Human Law, Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789–1835

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I. INTRODUCTION

Three kinds of innovation are commonly associated with the early federal courts: establishing the institution of judicial review without any clear authorization for doing so, using judicial review to define property rights more expansively than would have been anticipated by contemporaries, and employing fundamental principles derived from natural or "higher" law for this purpose.[1] I will argue that the early federal courts were far less innovative in these three respects than most scholars have supposed. First, the Framers of the Federal Constitution seem to have anticipated that the new federal courts would exercise the power of judicial review, and to have understood judicial review as a judicial practice that did not require specific authorization in a written constitution.[2] Second, the Framers expected that in exercising the power of judicial review the federal courts would protect certain conventional property rights not stated in constitutional provisions.[3] Third, as the Framers expected, the federal courts of this era neither relied on nor endorsed using higher law as a basis for determining the validity of statutes affecting property rights.[4]

II. AT THE FOUNDING: TWO PARAMETERS OF JUDICIAL REVIEW

The subject of judicial review came up from time to time during the Constitutional Convention in 1787. Twelve delegates made remarks that seem to assume some form of judicial review as an ordinary judicial practice.[5] No delegate manifested a lack of familiarity with the concept. Some delegates had already exercised the power of judicial review themselves, as state court judges,[6] or advocated the lawfulness of

1. Higher law in this context refers to "a law that is not written in constitutions but which is behind and beneath such documents, a law that man does not make but which he may discover and apply." BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 297 (1931).

2. *See infra* text accompanying notes 5–22.

3. *See infra* text accompanying notes 24–38.

4. *See infra* text accompanying notes 39–55.

5. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Adrienne Koch ed., Ohio Univ. Press 1987) (Elbridge Gerry, Rufus King at 61; Roger Sherman, James Madison, Gouverneur Morris at 304–05; James Wilson, Nathaniel Gorham at 336–37; Gouverneur Morris at 339; Luther Martin at 340; George Mason at 341; John Rutledge at 343; James Madison at 352–53; Gouverneur Morris at 463; Oliver Ellsworth at 510; Hugh Williamson at 511; James Wilson at 518; James Madison at 539; Gouverneur Morris at 542; James Madison at 543; and James Madison at 631).

6. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1030 (2001).

judicial review as attorneys.[7] Courts in at least seven states had already exercised or endorsed some form of judicial review.[8] A majority of the delegates had legal training.[9] Delegates James Madison and Alexander Hamilton, writing later as Publius, took judicial review for granted in discussing the future federal courts.[10]

No provision in the proposed Constitution referred to judicial review, however.[11] Judicial review was never the subject of sustained discussion at the Convention, and no delegate moved to authorize the federal courts to exercise judicial review. Two delegates expressed disapproval.[12] Before the Convention, the power of judicial review had generated considerable opposition[13] as well as approval.[14] Some scholars have concluded that the Convention did not reach any meaningful consensus as to whether or how the federal courts would exercise a power of judicial review, and accordingly discounted the Convention proceedings as a source reflecting contemporary understanding of judicial review or expectations regarding how it would be practiced by the federal courts.[15]

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7. *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 490 (2005).

8. *See* CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 88–121 (2d ed. 1932); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1135–45 (1987); Treanor, *supra* note 7, at 475–97.

9. *See* Eskridge, *supra* note 6, at 1037.

10. *See, e.g.*, THE FEDERALIST NO. 78, at 524–28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). According to Hamilton, opponents of ratification had "upon many occasions" decried "the supposed danger of judiciary encroachments on the legislative authority." THE FEDERALIST NO. 81 (Alexander Hamilton), *id.*, at 545.

11. Judicial review is arguably implied by Article III, Section 2, and Article VI.

12. *See* NOTES OF DEBATES, *supra* note 5 (John Mercer at 462 and John Dickinson at 463). Dickinson said he was "at the same time at a loss what expedient to substitute." *Id.* at 463. Mercer and Dickinson represented Maryland and Delaware, respectively; apparently neither states' courts had yet exercised or endorsed judicial review. *See* HAINES, *supra* note 8, at 88–121.

13. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 93–99 (1988); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 302–05, 459 (1998); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 132–35 (1893).

14. According to Elbridge Gerry, state judges had "set aside laws as being [against] the Constitution. . . . with general approbation." *See* NOTES OF DEBATES, *supra* note 5, at 61.

15. LEVY, *supra* note 13, at 99–110; SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 42–43 (1990); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE 230–32 (1989); Treanor, *supra* note 7, at 469–70. *But see* SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 112 (1995); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 175–76 (1996); Sherry, *supra* note 8, at 1129.

The question of whether the Convention intended to authorize judicial review reflects a dubious premise: that delegates would have thought the federal courts needed formal authorization to conduct judicial review. State courts were exercising the power of judicial review already, without any authorization in their states' constitutions.[16] Judicial review had never been formally authorized in England, where Chief Justice Coke had memorably claimed the power to determine the validity of Acts of Parliament according to longstanding common law principles.[17] American patriots, too, had invoked an unwritten, ancient English constitution that set limits to the power of Parliament.[18] English and American courts that had exercised judicial review or endorsed it in principle always explained it as an inherent or implied duty.[19] Therefore the fact that the Convention did not formally authorize judicial review does not imply that the delegates were undecided about judicial review or opposed to it. Given the fact that courts practicing or endorsing judicial review had never regarded formal authorization from outside the courts as essential, Convention delegates probably thought that federal judges would feel they had the authority to exercise this notionally conventional power unless the Constitution prohibited judicial review.[20]

Regardless of whether the Convention proceedings might be regarded as reflecting any consensus among the delegates regarding the legitimacy or the likelihood of judicial review in the federal courts, however, the Convention provides a useful baseline for evaluating the degree of innovation practiced by the federal courts in later years. Delegates who seemed to take judicial review for granted showed a consistent or compatible understanding of the scope of judicial review in two basic

16. Sherry, *supra* note 8, at 1135.

17. Dr. Bonham's Case, 77 Eng. Rep. 646, 653 (K.B. 1610); *see* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 367–73 (1928). Some scholars have concluded that *Bonham's Case* was intended to address statutory construction rather than judicial review, and Coke himself later wrote that Parliament's legislative power was absolute. EDWARDO COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, CONCERNING THE JURISDICTION OF COURTS 36 (1797). Eighteenth-century Americans, however, seem to have understood *Bonham's Case* as asserting a power of judicial review.

18. *See* CHARLES F. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760–1776, at 43–49 (1933); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 75–76 (1986); Corwin, *supra* note 17, at 394–98 (suggesting that the influence of *Bonham's Case* was felt in America as early as the seventeenth century); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 865–69 (1978).

19. *See* Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 18, 23–26 (2003).

20. *See* THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 10, at 543; Hamburger, *supra* note 19, at 38–40.

respects. First, they anticipated that the fundamental law used by courts to determine the validity of statutes under the Federal Constitution would not consist merely of the constitutional text.[21] Second, they assumed that the federal courts would not invoke natural law or natural rights principles as a test of the validity of a statute.[22] Questions of property rights and economic liberty figured prominently in the delegates' hypothetical discussions of judicial review, so their discussions can offer useful if fragmentary evidence regarding the Framers' perceptions and expectations of how judicial review would apply to statutes modifying rights of property owners and other economic actors in the new federal courts.

A. Judicial Review Would Not Be Confined to Enforcing the Constitutional Text

Those Convention delegates who assumed that the federal courts would exercise judicial review evidently expected that federal courts would declare some kinds of laws void even if they did not violate a constitutional provision. Oliver Ellsworth said it was not "necessary" to prohibit the national legislature from enacting ex post facto laws, because "there was no lawyer, no civilian[23] who would not say that ex post facto laws were void of themselves."[24] Ellsworth evidently assumed that federal ex post facto laws, if challenged in court, would be declared void even if the Constitution did not expressly prohibit them, because the illegitimacy of ex post facto laws—among "the first principles of Legislation," according to James Wilson[25]—was already so well-established. Similarly, Gouverneur Morris opposed expressly prohibiting states from interfering with private contracts because "[t]he [j]udicial power of the U.S. will be a protection in cases within their jurisdiction."[26] No delegate

21. *See infra* text accompanying notes 24–38.
22. *See infra* text accompanying notes 39–55.
23. By "civilian" Ellsworth meant someone who is an expert in civil law. Similarly, Daniel Carroll refers to "civilians or others." NOTES OF DEBATES, *supra* note 5, at 511.
24. *Id.* at 510. Justice Thompson made a similar assertion in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 303–04 (1827) ("No [s]tate [c]ourt would, I presume, sanction and enforce an *ex post facto* law, if no such prohibition was contained in the constitution of the United States.").
25. NOTES OF DEBATES, *supra* note 5, at 511.
26. *Id.* at 542.

challenged the premise that courts would use such well-established extratextual principles in judicial review.[27]

James Madison reminded fellow delegates that in Rhode Island, "the Judges who refused to execute an unconstitutional law were displaced."[28] This was an allusion to *Trevett v. Weeden*, in which the highest court of Rhode Island had declared void a new law requiring creditors to accept paper money as legal tender for existing debts.[29] Madison and other delegates, evidently familiar with the existing state constitutions, would have known that Rhode Island had chosen to keep its colonial charter instead of adopting a written constitution,[30] and understood that the Rhode Island court had not relied on a written provision of fundamental law in overturning the tender law. Some probably knew that in Connecticut, the other state without a written constitution, the highest court had already held a statute void,[31] and that other states' courts had held statutes void on grounds not articulated in their written constitutions.[32] Roger Sherman, responding to George Mason's proposal to add a federal bill of rights to the Constitution, said that a bill of rights was unnecessary: "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."[33] Sherman's remark seems to imply that individual rights recited in state bills of rights would not become unavailable to litigants challenging a federal statute simply because they were not recited in the Federal Constitution. Some of those present would have known that state judges had endorsed using principles inferable from written constitutions as grounds for declaring a statute void,[34] and that principles of the unwritten English constitution, as

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27. The Convention later expressly prohibited ex post facto laws. U.S. CONST. art. I, § 9, cl. 3. This does not necessarily mean that the delegates disagreed with the statements of Ellsworth and Morris about fundamental law, however. Some delegates questioned whether courts would have the fortitude to declare statutes void despite pressure from the legislature. NOTES OF DEBATES, *supra* note 5, at 304–05.

