

ARTICLE

California's Natural Law Jurisprudence: 1849 to 1936

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I. Introduction

“The law,” said Oliver Wendell Holmes, Jr., “is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”¹ For others, law has appeared to be something significantly more than a dusty chronology of morality— for them, law was morality itself. The notion is an old-fashioned one, hence few subscribe to it today, but for much of the recorded history of mankind, and likely for humanity’s entire sentient experience prior to the advent of letters, human beings did believe that law and morality were synonymous, or at least derived from the same source— a source more authoritative and less partial than man’s arbitrary will, and to which man, the species, if he were wise and wished to live prosperously, would pay sincere homage. The most ancient conceptions of law are replete with notions derived from an alleged higher source, and its conveyance to mankind through intuition, reason and positive decree of the divine. Before men had devised any formal written law, Cain, in his deceit, is said to have revealed his knowledge that the killing of his brother was wrong.² Before God made his covenant with Abraham, or dispensed a written code of laws to the Israelites, men con-

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1. Oliver Wendell Holmes, Jr., “The Path of the Law,” in George C. Christie and Patrick H. Martin, *Jurisprudence*, 2nd Ed. (St. Paul: West Publishing Co., 1995), p. 807.

2. *Gen.* 4:9.

ducted themselves with such utter license, without any heed to those obligations of which they should have been aware, that God “repented. . .that he had made man on earth” and resolved to bring a judgment upon him in the form of the Great Flood.³ When law was finally codified, it came, it was said, directly from a divine source. Moses returned from his meeting with the Creator on the summit of Mt. Sinai with knowledge of an extensive body of law and subsequently “wrote down all the words of the Lord.”⁴ King Numa conversed with the goddess Egeria and acquired from her the divine wisdom that presaged his noble career as a lawgiver for the Romans.⁵ The Lacaedemonian Code of Lycurgus received the sanction of Apollo from the mouth of the god’s oracle at Delphi.⁶ And Hammurabi, one of the more reliably historical of the lawgivers of the ancient world, proclaimed his special ordination by the god Marduk “to enlighten the land, to further the well being of mankind” through promulgation of a divinely sanctioned code of laws.⁷

In practice, law must certainly have been more pragmatic than these fantastic traditions indicate, more rooted in human experience. And yet, in pre-historic and early historic times, understanding of a link between justice on earth and eternal truth originating beyond this earth were never likely far from the consciousness of any given individual. For persons inhabiting those by-gone days, a law arising in all communities, not merely one’s own, must have seemed to be, as Maitland noted, not a product of caprice or casual local circumstances, but reflecting, and attributable to, “the very nature of man.”⁸ Roman jurists, charged with adjudicating the disputes between persons engaged in transactions crossing many jurisdictional lines, famously devised a body of principles said to be (and perhaps actually was) common to all men, rooted in man’s nature and in his natural environment, which they called the *jus natural*. In time, the *princeps* came to be thought of as the primary exponent of this law. The Emperor Augustus was pontiff, or chief priest, and he quite self-consciously presented himself as a divine being bringing order and justice to the earth. The Emperor Marcus Aurelius actually studied law, made a practice of deliberating in the Senate over such legislation as was deemed most beneficial to the people, and generally conceived of himself as a servant of a higher order, to which he owed a duty to

3. *Gen.* 6:5-17.

4. *Ex.* 24:4.

5. Plutarch, “Numa,” *Plutarch’s Lives*, Vol. 1 (New York: Athenaeum Society, 1905), p. 131.

6. Plutarch, “Lycurgus,” *op. cit.*, p. 122.

7. *Code of Hammurabi*.

8. F.W. Maitland, “A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy From the Time of Hobbes to the Time of Coleridge,” in *The Collected Papers of Frederic William Maitland*, Volume I (New York: G.P. Putnam’s Sons, 1911; reprinted and available online by The Online Library of Liberty, located at <http://oll.libertyfund.org>), p. 16.

harmonize the disorder of the world with the perfection of eternity.⁹ The prince in Dark Age Europe was thought to be a scion of the All-Father, possessed of a strange charisma that rendered him both brave and wise. Later, under the influence of Christianity, this divine genetic heritage was transformed into a spiritual one. Princes healed, they judged and they created law codes pursuant to their dual obligations to their god and their people.¹⁰ Woden's alleged progeny, the Christian king Alfred, made law in England, sprinkling his Germanic tables of compensation with the Ten Commandments and selections from the Mosaic law of Exodus,¹¹ while in a later era, in France, Saint Louis sat in the shade of the wood of Vincennes and dispensed justice directly to the people.¹² Alfred's successors were particularly keen lawgivers. It was these men, and a few women, who created the institutions that gave rise to the Common Law, and to the great Court of Equity headed by the King's chief minister, the Lord Chancellor. Very often the Chancellor was a high churchman, learned in canon law, the texts of the Church fathers and, perhaps less often, the writings of the pagan philosophers of Greece and Rome and, thus, in touch with both pagan and Christian traditions of law as a function or manifestation of a natural order, designed and ordained by a higher Power, who also invested man with a conscience, with responsibilities as individuals, and charged him with the duty to strive to uphold the divinely sanctioned standard.¹³

Natural law, as the notion of a body of principles common to all men, apprehended by men through reason, and perhaps originating in or ordained by some authority higher than man, or at the very least deriving their force, as Montesquieu suggested, "entirely from our frame and existence,"¹⁴ was, of course, not the only source of law, either in ancient times or in more recent days. By the advent of the time corresponding with the founding of the American Republic, natural law had become but one of several repositories of legal principles from which American legislators, jurists and attorneys would draw in order to resolve issues before them.¹⁵ And yet those natural law principles derived from the ancients retained a strong hold on

9. See *The Augustan History*, published by Penguin Books as *Lives of the Latter Caesars*, pp. 110, 112, 119-120, and, generally, *Meditations*, by Marcus Aurelius.

10. In Italy, the Ostrogoths received their law from Theodoric, while Rothari and Luitprand legislated for the Lombards. Gundobald codified the habits and customs of the Burgundians in what is now southern France. Chindaswintha and Leovigild became lawgivers of the Visigoths in Spain, and shards of their handiwork are evident to this day in the *Family Code of California*.

11. See D.J.V. Fisher, *The Anglo-Saxon Age: c. 400-1042* (New York: Barnes & Noble Books, 1992), pp. 230-231.

12. Jean de Joinville, "The Life of St. Louis," in *Chronicles of the Crusades* (New York: Penguin Books, 1982), p. 177.

13. See, in part, F.W. Maitland, *Equity, Also The Forms of Action at Common Law: Two Courses of Lectures* (Cambridge: Cambridge University Press, 1929), pp. 2-8

14. Montesquieu, *The Spirit of the Laws* [Vol. XXXVIII of *The Great Books of the Western World*] (Chicago: Encyclopaedia Britannica, Inc.: 1952), p. 2.

15. See G. Edward White, *The Marshall Court and Cultural Change: 1815-1835* (Oxford: Oxford University Press, 1988), pp. 112-113.

the imaginations of legal thinkers and continued to influence and inspire those whose occupation it was to make sense of the competing claims arising out of the everyday workings of an increasingly complex social order. William Blackstone, a judge on the Kings Bench in the second half of the Eighteenth Century, declared in his influential *Commentaries* that

this law of nature being coeval with mankind and dictated by God himself is of course superior in obligation to any other. It is binding over the whole globe, in all countries and at all times. No human laws are of any validity if contrary to this.¹⁶

His words were no mere idle prattling. They were quite literally the living gospel for anyone in the English-speaking world aspiring to a profession on the bench or at the bar. America's early lawyers esteemed Blackstone as their chief mentor in the law. Those who drafted the Declaration of Independence, the Constitutions of the several States and the Constitution of the United States, in addition to those who manned the bench, who advocated at the bar, and who made the laws in state houses across the land, were very often ignorant of any learned source of legal knowledge other than Blackstone's four volume treatise. The influence of this writer, and the influence of the natural law tradition emanating from the Old World, remained extremely potent for several generations after the Republic's founding. As institutions evolved, as changes in society and the general culture shaped legal thinking, as new problems pressed for novel solutions and as questions regarding the fundamental nature of man and his relationship to the state were continually posed, faith in natural justice as a living source of law and legal principles waned considerably. In the past century, in particular, Americans have grown wary of the entire concept of a law of Nature. Their wariness has on occasion deepened as advocates of contrary positions in the great debates of the age each anchored their advocacy in principles of natural justice. As John Hart Ely has pointed out:

Natural law was invoked on both sides of the slavery question. Calhoun cited natural law to 'prove' the inferiority of blacks, and the Kentucky Constitution of 1850 and the Kansas Constitution of 1857 declared the right to own slaves 'before and higher than any constitutional sanction.'¹⁷

If natural law spoke with so many tongues, and admitted of such contradictory diversity, critics questioned how it could possibly be common to all men and never changing. If natural law was a dictate of right reason, who, asked the philosopher Will Durant, "shall determine what reason is right?"¹⁸ In the face of such questions, natural law ceased to be perceived by practitioners of the law as anything but a contrivance used to buttress the moral positions of those seeking outcomes a cynical man or woman might

16. Blackstone, *Commentaries*, quoted by John Hart Ely in *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), p. 48.

17. Ely, *op. cit.*, p. 51.

18. Durant, Will and Ariel, *The Story of Civilization (Vol. VII): The Age of Reason Begins* (New York: Simon & Shuster, 1961), p. 634.

judge to be more or less self-serving. As the Nineteenth Century approached the Twentieth, fewer self-respecting jurists could bring themselves to rely on such vague and malleable concepts as those traditionally defined as natural law when weighing the interests of litigants seeking justice. Over a much longer period of time, the general view of the legal profession came to be shared by a large portion of the general public. Indeed, because of the confusion and uncertainty aroused by and the apparent hollowness of natural law “our society,” observed Ely, “rightly does not accept the notion of a discoverable and objectively valid set of moral principles.”¹⁹

The dubiousness of the law of Nature as a formal source of law was well established by the second half of the Twentieth Century. Few judges sitting on State high courts and few members of the Supreme Court of the United States by the advent of this period can be said to have been overt proponents of natural justice. If anything, members of the bench were overtly hostile to it, and might even, when alarmed at the nuance of their brethren’s legal reasoning, accuse one another of succumbing to more primitive theories of jurisprudence. This vigilance in guarding the courthouse precincts from a resurgence of natural law thinking was well exemplified in the opposition of Justice Hugo Black in *Griswold v. Connecticut* to the majority opinion that a State may not, without a compelling reason, impair what the majority identified either as a fundamental right to privacy emanating like a penumbra from rights expressly enumerated in the text of the Constitution, or as one of those unnamed rights retained by the people pursuant to the Ninth Amendment.²⁰ Justice Black denounced the majority for subscribing to “formulas based on ‘natural justice,’ or others which mean the same thing.”²¹ To strike down a State’s law simply because it was offensive to a sense of fairness and justice was no jurisprudence at all, but, instead, a substitution of the judge’s personal values for the considered judgment of the legislature.²²

It is hard to read Black’s words without smiling at their unintended irony. They reveal an almost irrational hostility to natural law somewhat reminiscent of the desperate claims of eastern block ideologues to a greater degree of ideological purity than that possessed by their comrades. Rather than being judicial troglodytes hurling boulders from the mouth of some fetid natural law cavern, the *Griswold* majority was actually as hostile to natural law as Black was. Its opinion was founded not on a theory of natural rights, but on one of implied rights—rights the existence of which could be fairly inferred from the existence of expressed ones— or alternatively, on the assumption, as embodied in the Ninth Amendment, that any right not expressly surrendered to the state was retained by the people. Black, and

19. Ely, *op. cit.*, p. 54.

20. *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678.

