Court explicitly held that the right "to make a lawful loan of money in any state" was a privilege of national citizenship, and thus protected by the Privileges or Immunities Clause of the Fourteenth Amendment.[650]

The holding was scathingly attacked by then-Justice Stone (he would later become Chief Justice) in dissent. Pointing out that *Slaughterhouse* had limited the application of the Fourteenth Amendment's ("almost forgotten") Privileges or Immunities Clause to those growing out of the relationship between a citizen and the national government, he ridiculed

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[647] *Colgate v. Harvey*., 296 U.S. 404, 418 - 419 (1935).
[648] Ibid., 296 U.S. 404, 429 (1935).
[649] Ibid., 296 U.S. 404, 429, FN 5 (1935).
[650] Ibid., 296 U.S. 404, 430 (1935).

the notion that the discriminatory taxation here fell under that category, when the Court had held that not even the protections enumerated in the first eight amendments to the Constitution did.[651]

By one count, the Court was presented, from the time of *Slaughterhouse* in 1873 to *Colgate* in 1935 (a period of sixty-two years) with forty-five claims that state action had violated the Privileges or Immunities Clause of the Fourteenth Amendment, rejecting the claim in every instance.[652] Until *Colgate*, that is. Small wonder that Justice Stone referred to the Clause as "almost forgotten." Whether the Court in *Colgate* "deliberately repudiated the limitations placed upon the privileges and immunities clause in the *Slaughter-House Cases*"[653] is debatable, but it seems a stretch to argue that it was reviving the "fundamental rights" doctrine.[654] One would be hard pressed to find any examples of political thinkers or philosophers arguing that non-discriminatory taxation is a fundamental right protected by natural law or any similar precept. And *Colgate* was short-lived, as the Court explicitly overruled the case a mere five years later.[655]

More than one opinion discussed Justice Washington's *Corfield* opinion in *Hague v Committee for Industrial Organization*.[656] The case is significant for at least two reasons. First, one opinion explicitly referred to Washington's opinion as resting on his concept of "natural rights."[657] Second, another justice condemned Washington's understanding of the

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[651] *Colgate v. Harvey*, 296 U.S. 404, 444 (Stone, J. dissenting) (1935).
[652] Pendleton, "The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey," *University of Pennsylvania Law Review*, 87:3 (1939), 262. See cases assembled at 270 - 272.
[653] Ibid., 273 (1939).
[654] Ibid., 273 (1939).
[655] *Madden v. Kentucky*, 309 U.S. 83 (1940).
[656] *Hague v. Committee for Industrial Organization,* 307 U.S. 496 (1939).
[657] *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 511 (Opinion of Roberts, J.)

Article IV Privileges and Immunities Clause as "mistaken."[658] The case is worth considering in some depth.

In *Hague*, the municipality of Jersey City, New Jersey placed restrictions on the respondent labor unions' ability to meet and disseminate ideas and information. The complaint alleged that labor unions were, *inter alia*, prohibited from holding lawful meetings on the grounds that they were communist organizations, and stopped from distributing leaflets and pamphlets while other organizations were permitted to distribute similar printed matter.[659] The complainants in this case (the "respondents" at the Supreme Court) consisted of both individuals and organizations.

In the leading opinion,[660] Justice Roberts rejected Justice Washington's specific reasoning in *Corfield*. He characterized that earlier opinion as recognizing a group of "natural rights" and as holding that the Article IV Privileges and Immunities Clause was meant to "create rights of citizens of the United States guaranteeing the citizens of every State the recognition of this group of rights by every other State."[661] That view, Roberts held, had been superseded, in favor of a non-discriminatory reading of the Clause: "in any State, every citizen of any other State is to have the same privileges and immunities which

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(1939).

[658] *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 532 (Opinion of Stone, J.) (1939).

[659] *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 501 (Opinion of Roberts, J) (1939).

[660] There was no opinion for the very fractured Court. Two justices did not participate in the case. Of the remaining seven justices, no more than two joined any single opinion. The specific holding that the municipality's actions violated the 14th Amendment was concurred in by a 5 to 2 vote. There was disagreement, however as to whether the holding should rest on Privileges and Immunities grounds or on due process grounds. Compare 307 U.S. 496, 511 (Opinion of Roberts, J.) (relying on Privileges and Immunities) with 307 U.S. 496, 524-525 (opinion of Stone, J) (relying on Due Process). This disagreement foreshadows a similar one in *McDonald.*

[661] *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 511 (Opinion of Roberts, J.) (Citing *Corfield)* (1939).

the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own."[662]

The question then became whether the right to freely disseminate information is a privilege or immunity protected by the Fourteenth Amendment.[663] The Court held that it was. The right to discuss topics of national concern and to communicate regarding those topics was, the opinion said, "inherent in citizenship of the United States" and thus protected by the Fourteenth Amendment.[664] The Court's holding was limited to natural persons, so only the individual respondents prevailed. Interestingly, Justice Roberts' opinion made no effort to reconcile his claim that the right to assemble and distribute information was tied to national citizenship with cases holding that other, similar rights (e.g., the right to avoid compelled self-incrimination as discussed in *Twining*) were not.

Justice Stone agreed with the result in the case. But he disagreed that the Privileges or Immunities Clause should be applied. It had never been held, he noted, that freedom of speech and assembly are "privilege(s) or immunit(ies) peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers."[665] He cited (of course) *Slaughterhouse* for this proposition; and he was right that Roberts' opinion seemed to ignore those cautions of *Slaughterhouse*, which was still "good law" in 1939. Stone noted that the record did not indicate that the issue of whether these rights were privileges and immunities specifically tied to citizenship of the United States had been fully argued and

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[662] Ibid., 307 U.S. 496, 511 (opinion of Roberts, J.) (1939).
[663] If the Fourteenth Amendment's Privileges or Immunities Clause were limited to a non-discriminatory meaning, it would simply repeat the Article IV provision. Logically, the Fourteenth Amendment must provide additional protection that Article IV does not.
[664] *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 512 (opinion of Roberts, J.) (1939).
[665] *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 519 (opinion of Stone, J.) (1939).

decided in the courts below. Instead, he would have relied on a straightforward due process analysis.