28. *Id.* at 305.

29. Trevett v. Weeden (R.I. 1786). Although the court's opinion in *Trevett v. Weeden* was never published, the defendant's argument appeared as a pamphlet. *See* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417–29 (1971).

30. 1 FRANCIS NEWTON THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE, 1776–1850, at 129 (1898).

31. The Symsbury Case, 1 Kirby 444 (Conn. Super. Ct. 1785); *see* Treanor, *supra* note 7, at 487–89. Connecticut had declared its independence by an act of the legislature stating that the colony charter of 1662 would "remain the Civil Constitution of this State." 1 SCHWARTZ, *supra* note 29, at 289–90. The act contained a very brief recital of rights, consisting essentially of due process. *Id.* at 290.

32. Elbridge Gerry asserted that in Massachusetts the governor's salary was "secured by the spirit of the Constitution." NOTES OF DEBATES, *supra* note 5, at 39.

33. *Id.* at 630. Mason responded that "[t]he Laws of the U.S. are to be paramount to State Bills of Rights," an objection Sherman left unanswered. *Id.*

34. *See* Treanor, *supra* note 7, at 474–75, 485–86, 488–89, 493–495.

conceived by Americans, had been invoked by attorneys as grounds for holding statutes void in state courts.[35]

During the ratification process, Federalist writers consistently argued that citizens' rights would remain enforceable, responding to complaints that the proposed federal constitution lacked a bill of rights.[36] In *Federalist No. 44*, Madison considerably expanded the scope of Ellsworth's argument at the Convention that ex post facto laws were void regardless of any specific prohibition in a written constitution:

> Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and *all of them are prohibited by the spirit and scope of these fundamental charters*. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted.[37]

Similarly, some Anti-Federalist advocates contended that the federal courts would go beyond the literal text of the Constitution in finding grounds for declaring state statutes void. *Brutus*, for example, warned that the federal courts would be "empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[38]

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35. *See* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 357 (Julius Goebel Jr. ed., Columbia Univ. Press 1964); 1 SCHWARTZ, *supra* note 29, at 419–21.

36. *See* THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 10, at 579 ("[B]ills of rights, in the sense and in the extent they are contended for, . . . would even be dangerous."); THE FEDERALIST NO. 24 (Alexander Hamilton), *id.*, at 154 n.* ("New-York has no bill of her rights . . . . No bills of rights appear annexed to the constitutions of [some of] the other States . . . ."); THE FEDERALIST NO. 38 (James Madison), *id.*, at 247 ("Is a Bill of Rights essential to liberty?").

37. THE FEDERALIST NO. 44 (James Madison), *id.*, at 301 (emphasis added). This passage was quoted with approval by Justice Thompson in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 304–05 (1827). *See also id.* at 312 ("[The Contracts Clause stated] a great, yet not a *new* principle. It is a principle inherent in every sound and just system of laws, *independent of express constitutional restraints*.") (second emphasis added); *id.* at 266 (majority opinion) ("[Bills of attainder and ex post facto laws] are oppressive, unjust, and tyrannical, and, as such, are condemned by the universal sentence of civilized man.").

38. *Essays of Brutus No. 11*, *in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 83 (David Wootton ed., 2003).

B. Courts Would Not Use Natural Rights As a Basis for Declaring a Statute Void

Some scholars have inferred that Convention delegates intended or expected that courts would use natural law or natural rights in judging the validity of a statute.[39] This exaggerates the scope of judicial review reflected in the proceedings. Although the delegates repeatedly referred to existing or hypothetical laws as "unjust,"[40] and left important questions of economic justice exposed to the vagaries of national politics,[41] they did not expect courts to declare a law void simply because it was unjust. For the Framers, justice and law were distinct domains; injustice did not entail unconstitutionality. Delegates distinguished between laws that were unjust and laws that a reviewing court would pronounce void. James Wilson, a future law professor and Supreme Court Justice, said, "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect."[42] Similarly, George Mason, the prominent Virginia lawyer credited with drafting the Virginia Declaration of Rights, stressed this distinction while arguing that the federal judiciary should assist the executive in exercising the veto power over bills passed by Congress. The judges, he said, "could declare an unconstitutional law void. But with respect to every law[,] however unjust[,] oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."[43] Madison's later comments on Jefferson's draft of a constitution for Virginia also treated injustice and unconstitutionality as distinct.[44]

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39. WRIGHT, *supra* note 1, at 139–44; *see generally* Grey, *supra* note 18; Sherry, *supra* note 8, at 1158–60.

40. *See* NOTES OF DEBATES, *supra* note 5 (James Madison at 77; James Madison at 145; Gouverneur Morris at 255; James Wilson at 337; George Mason at 341; Oliver Ellsworth at 498; and James Madison at 543).

41. The Convention declined to prohibit Congress from interfering with the obligation of contract, despite Elbridge Gerry's efforts. *Id.* at 642. Madison was unable to secure consensus for drafting a contract clause that would ban state laws altering the obligation of future contracts as well as laws altering the obligation of contracts already in being. *Id.* at 542–43. The Convention did not prohibit Congress from issuing bills of credit or making something other than gold or silver a legal tender, though these issues were discussed. *Id.* at 470–71. Paper money had generally been regarded as unjust. *E.g.*, *id.* at 144.

42. *Id.* at 337.

43. *Id.* at 341.

44. *See* James Madison, *Observations on Jefferson's Draft of a Constitution for Virginia*, *in* THE FOUNDERS' CONSTITUTION 652 (Philip B. Kurland et al. ed., 1987) ("A revisionary power is meant as a check to precipitate, to unjust, and to unconstitutional laws.").

Hamilton's discussion of the judiciary in *Federalist No. 78*, similarly, distinguishes between "infractions of the constitution" and "the injury of the private rights of particular classes of citizens, by unjust and partial laws."[45] Laws violating the Constitution could be declared void, but all that courts could do with "unjust and partial laws" would be to construe them narrowly, "mitigating the severity, and confining the operation of such laws."[46] Similarly, Hamilton elsewhere refers in the alternative to a "pernicious or unconstitutional law."[47]

James Madison, who categorically condemned state laws affecting contracts as unjust,[48] urged the Convention to give Congress an absolute power to veto state laws instead of merely prohibiting the states from interfering with contracts. "Evasions might and would be devised by the ingenuity of [state] Legislatures."[49] Similarly, Madison later argued that the "jurisdiction of the supreme Court" would be "insufficient" to prevent "injurious acts of the States" because of "all the shapes which these could assume;" a "[federal] negative on the State laws" was therefore essential.[50] An absolute veto was essential, Madison argued in a letter to Jefferson after the Convention, because "[i]njustice may be effected by such an infinitude of legislative expedients, that . . . it can only be controuled by some provision which reaches all cases whatsoever."[51] Hamilton made the same argument in *Federalist No. 80*.[52] It is implicit in Madison's remarks that an unjust law evading the terms of a contracts provision in the Constitution would not be held void by the courts simply because it was unjust. Madison proposed a prohibition on state embargoes because they were categorically "unjust," as well as unnecessary

45. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 528.
46. *Id.*
47. THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 10, at 451.
48. *E.g.*, NOTES OF DEBATES, *supra* note 5, at 77, 145, 542.
49. *Id.* at 542.
50. *Id.* at 631. Charles Pinckney spoke of "rights, privileges [and] properties" that would need to be protected by checks and balances in the frame of government, without any suggestion that these could be defended in a court of law. *Id.* at 182.
51. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON at 212 (Robert A. Rutland et al. ed., 1977).
52. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 10, at 535. The premise that legislatures could enact laws circumventing enumerated prohibitions, because courts could only declare a law void if it clearly violated the Constitution, is also reflected in Hamilton's discussion of liberty of the press: "Who can give it any definition which would not leave the utmost latitude for evasion?" THE FEDERALIST NO. 84 (Alexander Hamilton), *id.*, at 580.

and impolitic;[53] implicitly, he did not anticipate that a court would declare such a law void because it was unjust. Madison had used *unjust* and *unconstitutional* as separate headings in notes for a speech opposing paper money in 1786.[54]

Further evidence that the Framers did not expect the new federal courts to invalidate state laws on grounds of violating natural rights is found in the Judiciary Act enacted by the Federalist majority in the First Congress. This law permitted the Supreme Court to determine the "validity" of state statutes by writ of error *only* "on the ground of their being repugnant to the constitution, treaties, or laws of the United States . . . ."[55] This limitation of the Court's appellate jurisdiction would have made no sense if the Federalists wanted natural justice or natural law to be used in deciding the validity of state statutes.

III. THE CASE LAW OF THE EARLY REPUBLIC

References to judicial review at the Constitutional Convention, I have argued, reflected an expectation that the federal courts would enforce some extratextual rights in exercising judicial review over state laws, but not use injustice as a basis for declaring a statute void.[56] The examples of enforceable extratextual rights referred to by Convention delegates were all rights having independent legal authority, such as those arguably contained in the English constitution, as Americans commonly conceived it.[57] The federal courts of the early republic, leading scholars have argued, did not always confine themselves to enforcing the new written constitutions but also drew on so-called higher law—ahistorical principles of natural law or social compact.[58] If accurate, this would mean that the federal courts exercised judicial review of a scope much wider than that contemplated by the Framers during the Philadelphia Convention.

A strikingly different understanding of the legal relevance of natural law or social compact principles to judicial review was expressed by a federal judge in 1830. Addressing the argument that a law should be

53. NOTES OF DEBATES, *supra* note 5, at 543.

54. 9 THE PAPERS OF JAMES MADISON, *supra* note 51, at 158–59.

55. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 85; *see id.* at 86 ("[N]o other error shall be assigned or regarded as a ground of reversal . . . .").

56. *See supra* text accompanying notes 24–55.

57. *See supra* text accompanying notes 17–18, 24–38.