21. *Id.* at 512.

22. *Id.*

others on the bench who shared his views, were so adamant in their opposition to natural law that they lost the perspective necessary to determine what exactly natural law was. The truth is that natural law theoreticians would never have identified the outcome or the method used by the majority to reach the decision it did in *Griswold* as resembling anything close to natural law or the principles of natural justice. They would never have done so because natural law *never* was a mere assumption made by one judge, one person, or several. Rather, it was, at its best, always a product of observation, often through inquiry into the history of humanity, of what was commonly considered right and just to all people, in all places. Discernment of common beliefs in such areas as religion, crime, punishment and ownership of property over long periods of recorded time and evident in many lands was the first step toward the determination of whether a particular law of Nature existed. This was exactly the point made by Justice Rehnquist in his dissent in the first of a series of decisions founded upon the majority's reasoning in *Griswold*. In what amounts to a mild natural law critique of the majority's opinion in the case of *Roe v. Wade*, Justice Rehnquist explained that the Court, to be true to the traditional method of adjudicating rights alleged to be fundamental or natural to members of a free society, should first have sought out evidence of that right "in the traditions and conscience of our people," and, if evidence of the right was forthcoming pursuant to this inquiry, then, and only then, declared the right to exist.²³ But history, suggested Rehnquist, revealed something quite contrary to the opinion of the majority, as would any audit of the stance. If most legislatures throughout the land. While some degree of public support in 1973 existed for the so-called "right to choose," there was much opposition, too. In such a state of divided opinion, set against a historical backdrop remarkably barren of examples demonstrating preponderant popular favor for the practice of abortion, it should not, said Rehnquist, have been possible for the Court to deem that a natural right to artificially, deliberately and prematurely terminate a pregnancy existed.

Rather than being a skirmish between advocates of natural law and a more formal jurisprudence, *Griswold* was a conflict between two approaches to interpreting positive law. Justice Black wished to rely exclusively on the words of the Constitution itself, while the majority believed it appropriate to explore the gaps between enumerated rights and the unmapped territory of the Ninth Amendment to reach a decision that represented a significant break with judicial precedent. On its face, natural law was no longer a source of law with any vitality, notwithstanding Justice Black's admonition to the Court. And yet, in its essence, it was not quite extinct. Positive law, not natural law, may have been the ultimate source of the rights alleged in *Griswold*, but positive law has its origins somewhere, too.

23. *Roe v. Wade* (1973) 410 U.S. 113, 173-177, 93 S. Ct. 705.

Justice Black may not have been correct to accuse his brethren of reliance on principles of natural justice, but his suspicion that natural law played some role in the decision did have some basis in truth. Rights jurisprudence, however modern justices wish to conceptualize and articulate it, originated in natural law, emerging in recognizable form in the immediate aftermath of successful revolutions in the Netherlands, England and America. The organic frameworks the revolutionaries created in each of these locales in the wake of their military victories were heavily indebted to principles of natural justice as defined by such writers as Cicero, Hugo Grotius and John Locke. The natural right of the individual to be free from oppression by his fellow man and by his government became enshrined (in America at least) in the concept of the separation of powers, the clauses touching upon contracts, *ex post facto* laws, bills of attainder and the privileges and immunities of citizenship, the grant of the franchise, and, finally, the Bill of Rights. The right to life itself was reduced to positive enactment in the form of due process of law, as well as numerous criminal and civil statutes and the rules of evidence, which eventually came to be codified federally and in the several States. The entire realm of equity, now merged with law in most jurisdictions in this country, is a creature of natural law jurisprudence. As originally conceived, the Chancellor, who presided in equity, was free of the rigid strictures of the law that bound the Judges of the King's Bench, and was empowered to seek out the truth through the hearing of evidence and to render a very broadly conceived justice. Very often his task was simply to determine what was fair to all the parties, to third persons and to society as a whole. What was fair was a function of morality, not merely as defined by the conscience of the Chancellor himself, but by the notions of equity recorded in the maxims of jurisprudence, the reports of previous Chancellors and the traditions and customs of the people as evident in daily life, history and the teachings of the predominant faith. These maxims have been incorporated into the common law, and in California a number of them have been codified.²⁴ The whole array of civil and criminal defenses, including laches, fraud, rescission, reformation, unconscionability, duress, mistake, defense of oneself and defense of another all have their origin in equity and the jurisprudence of the Chancellor. Modern family codes, too, owe much to notions of fairness and to what are perhaps the pre-eminent of natural law principles: the right of a parent to raise his or her children, and the right of children to be raised, protected and nurtured by their parents.²⁵ Family courts, in California and in other states, are expressly courts of equity, and judges in such courts are ever empow-

24. See *Cal. Civil Code* §§ 3509-3548.

25. See, for example, *Cal. Family Code* § 3900, which states that "the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances."

ered to render judgment not merely in accordance with enumerated factors, but also on whatever “other factors the court deems just and equitable.”²⁶

Natural law, then, is a real element of the law as it stands today, albeit a hidden one. Though not recognized as a source of law as once it was, it is a part of the legal heritage of America, the absence of which would undoubtedly have barred the development of our current system of laws and the society in which we live. As noted by the great legal historian G. Edward White, natural law itself may be ignored, even reviled, today, but it remains, nevertheless, a part of the law, “taken seriously as an authoritative source. . .to the extent it has been positivized.”²⁷ Regrettably, the process whereby natural law has ceased to be natural and taken on a positive character has to some extent cheapened the value, the dignity and the inviolable status of the law, particularly in the area of human and civil rights. Where once rights were an inalienable accouterment of individual human existence, they have now become nothing much more than privileges recognized and occasionally protected by the state. The process has been a remarkable one, plainly evident in the language and theories selected by jurists to articulate their decisions; and though the outcome of a particular issue might have been the same under either a natural law theory or more modern conceptions of the police power and its limitations, or even those influenced by critical legal studies, deconstructionism and other post-modern approaches to the law, it is hardly an arguable point that inalienable rights, when recognized as such by the preponderance of society’s individual members, are species of things much more inspiring and much more difficult to assail on an emotional level than a right which is the mere creation of lawmakers and judges. What the founders of the nation recognized as inherently the birthright of every man (with significant qualifications, of course), in theory, at least, is now understood to be but a function of the distribution of power in the community. Though history and experience might buttress this view in a way that neither ever supported natural law, it remains a view that weakens the fundamental validity and strength of rights by reducing them to mere interests, recognized as rights only so long as sufficient force stands behind them. Rights are no longer perceived as derivatives of man’s fundamental nature or reflective of his obligations to his conscience or his God. Instead, rights are but aspirations to and manifestations of power. They are sought by those who have little clout socially in relation to those who have more, and they are defended not as the birthright of humans formed from the dust, or from a single rib, but as the dearly won privilege of the stout of heart, the rich, or the vocal. Government and man, thus, are not accountable to all, but only to those who would war with government, if not on the field of battle as in days gone-by, then in the courtrooms of the land.

26. See, for example, *Cal. Family Code* § 4404.

27. G. Edward White, *op. cit.*, p. 675.

It is not by any means my objective to provide a far-ranging critique of rights jurisprudence and the theories that underlie, and, in my view, occasionally undermine, the general notion of legal rights. Instead, I wish merely to examine very generally the natural justice origins of rights-law in the American setting. As the experience and traditions of the United States are much better known, already thoroughly examined by generations of scholars, and far too broad and complex to detail here, I chose instead to focus on natural law as it was inherited by one of the several States (California), to discuss how the natural law tradition was first articulated by the Supreme Court of this State, and how the tradition and the theory it arose from evolved and eventually came to exhibit a somewhat different theoretical form.

California, like other States, inherited a rich heritage of natural law. Its first legislators adopted principles of natural justice much more freely than did the framers of the federal constitution, and its early judges wholeheartedly fell back not merely on the natural law articulations of the famed jurists of the American past, but also on the ideas of the pre-eminent natural law theorist, John Locke. Locke's theory, it should be noted, has not always been perfectly understood by those who have attempted to explain it. For those imperfect critics, natural law mandated natural rights, which the individual never yields, even when incorporating with others into the entity known as society. Should society and its government disregard or trample upon these liberties, the individual retains a right to resist the government and, if necessary, overthrow it. In actuality, Locke was less a radical than this simplified summary of his theory would indicate. Natural rights do exist, he said, but these are not limited simply to individuals. Natural rights, to be properly understood, must be comprehended in the aggregate. Rights, unordered and unprioritized, lead only to chaos, and it was this chaos that prompted individuals to organize the state in the first place. An individual member of organized human society acting in accordance with all of his natural rights might well place himself in opposition to other members of society, thereby violating *their* rights. This collision of interests could only be remedied by the regulating authority of the government, either in the form of elected representatives who pass laws governing human conduct, or jurists empowered to interpret the laws so passed. Insofar as the state represents the people, the state has rights, which the courts must ultimately balance against the rights of individuals the state's laws may have impaired.

For decades after California's founding, jurists continued to discuss the question of the balance of rights of individuals against those possessed by that aggregation of individuals represented by the state in essentially Lockean terms. As legal fashions changed, California's courts changed with them, retaining the underlying natural law principles, even as they adopted new language to articulate those principles. In time, the overt axi-

oms of natural law would be virtually banished from the vocabularies of judges, but the law of Nature itself, and the rights once thought to originate in it, remained embedded in the positive and common law, thereby permitting vindication, for a time at least, of those interests inherent in the body of the people as represented by its legislature, to enact laws aimed at minimizing the conflict of rights which close proximity of one person to another inevitably evokes. The focus of this paper remains narrow— affixed primarily on the nebulous area of economic rights which long remained a largely untilled sward, free of express guarantee, and ever a target of legislative innovation. It is here that the traces of pure natural law and natural rights theory endured longest, confounding jurists who discerned few express protections for these rights in the organic and positive law, but who nonetheless were required to find the point of balance between the rights that Nature reputedly bestowed upon each person and the interests of the people as a whole.