Wondering why Roberts and Black did not do the same, one commentator suggested that they wanted to limit the scope of the Due Process Clause to procedural guarantees. In other words, under this reading, Roberts' opinion in *Hague* was an attempt to get the Privileges and Immunities Clause to do the work that has subsequently been done by substantive due process.[666] Justice Stone, by contrast, was not interested in modifying the reasoning in *Slaughterhouse*, and reasoned that the Due Process Clause of the Fourteenth Amendment provided a greater range of protection, applying, as it did, to "persons" and not just "citizens."[667]

In *Edwards v. People of State of California*,[668] the Court considered a California statute making it a crime to assist bringing an indigent, non-resident person into the State. The petitioner, a resident of California, traveled to Texas to bring his unemployed brother-in-law back to California, and was convicted of this offense. In striking down the California Statute, the Court ruled that it violated Congress's right to regulate interstate commerce under Article I, Section 8.[669] It was well-settled, the Court said, that the transportation of persons across state lines was "commerce" for purposes of that clause.

Unwilling to rely on the Commerce Clause, Justice Douglas filed a concurring opinion relying instead on the Privileges and Immunities Clause. Douglas would have held

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[666] Seaman, "Constitutional Law: Fourteenth Amendment: Privileges and Immunities Clause: Civil Liberties: The Hague Case," *Michigan Law Review*, 38:1 (1939) 57, 63.
[667] Ibid., 57, 62 (1939).
[668] *Edwards v. People of State of California*, 314 U.S. 160 (1941).
[669] Ibid., 314 U.S. 160, 172 (1941).

that the right to travel across state lines is a right protected by "*national* citizenship."[670] That point had been settled beyond dispute at the time of the Fourteenth Amendment's ratification in 1868, Douglas wrote. He conceded that one might find language in several cases indicating that the right of free movement is incident to state citizenship, but relied on Justice Miller's failure, in *Slaughterhouse,* to characterize the right as one of state citizenship.[671] Note here that Justice Douglas, as late as 1941 is still at least purporting to honor the distinction between national and state citizenship that Justice Miller laid out in *Slaughterhouse*.

By the time of *Poe v. Ullman,*[672] a 1961 case involving a Connecticut law banning, *inter alia*, medical practitioners from giving even married couples advice on contraceptive use, the second Justice Harlan was developing a substantive due process jurisprudence that involved a gradualist approached based on tradition, rather than any concept of natural law. In dissenting from the Court's holding that the case did not present a "case or controversy" and thus was not justiciable, Harlan cited *Corfield*, just as he cited *Calder* as discussed in my paper analyzing that case,[673] but only for the proposition that the Fourteenth Amendment's *Due Process* Clause protects rights that are fundamental.[674] The Connecticut law at issue would be ruled unconstitutional, based on substantive due process,

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[670] *Edwards v. People of State of California*, 314 U.S. 160, 178 (Douglas, J., concurring) (emphasis in original) (1941).
[671] Ibid., 314 U.S. 160, 180 (Douglas, J., concurring) (1941).
[672] *Poe v. Ullman*, 367 U.S. 497 (1961).
[673] See my unpublished dissertation, *The Supreme Court and Natural Law: Calder v. Bull in the 20th Century and Beyond* (2017), 14 – 17.
[674] *Poe v. Ullman,* 367 U.S. 497, 541 (Harlan, J., dissenting) (1961). He nowhere mentioned, let alone relied on, the Privileges and Immunities Clause.

just four years later.[675]

The *Corfield* citation in *Duncan v. Louisiana*[676] was in Justice Black's concurring opinion and was contained in a speech by Senator Howard, who introduced the Fourteenth Amendment in the Senate.[677] Here, Justice Black, a longtime proponent of the view that the Fourteenth Amendment fully "incorporated" the Bill of Rights as against the states, cited Senator Howard's speech (and reference to *Corfield*) for that point. Justice Black and Justice Harlan here continued a debate that Black had previously had with Justice Frankfurter in *Adamson v. California*.[678] In fact, Justice Harlan, concurring in *Duncan,* relied on the same scholar that Justice Frankfurter had earlier relied on, in finding that the Fourteenth Amendment was *not* intended[679] to fully incorporate the Bill of Rights as against the states.[680]

In *Duncan*, the State of Louisiana sentenced a defendant to sixty days in prison and a $300 fine for simple battery. The Court refused to grant the defendant a jury trial.[681] The Court traced the lineage of the right to a jury trial through both English and American law,

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[675] *See Griswold v. Connecticut*, 381 U.S. 479 (1965).
[676] *Duncan v. Louisiana,* 391 U.S. 145 (1968).
[677] *Duncan v. Louisiana*, 391 U.S. 145, 166 (Black, J., concurring) (1968).
[678] *See Adamson v. California,* 332 U.S. 46, 59 (Frankfurter, J., concurring) and 332 U.S. 46, 90 (Black, J., dissenting) (1947).
[679] I am not suggesting that "intent" should be controlling. Such a position raises several issues including whose "intent" counts (the members of Congress, the Amendment's sponsors, the state legislatures?) and whether the interpretation of a constitutional amendment is limited to discerning intent.
[680] That scholar was a former student of Frankfurter's named Charles Fairman who was, two years after *Adamson*, to publish a seminal study "Does the Fourteenth Amendment Incorporate the Bill of Rights," *Stanford Law Review,* 2 (1949) 5. Harlan, in his *Duncan* dissent relied on Fairman's point that there was virtually no mention of "incorporation" in the state legislative debates regarding the Fourteenth Amendment's ratification. *Duncan v. Louisiana*, 391 U.S. 145, 191, n. 9 (Harlan, J. dissenting). For a fuller discussion of *Adamson*, see my unpublished dissertation, *The Supreme Court & Natural Law: Calder v. Bull in the 20th Century and Beyond,"* (2017), 8 – 9.
[681] *Duncan v. Louisiana*, 391 U.S. 145, 146.