58. GERBER, *supra* note 15, at 124–25; HAINES, *supra* note 8, at 206–08; WRIGHT, *supra* note 1, at 293–97; SNOWISS, *supra* note 15, at 65–66; Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 253 (1914); J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 58–63 (1931); Sherry, *supra* note 8, at 1168–76.

held void because it violated natural justice, he said that doing so would be unprecedented. "No court has yet presumed to question a legislative act, on the ground of a difference with their notions of natural justice . . . . It is the constitution that must be violated, and not any man's opinions of right and wrong, or his principles of natural justice."[59] This was an accurate generalization, I contend, concerning federal courts reviewing state statutes that restricted property rights or economic liberty.

Many such opinions that seem to rely on ahistorical principles of higher law—natural law or the social compact—in their reasoning, or seem to endorse in dictum the principle of using higher law to determine the validity of statutes, actually referred to such concepts in an ultimately historical, verifiable sense. The authority of such rules or principles was derived from historically verifiable endorsement, not from higher law. In reviewing state legislation restricting property or economic rights, none of these judges ever asserted, even in dictum, that a right derived from the law of nature or from the social compact could render a statute void.[60] Counsel earnestly pressed higher law arguments for overturning statutes, and higher law principles were often mentioned in dictum. But the courts' opinions on constitutional issues relied on higher law principles only when the positive fundamental law of the relevant jurisdiction incorporated those principles.[61] What the early federal courts actually did is fairly close to what the Convention delegates had anticipated. These courts did not confine themselves to enforcing the written constitution of the jurisdiction, but they went outside the text only to draw on the purported rights of Englishmen or on principles purportedly shared in common by the American written constitutions as a group.

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59. Livingston v. Moore, 15 F. Cas. 677, 683, 685 (C.C.E.D. Pa. 1830) (No. 8416), *aff'd*, 32 U.S. (7 Pet.) 469 (1833).

60. Other scholars have challenged the aptness of the higher law interpretation of many of these cases, particularly those of the Supreme Court. *See* ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW (1989); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 (1985); MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE (1996); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113 (2003).

61. All of the first thirteen states had formally adopted positive fundamental law of some kind. Only eleven, however, had adopted written constitutions. Conventions in Connecticut and Rhode Island had adopted their existing royal charters as fundamental law. *See* 1 SCHWARTZ, *supra* note 29, at 289–90; *see also supra* text accompanying note 30.

The early federal judges avoided relying on higher law principles in explaining their holdings.

Judicial reliance on human law rather than higher law had practical importance; it meant that concretely pertinent historical evidence could impose limits on the creativity judges might use in inferring constitutional principles.[62] And the distinction between reasoning from historical evidence and reasoning from ahistorical concepts is of historiographical importance because it tends to contradict the claim made by many scholars that the property rights jurisprudence of the early federal courts helped pave the way for the laissez-faire constitutionalism of the later nineteenth century.[63]

A. Van Horne's Lessee v. Dorrance *(1795)*

Justice Patterson's circuit court opinion in *Van Horne's Lessee v. Dorrance* states that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man" and that obtaining security for property "was one of the objects, that induced [men] to unite in society."[64] It has been classified as an instance of natural law reasoning.[65] The beginning and ending of the passage in which this language occurs, however, show that Patterson is not citing natural law in its own right as authority for his decision. Patterson derives his propositions of natural law from the Pennsylvania Declaration of Rights adopted as part of the state constitution in 1776: "I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are . . . acquiring, possessing and protecting property . . . . VIII. That every member of

62. *E.g.*, Commonwealth v. Lewis, 6 Binn. 266, 278 (Pa. 1814).

63. CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835, at 417–18, 641 (1973); WRIGHT, *supra* note 1, at 293; Corwin, *supra* note 58, at 253–54; James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1061 (2000); Grant, *supra* note 58, at 58.

64. Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).

65. *E.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 63 (3d ed. 2008); GERBER, *supra* note 15, at 68, 117–19; CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 89 (1930); WRIGHT, *supra* note 1, at 293; Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 452 (1990); *cf.* SNOWISS, *supra* note 15, at 68 (asserting that in *Van Horne's Lessee* natural law principles are given "disproportionate attention" over the constitutional text).

society hath a right to be protected in the enjoyment of life, liberty and property . . . ."[66] After Patterson reads these provisions to the jury, he says:

> *From these passages it is evident*; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The preservation of property then is a primary object of the social compact, and, *by the last Constitution of Pennsylvania, was made a fundamental law*.[67]

Patterson refers to natural rights and the social compact, but not as independently authoritative. It is only because the Pennsylvania constitution has "made" them "fundamental law" in that state that these objects of the social compact are legally relevant.

B. Calder v. Bull *(1798)*

Justice Chase's opinion in *Calder v. Bull* refers to the "purposes for which men enter into society" and "the *great first principles* of the *social compact*,"[68] and has been classified as an example of higher law reasoning.[69] But Chase's argument that legislative power is subject to implied limits ultimately relies on evidence that is historical in character, not on a hypothetical social compact. The social compacts Chase relies on are the recently adopted state and federal constitutions: "The people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their *persons* and *property* from violence."[70] Chase uses the asserted commonality of "certain *vital* principles in our *free Republican governments*"[71] because Connecticut lacked a written

66. 5 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3082–83 (Francis Newton Thorpe ed., 1909).

67. *Van Horne's Lessee*, 2 U.S. at 310 (emphasis added).

68. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

69. ELY, *supra* note 65, at 63; GERBER, *supra* note 15, at 118–19; WRIGHT, *supra* note 1, at 294; Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 376 (1911); Walter F. Dodd, *Extra-Constitutional Limitations Upon Legislative Power*, 40 YALE L.J. 1188, 1193 (1930); Grant, *supra* note 58, at 58–59; Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 628 (1916); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 78 (1992); Michael, *supra* note 65, at 452; Sherry, *supra* note 8, at 1172–73.

70. *Calder*, 3 U.S. at 388.

71. *Id.*

revolutionary constitution comparable to those of other states.[72] Chase's assertion that legislatures were subject to implied limitations refers not to every legislature, as in the writings of "speculative jurists,"[73] but to a "Federal, or State Legislature."[74] Chase thus claims to derive his conclusions from historical evidence, not the *ipse dixit* of higher law reasoning. Chase asserts that an American legislature would be exceeding its authority if it authorized "*manifest injustice by positive law*."[75] But this claim does not depend on natural law; it parallels the argument Federalist advocates had made so often during the ratification process: that existing extratextual rights would remain available to citizens even if the Constitution lacked a bill of rights.[76] Chase's claim that the recent American constitutions had been formed to achieve "security" for "*personal liberty*" and "*private property*" is historical in character.[77]

Chase's argument does not depend on inferring the terms of an ahistorical agreement from principles of natural justice. Instead he invokes a purportedly common knowledge among his readers, based on their shared historical personal experience.[78] His characterization of legislative power is

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72. Connecticut declared its independence by an act of the legislature stating that the colony charter of 1662 would "remain the Civil Constitution of this State." 1 SCHWARTZ, *supra* note 29, at 289–90. The Act contained a very brief recital of rights, consisting essentially of due process. *Id.* at 290. Connecticut's judiciary had already twice held an act of the legislature invalid, without identifying a pertinent source of fundamental law. *See* Treanor, *supra* note 7, at 487–89. The Connecticut courts may have been tacitly relying on Connecticut's royal charter of 1662, which granted colonists "all Liberties and Immunities of free and natural Subjects within any the Dominions of Us, Our Heirs or Successors, to all Intents, Constructions and Purposes whatsoever, as if they and every of them were born within the realm of *England*," and authorized the assembly to make "all manner of wholesome, and reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm of *England*." 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 533; *see* Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 656–57 (1829).

73. "It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void . . . ." *Calder*, 3 U.S. at 398 (Iredell, J.). Justice Iredell denies that courts have the power to declare a statute "void, merely because it is, in their judgment, contrary to the principles of natural justice," and observes that "ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject . . . ." *Id.* at 399. Iredell's strictures have been read as directed towards Chase, but this may not have been the case. Justice Iredell had already made the same argument at greater length in *Minge v. Gilmour*, 17 F. Cas. 440, 444 (C.C.D.N.C. 1798) (No. 9631). Chase was a judge, not a jurist, and his opinion in *Calder* does not rely on any ahistorical principles of natural justice.

74. *Calder*, 3 U.S. at 388.

75. *Id.*

76. *See supra* text accompanying notes 36–37.

77. *Calder*, 3 U.S. at 388.

78. In contrast, Chase uses an explicitly speculative tone in referring to the origins and status of property rights:

framed specifically for American legislatures rather than legislatures everywhere.

> The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for *all* its citizens in *future cases*; they may c*ommand* what is right, and *prohibit* what is wrong; but they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*; or violate the right of an *antecedent lawful private contract*; or the *right of private property*. To maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in *our free republican governments*.[79]

Chase appeals here to empirical evidence, his readers' supposed familiarity with the principles of "our free republican governments," not to a higher law derived from an abstract, ahistorical social compact.

Finally, although Chase seems to be asserting that the legislature's power is subject to substantive written limitations, his reasoning ultimately takes the form of an interpretive presumption: "It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it."[80] Similarly, Chase says it is "not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of *rights* vested in them by *existing* laws; unless for the benefit of the *whole* community; and on making full satisfaction."[81] Plainly, principles that a society might choose whether or not to adopt are not principles of higher law.

C. Fletcher v. Peck *(1810)*

In *Fletcher v. Peck*, the Yazoo Land Case, the Court held that a state was barred from annulling its own grant, even if procured by fraud, of land now held by a third party who had purchased the land for value with no notice of the fraud.[82] Chief Justice Marshall's opinion has been understood as relying on higher law or social compact reasoning as at

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> *It seems to me*, that the *right of property*, in its origin, could only arise from *compact express, or implied*, and *I think it the better opinion*, that the right, as well as the *mode*, or *manner*, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by *civil* institutions, and is always subject to the rules prescribed *by positive law*.

Id. at 394 (first and fourth emphases added).