II. The Wellspring of California's Natural Law Jurisprudence

A. The Beginnings of Natural Law Theory: Cicero and Aquinas

The judges who first considered the competing claims of litigants and weighed the evidence in cases of criminal wrongdoing in California, when seeking solutions and remedies from the fount of natural law, could draw from three distinct traditions. These traditions were the California Constitution— which was so new as to be almost no tradition at all— the jurisprudence arising out of the founding of the nation, and the ancient canon of natural law theory. Of these, the theoretical canon was perhaps the most important. It was out of this body of doctrine that the State and Federal systems of government were substantially derived. The tradition out of which the canon arose is known to be thousands of years old, no doubt predating the oldest surviving writings left to us by the ancients. What lies at its core is the fundamental notion of fairness. There is little disputing that this notion guided the most ancient of jurists, as did the concept of an order underlying the phenomenon of the world, and arising out of the world itself, affixed there by the gods, the exact meaning of which was left to men to decipher. No doubt the ciphers men developed occasionally failed in their task, leading to strange and irrational results. Not infrequently, superstition got the better of reason, with the consequence that for hundreds, if not thousands of years, ancient Europeans considered such legal remedies as the trial by ordeal and mutual combat to be fair and natural means of demonstrating the righteousness of a particular cause. But even when the popular imagination remained captive to superstition the weaknesses and dangers of a natural jurisprudence were not incapable of being corrected by truer application of Nature's principles. Henry Sumner Maine has pointed out the fundamental role fairness, or equity, played in the ancient world, particularly in the Roman world, and how broad concepts of fairness, de-

tected in part through the exposure of Roman juriconsults to the problems and mores of peoples throughout the Mediterranean basin, provided such useful service in the modification of a very elaborate, yet occasionally rigid, set of statutory laws.²⁸ The system of law that arose from this exposure, the *jus gentium*, eventually merged with the stoic belief in a higher law which man's reason might discern from the evidence of Nature.²⁹ Of the Roman theorists who wrote on the subject, Cicero remains the most prominent, and one of the few whose works survived the Dark Age that benighted the civilization of the West from the Fifth to the Ninth Centuries. Cicero, the pre-eminent attorney of the late Republican era, who served in a number of high state offices, including the consulship, postulated the existence of an "eternal law," manifest in the nature of all things. Evidence of the law itself he found in the annals of Rome's past, when law itself had yet to be formally codified. "Though in the reign of Tarquin," he noted, "there was no written law concerning adultery, it does not therefore follow that Sextus Tarquinius did not offend against the eternal law when he committed a rape on Lucretia."³⁰ The entire city knew of Tarquin's crime, and because it was so plainly a crime, the people rose up, drove out the prince, and exiled the father who, through his inaction, constructively condoned his son's conduct. This particular law, violated so obnoxiously by the heir of Rome's last king, eventually came, with other laws, to be incorporated into written codes, for which the latter day Romans would be famous; but it was not the writing of such a law that made it law in Cicero's opinion, but the apprehension of the law by the mind of man before its formal drafting.³¹ Reason itself was the special gift of God, impressed upon man's mind that he might descry the right from the wrong by observation and study.³² Morality, however, and the reason that apprehends it, are not concerned with rights derived from Nature, as later theorists would have it. Laws supported by reason create boundaries which the people, if they are to be moral beings in service to God and living harmoniously with one another, will not pass. The collective morality of the people, Cicero suggested, is represented by the State, whose agents originally drafted "such laws only as should conduce to the general morality and happiness," preserve "the security of the people" and encourage "the peace. . . of society."³³ The State itself, said Cicero, was a thing which logic derives from Nature. The laws which the State's agents devise and enforce are generally those arising out of the principles imparted to man by God and contributive to man's health and happiness. "Nothing is so conformable to justice," said he, "and to the condition

28. Henry Sumner Maine, *Ancient Law* (London: 1861).

29. *Id.*

30. Cicero, *De Legibus*, II.4.

31. *Id.*

32. *Id.*

33. *Id.* at II.5.

of Nature as sovereign power; without which, neither house, nor commonwealth, nor nation, nor mankind itself, nor the entire nature of things, nor the universe itself, could exist.”³⁴ Thus, positive law, for Cicero, was but the codification of man’s higher natural tendencies and aspirations and a reflection of God’s will for mankind, without which the law of Nature would not and could not be enforced.

The state as a necessary consequence of human nature, into which Nature or Nature’s God incorporates a desire for peace and a wish for the good, but not always to a degree sufficient to enable men to secure either without support from a governing authority, was not a concept that died with Cicero. The Emperor Augustus elevated himself and the idea of statecraft to divine status, and represented himself throughout the Roman world as the ordering principle of the earthly cosmos. *He* was justice, and, because he was, he maintained the peace and prosperity of mankind. His successors attempted to follow his example, and some even succeeded, but eventually the excesses of the monarch undermined the faith not merely of the people, but of the soldiers, with the consequence that military despotism and the underlying principle of might-makes-right, with all the false trappings of the Republic and of the divine, displaced Augustus’ model of a natural order held together by the virtue of the Emperor. In a later age, the writings of Cicero and other thinkers from the classical era would be rediscovered, and these rediscoveries would fire the imaginations of a new generation of theorists. Among these was Thomas Aquinas, who, like Cicero, was both an Italian and an advocate of the law of Nature. Unlike Cicero, however, he placed natural law not at the top of the hierarchy of obligations men must bear, but near the bottom, beneath the eternal law of God, of which men could know little directly, and God’s positive law, as revealed in the Bible and the writings of the learned fathers of the Church. He agreed with Cicero that the law of Nature was imprinted on man by God in the form of human conscience and knowable from Nature itself through the power of reason.³⁵ Reason, he asserted, allows man to participate in the knowledge of eternity, which is God Himself. Yet whatever knowledge he can glean through his reason is not the actual stuff of eternity, but merely a bastardized version of it. Each thing has an essence that it seeks to fulfill.³⁶ Man is no different. Like any other thing or object in the world, he seeks his end. Man’s end includes the exercise of those functions common to all animal creatures: sexual intercourse, the education of offspring, and the general preservation of his own life, all of which are known and pursued innately, and require no external suggestion to be acted upon.³⁷ Yet mankind’s end is greater than the satisfaction of these carnal impulses. Because

34. *Id.* at III.1.

35. St. Thomas Aquinas, *Summa Theologica*, Q. 91, Art. 2.

36. *Id.* at Q. 91, Art. 2.

37. *Id.* at Q. 94, Art. 2.

human beings possess a social urge, inclining them to live in society with others, Nature, in the form of the principle that one “avoid offending those among whom one has to live,” suggests the means by which this urge might best be fulfilled.³⁸

For all his learning, Aquinas refrained from expounding too much upon the question of the role of the state in the life of man, thus absent from his extensive body of work are any lengthy discussions of the origin of the state, or the state's role in facilitating or suppressing human nature. States themselves were weak in his day. The empire had long since disappeared, though during his lifetime a self-styled emperor— his kinsman in fact— was engaged in near perpetual war with the Church, fighting for control of Rome that his empire might be formally consummated.³⁹ With the exception of England and perhaps Sicily, no states in the modern sense existed at all. Aquinas was an imperialist, but his *imperium* was a spiritual one, thus he had no compelling need to ponder whether the state was an entity derived from and fulfilling natural law, or a necessary by-product of, or response to, the natural tendencies of man to live in society and to live virtuously in harmony with his neighbors. Later Thomists did venture into this subject area, seeking justification for resistance to both the Church and the Empire. It was these individuals who developed and refined the theory of man's inherent liberty, the conflict of his conscience with the fallen condition of his body and soul, and his compelling need to cede his freedom to the State so as to limit the manifestation and effect of individual breaches of Nature's law.⁴⁰ Secular thinkers, arrayed against Pope and Emperor, added to this refinement of Thomist theory the concept of the duty and the right of the people to rebel should the government they create fail to govern in accordance with the dictates of justice by impairing those rights which men never permanently surrender. The theory found its greatest currency in northern Italy and in the Netherlands among those attempting to stave off foreign occupation and the tyranny of native born dynasts eager to expand their powers and dominion. The Dutch were particularly keen on justifying their resistance to the government of Spain, which sought to impose more uniform control over the provinces of the Netherlands and to impress upon the people of those lands an orthodoxy in religious belief and practice. One of the early leaders of the Dutch Republic was Hugo Grotius, an attorney turned statesman who compiled, while in prison, a monumental treatise on natural law theory entitled *On the Law of War and Peace*.

38. *Id.*, Q. 94, Art. 2.

39. Through both his mother and his father Saint Thomas Aquinas was a cousin of the Emperor Frederick II.

40. See Quentin Skinner, *The Foundations of Modern Political Thought (Vol. II): The Reformation* (Cambridge: Cambridge University Press, 1980), pp. 155-156.

B. Natural Law Comes of Age: Grotius and Locke

Man was a social creature, Grotius observed, but men did not always live in political society. He was governed by his reason prior to being governed by the State, but reason was not always, in man's pre-political condition, sufficient to deter the adverse consequences of stateless life. Men might be inclined by Nature to commune with others of their kind, but pre-political society was not always pleasant or safe. Men might be inclined by Nature to practice the moral virtues facilitating healthy and harmonious living, such as temperance, fortitude, and discretion, and they might even be inclined to honor God, who imprinted the soul of the species with a conscience capable of discerning higher truths, but not all men were always so inclined. What each individual did have in common was "the care. . .from the moment of birth. . .for itself and the preservation of its condition, its abhorrence of destruction, and of every thing that threatens death."⁴¹ This is a fundamental principle of Nature, and is reflected, said Grotius, in the well-accepted notion of killing in defense of oneself.⁴² It is reflected, too, he suggested, in the formation of the State, the end of which "is to a form a common and united aid to preserve to every one his own."⁴³ Under the aegis of the State, the people are discouraged from resorting to force to obtain what is theirs by right— whether that force be for the purpose of achieving retribution for an offense against one's honor or person or to regain possession of property of which they'd wrongfully been deprived— and, instead, to seek redress in courts of justice.⁴⁴ The State, too, might enforce rights directly, protecting the people prospectively by force of arms, or retrospectively by punishing wrongdoers after a breach of the peace has occurred. The State, through its agents, creates positive law to provide guidance for the people in living in communal harmony, but this law is itself, if it is to be just, founded on principles of natural law: the sanctity of life and personal property, the sacredness of promises, and the necessity of order and peace. In delving into the annals of mankind and the writings of the wise to identify those laws common to all peoples, Grotius declared such laws to be those which arise out of man's fundamental nature as a moral being, and from man's relationship to his own kind and to the world. Differences abound among the learned people of the past as to what is right and what is wrong, but "whenever many of them at different times and in different places declared the same thing to be true, their unanimity must be ascribed to a universal cause, which, as we inquire into it, can be nothing else than a correct inference from the principles of Nature."⁴⁵ And yet, without the State, these principles of Nature, discernable in all cultures in

41. Hugo Grotius, *On the Law of War and Peace*, I.2.I.

42. *Id.* at I.3.III.