noting that the First Continental Congress had listed the right to trial by jury as among "the most essential rights and liberties of the colonists."[682] It ultimately agreed with the petitioner (the "defendant" at trial) in this case that the Sixth Amendment right to trial by jury was a guarantee that the states had to honor as well. Illustrating how infrequently the Privileges or Immunities Clause was used, however, the Court instead relied on the Due Process Clause of the Fourteenth Amendment.

Both the opinion for the Court and the dissenting opinion discussed the continued viability of Justice Washington's *Corfield* opinion in a 1975 case, *Baldwin v. Fish and Game Commission of Montana*.[683] The Court there considered a challenge to a Montana law charging markedly higher fees for out-of-state hunters of elk. The Court upheld the fees against an Article IV Privileges and Immunities Challenge, as well as one based on the Equal Protection Clause of the Fourteenth Amendment.

Suggesting that the development of Fourteenth Amendment jurisprudence provides one explanation for the Court's failure to "precise(ly) shape" the contours of Article IV's Privileges and Immunities Clause,[684] the Court held that "only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the nation as a single entity, must the state treat all citizens, resident and nonresident, equally."[685]

Justice Blackmun's opinion for the Court cited *Corfield* favorably for the point that, in regulating the use of common property, a state is not required to extend to citizens of

[682] Ibid., 391 U.S. 145, 152 (1968).
[683] *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978).
[684] Ibid., 436 U.S., 371, 379-380 (1978).
[685] Ibid., 436 U.S. 371, 383 (1978).

other states the same advantages that it extends to its own citizens.[686] Recalling Justice Washington's opinion that the Privileges and Immunities Clause was restricted to "fundamental" rights[687] and rejecting the claim that Justice Washington's analysis in *Corfield* was now a dead letter, the Court framed the issue as whether Montana's distinction between residents and nonresidents "threatens a basic right in a way that offends the Privileges and Immunities Clause."[688] In answering "no" to that question, the Court noted that the state law deprived no one of the right to travel or the means of livelihood, and was thus not "basic to the maintenance or wellbeing of the Union."[689]

The Court's opinion in *Baldwin* clarified that Justice Washington had used the term "fundamental" in *Corfield* in two different senses. One was a "natural rights" sense, as when Washington wrote, for example, of the right to "life and liberty."[690] When he also wrote, however, of the right of the citizen to pass through or to reside in other states, or to maintain actions in other states, he does not seem to have had classical natural rights in mind; he seemed, instead, to be focusing on those interests that Hamilton had earlier identified in *Federalist* 80, those rights that bound together American citizens as Americans. It was in this latter sense that the *Baldwin* Court thought Washington's language still had force and relevance.

Justice Brennan, speaking for himself and two other dissenters, would have

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[686] Ibid., 436 U.S. 371, 384 (1978).
[687] The Court added that Washington used the term "fundamental" in "the modern as well as the 'natural right' sense." 436 U.S. 371, 387 (1978). Evidently Justice Blackmun had in in mind the formation and maintenance of the Union as the "modern" meaning of "fundamental." *See* Bogan, *Privileges and Immunities: A Reference Guide to the United States Constitution* (2003), 78.
[688] *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 387 (1978).
[689] Ibid., 436 U.S. 371, 388 (1978).
[690] *Corfield v. Coryell*, 6 Fed. Cas. 546, 551 (1823).

discarded Washington's "fundamental" rights scheme altogether. He thought that Washington's language and subsequent interpretations had hopelessly muddled the Privileges and Immunities Clause. That language had used a "natural rights" methodology which was the subject of a "controversy raging in his time,"[691] which was now obsolete, in the dissenters' view. Worse still, even though Washington's understanding of the Clause was "seemingly discarded" in *Paul v. Virginia,*[692] in favor of holding that the Clause merely prohibits a state from discriminating in favor of its own citizens, subsequent Court opinions had created a hybrid of the two concepts. Thus, the Clause had come to mean that a state could not discriminate against citizens of other states only with respect to those fundamental rights it guaranteed to its own citizens.[693]

The dissenters would have discarded this scheme altogether and replaced it with the following two-part test: 1) Is the presence or activity of nonresidents the source or cause of the problem or effect with which the state seeks to deal?; and 2) Does the discrimination practiced against nonresidents bear a substantial relation to the problem they present? Only if the answer to both questions was "yes," (and irrespective of whether the discrimination involved a "fundamental" right), could a discriminatory action be sustained under the Privileges and Immunities Clause.[694]

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[691] *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 396 (Brennan, J., dissenting) (1978).
[692] *Paul v. Virginia*, 75 U.S. 168 (holding that, for purposes of the Privileges and Immunities Clause, a corporation is not a "person.") (1869).
[693] *Baldwin v. Fish and Game Commission*, 436 U.S. 371, 398 (Brennan, J., dissenting) (1978).
[694] Ibid., 436 U.S. 371, 402 (Brennan, J., dissenting) (1978).

Justice Thomas: Reviving Privileges and Immunities?