79. *Id.* at 388–89.
80. *Id.* at 388.
81. *Id.* at 394.
82. 10 U.S. (6 Cranch) 87, 139 (1810).

least an alternative basis for the holding.[83] Some of Marshall's remarks do seem to rely on higher law:

> [T]here are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.
>
> . . . .
>
> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation[?]
>
> . . . [T]he state of Georgia was restrained, either by *general principles which are common to our free institutions*, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.[84]

But the "great principles of justice, whose authority is universally acknowledged"[85] come from the English legal tradition, as it was commonly conceived by contemporary American writers, rather than from natural law or natural rights.

When Marshall questions whether the State of Georgia can rightfully "claim to itself the power of judging in its own case,"[86] he is alluding to one of Chief Justice Coke's own examples of a statute "against common right and reason" that "the common law adjudges . . . as to that point void."[87] He does not insist on this, though, going on to argue that *if* Georgia could rescind a conveyance by statute rather than by litigation—

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83. GERBER, *supra* note 15, at 120; HAINES, THE ROLE OF THE SUPREME COURT, *supra* note 63, at 326; SNOWISS, *supra* note 15, at 126; Corwin, *supra* note 58, at 253; Grant, *supra* note 58, at 59–60; Massey, *supra* note 69, at 77–78; Michael, *supra* note 65, at 474; William Wiecek, *The Rise and Fall of Classical Legal Thought: Preface to the Modern Constitution*, *in* CONSTITUTIONALISM AND AMERICAN CULTURE: WRITING THE NEW CONSTITUTIONAL HISTORY 64, 70 (Sandra F. VanBurkleo et al. eds., 2002); Wilmarth, *supra* note 60, at 126.

84. *Fletcher*, 10 U.S. at 133, 135, 139 (emphasis added).

85. *Id.* at 133.

86. *Id.*

87. Dr. Bonham's Case, 77 Eng. Rep. 646, 653 (K.B. 1610); *see id.* at 654 ("[I]f any Act of Parliament gives to any to hold . . . pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is a party . . . ."). Marshall's assertions that a contrary result would make all land titles "insecure" and seriously obstruct "the intercourse between man and man," and that the power exercised by the Georgia legislature would "devest any other individual of his lands, if it shall be the will of the legislature so to exert it," *Fletcher*, 10 U.S. at 133–34, follow Coke's method of demonstrating that a statute is against common reason: asserting that its principle would lead to absurd results in other cases. *See Bonham's Case*, 77 Eng. Rep. at 654 (arguing that if a certain statute is upheld, then logically "every common seal shall be defeated upon a simple surmise, which cannot be tried").

"performing a duty usually assigned to a court"[88]—it would nonetheless be "equitable,"—rescission being an equitable remedy—and that "its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal."[89] Here again Marshall draws on English legal tradition rather than higher law: a "court of chancery . . . would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration."[90] What makes this conclusion authoritative for an American court, in Marshall's view, is that it follows "rules of property . . . common to all the citizens of the United States" and "principles of equity which are acknowledged in all our courts."[91] These are rules and principles, in other words, "whose authority is universally acknowledged" throughout the United States.[92] Marshall speculates, but does not assert, that "the nature of society and of government" prescribes "some limits to the legislative power," but the implied limitation he suggests is, again, conventional in English and American fundamental law: that "the property of an individual, fairly and honestly acquired," may not be "seized without compensation."[93]

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88. *Fletcher*, 10 U.S. at 133. In *Calder v. Bull*, 3 U.S. (3 Dall.) 398, 397–401 (1798), the Supreme Court had held that the Connecticut assembly did not overstep its authority by ordering a new trial in a civil case, overruling an earlier court ruling, because the Ex Post Facto Clause of the Constitution applies solely to criminal and not civil cases. A court proceeding was the "mode" which "the common sentiment, as well as common usage of mankind, points out" for seeking to "set aside a conveyance obtained by fraud." *Fletcher*, 10 U.S. at 133.

89. *Fletcher*, 10 U.S. at 133.

90. *Id.* at 134.

91. *Id.*

92. *Id.* at 133.

93. *Id.* at 135. See WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *139:

> If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; . . . [but] the public good is in nothing more essentially interested, than in the protection of every individual's private rights . . . . [T]he legislature alone can . . . interpose, and compel the individual to acquiesce . . . [n]ot by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.

Id.

By 1810 an express compensation requirement was contained in several state constitutions as well as in the Federal Bill of Rights, and the principle of compensation was conventional. *See* U.S. CONST. amend. V; MASS. CONST. pt. I, art. X; OHIO CONST. art. VIII, § 4; PA. CONST. art. IX, § 10; VT. CONST. ch. I, art. II; James W. Ely, Jr., *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the*

Marshall's reasoning, moreover, would be essential to the case only "were Georgia a single sovereign power."[94] But Georgia is part of the "American union," with its "constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass."[95]

Marshall then proceeds to interpret the Contracts Clause, reinforcing "the natural meaning of words"[96] with an account of the views of the Framers and the understanding of the ratifiers:

> If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? . . .
>
> The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.
>
> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that *the framers of the Constitution* viewed with some apprehension, the violent acts which might grow out of the feelings of the moment; and that *the people of the United States, in adopting that instrument*, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously *founded in this sentiment . . . .*[97]

What has been regarded as higher law reasoning appears again in Marshall's concluding statement:

> It is, then, the unanimous opinion of the court that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by *general principles which are common to our free institutions*, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.[98]

These remarks do not imply higher law reasoning on Marshall's part. The "general principles which are common to our free institutions" are those recited or implied in the American constitutions,[99] not the principles of an imagined, ahistorical social compact. And his reference to "general principles which are common to our free institutions" is explicitly stated

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Compensation Principle, 36 AM. J. LEGAL HIST. 1, 1, 15–16, 18 (1992).

94. *Fletcher*, 10 U.S. at 136.
95. *Id.*
96. *Id.* at 138.
97. *Id.* at 137–38 (emphasis added).
98. *Id.* at 139 (emphasis added).
99. *Id.* This recalls Justice Chase's reasoning in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). *See supra* text accompanying notes 68–81.

in the alternative in order to comprehend Justice Johnson's reasoning. Marshall, characteristically, wants to characterize the Court's position as unanimous, but Justice Johnson explicitly denies that the Contracts Clause justifies overturning the Georgia statute, and instead invokes "the reason and nature of things: a principle which will impose laws even on the deity."[100] Marshall does not endorse Johnson's rationale here. He merely describes it, in the alternative, as part of a unanimous result.

Justice Johnson's use of the phrase "general principle, the reason and nature of things" certainly sounds like higher law, especially since it appears in the same sentence as "the deity."[101] But the reasoning Johnson uses to explain himself suggests instead that his thinking was entirely earthbound. The "things" whose "nature" lead Johnson to deem the Georgia law invalid are the substance of the transaction and dispute viewed in conventional legal and political terms, not eternal principles of natural justice.[102] Johnson deals in principles of government, not natural rights, when he insists on the distinction between a sovereign's "right of jurisdiction" and its "right of soil."[103] Of the same character is Johnson's assertion that a sovereign's possessions "may be parted with in every respect similarly to those of the individuals who compose the community" because its possessions are "entirely accidental" and "in no [way] necessary to its political existence."[104] His conclusion that property conveyed by the public becomes thereby "vested" in the recipient tracks a concept of the common law.[105] Johnson's premise that the acts of the "supreme power" "must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise" is the antithesis of higher law reasoning.[106] Johnson's effort to demonstrate the "absurdity" of the opposing argument is a familiar device in common law reasoning.[107] On the question of whether Georgia had held the lands in question in fee simple, despite the rights of Indian tribes, Johnson reasons from "technical principles."[108] His "just

100. *Fletcher*, 10 U.S. at 143.
101. *Id.*
102. Similarly, Marshall says that the issue in *Fletcher* is "in its nature, a question of title." *Id.* at 133.
103. *Id.* at 143.
104. *Id.*
105. *Id.*
106. *Id.* at 144.
107. *Id.*; *see, e.g.*, Bonham's Case, 77 Eng. Rep. 646, 654 (K.B. 1610).
108. *Fletcher*, 10 U.S. at 146.

view of the State of the Indian Nations" is derived from the evidence of treaties, laws, and land purchases, and not from natural law principles.[109] And the nature of Georgia's title follows from "our law," which "will not admit" the idea of a fee simple estate "being limited after a fee-simple."[110] Thus, Johnson's "general principle" of "the reason and nature of things" makes essentially the same kind of appeal to conventional legal reasoning as Marshall's "great principles of justice, whose authority is universally acknowledged."[111]

D. Society for the Propagation of the Gospel v. Wheeler *(1814)*[112]

A New Hampshire statute required a landowner suing to recover possession of real property to pay compensation for the value of improvements made by a tenant who had peacefully occupied the premises for more than six years with color of title.[113] A landowner subject to this statute challenged it on the ground that it was "repugnant to natural justice," besides violating the federal and state constitutions.[114] In the course of holding the statute unconstitutional under the New Hampshire constitution, Justice Story says that applying a statute to "past cases" is "against natural justice."[115] But this statement does not mean that Story endorses the landowner's claim that the statute was void. Rather, he construes a provision in the state constitution prohibiting "[r]etrospective laws" as "highly injurious, oppressive and unjust";[116] the issue as he poses it is whether the law before him is a retrospective law within the meaning of the state constitution.[117] Notably, Story refrains from reading the state constitution's retrospectivity clause on its face as banning all retrospective laws, and from applying the Federal Contracts Clause because the law in question impaired "vested rights."[118] Story cites but does not endorse Chancellor Kent's categorical condemnation

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109. *Id.* at 146–47.
110. *Id.* at 147.
111. *Id.* at 133.
112. 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).
113. *Id.* at 767–68.
114. *Id.* at 766.
115. *Id.* at 768.
116. N.H. CONST. of 1784, pt. I, art. XXIII, *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 2456.
117. *Wheeler*, 22 F. Cas. at 767.
118. *Id.*; *cf.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) ("[C]onveyances have vested legal estates, and . . . that they originally vested is a fact, and cannot cease to be a fact."). "[T]he people of the United States," in ratifying the Constitution, "have manifested a determination to shield themselves and their property" from arbitrary state legislation. *Fletcher*, 10 U.S. at 138.

of retrospective laws,[119] saying only that "in a fit case" he would "go a great way" with Kent's analysis.[120]

E. Terrett v. Taylor *(1815)*

A Virginia statute of 1801 asserted public ownership of lands belonging to the Episcopal Church, an established church up until 1776. In *Terrett v. Taylor*, a case coming from the part of the District of Columbia ceded to the federal government by Virginia, the Supreme Court held that the statute was void as an attempt to:

> repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal . . . vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators . . . .[121]

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119. See *Dash v. Van Kleeck*, 7 Johns. 477, 505–06 (N.Y. Sup. Ct. 1811):

> An *ex post facto* law, in the strict technical sense of this term, is usually understood to apply to criminal cases, and this is its meaning, when used in the Constitution of the United States; yet laws impairing previously acquired civil rights are . . . equally to be condemned. We have seen that the cases in the English and in the civil law apply to such rights; and we shall find, upon further examination, that there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by devesting him of a lawfully acquired right. The distinction exists only in the degree of the oppression . . . .