43. *Id.* at I.2.I.

44. *Id.* at I.3.II.

45. *Id.*, Preface, at 40.

all times, would be unenforceable, save by each individual confronted with breaches of Nature's law. Any wide scale resort to private justice, however, would only lead to a general breach of the peace and the destruction of the interests that human beings are by Nature inclined to preserve. The State, thus, is a necessary adjunct to the law of Nature— without which that law would be overwhelmed by the lawless impulses of the human race.

How dependent the State is upon the people, and whether or not the people retain rights derived from Nature which legitimates their resistance to unjust governments were not questions with which Grotius overly concerned himself. He objected to the notion that the people retained any authority following their creation of the state, and argued instead that the people were subject to the government that ruled over them, though he did concede that anyone who argued that a person's duty "to the sovereign does not oblige anyone to do an act manifestly unjust and repugnant to the law of God. . . would say nothing but what is true and universally admitted."⁴⁶ That he lived in a Republic that for the past forty years had been engaged in a fight for survival against the Spanish Empire may explain his lack of interest in rights derived from Nature that are ever retained by the people despite their entry into political society. His own government generally protected such rights, while the government that did not had long since been overthrown. Any infringement on rights by the state, including his own rights by order of the Stadholder Maurice, was perhaps justified, theoretically at least, by the condition of emergency arising out of the long war with Spain.

Had the Netherlands been isolated from the struggles of the great powers and its people sufficiently free to contemplate what impositions the government placed upon their lives, Grotius might have taken a stronger stance on individual rights, perhaps one quite similar to that taken by John Locke some seventy years later. Locke was in many ways highly indebted to Grotius, and much of his discussion of those laws arising out of Nature was borrowed directly from Grotius' great treatise. And yet Locke, more than any legal theorist prior to his time, placed natural law into a coherent theoretical framework, incorporating both the rights of man derived from Nature, and the fundamental, naturally derived role of the government to secure, defend and promote the interests of all individuals living under its jurisdiction. Man, he suggested, was a creature of God, invested with reason and a conscience, born in a state of Nature, which Locke described as "a state of perfect freedom" wherein people could "order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of Nature, without asking leave, or depending upon the will of any other man."⁴⁷ "Though this be a state of liberty," he explained, ". . . it is not a state of license: though man in that state has an uncontrollable liberty

46. *Id.* at I.1.IX.

47. John Locke, *Second Treatise of Government*, II.4.

to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it.”⁴⁸ “The state of Nature has a law of nature to govern it,” and this law “obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another’s pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another’s uses.”⁴⁹ In this state of Nature, each individual has the right to execute Nature’s law, “a power not only to preserve his property, that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion requires it.”⁵⁰ Such punishment, however, must ever, he stressed, be administered “with calm reason, in proportion to the crime.”⁵¹

As much as Nature is governed by a law of Nature, the law is not always honored: not all men heed it. “Though the law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.”⁵² And as many men misinterpret it, or misconstrue it, and thereby disobey it, its enforcement by individuals wronged by the consequences of that disobedience is not always just. Men, observed Locke, are often partial to their own cause, violent in their passions and incapable of that calm execution of a law that their reason, if they let it, permits them to undertake. Men, too, were often incapable of enforcing the law for no other reason than their lack of power, or their fear that enforcement of their rights might cause them greater grief than the mere loss of something rightfully their own.⁵³ Far from being an ideal state, akin to the Golden Age of mythical Greece, the state of Nature was marked by uncertainty and inconvenience. As “remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case” government and the polity

48. *Id.* at II.6.

49. *Id.*

50. *Id.* at VII.87.

51. *Id.* at II.8.

52. *Id.* at IX.124.

53. *Id.* at IX.126.

were conceived.⁵⁴ Once consented to by all (or perhaps a majority) who would live under it, the state provided protection for society as a whole, but not without each individual's sacrifice of a number of those rights possessed in man's natural condition. It was after all for the purpose of preserving one's most fundamental rights that compelled men to form the state. The primary right ceded to the state upon man's submission to its authority was the right to enforce Nature's law, and men did so that they might be liberated from the greater hazards posed to their rights by the inexactness of each man's power to apprehend, through the veil of his own passions, the justness of his own cause. In each individual's place, the state assumed the role of umpire for the community, establishing settled rules of procedure, and conducting itself with indifference to the parties in controversy.⁵⁵ Other rights, however, men retained, which the government could not, with impunity, impair. The end of government, Locke said, "is not to abolish or restrain, but to preserve and enlarge freedom; for in all the states of created beings capable of laws, where there is no law there is no freedom; for liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told a liberty for every man to do what he lists."⁵⁶ "The power of the society," he stated, ". . . can never be supposed to extend farther than the common good, but is obliged to secure everyone's property by providing against those defects. . . that made the state of Nature so unsafe and unsound."⁵⁷

The power of the state is vested in the legislature, and the legislature's role is a fundamental one: the enforcement of "the first and fundamental natural law, which is. . . the preservation of society, and (as far as will consist with the public good) of every person in it."⁵⁸ But to the extent that the public good requires, the state may impair an individual's natural rights. The rules the legislature "make for other men's actions must. . . be conformable to the law of nature," the chief underlying principle of which is the "preservation of mankind."⁵⁹ Only when the legislature goes too far in impairing rights, when it does so for arbitrary reasons, and wrongly threatens the lives and property of members of the community, do the people have the right to challenge by force their government and replace it with another. "Whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence."⁶⁰ Under such cir-

54. *Id.* at II.13.

55. *Id.* at VII.87.

56. *Id.* at VI.57.

57. *Id.* at IX.131.

58. *Id.* at XI.134.

59. *Id.* at XI.135.

60. *Id.* at XVIII.222.

cumstances “the people have a right to resume their original liberty, and by the establishment of a new legislature, provide for their own safety and security, which is the end for which they are in society.”⁶¹ Such resorts to the right of rebellion Locke believed would be rare, in part because of what he perceived to be the care most governments take not to overly rile the sensibilities of the people, and partly because of the natural conservatism of the human heart, which causes people to be “not so easily got out of their old forms.”⁶² Thus, for the most part, the state will be left intact, it will be permitted by the people to legislate for the good of the community, and its restriction of an individual’s liberty will generally only occur after a balancing of individual rights against the rights of all people to enjoy a peaceful and secure environment.

C. Natural Law in North America: The United States and California

1. *Natural Law and the Founding of the Nation*

Locke himself was writing for a revolutionary audience, attempting, in part, to provide some philosophical justification for the toppling of one King and the elevation of another. His tract became the essential ideological rationale supporting the Glorious Revolution, an event that received tremendous plaudits both in England and in England’s overseas colonies. Indeed, American colonists rose up on the news of the flight of King James II and overthrew their own colonial governments in the name of the new monarch. Echoing the sentiments of Locke, whose words no doubt he had not even read, one anonymous revolutionary complained of the old regime in New England by declaring that “the very form of government imposed upon us, was among the worst of treasons, even a treasonable invasion of the rights which the whole English nation lays claim unto; every true Englishman must justify our dissatisfaction at and believe that we have not so much resisted the ordinance of God, as we have resisted an intolerable violation of His ordinance.”⁶³ Locke’s theory eventually was transmitted to American shores, where it received a welcome home in the imaginations of many colonials.⁶⁴ Those who took umbrage at the policies of King George III cited the rights of colonials as Englishman and as human beings and the obligation of the King to take heed lest the people resort to higher principles of justice and disassociate from his rule. When revolts broke out in 1775, great was the talk of the laws of Nature and the rights derived therefrom. Meeting in Philadelphia, representatives of each of the North American col-

61. *Id.*

62. *Id.* at XVIII.223.

63. “An Account of the Late Revolution in New England by A.B.,” in Michael G. Hall, *The Glorious Revolution in America* (Chapel Hill: University of North Carolina Press, 1964), p. 48.

64. See John C. Miller, *Origins of the American Revolution* (Boston: Little, Brown & Co., 1943), pp. 170-173.

onies, with the exception of Nova Scotia, Upper Canada, Newfoundland, and Quebec, approved a resolution proclaiming “that all Men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness— that to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.” Such rhetoric, inspired directly by Locke’s theory of natural rights, fueled the engine of war as much as any funds raised by Robert Morris, and laid the philosophical groundwork for an independent nation. Even before the organization of the United States under the present Constitution, the peoples of the several colonies organized new governments— drafting constitutions of their own, each of which incorporated mechanisms whereby the rights of individuals might be protected from government, and the government harnessed so that it might fulfill its function to guard the people from excesses of that liberty endemic in Nature but which the people never fully relinquish to the state. Among these mechanisms were Bills of Rights, which, like the Virginia Bill of Rights drafted by George Mason, usually “set forth the doctrine of Natural Rights, the compact theory of the state, and the right of revolution in language remarkably like that” employed in the Declaration of Independence.⁶⁵

Some commentators, like John Hart Ely, have suggested that when the time came to reorganize the federal government, so as to form “a more perfect union,” the framers, who as revolutionaries had wholeheartedly embraced the natural law tradition, retreated from what Ely dubbed “these controversial doctrines” and, instead, crafted an entirely positive instrument of government.⁶⁶ Part of the reason for this, said Ely, has to do with the fact that “the need to make a case was no longer present:” the revolution, a positively illegal act, was a *fait accompli*, its work had been achieved, and the doctrines that liberated the consciences of otherwise loyal subjects of the King were now superfluous to the effort to construct a new state.⁶⁷ Ely, however, was quite wrong in his assessment of a dearth of natural law theory underlying the Constitution. In truth, the framers were so enmeshed in the theory that they could not but conceive of a government that incorporated means by which the state might be restrained from interfering with the liberties of the people. History had provided new lessons since the days of Locke, and one of these was that theory alone was not sufficient to safe-

65. Kelly, Alfred H. and Winfred A. Harbison, *The American Constitution: Its Origins and Development*, 3d Ed. (New York: W.W. Norton & Company, Inc., 1963), p. 96.

66. Ely, *op. cit.*, p. 49.

67. *Id.*

guard rights; institutions must be constructed in such a way as to render their preservation all the more certain. Consistent with the teachings of history, the framers crafted a two-tier system of government, one which dispersed power federally, with the federal government providing a common touchstone, and acting for all in certain matters of common concern, and another which dispersed the powers of the federal government among three coordinate branches: the executive, legislative and judicial. Each branch would have the means to check the other, thus all but guaranteeing that accord would be difficult to establish in all but the least controversial matters. Further protections were eventually added with the adoption of the first ten amendments to the Constitution, which hindered the federal government from impairing rights essential to that life, liberty, and property which arose first in a state of Nature, and which remained rightfully the possession of the people after formation of the compact that first infused life into the organic structure of the polity.