For only the second time ever the Court relied on the Fourteenth Amendment's Privileges or Immunities Clause in striking down a state law in *Saenz v. Roe.*[695] In 1992, California passed a statute limiting welfare (specifically Temporary Assistance to Needy Families or "TANF") benefits to newly arrived residents, those who had lived in the state for less than twelve months. In overturning the law, the Court held that it violated the Privileges or Immunities Clause of the Fourteenth Amendment, and particularly the "right to travel." That right encompassed, the Court said, three different components: First, the right of a citizen to leave one state and travel to another, second, the right to be treated as a welcome visitor while present in the second state, and finally, for those who decide to reside there permanently, the right to be treated like other citizens of the state.[696] It was this last component that was implicated in this case. Although the opinion acknowledged that there have been widely divergent views of what the Fourteenth Amendment's Privileges or Immunities Clause protects (especially in *Slaughterhouse)*, it was "common ground" that the right to travel at least was included.[697] The Court cited *Corfield* in noting that a visitor to one state enjoys the privileges and immunities of citizens of the several states.[698]

Chief Justice Rehnquist dissented in *Saenz,* arguing that the state was entitled to

[695] *Saenz v. Roe*, 526 U.S. 489 (1999). The other case was *Colgate.* Although it will be recalled that the lead opinion in *Hague* relied on the Privileges and Immunities Clause, that approach did not command a majority of the Court.
[696] Ibid., 526 U.S. 489, 500 (1999).
[697] Ibid., 526 U.S. 489, 503 (1999).
[698] Ibid., 526 U.S. 489. 499, n. 16 (1999).

establish a *bona fide* residence requirement, and disputing the argument that this claim had anything to do with the "right to travel." as opposed to an equal protection claim.[699] It is Justice Thomas's dissent in the case though, that concerns us most here.

Thomas argued for looking to the intent of the framers of the Fourteenth Amendment.[700] Tracing the "privileges and immunities" phraseology to the 1606 Charter of Virginia, and arguing that the term signified certain "fundamental rights and liberties specifically enjoyed by English citizens,"[701] he cited approvingly Justice Washington's language from *Corfield*. In citing *Corfield*, he argued, persuasively, that the Congress which enacted the Fourteenth Amendment were heavily influenced by Washington's explanation of Article IV privileges and immunities.

Finally, Thomas (joined by Rehnquist) indicated that he would be "open to reevaluating" the meaning of the Privileges or Immunities Clause in "an appropriate case."[702] That Clause, he wrote, might displace rather than augment, some of the Court's equal protection and substantive due process jurisprudence.

Thomas's suggestion that the Privileges or Immunities Clause might displace substantive due process as a vehicle for securing certain fundamental liberties has been taken up by at least one commentator, who has argued that it does make a difference

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[699] *Saenz v. Roe*, 526 U.S. 489, 511 (Rehnquist, C.J., dissenting) (1999).
[700] It is an argument that Justice Thomas perhaps makes more frequently than any other justice; in other cases Thomas has argued for re-examining well-settled Commerce Clause jurisprudence in favor of the drafters' intent. Although Chief Justice Rehnquist joined Thomas's opinion in this case, notably, Justice Scalia, who usually shares Thomas's "originalist" philosophy, did not, casting his lot with the majority instead.
[701] *Saenz v. Roe*, 526 U.S. 489, 523 (Thomas, J., dissenting) (1999).
[702] *Saenz v. Roe,* 526 U.S. 489, 528 (Thomas, J., dissenting) (1999). He would accept his own invitation in *McDonald,* supra.

whether the Court protects fundamental rights under the rubric of Privileges or Immunities or under substantive due process. Under this reasoning, using the Privileges or Immunities Clause would be the intellectually honest approach, and the task of discerning substantive rights would be "more disciplined and restrained" than it otherwise is.[703]

This reasoning is dubious. Irrespective of whether, as an historical matter, Thomas is correct that the Clause was intended to secure certain fundamental liberties against state encroachment, the fact remains that over a century and a half of judicial pronouncements have passed since its enactment. While the drafters' intent is undoubtedly a relevant consideration in considering the meaning of a constitutional enactment, it cannot be the only one. Such a methodology ignores the fact that not only Congress, but at least three-quarters of states also passed the amendment, and that perhaps those supporting it had a variety of intentions, or even understandings of the Clause's meaning. Attempting to replace a century and a half of extensive jurisprudence with respect to substantive due process, equal protection, and privileges and immunities in favor of discerning the intent of the provisions' drafters, is not a sensible or even a workable trade-off. Whatever benefits might be gained by a fidelity to the historical context and intentions of the Fourteenth Amendment's ratification would be more than offset by the substantial upheaval to existing law that such a process would entail. Add to that the fact that only two justices, one of them now deceased, have argued for such a process, and it is readily apparent that the suggestion is an academic one only.

[703] Shaffer, "Answering Justice Thomas in Saenz: Granting the Privileges or Immunities Clause Full Citizenship within the Fourteenth Amendment," *Stanford Law Review*, 52:3 (2000), 709, 733.