Id. See also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 303–04 (1827) (Thompson, J., concurring):

> No State Court would, I presume, sanction and enforce an *ex post facto* law; if no such prohibition was contained in the constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles, upon which every just system of laws is founded. It is an elementary principle adopted and sanctioned by the Courts of justice in this country, and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition.

Id. See also *id.* at 304–05:

> [B]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters.

Id. (quoting THE FEDERALIST NO. 44 (James Madison), *supra* note 10, at 281).

120. *Wheeler*, 22 F. Cas. at 767.

121. 13 U.S. (9 Cranch) 43, 52 (1815).

Justice Story's opinion for the Court refers to "the common sense of mankind and the maxims of eternal justice," "principles of civil right," "the principles of natural justice," and "the fundamental laws of every free government,"[122] among other extra-constitutional principles, and is widely cited as a classic instance of higher law reasoning.[123]

The conceptual context of the quoted remarks, however, is the prerevolutionary American Whig understanding of an English constitution that imposed substantive limits on the power of Parliament. Chief Justice Coke's famous assertion in *Bonham's Case* that "when an Act of Parliament is against common right and reason, or repugnant . . . the common law will controul it, and adjudge such Act to be void,"[124] had been taken as axiomatic by many Americans since before the Revolution.[125] When Story asserts that the churches' property was "indefeasibly vested" in their legal agents,[126] he is not asserting a natural rights principle that vested rights can never be impaired, or that no vested rights are defeasible. His point is that the title to this particular property is indefeasible because the rules of English common law on this point are part of Virginia's fundamental law, and none of the ways one might lose vested rights under the English common law applied in this case. The fact that the property had been "generally purchased by the parishioners, or acquired by the benefactions of pious donors," rather than "originally granted by the state or the king,"[127] was significant because this put the property beyond the reach of the English common law principle that grants might be resumed by a grantor for breach or nonperformance of an implied condition.[128] The English common law also authorized forfeiture of vested property to the Crown for certain kinds of offenses.[129] But this exception to the common law's protection of vested property was also foreclosed: the property "was not forfeited; for the churches had committed no offence."[130]

When Story says that "dissolution of the regal government" did not destroy "the right to possess or enjoy this property," or dissolve "civil

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122. *Id.* at 50–52.
123. SNOWISS, *supra* note 15, at 136; WRIGHT, *supra* note 1, at 296–97; Dodd, *supra* note 69, at 1193 & n.24; Ely, *Marshall Court*, *supra* note 63, at 1049–50; Grant, *supra* note 58, at 60–61; Haines, *The Law of Nature in State and Federal Judicial Decisions*, *supra* note 69, at 640; Sherry, *supra* note 8, at 1175.
124. 77 Eng. Rep. 646, 652 (K.B. 1610).
125. *See supra* text accompanying note 17.
126. *Terrett*, 13 U.S. at 49.
127. *Id.*
128. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *152–53.
129. *Id.* at 267–68.
130. *Terrett*, 13 U.S. at 50.

rights" or abolish "the common law,"[131] he paraphrases provisions of the Virginia Declaration of Rights.[132] Story invokes "a principle of the common law that the division of an empire creates no forfeiture of previously vested rights of property," and remarks that this principle "is equally consonant with the common sense of mankind and the maxims of eternal justice."[133] But associating a rule of positive law with natural justice was a conventional way of commending the positive law;[134] Story does not say "the maxims of eternal justice" have independent legal force. He quickly sidesteps the foregoing reasoning anyway: "admitting that, by the revolution, the church lands devolved on the state, the statute of 1776, *ch.* 2, operated as a new grant and confirmation thereof to the use of the church."[135]

Assuming arguendo that the churches derived their property from the statute of 1776, Story next considers whether the state could revoke this grant. Because Story has already established that under English common law there is no basis for resuming the grant based on breach of implied condition or on forfeiture for nonperformance of implied condition, it follows that the only way the churches could lose their property would be if a legislative grant were "revocable in its own nature, and held only *durante bene placito*."[136] Story's assertion that such a premise would be "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired," again reflects premises stated in the

131. *Id.*
132. *Id.* See the VIRGINIA DECLARATION OF RIGHTS § 1 (1776):
> That all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Id.; *see also id.* § 8 ("[T]hat no man be deprived of his liberty, except by the law of the land or the judgment of his peers."); *id.* § 11 ("That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."); 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 3813–14.
133. *Terrett*, 13 U.S. at 50.
134. *E.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *121–23; *see also* Hamburger, *supra* note 19, at 18; REID, *supra* note 18, at 90–92.
135. *Terrett*, 13 U.S. at 50.
136. *Id.*

Virginia Declaration of Rights, as well as in other states' constitutions[137] and in prior Supreme Court opinions.[138]

Story next turns to the status of the churches as corporations, established by an Act of 1784 that had been later repealed. The common law was "a tacit condition annexed to the creation of every such corporation;" Story asks whether the circumstances fit any of the ways a private corporation could "loose its franchises" under the common law.[139] A common law proceeding of quo warranto might be used in cases of "a misuser or a nonuser" of a private corporation's privileges, but no such proceeding had been instituted here, nor had the legislature alleged misuser or nonuser.[140] Responding to Virginia's claim that the Act of 1784 violated its own constitution and bill of rights, Story concedes that "a change of government" would permit terminating whatever "exclusive" corporate privileges were "inconsistent with the new government."[141] But it is dispositive here, Story argues, that the contrary understanding of the state constitution had been acted on by Virginia's "former legislatures from the earliest existence of the constitution itself," in statutes "promulgated or acquiesced in by a great majority, if not the whole, of the very framers of the constitution."[142] Summarizing this line of common law analysis, Story denies that "the legislature can repeal statutes creating private corporations, or confirm[] to them property already acquired under the faith of previous laws" in the absence of a common law basis for repealing a legislative charter or grant.[143]

Story concludes his constitutional analysis grandly: "[W]e think ourselves standing upon the principles of natural justice, upon the fundamental

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137. *Id.* at 50–51; *see* VIRGINIA DECLARATION OF RIGHTS § 1 (1776) ("That all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property . . . ."); 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 3813.

138. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388–89 (1798) ("The Legislature . . . cannot . . . violate . . . the right of private property. To maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) ("[W]here are [inherent limits to legislative power] to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation[?]").

139. *Terrett*, 13 U.S. at 51; *see* Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292, 333 (1815) (Story, J.) ("[W]e take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birth right of the colonies unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges.").

140. *Terrett*, 13 U.S. at 51.

141. *Id.* at 51–52.

142. *Id.* at 51.

143. *Id.* at 52.

laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."[144] But given that Story's argument up to this point consists of a methodical analysis of common law principles supposedly adopted by Virginia as part of its fundamental law, it is unlikely that Story means to rest his holding partly on natural justice, mentioned now for the first time without explanation or elaboration.[145] The usual reason for asserting that some other legal tradition would reach the same result as the common law was to emphasize the soundness of the common law position, not to attribute independent authority to the other tradition.[146] Story's sweeping reference to other kinds of law as supporting his decision should be seen as a response to anticipated criticism of the opinion for treating common law rules as fundamental law.[147]

F. Johnson v. McIntosh *(1823)*

In *Johnson v. McIntosh*, determining the validity of title conveyed by Indian tribes, Chief Justice Marshall makes many references suggestive of higher law reasoning.[148] Marshall says deciding the case requires examining "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations," as well as principles of American law.[149] He refers to "the rights of the original inhabitants," "the rightful occupants of the soil," "natural right," and "universal law," distances himself from the "pompous claims" of European nations, and disclaims any intention of defending "those

144. *Id.*

145. Here, *the fundamental laws of every free government* refers to the state constitutions in general. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 387–88 (1798); *see also* Jones v. Shore's Ex'r, 14 U.S. 462, 471 (1816) (Story, J.) (asserting that "the words of a statute ought to be very clear" to prevail over an otherwise applicable "maxim of natural justice").

146. *E.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *419; *see* R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1676–82 (1992).

147. *Cf.* THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 10, at 578 (asserting that the common law is "liable to repeal by the ordinary legislative power" and has "no constitutional sanction" under the New York constitution).

148. 21 U.S. (8 Wheat.) 543 (1823); *see* WRIGHT, *supra* note 1, at 295.

149. *McIntosh*, 21 U.S. at 572.

principles which Europeans have applied to Indian title."[150] But the only abstract principles Marshall even considers applying are those that have been accepted and consistently acted on by European and American governments; he dismisses other principles of the natural law treatise tradition as "private and speculative opinions of individuals."[151] And none of the natural law principles Marshall mentions that would support the natives' title to their own lands are given any effect where they conflict with "the law of the nation in which they lie;" principles "which our own government has adopted in the particular case, and given us as the rule for our decision."[152]

The discovery doctrine must be accepted by American courts as authoritative, Marshall argues, because abundant historical evidence shows it to be conventional among relevant nations—a principle "recognised by all European governments, from the first settlement of America."[153] Most importantly, the discovery doctrine is one to which the United States had "unequivocally acceded," which the United States had "exercised uniformly over territory in possession of the Indians."[154] The discovery doctrine was recognized by "[a]ll our institutions," and had never been "questioned in our Courts."[155] The discovery doctrine had been so continuously asserted and so widely acted on, Marshall argues, that American courts cannot reconsider it.