How steeped the framers of the Constitution were in natural law theory is manifest in the writings of those who most prominently advocated its ratification. Alexander Hamilton, James Madison and John Jay were each of the opinion that the proposed governmental system provided a remedy both to disunion and to the tendency of any government to encroach upon the rights of the people. The issue at hand—the formation of a more perfect union—was one that demanded a conclusive response. The national government at present was weak. Its weakness would only increase with the passage of time. Foreign nations would begin to encroach upon the boundaries of the several States. The several States would begin to squabble amongst themselves. Life would become uncertain. That “great principle of self-preservation,” which, according to Locke, compels men to enter into the social compact, demanded something more than a vulnerable coalition of autonomous polities. If a government is to exist, its aim must be, as Madison said, the “safety and happiness of society,” and the upholding of “the transcendent law of Nature and of Nature’s God.”⁶⁸ The approach of Madison and his colleagues to the problem of crafting a national government was scientific—each had studied what Hamilton called the “probable exigencies of ages, according to the natural and tried course of human affairs,”⁶⁹ and from this study they had concluded that rights are the inheritance of all men (Jay and Hamilton believed this somewhat more profoundly than the slaveholding Madison did) and that a government with internal checks and balances could withstand government’s natural tendency to usurp these rights, and thereby maintain enough vitality to resist the centrifugal forces pulling at the center. Human beings, they believed, are by nature discordant, divisive and given to faction: certain people will

68. “Federalist No. 43,” in *The Federalist Papers*, Clinton Rossiter, ed. (New York: Mentor Books, 1961), p. 279.

69. “Federalist No. 34,” *op. cit.*, p. 207.

strive for precedence; the strong will oppress the weak and the many the few. Even the strong, said Madison, come to rue such a condition of life, and they, in concert those whom they might oppress, eventually clamor for security and peace from the constant state of uncertainty and potential strife.⁷⁰ This vision was somewhat darker than Locke's, and somewhat more akin to that of the other great natural law theorist of the Seventeenth Century, Thomas Hobbes. But the remedy proposed was purely Lockean. Madison, Hamilton and Jay eschewed Hobbes' investment of all power with the state. Maximizing natural liberty was their goal, as was resistance to foreign and domestic sources of bondage, and they believed all of this could be accomplished by a federal union of the States in the manner outlined in the Constitution.

2. *Natural Law's Influence on Early American Jurisprudence*

When the Constitution was ratified, and the system of government it sanctioned came into being, the new President appointed the first members of the Judicial Branch of government: the Supreme Court of the United States. Their task was a formidable and uncertain one. Prior to their sitting there was no federal law. There was no agreement in the country as to what precedent the Court should and could rely on. There were no written reports, and few treatises other than Coke and Blackstone. The English common law tradition, particularly the common law tradition of equity, was in disrepute, largely because of the stigma still attached to anything English.⁷¹ The judges of the Federal high court, over whom Jay presided as the first Chief Justice, proceeded cautiously. Very little guidance could be found in Jay's own collaborative work with Hamilton and Madison. Of jurisprudence, Hamilton had only to say that Judges "ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."⁷² Fundamental law, of course, included the Constitution, but it also encompassed the tradition of natural law stretching back over time, across the waters, through the courts of equity, and beyond that into the Anglo-Saxon moot, the teachings of scripture and the *jus gentium* and *jus natural* of the ancient Roman jurisconsults. Many cases could be decided without any overt reference or resort to natural law. The issues in such cases were plainly procedural, or based on written statutes, or involved expressed sections of the Constitution. Others, however, benefited greatly from judicial deference to higher principles of natural justice. In *Van Horne's Lessee v. Dorrance*, for instance, Justice William Patterson, in adjudicating a property dispute, referred to "the right of acquiring and possessing property, and having it protected" as "one of the natural, inherent,

70. "Federalist No. 51," *op. cit.*, p. 324-325.

71. G. Edward White, *op. cit.*, p. 128.

72. "Federalist No. 78," *op. cit.*, p. 468.

and unalienable rights of man.”⁷³ In a clear allusion to Locke he noted that “men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society.”⁷⁴ “The preservation of property,” he concluded “is a primary object of the social compact.”⁷⁵ Even more reliant on Locke and the natural law tradition was Justice Samuel Chase, who, in *Calder v. Bull*, challenged the notion of “the omnipotence of a State Legislature,” explaining that “the people of the United States erected their Constitutions, or forms of governments, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence.”⁷⁶ As this was the end to which the legislative power was created in the United States, the exercise of the power was limited by it. “This fundamental principle,” he stated, “flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit.”⁷⁷ Whenever the Federal, or even a State, legislature ventured to legislate, the venture should not exceed the limits of the legislative authority, for “there are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.”⁷⁸ Though Chase ruled against the claim of a violation of a right in the case at hand, he nevertheless had articulated an unabashed statement in favor of reliance on natural law should the Court in the future deem it necessary.

That Justice Chase would be prone to flights of natural law fancy is not surprising given the fact that he was one of those fifty-four men who had pledged their lives, fortunes and sacred honor when endorsing the Declaration of Independence. Somewhat more surprising is the support for natural law evinced by Chief Justice Marshall during his long tenure on the high court. A practical man, whose primary concern during his thirty-four years presiding over the Court was to nurture the growth of a strong national government, resistant both to external attack and internal discord, he nevertheless proved a powerful defender of rights allegedly derived from Nature, which the government was originally formed to protect. These rights were those related to property, and to contracts, which the federal constitution had provided express protections for in the Bill of Rights, but also, with

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

74. *Id.*

75. *Id.*

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

77. *Id.*

78. *Id.*

regard to actions undertaken by State legislatures, in the *ex post facto*, privileges and immunities, and bill of attainder clauses. His own reasoning was oblique in its debt to Locke and other natural law theorists, but the debt was nevertheless real, particularly in the case of *Fletcher v. Peck*, in which he reminded the nation of the existence of “certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.”⁷⁹ Hinting at a return to a state of Nature should States be allowed to overturn contracts, as the State of Georgia wished to do, the Chief Justice declared that “all titles would be insecure, and the intercourse between man and man would be very seriously obstructed.”⁸⁰ Marshall gave his blessing to a majority opinion six years later in the case of *Green v. Biddle*, in which Justices Bushrod Washington and Joseph Story drew upon principles of natural law to uphold a compact entered into between two States, whereby dispossessed persons holding title under the laws of one State would be compensated for improvements to lands by the persons holding title under the laws of the other, explaining that what the two States had done was to “assert the principle of natural justice. . .that he who takes possession of vacant land, under prima facie legal title, and makes valuable and lasting improvements, shall be considered as a *bonae fidei* possessor,” and entitled to compensation.⁸¹

It was Story, more so than any other member of the Court in the early days of the Republic, who expressed the greatest affinity and exhibited the greatest reliance on the natural law tradition. And it was Story's words that very often appeared in the opinions of California's early Court when its justices saw fit to drink from the wellspring of natural law jurisprudence. While Story was unquestionably the most learned of the men who served on the Supreme Court during his era, what was especially remarkable about him was his intent to disseminate his learning to others, not merely for the purpose of articulating the reasons for the majority's view in any given case, but for the larger purpose of influencing the course of American jurisprudence. American jurisprudence was founded largely on the federal constitution, the organic law of the land, the state constitutions, and on the statutes passed by Congress and the state legislatures. Judicial opinion, too, and the common law, represented other sources and manifestations of jurisprudence in the new nation. Judicial opinion, however, had many additional sources, and one of the chief of these, in the view of Joseph Story, was the tradition of natural law. There is no question that he had read Locke's treatise and embraced it. The reach of his arms, however, was long, hence his embrace encompassed the work of Grotius, Cicero and others as well. He believed, with all of these writers, that a law of Nature did exist. It was, he said, a “system of principles, which human reason has

79. *Fletcher v. Peck* (1810) 10 U.S. 87, 133, 6 Cranch 87.

80. *Id.* at 133-134.

81. *Green v. Biddle* (1823) 21 U.S. 1, 32, 8 Wheat. 1.

discovered to regulate the conduct of man in all his various relations.”⁸² “In its largest sense,” he continued, “it comprehends man’s duties to God, to himself, to other men, and as a member of political society.”⁸³ In creating man, God also created a means by which man might live his life so as to yield peace, happiness and security.⁸⁴ The means by which these things might be yielded was the law of Nature and abidance by it. Happiness and security, though governed by this law, were themselves, he suggested, rights of man emanating from his natural condition, and served to protect the integrity of his life, his limbs, his liberty and the produce of his personal labor to the extent of his present wants, as well as his access to “air, light, water and the common means of subsistence.”⁸⁵ Originally, men lived outside the bounds of political society, in a state of Nature. The law of Nature governed him there, yet his rights were his and his alone to exercise and to protect.⁸⁶ The law and his rights, unfortunately, were not so easily enforced by himself unaided. For this reason, Story postulated, “men enter. . .into civil societies.”⁸⁷ In so doing, men give up a degree of their natural rights, particularly with regard to their private claim to punish those individuals who trespass against them, so as to ensure “the good order, peace and safety of the whole society.”⁸⁸ In place of the individual as enforcer of rights, stands the new government. As its object is the preservation of the general rights and the general welfare of the community, the government may further impair the natural freedom of the people. “Under certain circumstances,” Story explained, “life, and liberty, and property, may justly be taken away; as, for instance, in order to prevent crimes, to enforce the rights of other persons, or to secure the safety and happiness of society.”⁸⁹ “The fundamental objects of all civil governments,” after all, “are, or ought to be, to promote the welfare and safety of the whole society.”⁹⁰ The aggregate of all individuals have rights, and government, the agent and representative of the people, has a duty, perhaps even a right, to exercise its lawful power to whatever reasonable extent necessary to protect the vested interests of all in life, liberty, property and happiness.

Among Justice Story’s firmest convictions was that rights arising out of contractual relationships were among those encompassed within the body of natural law. Contracts already formed, with rights arising from them already vested, could not, he argued, be impaired because “the obligation of

82. Joseph Story, “Natural Law,” in *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1990), p. 313.

83. *Id.*

84. *Id.*

85. *Id.* at 314.

86. *Id.* at 318.

87. *Id.*

88. *Id.*

89. *Id.* at 315.