The most recent case in which justices discussed *Corfield* at length - and engaged in an extended analysis of the appropriateness of using the Due Process Clause as a means of incorporation, as opposed to the Privileges or Immunities Clause - was a Second Amendment case, *McDonald v. City of Chicago*. [704] The *McDonald* Court faced a Chicago City ordinance that essentially banned private gun ownership within the City. The Second Amendment to the Constitution provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[705]

The Petitioners in Chicago alleged that the city ordinance violated their Second and Fourteenth Amendment rights. Specifically, they contended that, like most of the other provisions in the Bill of Rights, the Second Amendment right to keep and bear arms was incorporated as protection against any government action, including state and local. In *McDonald*, the Court was squarely presented with the issue of whether they should reject the narrow *Slaughterhouse* interpretation of the Fourteenth Amendment, discussed at some length above. In other words, should they base incorporation of the Bill of Rights on the Privileges and Immunities Clause instead of the Due Process Clause? The Court rejected the invitation, noting that (as championed by Justice Black and others), the Due Process Clause of the Fourteenth Amendment had become the judicially-accepted vehicle by which fundamental rights listed in the Bill of Rights were incorporated as against the states.[706]

Turning to the Due Process Clause, the Court then held that the Second Amendment

[704] *McDonald v. City of Chicago,* 561 U.S. 462 (2010).
[705] U.S. Constitution, Amendment II.
[706] *McDonald v. City of Chicago,* 561 U.S. 462, -- (2010).

right to bear arms was "fundamental," and that the Chicago ordinance at issue thus violated the Second and Fourteenth Amendments to the Constitution. The Court rejected the supposed notion that the right to keep and bear arms was a "second-class right."[707] It also dismissed the City's claim that Section 1 of the Fourteenth Amendment was merely an anti-discrimination provision - similar to the argument that eventually won the day with respect to Article IV's Privileges and Immunities Clause.

Justice Thomas did not join that part of the Court's opinion which rejected reliance on the Privileges or Immunities Clause, and rejected the petitioner's invitation to repudiate the narrow construction of that Clause given by the Court in *Slaughterhouse*. Instead, he filed a separate opinion, concurring in part, and concurring in the judgment.[708] Instead of relying on the Fourteenth Amendment's Due Process Clause, he would have based the holding on the Privileges or Immunities Clause. Tracing the history of the Clause through *Slaughterhouse* and such cases as *United States vs Cruikshank*,[709] (holding that the right to peaceably assemble was not one of the privileges of United States citizenship because it long predated the adoption of the Constitution), Thomas criticized the Court's previous holdings for "marginali(zing)" the Clause.[710] This marginalization, according to Thomas, has led to an unfortunate "substantive due process" jurisprudence that is reflected in this case. Note that the late Justice Scalia was also, like Thomas, a critic of the Court's

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[707] Ibid., 561 U.S. 462, -- (2010).
[708] *McDonald v. City of Chicago*, 561 U.S. 742, -- (Thomas, J., concurring in part and concurring in the judgment) (2010).
[709] *United States v. Cruikshank,* 92 U.S. 542 (1876).
[710] *McDonald v. City of Chicago*, 561 U.S. 742, -- (Thomas, J., concurring in part and concurring in the judgment) (2010).

substantive due process jurisprudence, but he explicitly accepted it in this case.[711]

Justice Thomas, it will be recalled, was one justice (along with Scalia) whom critics suggested was willing to rely on precepts of natural law or natural rights in his jurisprudence. And indeed, in *McDonald*, he rejected the now-widely accepted view that the Article IV Privileges and Immunities Clause was a nondiscrimination clause, in favor of Justice Washington's older view.[712] Article IV, Justice Thomas suggested, provides a certain federal guarantee of "baseline" rights that no state could abridge.[713]

Justice Thomas's view might once have carried the day. It no longer will, and he could not even persuade his fellow originalist, Justice Scalia, to join him. Thomas is an outlier on the current court, willing to turn back decades of precedent with respect to, among other issues, the Privileges and Immunities Clause and Commerce Clause jurisprudence. His arguments might have received a receptive audience from past courts and past justices, including Washington and the first Harlan, but not at the present time.

The drafters of Article IV of the Constitution, the Privileges and Immunities Clause, may have had natural rights in mind when they drafted it. They may have meant that there were certain limits beyond which no government body could go, but one cannot conclude that definitively from evidence existing at the time of the Constitutional Convention. There is, however, ample evidence that early jurists thought in terms of natural rights, and Justice Field made that explicit in his dissent in *Slaughterhouse*. Quite a few of the interpretations

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[711] *McDonald v. City of Chicago*, 561 U.S. 742, -- (Scalia, J., concurring) (2010).
[712] *Baldwin v. Fish and Game Commission*, 436 U.S. 371, 398 (Brennan, J., dissenting) (1978).
[713] *McDonald v. City of Chicago*, 561 U.S. 742, -- (Thomas, J., concurring in part and concurring in the judgment) (2010).

of the Privileges or Immunities Clause have suggested a natural rights basis for the Clause. The Court's opinion in *Mugler* seemed to suggest as much. Several of these opinions have been dissents or concurring opinions criticizing the Court for not adopting a Privileges or Immunities rationale. The former category includes Justice Field's dissent in *Slaughterhouse,* Justice Harlan's dissent in *Maxwell*, and Justice Thomas's dissent in *Saenz.* This latter category would include Justice Thomas's concurring opinion in *McDonald*, and Justice Douglas's concurring opinion in *Edwards.* Of the fifteen cases citing *Corfield* and discussed in this paper (there were a total of thirty-six cases citing *Corfield*; as explained previously those opinions whose only interest in citing *Corfield* was for the non-discriminatory reading of the Privileges and Immunities Clause have not been discussed), the *Corfield* cite is found in eight majority opinions, five concurring opinions and six dissents. However, the Court has cited the Privileges and Immunities Clause as the basis for its holdings only very rarely. The Privileges or Immunities Clause is now the least relied-upon (even though the first mentioned) part of Section I, Clause 2 of the Fourteenth Amendment, taking a back seat to Due Process and Equal Protection claims.[714] Still, there are enough suggestions in Supreme Court jurisprudence that the Article IV Privileges and Immunities Clause and Amendment Fourteen's Privileges or Immunities Clause are meant to be interpreted in light of natural rights principles. That is largely a matter of historical interest now. Although there has been a recent revival of interest in the Privileges and Immunities Clause, largely because of Justice Thomas's writings, it seems unlikely that this

[714] *See* Shaffer, "Answering Justice Thomas in Saenz: Grating the Privileges or Immunities Clause Full Citizenship within the Fourteenth Amendment," *Stanford Law Review,* 52: 3 (2000), 709, 711 – 712.

renewed interest presages a new era of natural law jurisprudence. But the complete story of natural law and natural rights in Supreme Court jurisprudence must encompass the story of privileges and immunities – as well as the Chase-Iredell debate in *Calder*. Those are two integral parts of any complete analysis of where the Court has been and where it might be going.