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[156]

Here it becomes apparent that even the rules of international law established among European powers have no independent legal authority

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150. *Id.* at 574, 589–91, 595; *see also id.* at 573 ("The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."). Marshall returned to this theme in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832).

151. *McIntosh*, 21 U.S. at 588; *see* The Antelope, 23 U.S. (10 Wheat.) 66, 115 (1825) (arguing that the slave trade "could not be considered as contrary to the law of nations," because it "was authorized and protected by the laws of all commercial nations").

152. *McIntosh*, 21 U.S. at 572; *see also* Meade v. Deputy Marshal, 16 F. Cas. 1291, 1293 (C.C.D. Va. 1815) (No. 9372) (Marshall, J.) ("It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned . . . without an opportunity of being heard.")

153. *McIntosh*, 21 U.S. at 592.

154. *Id.* at 587–88.

155. *Id.* at 588.

156. *Id.* at 591.

in Marshall's analysis. Even if the discovery doctrine and its corollary principles were "opposed to natural right, *and to the usages of civilized nations*, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it . . . certainly cannot be rejected by Courts of justice."[157]

G. Corfield v. Coryell *(1823)*

Enforcing a New Jersey statue that reserved to state residents the right of dredging for oysters in territorial waters, state officials seized a boat owned by a non-resident.[158] The boat's owner challenged the constitutionality of this law under the Privileges and Immunities Clause, among other grounds.[159] Circuit Justice Washington's famous definition of *privileges and immunities* uses many phrases evocative of the Declaration of Independence and other higher law texts:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general 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 safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental . . . .[160]

The entire passage is anchored to verifiable positive law, however, by the qualifying phrase "which have, *at all times, been enjoyed by the citizens of the several states* which compose this Union, from the time of their becoming free."[161] Thus Washington does not attribute independent

157. *Id.* at 591–92 (emphasis added).
158. Corfield v. Coryell, 6 F. Cas. 546, 547–48 (C.C.E.D. Pa. 1823) (No. 3230).
159. *Id.* at 550.
160. *Id.* at 551–52; *see* WRIGHT, *supra* note 1, at 294 n.1.
161. *Corfield*, 6 F. Cas. at 551 (emphasis added).

legal authority to natural rights principles.[162] A natural right that has not been continuously enjoyed since 1776 in all thirteen states is not among the privileges and immunities secured by the Constitution, according to his formulation. This empirical anchor explains how Washington can say that enumerating these privileges, although "tedious," would not be "difficult."[163] In contrast, a longstanding premise of natural rights discourse was the impossibility of enumerating all the natural rights.[164]

H. Wilkinson v. Leland *(1829)*

Justice Story's opinion for the Court in *Wilkinson v. Leland* declares "[t]hat government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint," and that "[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."[165] Story's opinion is widely regarded as an example of higher law reasoning,[166] but his argument deals in

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162. *See also* United States v. Fisher, 6 U.S (2 Cranch) 358, 400 (1805) ("[I]f the literal expressions of the law would lead to absurd, unjustified, inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done."); Beach v. Woodhull, 2 F. Cas. 1104, 1105 (C.C.D.N.J 1803) (No. 1154) ("The law is clearly retrospective and unjust in its operation, but it is not for this court to correct it, or to declare it a nullity. It is not repugnant to the constitution.").

163. *Corfield*, 6 F. Cas at 551. Similarly, George Mason had said in the Federal Convention that "with the aid of the State declarations [of rights] a [federal] bill might be prepared in a few hours." NOTES OF DEBATES, *supra* note 5, at 630.

164. James Wilson had made this point in the Pennsylvania ratifying convention:

> I consider there are very few who understand the *whole* of these rights. All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and citizens. . . . Enumerate all the rights of men! I am sure, sir, that no gentlemen in the late Convention would have attempted such a thing.

2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 470 (Merrill Jensen ed., 1976). In the North Carolina ratifying convention, on July 28, 1788, Samuel Spencer asked for "a bill of rights, to secure those unalienable rights, which are called by some respectable writers the *residuum* of human rights, which are never to be given up" under any government. James Iredell responded, "No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by the Constitution. . . . Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 138, 149, 167 (Jonathan Elliot ed., 2d ed. 1836); *see also* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 942 (1993) ("Commentators had long observed that natural law was so general and so imprecise that it invited a variety of conflicting opinions about its requirements.").

165. 27 U.S. (2 Pet.) 627, 657 (1829).

166. *See* WRIGHT, *supra* note 1, at 296–97; Dodd, *supra* note 69, at 1193; Ely, *supra* note 63, at 1051; Gerber, *supra* note 15, at 243; Grant, *supra* note 58, at 63;

historical inference—"the true extent of the power . . . granted" by the people of Rhode Island to their legislature—rather than higher law.[167]

After a probate proceeding in New Hampshire, the executrix had contracted to sell the decedent's property in Rhode Island without undertaking any probate proceedings there. Attempting to cure this irregularity, the executrix then obtained from the Rhode Island legislature a private act that ratified the transaction. The constitutionality of the private act was challenged in the course of an action of ejectment.[168] But Rhode Island, like Connecticut at the time of *Calder v. Bull*, lacked a written constitution.[169] Instead, the "form of government" that a revolutionary convention established at the time of the Revolution was based on the colonial charter of 1663, which was therefore "now a fundamental law."[170] The charter's definition of the legislature's powers was itself vague, however, providing merely that laws should "be not contrary to and repugnant unto, but as near as may be agreeable to the laws, &c. of England, considering the nature and constitution of the place and people there."[171]

Story treats the question of the legislature's power as a matter for historical inference, not the application of higher law. In determining whether "the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties," Story posits a series of historical presumptions derived from historical circumstances, to be acted on in the absence of contrary evidence:[172]

> In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence.[173]

Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257, 285 & n.65 (1924).

167. *Wilkinson*, 27 U.S. at 657.

168. *Id.* at 654–55.

169. Calder v. Bull, 3 U.S. (3 Dall.) 386, 392–93 (1798); 1 THORPE, *supra* note 30, at 129; *see supra* text accompanying notes 30–31.

170. *Wilkinson*, 27 U.S. at 656. Story speaks of whether the statute is "constitutional" even though Rhode Island lacked a written constitution at this time. *Id.*

171. *Id.* at 657. The words replaced by "&c." are "of this our realme." *See* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 3215.

172. *Wilkinson*, 27 U.S. at 658.

173. *Id.* at 657. This is consistent with Story's view of the relevance of natural

And even if the royal charter could be shown to have granted the colonial assembly such extraordinary authority, it could "scarcely be imagined" that the revolutionary process in Rhode Island "could have left the people of that state subjected to its uncontrolled and arbitrary exercise."[174]

Story's assertion that the "fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred"[175] does not mean the "fundamental maxims of a free government" have an independent authority that courts must enforce. Rather, Story argues that these are implicit terms of the "general grant of . . . authority" from the people during Rhode Island's "great event"[176]—the Revolution—that established the powers of Rhode Island's assembly. To discern the unarticulated intentions of Rhode Island's body politic at that time, Story infers a commonality of basic governmental principles among the people of the thirteen states in 1776. If the people of Rhode Island had meant to adopt the same fundamental maxims of a free government that other states' revolutionary conventions had declared in writing, Story argues, then it made sense to draw on those principles as a source for interpretive inference. Therefore "no court of justice *in this country* would be warranted in *assuming*, that the power to violate and disregard" the rights of "personal liberty and private property" was implied by "any general grant of . . . authority" or "general expressions of the will of the people," such as those found in the historical record in Rhode Island.[177]

Story concedes that the people of Rhode Island might have intended to authorize their legislature to violate the rights of personal liberty and property, an authorization that would be binding, but treats this as an unlikely historical claim that would have to be demonstrated rather than inferred from silence. "The people"—here, those of Rhode Island—"ought not to be *presumed* to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."[178]

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justice in statutory construction. *See* Jones v. Shore's Ex'r, 14 U.S. (1 Wheat.) 462, 471 (1816) (asserting that "the words of a statute ought to be very clear" that would lead a court to construe a statute against "a maxim of natural justice" and "the plainest rules of equity").

174. *Wilkinson*, 27 U.S. at 657.

175. *Id.* Story used the same language in his *Commentaries on the Constitution of the United States*. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1393, at 268 (Boston, Hilliard, Gray, & Co. 1833).

176. *Wilkinson*, 27 U.S. at 657.

177. *Id.* (emphasis added); *see* 3 STORY, *supra* note 175, § 1393, at 268.

178. *Wilkinson*, 27 U.S. at 657 (emphasis added); *see* 3 STORY, *supra* note 175, § 1393, at 269 ("The people ought not to be presumed to part with rights, so vital to their security and well-being, without very strong and positive declarations to that effect.").