90. *Id.* at 318.

contracts, or. . .the duty of performing them,” conform with the dictates of natural law and the will of God, “which requires all men to deal with good faith, and truth, and sincerity in their intercourse with others.”⁹¹ The right itself was one deemed so fundamental that the framers expressly extended protection to it.⁹² As James Madison noted, “laws impairing the obligations of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation.”⁹³ The framers, Madison noted, “very properly. . .added this constitutional bulwark in favor of personal security and private rights.”⁹⁴ A question Story and the Court in his day did not address was whether one’s prospective right to enter into a contract could be impaired by an act of Congress or State Legislature. For the next one hundred years after the Marshall Court era, the Supreme Court wrestled with this issue. No one doubted the natural right of men to pursue a trade or to earn a living, but many were uncertain as to the limits of the government’s power to impair that right. What was certain was the notion of the state’s power to legislate for the good of the entire community, even at the expense of the fundamental liberty of individuals. By the 1830s, it became common for the High Court to define the authority to protect and to further communal rights as police powers, and the proposition that the government can necessarily impair rights derived from Nature for the benefit of all members of society as the Police Powers Doctrine.⁹⁵ The doctrine came into its own in 1837 in the Taney Court decision in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge Co.*, in which Chief Justice Roger B. Taney reminded the litigants, and posterity, that “the object and end of all government is to promote the happiness and prosperity of the community by which it is established.”⁹⁶ Individuals have rights, and these rights might be sacred, but, said Taney, “we must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation.”⁹⁷ For him, and the Court’s majority, the legislature did not abuse its authority when it created a new bridge franchise and permitted the erection of a second bridge over the Charles River, even if in doing so it undercut the practical monopoly the earlier franchisee possessed pursuant to the original franchise agreement. The legislature did not abuse its authority because its purpose was to ad-

91. *Id.* at 321.

92. *Constitution of the United States*, Art. I, Sec. 10.

93. “Federalist No. 44,” *op. cit.*, p. 282.

94. *Id.*

95. The phrase is attributable, like so many things in our jurisprudence, to Marshall, who first used it in his famous opinion in the case of *Gibbons v. Ogden* (1824) 22 U.S. 1, 208, 9 Wheat. 1

96. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge Co.* (1837) 36 U.S. 420, 547, 11 Pet. 420.

97. *Id.* at 548.

vance the best interests of society, and these interests were of greater weight than the interests of a single individual.

3. *Natural Law and Slavery*

Taney, of course, was notoriously hostile to business. He was a Jacksonian Democrat, and his fingerprints were everywhere on the successful plan to divest the Bank of the United States of its assets and its charter. And yet, his opinion was not a cynical one, in that it reflected a genuine belief that the legislature has the right, derived from its role as the representative of all of the people, to regulate human conduct for the common good, even when the rights of some of the people might be lost or impaired in the process. The right of the government to uphold the interests of the people and the government's power to actually do so were viewed by Taney and his colleagues as particularly vital—so much so that the Court might only rarely deem state action excessive, unreasonable and, thus, invalid. The one time during its tenure that the Taney Court actually struck down a legislative act was the one time the majority was able to discern an instance where the rights of individuals outweighed the right of the government to regulate for the common good. The case in question was the notorious *Dred Scott v. Sandford*. The decision was a strange one, resulting not from a clear majority, but from a majority of concurring opinions. The general consensus of these various opinions was the rejection of the black petitioner's plea that he was no longer a slave on account of his fortuitous residence on free soil and a holding that the Congressional ban on slavery in the unincorporated territory of the United States in the form of the Missouri Compromise constituted an impermissible interference with vested property rights, rights derived from Nature, the protection of which government was instituted to guarantee. "An act of Congress," said Taney, "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. . . could hardly be dignified with the name of due process of law."⁹⁸

From the standpoint of a century and half later, it is easy to dismiss Taney's opinion as that of a man steeped in racism, hypocrisy and economic self-interest. Taney, however, was no slave-holder and no hypocrite (though he may well have been a racist). He was, in fact, according to Justice Samuel Miller, a "great good man" whom Miller—once the reviler of the Chief Justice due to the latter's opinion in *Dred*—came to regard with the highest sentiments of friendly affection.⁹⁹ It is, perhaps, conducive of a fairer assessment of Taney's infamous decision, and of his vague reli-

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

99. Walker Lewis, *Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney* (Boston: Houghton Mifflin Company, 1965), p. 473; Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003), pp. 51 and 93.

ance on the natural law of property, to note that slavery was the most divisive and controversial issue in the nation's history. It is not imaginable that any issue in the future could ever envelop the nation in such a cloud of hysteria as to provoke the kind of violent outburst that eventually occurred because of and finally ended the institution of slavery. Because it was such a vital and volatile interest, inextricably bound up with the destiny of the nation, Taney could reasonably consider it prudent to avoid an outcome that might radically alter the status quo. The only way to avoid such an outcome, he may have thought, was to adjudge it contrary to natural and vested rights in property for the government to strip a person of what was rightfully his by operation of mere positive law.

Taney's concern not to upset the status quo may well have been reasonable from the standpoint of attempting to repress a conflict thought by fanatics to be irrepressible, yet the rationale by which he transformed his concern (if that is what he actually did) into binding authority was completely untenable pursuant to that same body of natural law theory on which he purported to rely. Grotius and Locke both had suggested that the right to own property was itself a function of the natural impulse men have to sustain their lives. In the State of Nature, no one owned anything until their labor was mixed with some element of Nature's bounty, thereby improving it, or changing it into something capable of use or consumption. Aside from the effort expended in breaking the will of another human being, it would not likely have been discernable either to Locke or Grotius what labor might have been mixed with the prospective human property as to improve it to the point where it became inalienably the possession of another. Both writers spoke extensively of the natural right of individuals to be free from the bonds imposed by other men. Locke himself memorably proclaimed that "the natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man."¹⁰⁰ Latter-day Americans generally approved of this view. The Declaration of Independence had trumpeted man's natural right to liberty. Benjamin Franklin and John Jay served as presidents of the nation's earliest abolitionist organizations.¹⁰¹ Secretary of the Treasury Albert Gallatin, when but a mere state legislator, declared slavery "obviously contrary to the laws of nature, the dictates of justice. . .and natural right."¹⁰² In his peroration before the Supreme Court in the matter of *The Amistad*,¹⁰³ former President John Quincy Adams cited natural law as the fundamental basis of his

100. Locke, *op. cit.*, IV.22.

101. Carl Van Doren, *Benjamin Franklin* (New York: The Viking Press, 1938), p. 774, and Louis Filler, *The Crusade Against Slavery: 1830-1860* (New York: Harper & Row, 1963) pp. 3-4.

102. Raymond Walters, Jr., *Albert Gallatin: Jeffersonian Financier and Diplomat* (Pittsburgh: University of Pittsburgh Press, 1969), p. 376.

103. *The Amistad* (1841) 40 U.S. 518.

appeal for the liberty of his African-born clients.¹⁰⁴ Adams' good friend and admirer, Joseph Story, who authored the Court's unanimous opinion effectively freeing Adams' clients, identified slavery as an institution "so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification."¹⁰⁵ Until *Dred*, the Congress itself had demonstrated an unmistakable tendency to gradually restrict the growth and spread of the institution, first by prohibiting slavery in the Northwest Territory, then by outlawing the importation of slaves from abroad, then in enacting the Missouri Compromise, then by approving the Wilmot Proviso, and, finally, by abolishing slavery in the District of Columbia. Slavery, in the minds of a majority of America's lawmaking class, was a contradiction of that right to be free so integral to the system of natural law.

Defenders of slavery may well have asserted that negroes were less intelligent, less moral and less civilized than white men, and thus by nature not fully capable of freedom, or deserving of it;¹⁰⁶ but, in so asserting, they turned a blind eye to the fact that neither Locke nor Grotius, nor any other important natural law theorist, in stating the natural right of men to be free, ever qualified this right based on any distinctions rooted in race, intellectual capacity or the hallmarks of culture. Men were free by Nature, whether black or white, whether steeped in the accouterments of an allegedly advanced culture, or one primitive in comparison. When the nation's great judicial minds pondered the question of the natural basis of freedom, and made a record of their thoughts in the form of written opinions, they generally could not evade this conclusion. "That it is contrary to the law of nature will scarcely be denied," declared Chief Justice Marshall.¹⁰⁷ "That every man has a natural right to the fruits of his own labor is generally admitted, and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of the admission."¹⁰⁸ Lemuel Shaw, citing Lord Mansfield, attributed slavery not to Nature, but to positive human enactment supported by force.¹⁰⁹ Judge Mills of the Court of Appeals of the State of Kentucky held that the rights of the slaveholder were rights "existing by positive law of a municipi-

104. Adams' argument, which the reporter recalled as being "able and interesting," was not included in the report of the case, notwithstanding the reporter's desire to include it, for the simple fact that Adams failed to provide him with a copy prior to the date of publication. Adams' words, nevertheless have survived, and can be found, among other places, on Yale Law School's Avalon Project website, at <http://www.yale.edu/lawweb/avalon/treatise/amistad/amistad-002.htm>.

105. Joseph Story, "A Charge Delivered to the Grand Jury of the Circuit of the United States. . . For the Judicial District of Maine, May 8, 1820, in Mason Lowance, *Against Slavery: An Abolitionist Reader* (New York: Penguin Books, 2000), p. 33.

106. Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Baltimore: Penguin Books, 1969), pp. 304-305.

107. *The Antelope* (1825) 23 U.S. (23 Wheat.) 66, 91

108. *Id.*

109. *Commonwealth v. Aves* (1836) 18 Mass. (18 Pick.) 193, 211.

pal character, *without foundation in the law of nature*, or the unwritten and common law.”¹¹⁰ Perhaps none said it more emphatically than Justice John McLean, Taney’s dissenting colleague in *Dred Scott*, in a decision announced many years before as a member of Ohio’s Supreme Court, wherein he declared slavery to be an institution having “its origin in usurpation and fraud,” violative of “the immutable principles of natural justice,” and thus incapable of being “sanctified into a right.”¹¹¹ Forty years later, in his powerful dissent in *Dred Scott*, he toned his language down, but remained convinced that “all slavery has its origin in power, and is against right.”¹¹² A near identical point was made by McLean’s fellow *Dred* dissenter Benjamin Curtis, who, six months before resigning in disgust from the High Court, placed on record his view regarding “the social and moral evils of slavery” and “its inconsistency with the Declaration of Independence and with natural right.”¹¹³ In accord with Justice Curtis and the others cited here, this author can safely express his view that far from being a right derived from Nature, the alleged right to own another person was so contrary to the notion of natural law and natural rights as understood in the eighteenth and nineteenth centuries as to render Taney’s opinion an unfortunate, albeit unintentional, mockery of justice, and hardly a stain, as John Hart Ely and others have suggested, on that same natural law tradition by which Taney and other defenders of slavery in America wrongly sought to justify an institution morally discreditable then, and thoroughly discredited and reviled today.

4. *Natural Law Comes to California*

To the credit (in contemporary eyes) of those Americans who came to California and took part in the framing of California’s first constitution, when the issue of slavery and its legality came to the fore during the State’s Constitutional Convention its legality was unanimously rejected. It was rejected in large part because of the wide currency among the delegates of a natural law tradition that held slavery to be an unnatural and illegitimate institution. This tradition influenced the delegates on issues other than just slavery. In fact, California’s framers loudly proclaimed their essential accord with the compact theory of government detailed by Locke and evident in the constitutional theories and memorials of the nation’s leading justices and those who, prior to 1849, had drafted both federal and state constitutions. Why this was the case has perhaps much to do with the intense experience that life on the American frontier must have entailed, especially for those from the more settled parts of the nation. That state of Nature they

110. *Rankin v. Lydia* (1820) 2 A.K. Marsh. 467, 9 Ky 467, 1820 WL 1098, 3 (Ky).