CONCLUSION

A survey of cases in which the Supreme Court speaking as the Court, or an individual justice writing a concuring or dissenting opinion have cited *Calder* for its natural law implications or *Corfield* for Justice Washington's construction of the Privileges and Immunities Clause yields several related conclusions.

Natural law and natural rights philosophy have had a significant impact on Supreme Court jurisprudence, especially in the aftermath of the Constitution's Fourteenth Amendment. While one will not often (if ever) find a Court opinion that explicitly argues that natural law *as such* is controlling, there are several cases where the holding can most plausibly be explained as relying on natural law principles. Moreover, there have been several Supreme Court justices who themselves have written in terms of "eternal justice" and the "law of nature" in a manner suggesting that those principles have served at least as substantial influences on their thinking.

Court opinions that may be said to have relied, at least in part, on natural law reasoning include (but are not limited to) the following: The Court's opinion in *McVeigh,* the Salmon Chase and Field dissents in *Knox* and the other *Legal Tender* cases, the Field

dissent in *Slaughterhouse*, the Salmon Chase dissent in *Osborn*, the Court's opinion in *Loan Association,* the Harlan dissent in *Atchison*, the Harlan dissent in the *Civil Rights Cases,* the majority opinion (by Harlan) in *Mugler* (which arguably provided the bridge between past cases and "substantive due process") Douglas's dissent in *Poe*, the Court opinion (by Douglas) in *Griswold*, and, if one is to accept Justice Black's argument, The Court's opinions in *Adamson* and *in re Winship*, the Thomas dissent in *Saenz*, and the Thomas concurrence in *McDonald*.

This is not necessarily to argue that natural law was controlling in any of these opinions for the Court, or dispositive for any of the single justices. Justice Black, as has become apparent, was certain that several of his brethren did rely on natural law precepts. He was to write repeatedly – in *Adamson*, in *Griswold* and in *Winship*, among other cases – that the Court or individual justices felt that they had a roving commission, especially under the Fourteenth Amendment, to infuse abstract constitutional provisions with their own sense of universal principles or eternal law or natural justice. He took liberties associated with writing dissents to be more rhetorically inclined, and even caustic, for Black, a jurist who believed in "strict construction," was an unapologetic positivist. My own conclusions will be less dogmatic, I hope.

Still, Court opinions such as in the *McVeigh* and *Loan Association,* and cases are best explained by reliance on natural law principles. In neither of these cases did the Court rely on an explicit constitutional provision, while striking down a federal law in *McVeigh* and state laws in *Loan Association.* Although the argument is not as straightforward in a case like *Griswold*, (as by the time of that case, the Court had developed an extensive

substantive due process jurisprudence), the author of the Court's opinion, Justice Douglas freely borrowed from the language of natural law, especially in his *Poe* dissent, but also in his memoirs.

There are several instances of concurring or dissenting justices using the language of natural law. One finds this often in dissents by Justice Field, in both the *Legal Tender Cases* and *Slaughterhouse*, and by Justice Harlan in *the Civil Rights Cases* and *Atchison*. Then, too, there are Justice Thomas's more recent suggestions (in *Saenz* and *McDonald*) that the Privileges and Immunities Clause ought to be revived and infused with natural justice principles.

It is well to keep in mind these opinions often find a mix of natural law rhetoric and language regarding Americans' historic rights or the privileges that are inherent in free, republican governments. It frequently is unclear whether the language is invoking natural law *as such* or natural law as mediated by historical practice and America's particular brand of constitutional government. That ambiguity begins with Chase's opinion in *Calder*. For one might argue that natural law controls in all cases and that any legislative decree contrary to natural justice is void (Justice Field comes close to this position). One might argue that the Constitution's drafters deliberately incorporated certain fundamental principles, as reflected in the Bill of Rights, and especially in the Ninth Amendment, and that judicial interpretation ought to be guided by this fact (an approach Justice Goldberg advocated in *Griswold*). Or one might argue that there is no fiddling with the text of the Constitution, and that a jurist's job is to interpret the text in light of history and the drafters' intentions irrespective of any other "fundamental" principles (the approach taken both by

Justices Black and Scalia). But it would be wrong to suggest that natural law considerations were *merely* rhetorical, either or at the time of the founding or since.

There are at least three trends that can be discerned by tracing the *Calder* history. First are those justices who unequivocally side with Iredell's opinion in that case, and who hold that constitutional interpretation (at least by judges) is limited to what controlling positive law provides. That line can be traced from Iredell, who argued that natural justice admits of no fixed principles, and that judges ought not to consider any extra-constitutional sources. Clifford subsequently picked up that theme, as did Black and this tradition was most recently continued by Justice Scalia, until his passing in 2016. The Iredell-Clifford–Black-Scalia school is reasonably uncomplicated; judges must look to text and intention and interpret constitutional provisions and legislative enactments accordingly.