To fortify this premise, Story invokes the juridical experience of Rhode Island's sister states:

> We know of no case, in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state of the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.[179]

Story does not argue that Rhode Island is bound by the principles adopted by the other states; his point is that the Court should presume that Rhode Island acted on the same principles as its sister states in 1776 unless there is unequivocal evidence to the contrary. Based on all this circumstantial evidence and on the inferences drawn from it, the Court was "not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them [from one named individual to another] without the assent of the parties."[180] Thus the issue as Story framed it was one of historical fact, not the dictates of higher law. In concluding the passage, moreover, Story reveals that it has all been dictum: "[C]ounsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine."[181]

After this digression, Story resolves the contested issues in the case in a straightforward manner. The Rhode Island Act, construed "according to the intention of the legislature, apparent upon its face," leaves "no reasonable doubt of its real object and intent . . . to confirm the *sale* made by executrix, so as to pass the title of her testator to the purchasers," as the executrix had requested in her legislative petition.[182] The Act did not divest a vested interest "in a manner inconsistent with the principles of [Rhode Island] law" because the devisee had taken an estate that under Rhode Island law was "defeasible" to the extent of any liens securing decedent's debts.[183] Given these conclusions, according to Story, the only way to uphold the decision of the lower court would be for the Supreme Court to declare categorically that "in a state not having

179. *Wilkinson*, 27 U.S. at 658; *see* 3 STORY, *supra* note 175, § 1393, at 268 ("[S]ince the American revolution no state government can be presumed to possess the transcendental sovereignty, to take away vested rights of property.").
180. *Wilkinson*, 27 U.S. at 658.
181. *Id.*
182. *Id.* at 662.
183. *Id.* at 658–59.

a written constitution, acts of legislation, having a retrospective operation, are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights."[184] Citing *Calder v. Bull*, Story denies that the Court had recognized any such principle.[185]

I. Worcester v. Georgia *(1832)*

A missionary, convicted of violating a Georgia statute that prohibited whites from entering Cherokee territory without a license from the governor, alleged on appeal that his conviction was invalid because the statute violated the federal government's exclusive jurisdiction over Indian affairs.[186] The issue before the Court was one of personal liberty—the validity of the appellant's criminal conviction—but Chief Justice Marshall's opinion for the Court extensively discusses the property rights of the Cherokee nation in concluding that Georgia's legislation was invalid. Although Marshall refers to higher law concepts such as "natural justice" and "original natural rights," he nowhere implies that these rights have any legal authority of their own.[187] Instead, as in *Johnson v. McIntosh*,[188] the legal relevance of such concepts comes from being recognized or tacitly reflected in governmental acts. Thus "natural justice" is relevant to his analysis because it is an explicit term in an Indian treaty.[189] The Indian nations' "original natural rights, as the undisputed possessors of the soil" are relevant, in Marshall's argument, because they are part of the conventional understanding of the Indians' land rights reflected in relevant federal treaties and laws,[190] in earlier

184. *Id.* at 661.
185. *Id.*
186. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 515 (1832).
187. *Id.* at 550, 559; *see* WRIGHT, *supra* note 1, at 295.
188. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 604 (1823).
189. *Worcester*, 31 U.S. at 550.
190. *Id.* at 559. In addition, see *id.* at 556–57:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.

Id.; *see also id.* at 543 ("[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.").

laws of the State of Georgia,[191] and before American independence in the documents and actions of colonizing nations.[192]

J. United States v. Percheman *(1833)*

After Spain ceded East Florida to the United States in 1819, federal commissioners appointed to investigate Spanish land claims rejected the evidence of title presented by Juan Percheman.[193] When Percheman nonetheless obtained a decree from a territorial court confirming his title, the United States appealed.[194] In the course of upholding the decree confirming claimant's title, Chief Justice Marshall appears to invoke natural rights when he declares "that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."[195] These civilized principles of justice are potentially relevant, however, only because they are embodied in the "modern usage of nations, which has become law,"[196] and would be given direct effect only if the Treaty of 1819 contained "no stipulation respecting the property of individuals."[197] But since the Treaty does address property

191. The Court remarks:

> Georgia, herself, has furnished conclusive evidence, that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent . . . .

Id. at 560.

192. The Court further notes:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed . . . .

Id. at 559; *see also id.* at 546 ("[Colonial charters] asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.").

193. United States v. Percheman, 32 U.S. (6 Pet.) 51, 57 (1833).

194. *Id.* at 59.

195. *Id.* at 87; *see* WRIGHT, *supra* note 1, at 294.

196. *Percheman*, 32 US. at 86.

197. *Id.* Chief Justice Marshall remarks, regarding Florida:

> Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who

rights, even "the usages of the civilized world" are not binding.[198] Marshall consults them only as a presumptive guide for inferring the intentions of the parties to the Treaty, in the absence of persuasive evidence to the contrary.[199]

K. Livingston v. Moore *(1833)*

A Pennsylvania Act of 1785 authorized the state comptroller to establish liens on the real estate of persons owing debts to the state, without notice to the debtor, as if the state had secured a judgment against the debtor in a court;[200] later laws authorized the sale of property subject to such liens. In federal circuit court, landowners who had purchased property from the debtor complained that these laws violated various provisions of the federal and state constitutions, and also that the statutory procedure for establishing the lien violated "natural justice" because of the lack of notice to the debtor.[201] The circuit court flatly rejected the relevance of natural justice to the validity of a statute:

> No court has yet presumed to question a legislative act, on the ground of a difference with their notions of natural justice; and no legislature would, or ought to submit to such a restriction of their authority. . . .
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> . . . It is the constitution that must be violated, and not any man's opinion of right and wrong, or his principles of natural justice.[202] . . . [The legislature is]

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became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign.

Id. at 87.

198. *Id.* at 88–89.

199. Marshall States:

> [T]he eighth article of the treaty . . . must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security *further than its positive words require*, would seem to be admissible.

Id. at 88 (emphasis added); *see id.* ("The treaty . . . conform[ed] exactly to the universally received doctrine of the law of nations. *If* the English and Spanish [language] parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.") (emphasis added).

200. Livingston v. Moore, 15 F. Cas. 677, 681–83 (C.C.E.D. Pa. 1830) (No. 8416), *aff'd*, 32 U.S. 469 (1833).

201. *Id.* at 682–83.

202. *See also id.* at 682 ("It would be a bold step in this, or any other court, to pronounce an act of a state legislature unconstitutional and void, on such general opinions and principles [of natural justice], however just in themselves.").

The circuit court further noted:

> I might think notice to be a "substantial requisite of natural justice," but in a certain case, the legislature has thought otherwise; and they had a constitutional

> charged with oppression, injustice, partiality, an injurious departure from the ordinary modes of proceeding, and a total disregard to the rights and interests of others in the pursuit of the rights and interests of the state. If all this were true, there may nevertheless be evils for which we are not authorized to administer a remedy; there may be injuries we cannot redress . . . our power over the subject is measured to us by the constitution, and we must take care that in our zeal to redress real or supposed wrongs, we do not commit a greater wrong.[203]

The challenged laws must be enforced, the court declared, unless "they violate any of the provisions of the constitution of the United States, or of the constitution of Pennsylvania, and are so inconsistent with them, or either of them, that it is the right and duty of the court to declare them to be null and void."[204]

In the Supreme Court the debtor's heirs again argued, among other grounds, that the state legislation was "inconsistent with the principles of private rights and natural justice, and therefore void," aside from any violation of a constitutional provision.[205] In affirming the result below, the Court ignored the natural justice claim.[206]

Justice Johnson, however, after delivering the opinion of the Court, gives his own reasons for concurring.[207] Unlike the rest of the Court, which ignores plaintiffs' extratextual challenge to the Pennsylvania legislation, and the circuit court below, which had condemned the idea of using "natural justice" to determine the validity of statutes,[208] Johnson addresses the substance of plaintiffs' arguments from "the principles of private rights and natural justice."[209] Justice Johnson does not say that natural justice is ordinarily relevant to the question of a statute's constitutionality; his

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> right to think so, and to act upon their own opinion of this abstract question, as well as of its application to the case they were providing for.

Id. at 683; *see* Beach v. Woodhull, 2 F. Cas. 1104, 1105 (C.C.D.N.J. 1803) (No. 1154) (Washington, J.) ("The law is clearly retrospective and unjust in its operation, but it is not for this court to correct it, or declare it a nullity. It is not repugnant to the constitution.").

203. *Livingston*, 15 F. Cas. at 683, 685.

204. *Id.* at 685.

205. Livingston v. Moore, 32 U.S. (7 Pet.) 469, 540 (1833).

206. The Court stated:

> [T]he words used in the constitution of Pennsylvania, in declaring the extent of the powers of its legislature, are sufficiently comprehensive to embrace the powers exercised over the estate of Nicholson in the two acts under consideration, and that there are no restrictions, either express or implied, in that constitution, sufficient to control and limit the general terms of the grant of legislative power to the bounds which the plaintiffs would prescribe to it.

Id. at 546.

207. *Id.*

208. *Livingston*, 15 F. Cas. at 683, 685.

209. *Livingston*, 32 U.S. at 540.

point is that if Pennsylvania's courts recognize natural justice as part of the "law of the land," the federal courts must accept this as part of the state's fundamental law.[210]

Johnson first counters plaintiffs' argument that the Pennsylvania legislation was inconsistent with "the reason and nature of things" because it was "inconsistent" with the original "contract of grant" and was effectively "a resumption of the land."[211] Johnson answers:

> [S]ubjecting the lands of a grantee to the payment of his debts, can never impair or contravene the rights derived to him under his grant, for in the very act, the full effect of the transfer of interest to him is recognized and asserted: because it is his, is the direct and only reason for subjecting it to his debts.[212]

Evidently the "things" whose "reason and nature" Johnson views as relevant to natural justice here are matters of ordinary domestic law—land grants and creditors' remedies—rather than principles of higher law. This is consistent with Johnson's own use of the phrase "reason and nature of things" in *Fletcher v. Peck*[213] and in *Martin v. Hunter's Lessee*,[214] and with the use of this apparently conventional phrase by others.[215]

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210. *See id.* at 542 ("When [federal courts] find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them, or deviate from them, than could be correctly exercised by their own tribunals."). In the circuit court, plaintiffs had cited a Pennsylvania case for the proposition that statutes must conform to "natural justice." *See Livingston*, 15 F. Cas. at 682–83 (quoting Fitler's Case, 12 Serg. & Rawle 277, 278–79 (Pa. 1825)).

211. *Livingston*, 32 U.S. at 550.

212. *Id.* at 550–51.

213. *See supra* text accompanying notes 101–111.

214. 14 U.S. 304, 372 (1816). Justice Johnson remarks:

> It must here be recollected, that this is an action of ejectment. If the term formally declared upon expires pending the action, the court will permit the plaintiff to amend, by extending the term—why? Because, although the right may have been in him at the commencement of the suit, it has ceased before judgment, and without this amendment he could not have judgment. But suppose the suit were really instituted to obtain possession of a leasehold, and the lease expire before judgment, would the court permit the party to amend in opposition to the right of the case? On the contrary, if the term formally declared on were more extensive than the lease in which the legal title was founded, could they give judgment for more than costs? It must be recollected that, under this judgment, a *writ of restitution* is the fruit of the law. *This, in its very nature, has relation to, and must be founded upon, a present existing right* at the time of judgment. And whatever be the cause which *takes this right away, the remedy must, in the reason and nature of things, fall with it.*

Id. at 371–72 (emphasis added).