111. Clare Cushman, *The Supreme Court Justices: Illustrated Biographies, 1789-1993* (Washington, D.C.: Congressional Quarterly, 1993), p. 102-103.

112. *Dred Scott v. Sandford* (1857), *supra*, at 538.

113. *Id.*, at 620 and 624.

had read about in books, or heard of in discourse with others, was now starkly highlighted in the experience of daily life. The government of California from 1846 to 1849 was virtually non-existent. A military regime ruled from Monterey, but its influence over the affairs of the people was minimal. Its leadership had eradicated the previous Mexican establishment, such as it was, and though it had proclaimed the laws of Mexico to still be in effect, much of the actual governance of the territory was conducted in the mining camps by ad hoc committees harboring a softness for vigilantism and summary proceedings. Life indeed was unpredictable, individual interests were ever threatened, and the passion of the crowd undoubtedly led to numerous miscarriages of justice, occasionally with fatal result. Many there were who were anxious that the virtually non-existent military regime be replaced by a regular civil authority, if only to bring a greater degree of security to the interests of all people. Delegates to the state constitutional convention, such as future Senator William Gwin, considered California to be very much in a state of Nature. It was, he reported, “like a blank sheet of paper, upon which we are required to write a system of fundamental law.”¹¹⁴ Though technically incorrect, in that Mexican law formally still did apply, and a government of sorts did exist, Gwin’s assessment may well be more accurate than the technical truth. The military did rule California, but only in the loosest sense. Mexican law did apply, but the law itself was largely unknown. The Mexican statutes were available only in far off Mexico City, and any judicial, executory, or independent scholarly gloss on these statutes was even more difficult to come by.¹¹⁵ Land titles in particular were a tangle, with persons claiming under three or four different authorities. If a state of Nature did not formally exist, it may as well have, and California’s delegates to its Constitutional Convention certainly approached their task as if Locke’s mythical natural state was indeed all around them.

In drafting the State Constitution, the delegates opted to open the document with a resounding reiteration of natural law theory, by stating that “all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.”¹¹⁶ Though it was conceded by the convention that the people form the government for the purpose of providing themselves with protection, security, and general benefits, the majority view held, in complete harmony with Locke’s theory, that the people retain an inherent political power which they might re-invoke should the government they

114. Gordon Lloyd, “Nature and Convention in the Creation of the 1849 California Constitution”, 6 *Nexus J. Op.* 23, at 27.

115. See Justice Baldwin’s dicta in *Hart v. Burnett* (1860), 15 Cal. 530, 611.

116. *Cal. Constitution of 1849*, Art. I, § 1.

invest with authority fail in its fundamental task.¹¹⁷ A series of essential rights, once said to be derived from Nature, was expressly incorporated into the Constitution, including the right to a jury trial, the right to freely exercise one's faith, the freedom from excessive bail, the freedom to speak openly, to write and publish one's sentiments, the right to peaceably assemble publicly, the right to petition the legislature, the right to be free from unreasonable searches and seizures, and (at least for some) the right to vote. By the close of the debates and the completion of the drafting process, the delegates would proclaim their confidence that the government they formed rested securely "on the eternal principles of equity and justice."¹¹⁸ No stronger statement manifesting the significance of the role that the natural law tradition was intended by the State's founders to play in California could have been issued.

III. Natural Law Jurisprudence in California

A. The Early Court and The Law of Nature

Gwin, of course, was incorrect in his assumption that California was a jurisprudential *tabula rasa*. Numerous legal traditions converged in California at the time of the founding of the State and the framing of the State Constitution in 1849, and these traditions influenced the authors of both the fundamental or organic structure of the government and the codes that were soon thereafter drafted. The State Constitution and the civil and criminal practice codes were two of the primary components of California's early law, and together constituted the formal beginnings of the State's jurisprudence. The judges and justices first elected to the bench were charged with applying the law to the facts as presented to them, but it was not infrequently the case that the formal law itself was lacking in clarity, or was entirely nonexistent, or, given the dearth of available sources, completely unknown, thus requiring the Court to find principles of law which might bridge the gap between what was written and what was just. Like the framers of California's Constitution, motivated in part by a commitment to fundamental principles drawn from the natural law and natural rights tradition, California's first jurists had occasion to draw upon that same tradition, particularly when considering the merits of what litigants alleged to be fundamental or natural rights, immune, in theory at least, to the would-be impairments imposed by the State's Legislature. Chief among the sources of natural law on which the Court relied was Locke's *Second Treatise of Government*. That Locke's theories animated the imaginations of the members of California's high court is clear as early as 1855 in the Court's deci-

117. *Cal. Constitution of 1849*, Art. I, § 2.

118. *Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October of 1849*, pp. 474-475, cited by Gordon Lloyd, *op. cit.*, p. 41.

sion in the case of *People v. Folsom*, in which the heiress of Captain William A. Leidesdorff, the deceased former owner of a large Mexican-era rancho in the vicinity of Sacramento, sought to enforce her right as the Captain's heir-at-law.¹¹⁹ The State sought to appropriate the late Captain's estate on the grounds that the common law, and with it the law of escheats, was immediately imposed upon California at the conquest of the territory by American arms. Because Leidesdorff's heir was incapable under the common law of inheriting, the land must necessarily escheat to the State. Observing the blatant opportunism of the Legislature, some of the members of which undoubtedly marveled at the prospect of assuming control of the valuable property, Chief Justice Hugh C. Murray contemplated the equity of the situation and found in favor of the would-be heiress. Mexican law, he stated, may well have been obliterated along with the Mexican regime upon the coming of American troops, but the common law did not, upon their arrival, automatically become the law of the land.¹²⁰ Yet neither was California lawless. Instead, between the time following the collapse of the Mexican government in 1847 and the establishment of the State government in 1849, California was in that peculiar state known as the state of Nature so familiar to students of Locke, who had explained that upon the dissolution of the polity, whether due to internal discord or foreign invasion, "everyone returns to the state he was in before, with a liberty to shift for himself and provide for his own safety, as he thinks fit."¹²¹ "In the absence of any law on the subject" and in the context of the state of Nature, Chief Justice Murray proclaimed, "the principles of the natural law would prevail."¹²² As the principles of natural law included both the inheritance by the kin of a decedent and the power of men "to bestow their estates on those who please them best,"¹²³ Chief Justice Murray concluded that "by the rule of natural justice" Leidesdorff's heiress "became entitled to the possession."¹²⁴

More than any other justice to serve in later days on the State's Supreme Court, Murray was by far the most extreme in his commitment to the Lockean tradition of natural rights. Nowhere is this more clear than in his majority opinion in *Billings v. Hall*, in which the Court struck down an Act of the Legislature requiring absentee landowners to pay squatters the value of the latter's improvement on the grounds that the Act represented an impermissible interference with the fundamental right embodied in Article I, Section 1 of the State Constitution.¹²⁵ Murray, a young man barely thirty years of age, reputedly enamored in the extreme with liquor and only

119. *People v. Folsom* (1855) 5 Cal. 373.

120. *Id.* at 379.

121. Locke, *op. cit.*, XIX.211.

122. *People v. Folsom*, *supra*, at 378.

123. Locke, *op. cit.*, VII.77.

124. *People v. Folsom*, *supra*, at 378.

125. *Billings v. Hall* (1857) 7 Cal. 1.

months away from a premature grave, was undoubtedly a racist, not above relying on what might be called “non-canonical” notions of natural law when justifying expansion of the scope of an already racist statute,¹²⁶ and was also quite possibly a “corrupt and immoral man,” as the son of the martyred journalist James King of William charged,¹²⁷ but he was without question a meticulous jurist, heavily influenced by the tradition of rights stemming in part from the Magna Carta and the ideas of Justice Story as articulated in such cases as *Green v. Biddle* and *Wilkinson v. Leland*.¹²⁸ The greatest influence upon his conception of rights emanated from the writings of Locke.¹²⁹ Quite overtly Murray rejected the model of legislative supremacy as articulated in the extreme by Thomas Hobbes. Just as overtly he embraced Locke and Locke’s contention ‘that the great end of man’s entering into society being the enjoyment of property in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law is the establishing of the legislative power; the first and fundamental natural law which is to govern the legislature itself, is the preservation of the society, and so far as consistent with public good, every person in it.’”¹³⁰ The legislature, however, was limited in its power. “It cannot possibly be absolutely arbitrary over the lives and fortunes of the people.”¹³¹ What bounds the scope of its authority is the law of Nature. “The law of Nature stands as an eternal rule to

126. See *People v. Hall* (1854) 4 Cal. 399, in which Chief Justice Murray determined that the legislature intended a law prohibiting admission of testimony of “Negroes” and other persons of color when the testimony was directed against white persons to extend to persons of Asian descent. In justifying his interpretation of the statute, the Chief Justice explained that Asians were “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impossible difference.”

127. Charles James King, “The Vigilance Committees,” Chapter VII in Leigh H. Irvine’s *A History of the New California: Its Resources and People*, Volume I (New York: The Lewis Publishing Company, 1906). King’s view was not shared by everyone. Oscar T. Shuck held Murray in high esteem, noting: “the record of his life will bear the closest scrutiny, and will lead the candid foe to confess, that he was uncorrupted and incorruptible.” See Shuck, *Representative and Leading Men of the Pacific* (S.F.: Bacon and Company, 1870), p. 476.

128. *Green v. Biddle* (1823) 21 U.S. 1, 8 Wheat. 1, and *Wilkinson v. Leland* (1829) 2 Pet. 657.

129. While it is true that Chief Justice Murray believed non-white races were inferior by nature to persons of Caucasian heritage, it was not a belief he acquired from any reading of Locke, Grotius, or any other important writer in the Natural Law tradition. Locke himself, it should be recalled, spoke in broad terms regarding the natural right of individuals to be free, and even upheld contemporary Native Americans as epitomes of persons living in a State of Nature, who, he explained “enjoyed their own natural freedom.” [Locke, *op. cit.*, VIII.105]. Both he and Grotius were notable in their efforts, when arguing on behalf of natural law, to allude to history, written authorities and experience. Murray, in his argument, merely generalizes without any exemplification. Consequently, Murray’s racist views cannot but be seen as much more than prejudices which he attempted to justify (thinly and improperly) on the grounds of the law of Nature.

130. *Billings v. Hall*, *supra*, at 10.

131. *Id.* at 11.

all men, binding upon legislatures as well as others.”¹³² The law of Nature embodies those rights that individuals enjoyed prior to incorporation of the body politic. Men might unite “to avoid the inconveniences which disorder men’s property in a state of Nature,” but the act of union does not obscure the specific motive underlying the union: the protection of each individual’s life and property. “Men would not quit the freedom of the state of Nature and tie themselves up under a government, were it not to preserve their lives, liberty, and fortunes, by stated rules.”¹³³ “It was,” he explained, “fallacious to think that the supreme or legislative power” presiding over “any commonwealth can do what it will, irrespective of the principles of natural justice, or dispose of the estates of subjects arbitrarily, or divest vested rights at pleasure.”¹³⁴ The law at issue in *Billings* did just this, concluded Murray, and, for this reason, it could not stand.