Chase's *Calder* opinion has resulted in two jurisprudential lineages. First are those justices whose language may be fairly construed as considering natural law principles as such. Field is the clearest example of this and the *first* Harlan also seemed to be in this tradition in his *Civil Rights Cases* and *Atchison* dissents and his opinion for the Court in *Mugler.* More recently Douglas and Justice Stevens may also have written in this tradition. Douglas's opinions in *Poe* and *Griswold* (the latter an opinion for the Court) have already been reviewed above; Justice Stevens wrote a noteworthy opinion in dissenting from the Court's holding in *Meachum v. Fano*. There, the Court upheld a state's refusal to grant a hearing to a prisoner who was transferred from one prison to another, the second prison imposing substantially more burdensome restrictions on the prisoner. In dissenting, Stevens wrote that the majority viewed liberties as coming from the Constitution or from

state law. This was incorrect, Stevens said, as the Due Process Clause protects certain inalienable rights. "All men were endowed by their Creator with liberty," Stevens wrote, echoing the Declaration of Independence. There thus is a Field – Harlan I – Douglas – Stevens line which traces its lineage back to Chase's *Calder* opinion.

On the other hand, are those justices who read Chase in the narrower sense that he was referring to principles that animate government in free, republican societies. These justices have argued for a gradualist approach, avoiding sweeping rhetoric about timeless principles, but arguing that there *are* fundamental precepts inherent in American republican government that courts should protect irrespective of specific textual commands. The two most prominent jurists in this line of thought have been Harlan II and Souter. So finally, there is a Chase – Harlan II – Souter jurisprudence that seeks to avoid the apparent extremes of "text only" (as in the Iredell-Clifford-Black-Scalia line) and what has been criticized as a free-roaming jurisprudence based in natural law principles (the Chase-Field-Douglas line).

As is now apparent, there were *no* citations to either the *Calder* opinion (for its natural law debate) or Justice Washington's *Corfield* opinion until after the Fourteenth Amendment's ratification in 1868, No Supreme Court opinion cited *Calder* until *McVeigh* in 1870, and none cited *Corfield* until *Slaughterhouse* in 1873. Natural law considerations took on a heightened importance and interest after the American government and system of federalism underwent a fundamental transformation as a result of the Civil War and the post-Civil War amendments. The federal Constitution instituted a government of very limited authority, one that did not have any of the "police powers" that were associated

with the state governments.

But after the ratification of the Fourteenth Amendment, the federal government, and thus federal courts, became guarantors of due process, privileges and immunities and equal protection as against the actions of individual states. Federal courts were thus called on to give substantive content to these abstract constitutional guarantees and given that *state* constitutions often explicitly provided for natural law considerations, it was not surprising that courts would consider similar principles in interpreting the Fourteenth Amendment.

Beginning in 1870, then, the Supreme Court and individual justices began engaging the Chase-Iredell exchange in *Calder*, but always, for the remainder of the Nineteenth Century, in the economic and property sphere. All seven of the cases in which the Chase and Iredell opinions were discussed for the remainder of the Century involved questions of judicial protections of property. These opinions reflected the general philosophical atmosphere of the time, where natural law principles were often thought to serve property interests first.

That trend did not continue into the Twentieth Century. Although property and contractual concerns remained paramount in cases such as *Lochner*, no justice was to cite *Calder* again until 1947, and only once since that time – in *Kelo* – have property interests been at stake. Instead the cases have involved criminal law or juvenile adjudication (*Adamson* and *Winship*), issues of privacy and personal autonomy (*Poe, Griswold, Glucksberg*) and sovereign immunity (*Seminole Tribe*).

The Court's substantive Due Process jurisprudence has developed along similar

lines. Although the exact date of the Court's recognition of a substantive component to the Due Process Clause is disputed, by 1887 – the date of the *Mugler* decision – the Court was certainly considering and applying substantive due process concerns. Here, too, the early concerns were with property and economic issues. And the Twentieth and Twenty-First Century focus on individual liberties and personal autonomy has also been reflected in Supreme Court substantive due process jurisprudence. One scholar has referred to this focus as the "new morality," and that new morality is also reflected in Supreme Court jurisprudence that has *not* cited *Calder* or *Corfield*. Examples include Court holdings protecting the right of a woman to choose whether to terminate a pregnancy (*Roe v. Wade*) and the right of individuals to choose whom they will marry (*Obergefell v. Hodges*). It is to be expected that while much of the Supreme Court's Nineteenth and early Twentieth Century cases involved considerations of natural law, broadly defined, more recent cases – and probably future cases, as well – will focus more narrowly on natural rights. "There are limits beyond which government may not go," once meant, for example, that government could not interfere with the employer-employee relationship (*Lochner*). It is now much more likely to mean that government may not interfere with personal and private decisions (*Roe, Casey, Obergefell*).

The Privileges and Immunities Clause (or, to use the Fourteenth Amendment's verbiage, the Privileges or Immunities Clause), as reflected in *Corfield* citations, has taken a slightly different, though similar trajectory. But here, too, it was after the Fourteenth Amendment's ratification. The Nineteenth Century *Corfield* citations also came primarily in the economic sphere (*Slaughterhouse, Mugler, Blake*) although issues of Civil Rights

also presented themselves (*The Civil Rights Cases*, *Hodges*). In the Twentieth Century, one finds the type of criminal law procedure cases that one does find much of in *Calder's* progeny, including the cases of *Maxwell, Twining* and *Duncan.* This is because the Privileges and Immunities Clause is more easily applied to criminal procedure cases, than is the sort of natural law analysis one finds in *Calder* and its progeny. Whether a jury must be made up of twelve as opposed to eight members, for example, or whether a criminal defendant is entitled to a jury at all, are questions to which natural law provides no answer. One may, however (as the first Harlan did) trace the historical privileges to a jury trial that the English and early Americans enjoyed.