215. Hamilton had used the phrase in describing how courts decide which of two inconsistent statutes should be given effect:

> The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. *But this is mere rule of construction, not derived from any positive law*, but from the *nature and reason of the thing.* It is a rule not enjoined upon the courts by legislative

The other claim that Johnson characterizes as based on "the principles of private rights and natural justice"[216] is that "in this case the community sits in judgment in its own cause, when it affirms the debt to be due for

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> provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.
>
> But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, *the nature and reason of the thing indicate the converse of that rule as proper to be followed.* They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority . . . .

THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 526 (emphasis added).

In *Opinion of the Justices*, 14 Mass. 470 (1784), the court considered whether the state legislature had the power to fill vacancies in the Council, in the absence of an explicit constitutional provision to that effect:

> It seems very clear . . . that the constitution designed those offices should be always filled, and that a council of nine persons should exist; and that in one case of a vacancy, arising by an *implied resignation*, it is expressly provided that it shall be filled up; *which, from the reason and nature of things, implies* a constitutional power of filling up seats *directly and positively vacated* by death or *actual resignation*.

Opinion of the Justices, 14 Mass. at 471 (second emphasis added); *see* Griswold v. Stewart, 4 Cow. 457, 457 (N.Y. Sup. Ct. 1825) ("The rule, that nothing which was a defense to the original action can be pleaded in *scire facias*, applies only to the original parties or to privies, not strangers. *This is evident from the reason and nature of things*." (second emphasis added)). In *Emery v. Neighbour*, 7 N.J.L. 142 (N.J. 1824), the court was faced with a trust instrument whose terms did not expressly give a beneficiary the power to make a testamentary disposition:

> *Do they then do so in the reason and nature of things?* The money is to be paid to the trustees, for her sole, separate, and exclusive use; it is to be paid in consideration of her relinquishment of her conjugal rights, generally the most precious, and by far the most important of all the rights that woman can possess; it is to be paid as a sum in gross, not in annual, monthly, or weekly payments, nor as a principal to raise an annual interest for her annual support; it is to be subject, in the hands of the trustees, to her *sole order and disposition.*
>
> It would be difficult to find words to create an estate, in money, for the separate use of the *femme*, of more extensive and unlimited import.

Id. at 148 (first emphasis added). In *Davies v. Powell*, 125 Eng. Rep. 1013, 1014 (C.P. 1738), the court gave the following reasons for departing from a traditional common law rule holding that deer were not distrainable:

> [T]he nature of things may in time change; it is now well known [deer] are become chattels of profit, and the practice of grasing so general, as to be deemed a good improvement of a farm; the reason of this thing therefore being altered, the law must vary with it.
>
> We are all agreed, that these deer upon all the circumstances of this case, were properly distrainable.

Id.

216. *Livingston*, 32 U.S. at 540.

which the land is subjected to sale, and then subjects the land to sale to satisfy its own decision thus rendered."[217] Johnson's response to this claim indicates that he understands plaintiffs' challenge to depend on assessing the purposes and effects of ordinary legal phenomena rather than deductions from higher law:

> This view of the acts of the state, is clearly not to be sustained by a reference to the facts of the case. As to the judgment of 1797, that is unquestionably a judicial act; and as to the settled accounts, the lien is there created by the act of men who, quoad hoc, were acting in a judicial character; and their decision being subjected to an appeal to the ordinary, or rather the highest of the tribunals of the country, gives to those settlements a decided judicial character: and were it otherwise, how else are the interests of the state to be protected? The body politic has its claims upon the constituted authorities, as well as individuals; and if the plaintiffs' course of reasoning could be permitted to prevail, it would then follow, that provision might be made for collecting the debts of every one else, but those of the state must go unpaid, whenever legislative aid became necessary to both. *This would be pushing the reason and nature of things beyond the limits of natural justice.*[218]

L. Baltimore & Ohio Railroad Co. v. Van Ness *(1835)*

After an act of Congress authorized a railroad to condemn land in the District of Columbia, an affected landowner brought suit challenging the statute's validity.[219] One of the grounds for challenge was that the statute took "private property for private use, which is not authorized by the constitution."[220] Circuit Judge Cranch states that taking private property "for private use, with just compensation" is "not within the prohibition of the constitution" but "would be an arbitrary proceeding."[221] In determining whether or not the statute effectively takes property for private use, Cranch considers the statute's purposes, its effects, and the logical implications of other statutes governing the railroad's operations:

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217. *Id.* at 551. A law authorizing one to judge in his own case was one of Chief Justice Coke's examples of a statute contrary to "common right and reason" that "the common law adjudges . . . as to that point void." Dr. Bonham's Case, 77 Eng. Rep. 646, 653 (K.B. 1610); *see id.* at 654 ("[I]f any Act of Parliament gives to any to hold . . . pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is a party . . . ."). See also WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *91:

> [I]f an act of parliament gives a man power to try all causes, that arise within his manor . . . ; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.

Id.

218. *Livingston*, 32 U.S. at 551 (emphasis added).
219. Balt. & Ohio R.R. Co. v. Van Ness, 2 F. Cas. 574 (C.C.D.C.1835) (No. 830).
220. *Van Ness*, 2 F. Cas. at 575–76.
221. *Id.* at 576.

> [T]his railroad, although it may be profitable to the stockholders, is also a great public benefit. It does not prevent the public from enjoying all the advantages which they enjoyed before, and gives them a cheaper, safer, and more expeditious mode of travelling than they would otherwise have. If it may not be called a common highway, yet it is really a common good. It is a great public convenience. The land is really taken for public use. The condemnation of land, for such purposes, has been so general, and so extensive, for many years, that it may well be considered as established by the law of the land. Every state of the Union has granted charters for such objects, with similar powers. The rates of toll, &c., are established by law, which could not be done unless the object was of a public nature; nor would the legislature have power to restrain them in the exercise of their private rights. The state of Maryland also has a great interest in the road, as it is to receive five per cent. upon the gross receipts of tolls from passengers; and has an option to take a large portion of the stock within a limited time after the completion of the road. The condemnation of the land, therefore, is clearly for the Maryland public use; even if it be not for the use of the whole American public.[222]

Concluding, the court says that the statute does not contravene "any of the principles of natural justice,"[223] but, not having used the term earlier, leaves it unclear what it means by natural justice. The opinion seems to suggest that the statute does not contravene natural justice because it is not "arbitrary,"[224] and that the statute is not arbitrary because even though

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222. *Id.*
223. *Id.*
224. *Id.* Other federal opinions show the term natural justice being used to mean that a result is reasonable in the context of relevant doctrinal principles, rather than as the application of higher law reasoning. See *The Nereide*, 13 U.S. 388, 438–39 (1815) (Story, J.):

> The resistance of the convoy is the resistance of all the ships associated under the common protection, without any distinction whether the convoy belong to the same or to a foreign, neutral sovereign—for *upon the principles of natural justice*, a neutral is justly chargeable with the acts of the party, which he voluntarily adopts, or, of which he seeks the shelter and protection. . . . —these principles are recognized . . . ; and can never be shaken without delivering over to endless controversy and conflict the maritime rights of the world.

Id. (emphasis added). See also *Greene v. Darling*, 10 F. Cas. 1144, 1147–48 (C.C.R.I. 1828) (No. 5765) (Story, J.):

> The strong impression left upon my mind by other authorities is, that Lord Mansfield's doctrine, as to the jurisdiction of set-off in equity, is not in its general latitude, and without some qualifications, maintainable. It seems irreconcileable with what fell from Lord Cowper, in Lanesborough v. Jones, 1 P. Wms. 326, who said, that "*it was natural justice and equity, that in all cases of mutual credit only the balance should be paid*;" . . . . Lord Cowper here relies on the fact of mutual credit, (by which I understand him to intend, a credit founded on a knowledge of, and trust to, the existing debts,) as itself, in a case of insolvency, furnishing an equity. . . .
>
> The conclusion, which seems deducible from the general current of the English decisions . . . is, that courts of equity will set off distinct debts, where

the railroad might be "a private object, in itself" its overall character is sufficiently public because the legislature "[has] deemed it to be so far a public object as to be worthy of their control and regulation, and of the exercise of their power to apply private property to its use, upon making just compensation, to be ascertained by a jury"[225] and because such statutes are so widespread in America that their legitimacy "may well be considered as established by the law of the land."[226]

IV. CONCLUSION

The early federal courts are commonly regarded as having been remarkably innovative in that they practiced judicial review without any real authorization for doing so, they used judicial review to define property rights much more expansively than would have been anticipated, and they used timeless principles of natural or higher law to accomplish this. I argue that the early federal courts were far less creative than this account suggests. The Framers of the Federal Constitution seem to have anticipated that the new federal courts would exercise the power of judicial review without requiring specific authorization in a written constitution. The Framers also seem to have expected that the federal courts would employ the power of judicial review to protect some conventional property rights not stated in constitutional provisions, but stopping short of higher law. Finally, I contend, the pertinent case law shows that the early federal courts essentially stayed within the Framers' expectations in these respects. In determining the validity of statutes affecting property rights, these courts drew on certain principles they regarded as inherited from the English legal tradition or took to be shared in common among the American constitutions, but they did not rely on higher law for this purpose.

> there has been a mutual credit, *upon the principles of natural justice, to avoid circuity of suits*, following the doctrine of compensation of the civil law to a limited extent.

Id. (emphasis added).

225. *Van Ness*, 2 F. Cas. at 576. The court continues, "[W]e cannot say that the provisions of the act, which authorize the condemnation of land, for such a road, are void, as being unconstitutional, or as contravening any of the principles of natural justice." *Id.* The court cites *Van Horne's Lessee v. Dorrance*, 3 U.S. 304, 312 (C.C.E.D. Pa. 1795) as illustrating the scope of a Pennsylvania constitutional provision formally recognizing a natural right to possess property, not as showing a court's direct application of a natural rights principle. *Van Ness*, 2 F. Cas. at 576.

226. *Id.*