

subtopic

## The U.S. Supreme Court and Natural Law

### THE U.S. SUPREME COURT *and* NATURAL LAW

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The United States Supreme Court has been reluctant to argue from universal principles not announced in the Constitution's [text](#), or at least to do so in an articulate and systematic fashion. It has preferred to limit itself to the text of the Constitution, statutes, or treaties, wary of going beyond these texts or the intent of their framers and ratifiers. Nevertheless, the Court has on many occasions engaged in a variety of natural-law analyses.

In the broadest sense, "natural-law jurisprudence" involves a judge's resort to a "higher law," one anterior and superior to the written constitution. The ancient Athenians, for example, distinguished between man-made laws (*thesmos*) and natural laws (*nomoi*). The Romans, particularly [Cicero](#), similarly argued that human law ought to be in conformity with eternal principles of "right reason." The *Institutes* of the Emperor Justinian noted that slavery existed by human law but was contrary to nature. A great revival of natural law thinking took place in the high middle ages, particularly in the work of [St. Thomas Aquinas](#). English jurists, particularly Bracton and Glanville, maintained natural law theory, distinguishing between the natural rights of the subject (*jurisdictio*) and the power of the government (*gubernaculum*).

The notion of natural law pervaded the period of the American founding. It was expressed in the [Declaration of Independence](#)'s claims of "self-evident truths" about human equality, the necessity of consent, and the right to revolution. The idea of natural law was prevalent at the Constitutional Convention and during the ratification debates, though not so much in the text of the Constitution itself. William Blackstone's [Commentaries on the Law of England](#) (1765-69), a widely-read treatise in the American colonies, contained one typical expression of the idea of natural law. James Wilson, a delegate at the Convention, important Federalist defender of the Constitution, and Supreme Court justice, made many natural-law-based assumptions in his celebrated [law lectures](#) given at the College of Philadelphia (1790-91).

Decisions of the early Supreme Court were often forthrightly based on natural-law arguments. In [Chisholm v. Georgia](#) (1793), for example, Justice Wilson held that a South Carolina citizen could sue the state of Georgia, not just because [Article III](#) of the Constitution gave the federal courts jurisdiction in "controversies between a state and citizens of another state," but because of what he believed to be the "principles of general jurisprudence" upon which the Constitution rested. (The decision was ultimately overturned by the Eleventh Amendment in 1795.) In the same term, the Court, interpreting both the federal and state constitutions, noted that "the right of trial by jury is a fundamental law, made sacred by the Constitution," and that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent rights of man" (*Vanhorne's Lessee v. Dorrance*). Justice Samuel Chase gave a fuller statement of a kind of natural law theory in [Calder v. Bull](#) (1798). "The purposes for which men enter into society will determine the nature and terms of the social compact. . . . This fundamental principle flows from the very nature of our free republican governments. . . . There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." Chase gave as examples "a law that makes a man a judge in his own cause, or a law that takes property from A and gives it to B." "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." Justice Chase, an ardent Federalist and judicial activist, became more restrained after he was

impeached and nearly removed when the Jeffersonian Republicans took over the government in 1801.

Something of a retreat from natural-law-based jurisprudence in the Court's opinions is evident in the early nineteenth century. In part this retreat was a reaction to the excesses of the French Revolution, which began with intense assertions of the "rights of man." It also reflected the Jeffersonian and Jacksonian democratic suspicion of natural law as the province of elite lawyers and judges. Thus Chief Justice John Marshall usually preferred to base his decisions only on the Constitution's text rather than to appeal to principles of natural law found beyond the Constitution. In *Fletcher v. Peck* (1810), for example, he did refer to "the principles which are common to our free institutions"—the "vested rights" of a property owner, as Chase had described them. But he primarily appealed to "the particular provisions of the Constitution"—in this case, [Article I, section 10](#), the "contract clause." The contract clause was thus interpreted to provide the textual equivalent of natural-law doctrines such as "vested rights." Marshall called the contract clause "a bill of rights for the people of each state." Justice Joseph Story was more inclined to invoke directly the idea of natural law, particularly in his widely read *Commentaries on the Constitution*. He also employed a natural-law argument in the 1815 case of *Terrett v. Taylor*, which established the rights of private corporations. The principle of vested rights, he said, was "consonant with the common sense of mankind and the maxims of eternal justice"; a Virginia act revoking property rights 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."

The Court's use of natural-law principles experienced a revival in the years before the Civil War. This revival was a response to some of the excesses of state legislatures during these years. Both state constitutions and state courts limited legislative power. The New York Court of Appeals began to apply its state constitution's declaration that no person could be deprived of life, liberty, or property without due process of law (a precept originally expressed in Chapter Thirty-Nine of [Magna Carta](#), and in the [Fifth Amendment](#) of the U.S. Constitution) to strike down a state prohibition on the sale of alcoholic beverages. This way of interpreting the phrase "due process of law" suggested that the phrase meant something more than the government's exercise of power according to recognized *procedure* (often called "procedural due process"). It implied that there were fundamental or natural rights that government could not violate regardless of the forms it followed (which interpretation has been called "substantive due process"). At the federal level, the conflict over slavery drew both parties to the equivalent provision in the Fifth Amendment. Abolitionists argued that Congress was obliged to prohibit slavery in the territories because slavery deprived blacks of their liberty without due process of law. Southerners countered that Congress had to protect slavery in the territories, lest they deprive slaveholders of their property without due process of law. Chief Justice Taney appeared to accept the latter position in the *Dred Scott* case. Though he may not have spoken for a majority on this particular point, he noted that the Missouri Compromise (which prohibited slavery north of 36° 30') had been unconstitutional because "[a]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."