As Justices Roberts and Brennan have both argued, the non-discriminatory reading of the Privileges and Immunities Clause has appeared to win out. Justice Thomas has attempted to revive the Privileges and Immunities Clause and infuse it with substantive content, but he has been an outlier on the Court, unable to persuade even his fellow originalist, Justice Scalia, to join with him in that venture. Instead, the Fourteenth Amendment's Due Process Clause has been the vehicle the Court has most commonly used to protect individual rights and liberties.

This study's goal has been to evaluate the use of natural law and natural rights concepts in Supreme Court jurisprudence by looking at the progeny of two cases, *Calder v. Bull* and *Corfield v. Coryell*. Examining the history of those cases has been a fruitful way of conducting one part of an exhaustive history of natural law in American legal jurisprudence. The method is justified by the fact that these two cases are landmark pieces of jurisprudence, known to any student of American law and jurisprudence. If the Chase-

Iredell debate is engaged, it is likely to engaged with citations to those jurists. Similarly, if the Privileges and Immunities Clause, one very plausible basis for natural rights protections in the Constitution, is to be construed, Washington's opinion in *Corfield* is likely to be cited.

But avenues for future research have suggested themselves. While the method employed here has the benefit of avoiding any subjectivity in case selection (if a case has the appropriate citation, it was considered; otherwise it was not), it will miss cases that arguably do involve debates around natural law or natural rights considerations. Some of those are mentioned above. There is also a strand of "morals" legislation that the Supreme Court has considered (for example, *Paris Adult Theatre v. Slaton*) that form no part of this study. But a complete history of natural law jurisprudence in the United States will pursue the methods used here, by for example, considering an exhaustive history of the Ninth Amendment. For that provision, like the Privileges and Immunities Clause, arguably provides a *textual* basis for natural rights protection. We have seen the Ninth Amendment cited in *Griswold*, as it was, too in *Roe*. And while it was once a restraint on the federal government alone, perhaps that is no longer a tenable position.

APPENDIX – ALL CASES CITING *CORFIELD V. CORYELL*

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

Austin v. New Hampshire, 420 U.S. 656 (1975)

Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371 (1978)

Blake v. McClung, 172 U.S. 239 (1898)

Canadian Northern Railway. Co. v. Eggen, 252 U.S. 553 (1920)

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907)

Civil Rights Cases, 109 U.S. 3 (1883).

C.J. Henry Co. v. Moore, 318 U.S. 133 (1943)

Colgate v. Harvey, 296 U.S. 404 (1935),

Duncan v. Louisiana, 391 U.S. 145 (1968)

Edwards v. People of State of California, 314 U.S. 160 (1941)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939)

Hess v. Pawloski, 274 U.S. 352 (1927)

Hodges v. United States, 203 U.S. 1 (1906)

Howlett By and Through Howlett, v. Rose, 496 U.S. 356 (1990)

Lynch v. Household Finance Corporation, 405 U.S. 538 (1972)

Manchester v. Massachusetts, 139 U.S. 240 (1891)

Mason v. State of Missouri, 179 U.S. 328 (1900)

Maxwell v. Dowd, 176 U.S. 581 (1900)

McDonald v. City of Chicago, 561 U.S. 742 (2010)

McKnett v. St. Louis & San Francisco Railway Co., 292 U.S. 230 (1934)

Monell v. Department of Social Services, 436 U.S. 658 (1978)

Mugler v. Kansas, 123 U.S. 628 (1887)

Oregon v. Mitchell, 400 U.S. 112 (1970)

Poe v. Ullman, 367 U.S. 497 (1961)

Saenz v. Roe, 526 U.S. 489 (1999)

Shapiro v. Thompson, 394 U.S. 618 (1969)

Slaughterhouse Cases, 83 U.S. 36 (1873)

Slocum v. New York Life Insurance, 228 U.S. 364 (1913)

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)

Twining v. State, 211 U.S. 78 (1908)

United Brotherhood of Carpenters & Joiners of America v. Scott, 463 U.S. 825 (1983)

United States v. Guest, 383 U.S. 745 (1966)

United States v. Wheeler, 435 U.S. 313 (1978)

Zobel v. Williams, 457 U.S. 55 (1982)

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"There was never a day that I left the room without a further understanding of the subjects he presented." - Pensacola State College, 2016.

"Absolutely brilliant and extremely knowledgeable," - Pensacola State College, 2016.

"He knows what he is talking about, his knowledge of his subject area makes his classes so interesting." - Pensacola State College, 2016.

CONFERENCE PRESENTATIONS:

Florida Political Science Association. "To Declare War: Does it Mean Anything Anymore?" Presented at FPSA meeting in Orlando, Florida, March, 2007

University of Portland, Religious Freedom Conference. "Bristling with Hostility." Presented at University of Portland Garaventa Center, April, 2007.

City of Augusta, "Lincoln, Maine & the War Between the States," February, 2009

City of Augusta, "Rum, Romanism & Rebellion: James G. Blaine & the Election of 1884" February, 2010.

Roger Williams University. "Conscientious Objectors in the American Revolution: Anabaptists and Quakers compared and contrasted." Presented at Roger Williams University, April, 2011.

Hiram College. "'No Soviet Domination': Presidential Debates, the media and the voter." Presented at Hiram College Conference on the 2012 presidential election, March, 2013.

Boston University, "From Natural Law to Natural Rights to Social Justice"; Topics in Political Theory Series, March, 2015.

Mt. Union College. "Locke, Immigration and the Obama Presidency." - Presented at Mt. Union College, October 2015.

PUBLICATIONS:

"No Soviet Domination: Presidential Debates, Public Opinion and the Media." Vol 2, Chapter 8 in *A Transformation in American Politics: The Presidential Election of 2012*. Brattebo, Douglas, Tom Lansford, and Jack Covarrubias, ed. University of Akron Press, In press.

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