After the Civil War, the enactment of the [Fourteenth Amendment](#) provided a new and much stronger textual basis for natural-law jurisprudence. That amendment repeated the Fifth Amendment's protection of every person's life, liberty, and property against state deprivation (the [Bill of Rights](#) had applied only to the federal government). It guaranteed that no citizen could be deprived of his "privileges and immunities"; nor could any state deny "the equal protection of the law" to any person. In time, these clauses would do what the contract clause had done for Marshall: provide a textual basis for natural-law judging. At the same time, Chief Justice Salmon Chase showed himself willing to engage in natural-law judging under the cover of the Fifth Amendment. In the [Legal Tender Cases](#) (1869), the Court ruled that Congress could not make paper money legal tender in the payment of private debts. Chase denounced the act (which, ironically, had been his brainchild as Lincoln's Secretary of the Treasury) as "contrary to justice and equity." Though the text of the contract clause applied only to states, Chase argued that "the spirit of this prohibition should pervade the entire body of legislation." However, two new

appointments led the Court to overrule this decision in 1870.

In the late nineteenth century, the Court began to exert the idea of substantive due process more often, using the Fourteenth Amendment to shield those rights so fundamental that the state could not deprive a person of them for any reason (regardless of the nature of the process used). The majority of the Court in the [Slaughterhouse](#) cases (1873) rejected the argument that the right to work without being subject to a state-sponsored monopoly was such a right, while the dissenters relied on the nature of free institutions to argue that it did. "Grants of exclusive privileges are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void," wrote Justice Stephen Field. A majority of the Court accepted fundamental limits on state police power using natural-law language in the following year, in *Loan Association v. Topeka*, though it did not cite the Fourteenth Amendment explicitly. One of the first times that the Court overturned a state law under the Fourteenth Amendment was *Yick Wo v. Hopkins*, in 1886—a law which appeared nondiscriminatory on its face was administered in a discriminatory fashion against Chinese-Americans. Drawing on the "free labor" philosophy of the anti-slavery movement, the Court fashioned the doctrine of "liberty of contract" against state attempts to regulate the economy, particularly labor relations. Though the Court upheld such state regulations in most cases, the ones in which they used "substantive due process" and "liberty of contract" to strike down state laws became anathema to progressive reformers. Among the most infamous were [Lochner v. New York](#) (1905), which overturned a law prohibiting bakers from working more than ten hours per day or six days per week. Similarly excoriated by reformers were *Adair v. United States* (1908) and *Coppage v. Kansas* (1915), which forbade the federal government or the states to prohibit "yellow-dog contracts," in which employees promised not to join labor unions.

Ironically, the Supreme Court revived natural-law principles at the same time that political philosophers and academic lawyers had all but abandoned them. Progressive legal theorists such as [Oliver Wendell Holmes, Jr.](#), Roscoe Pound, and Louis D. Brandeis attacked the Court's "laissez-faire" economic jurisprudence as illegitimate, for the reason that it imported into constitutional interpretation political and economic theories external to the text of the Constitution. After making some inroads up to World War One, and after a setback in the 1920s, the rejection of laissez-faire natural-law jurisprudence seemed complete by 1937–38, when the Supreme Court overthrew almost all of its 1890–1937 precedents in matters of economic regulation. The Court issued a particularly sharp blow to natural law in *Erie Railroad v. Tompkins* (1938), in which it overthrew nearly a hundred years of federal commercial common law that derived from "the general principles and doctrines of commercial jurisprudence" (*Swift v. Tyson* [1842]). Now the court held that, in cases involving suits between citizens of different states, the federal courts could only resort to the positive enactments of state legislatures and courts, and could not appeal to higher law. However, the Court left the door open to special judicial protection of non-economic non-textual rights, particularly those of minority groups.

One avenue on which the Court revived natural-law jurisprudence was the application of the Bill of Rights to the states (known as "incorporation"). This had begun as early as 1890, when the Court held that the "takings" clause of the Fifth Amendment prohibited states, by way of the due process clause of the Fourteenth Amendment, from imposing excessively low or confiscatory railroad rates. Beginning in the 1920s and 1930s, the Court began to apply those provisions of the Bill of Rights that it regarded as "fundamental," or, as Justice Cardozo put it, part of "the very essence of a scheme of ordered liberty," to the states. Because of its association with laissez-faire jurisprudence, post-New Deal civil libertarians were reluctant to express their fundamental-rights view explicitly. This reluctance was particularly evident in the landmark desegregation case of *Brown v. Board of Education* (1954). In [Griswold v. Connecticut](#) (1965), the Court struck down a state anti-contraceptive law on the basis of the "right to privacy" that was not expressly stated in the Constitution. Justice Douglas claimed that "specific guarantees [in the Bill of Rights] have penumbras, formed by emanations of these guarantees that help give them substance and life." Justice Black, a longtime opponent of natural-law jurisprudence, vehemently dissented in this case. He wrote, "I cannot rely on the due process clause or the Ninth Amendment or any mysterious and uncertain natural law concept." He rejected such doctrines, "based on subjective considerations of 'natural justice,'" even if he approved of the policy ends which they served. The right to privacy was reaffirmed in the Court's 1973 abortion decisions, but it gradually gave

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way to a more explicit substantive due process and natural-law justification. In perhaps the most expansive appeal to extra-constitutional natural-law norms, the Court in 1992 asserted that the right to abortion was a liberty protected by the Fourteenth Amendment, and “[a]t the heart of liberty is the right to define one’s own concept of existence, of the universe, and of the mystery of human life.” The Court repeated this principle in its 2003 decision overturning a Texas anti-sodomy law.

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