Justice Murray’s audacious articulation of natural law as a law transcending all other law in California did not go unchallenged. Playing Iredell to Murray’s Chase, the Chief Justice’s associate on the bench, David Terry, objected to the majority decision. No uncompromising opponent of Locke’s social compact theory, Terry nevertheless questioned the principle that the people retain such inchoate authority as to permit them, or the Court they elect, to override the acts of the legislature. Quoting Blackstone’s express critique of Locke’s hypothesis that “there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the Legislature act contrary to the trust reposed in them,” he agreed with that learned commentator that “this devolution of power to the people at large, includes in it the dissolution of the whole form of government established by that people— reduces all the members to their original state of equality, and by annihilating the sovereign power, repeals all positive laws whatsoever before enacted.”¹³⁵ That natural justice might be the express basis of the people’s revolt against the state or of the Court’s annulment of legislative acts was a proposition that carried little weight with Terry, who firmly believed, with Justice Iredell in *Calder v. Bull*, that “the ideas of natural justice” have no legitimate place in the jurisprudence of the land because they “are regulated by no fixed standard.”¹³⁶ The law in question admittedly imposed an obligation on a legal title-holder that was unwanted and unbargained for. It did call into question the issue of fundamental rights in property. And yet, said Terry, it was a reasonable exercise in legislative discretion, aimed at the encouragement of the improvement of the vast unsettled spaces of California and a balancing of equities between those who own land but do not live upon it and those who

132. *Id.*

133. *Id.* at 11-12.

134. *Id.* at 12.

135. *Id.* at 23.

136. *Id.*

do not own it, but who, very often by mistake, take up on and develop it, only to learn later that legal title lies elsewhere.

While he could not admit to the validity of the particular manifestation of the Chief Justice's natural law jurisprudence, Terry exhibited little difficulty in conceiving of an appeal to natural justice in support of his own dissent. Under the circumstances informing the legislature's Act, he noted, "we may well doubt whether it would be a greater violation of natural justice to deprive hundreds of citizens and their families of the homes erected by the labor of years, without making any compensation for the improvements which constitute a great part of the value of those homes, or to permit them to retain possession of them upon paying the owner of the soil the full value of all that is really his own."¹³⁷

How deeply Terry was committed to Locke's theories and to Natural Law generally became all too evident in the following term, in the case of *Ex parte Newman*.¹³⁸ In that case, a shop owner of the Jewish faith sought his freedom following conviction for violating a penal law prohibiting the sale of goods on Sundays. Writing for the majority, which granted the petitioner his writ, Terry reiterated Locke's general thesis that "when societies are formed, each individual surrenders certain rights, and as an equivalent for that surrender has secured to him the enjoyment of certain others appertaining to his person and property, without the protection of which society cannot exist."¹³⁹ The legislature, he declared, possesses "the right to so restrain each one, in his freedom of conduct, as to secure perfect protection to all others from every species of danger to person, health, and property, that each individual shall be required so to use his own as not to inflict injury upon his neighbor."¹⁴⁰ This principle was not, he suggested, at odds with Article I, Section 1 of the State Constitution. Nor was Terry himself at odds with Murray's commitment to "those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen." What he articulated was a *balancing* between liberty and safety, or between the natural right of the citizen to pursue a living and the government's role as a guarantor of the rights of all the people to be safe and secure from the embroilments characteristic of the state of Nature. Here, because the law presumed to dictate when a man might work, and was inspired, in Terry's view, largely by a particular religious perspective contrary to Article 1, Section 4 of the State Constitution, the law trespassed upon the liberties of the people without producing any concomitant enhancement of the public safety or well-being. Concurring with Terry, Justice Peter Burnett appealed more forcibly to principles of abstract justice, noting, however, that such was proper only when "a given

137. *Id.* at 26.

138. *Ex parte Newman* (1858) 9 Cal. 502.

139. *Id.* at 507.

140. *Id.* at 508.

construction of the law is clearly contrary” to those principles.¹⁴¹ Here, he asserted, the law in question and natural justice were quite manifestly in conflict. Consequently, the law itself was void.

Of the three members of the Court reviewing *Ex parte Newman*, only Justice Stephen Field believed the law was a proper exercise of the legislative power, consistent with the principle that government must uphold the physical and moral well-being of society. Pursuant to Locke’s balancing of the natural rights of individuals against the fundamental rights of individuals in the aggregate, Field found the interests of the latter weightier than the former. That he was committed to such a balancing process, and not incapable of vindicating the rights of individuals even when those rights might conflict with the prerogatives of government is known to anyone familiar with his famous dissent in the *Slaughter-House Cases*, when, as a member of the Supreme Court of the United States, he declared that the Fourteenth Amendment “was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.”¹⁴² There were, however, bounds that even the Legislature could not exceed when fulfilling its authorized role as rule maker for society. In the case of *Ex parte Newman*, those limits had not been exceeded. Even the role that Christianity might have played in influencing the legislators and shaping the legislation was of no great concern to him, nor was it a surprise. Unlike Terry and Burnett, who favored a much stricter division between spiritual motives and legislative results, Field recognized the fact that Christianity “is the basis of our civilization and that its spirit should infuse itself and humanize our laws.”¹⁴³ For Field, Christianity, and religion in general, acted in much the same way as did natural law, providing a source of universal morality to be drawn upon by lawmakers attempting to devise means by which individuals might live in freedom with one another without a breach of that compact designed to avert the dangers and uncertainties inherent in the state of Nature.

In the years following *Newman*, the California Court would more frequently than not uphold the Acts of the legislature. The Justices composing that panel were generally selected from the ranks of the most prominent attorneys in the State, and as they ran for election on statewide tickets they invariably became objects of fancy in the eyes of powerful interests—the same interests that allegedly bought seats in the assembly and senate for amiable and compliant candidates. The members of the Court during the 1860s could boast distinguished professional associations at least as impressive as any member of either house of the State legislature. Before and after his service on the High Court, the name of Justice Joseph Baldwin was

141. *Id.* at 512.

142. *In re Slaughter-House Cases* (1872) 83 U.S. 36, 105, 16 Wall. 36.

143. *Ex parte Newman*, *supra*, at 523-524.

affixed to the shingle hanging before the door of one of San Francisco's chief corporate law offices.¹⁴⁴ Silas W. Sanderson represented the interests of the Big Four both before and after (and perhaps during) his years on the State Supreme Court.¹⁴⁵ Edwin Bryant Crocker did Sanderson at least one better by virtue of being the actual sibling of the biggest of the Big Four.¹⁴⁶ When legislation drafted by law makers beholden to the State's powerful interests came to be challenged in the Courts, a bench owing its prominence and prestige to those same powerful interests generally found little objectionable in its provisions. And, yet, as predictable the outcome of judicial challenges to acts of the legislature might have been, the members of the High Court remained generally bound by the conventions of the law and the power of precedent. As much as the bench might have been biased in favor of a particular outcome, it was nevertheless required to articulate that bias and in some measure temper it via the language of rights embodied in the State Constitution and the prior decisions of the Court. Not surprisingly, the Court continued to speak in terms of balancing the rights of individuals against the rights and duties of government to safeguard the interests and well being of all.

In the case of *Gilmer v. Throckmorton*, Justice Baldwin explained that "important as are the interests of each man, they must sometimes yield to the interests of all; and the Government, which acts for the whole, must be permitted to work out its general object, though sometimes at the expense of the natural rights of individuals."¹⁴⁷ In *Cohen v. Wright*, the Court again upheld a legislative act, this time in the form of a law requiring attorneys to swear an oath of allegiance to the federal Government—a provision inspired by the ongoing Civil War and quite likely the recent decision of former Chief Justice Terry to return to his native Texas to wage war against the United States.¹⁴⁸ Article I, Section 1 of the State Constitution was the basis for the challenge to this law. As noted by Justice Crocker, "the great natural right to life, liberty, and property is fully recognized by this section of the Constitution."¹⁴⁹ The right to practice law, however, was not a right rooted in Nature, but was, instead, a creature of statute.¹⁵⁰ Even had it been

144. His prominence is attested to by the newspapers of the day, as well as by Oscar T. Shuck, in a sketch appearing in *Representative and Leading Men of the Pacific* (S.F.: Bacon and Company, 1870), at p. 140.

145. John Norton Pomeroy, *Some Account of the Work of Stephen J. Field* (Clark, N.J.: The Law Book Exchange, 2003), p. 238; Central Pacific Railroad Company, *Annual Report of the Board of Directors of the Central Pacific Railroad Company to the Stockholders* (S.F.: H.S. Crocker and Company, 1879), p. 59.

146. Cornelius Cole, *Memoirs of Cornelius Cole, Ex-Senator of the United States From California* (N.Y.: McLaughlin Brothers, 1908), p. 129; Edwin Legrand Sabin, *Building the Pacific Railway* (Philadelphia: J.B. Lippencott Company, 1919), p. 46.

147. *Gilmer v. Throckmorton* (1861) 18 Cal. 229, 253.

148. *Cohen v. Wright* (1863) 22 Cal. 293.

149. *Id.* at 325.

150. *Id.* at 319.

a natural right, it might still be subject to legitimate impairment by act of the legislature. “The government,” he said, “owes the duty of protection to the people in the enjoyment of their rights, and the people owe the correlative duty of obedience and support to the Government.”¹⁵¹ If the government failed in its duty to protect individuals in the exercise of their rights, the people might take advantage of their right to alter or even overthrow the government— which is exactly what many in the rebellious southern states were at that very moment attempting to do. Until such failure occurred, “the citizen cannot demand protection without” rendering “the equivalent of obedience and support.” The disqualification of the appellant here from the practice of law was thus appropriate, as was the law underlying it. “The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society.”¹⁵²

The willingness of justices to uphold laws regulating conduct and impairing the freedom of individuals may in part have been owing to the disruption of the social and political order following the outbreak and then the conclusion of the great Civil War. The great responsibility of government to safeguard the interests of all individuals, as well as to foster the well-being of society, coupled with its fundamental right to exist in accordance with the paradigm articulated by Locke, undoubtedly influenced judges, as well as legislators, quite independent of any loyalties they might have pledged to those powerful financial interests that assisted in their rise to judicial heights. By the end of the decade during which the terrible conflict was fought, and in the midst of the constitutional crises culminating in the impeachment of the American President by the Reconstruction Congress, California had thoroughly embraced a theory of government emphasizing the public welfare, even at the expense of individual liberty. California’s great guarantor of liberty, Article I, Section 1 of its Constitution, came to be seen by the Court “not as putting life or liberty entirely beyond the reach of the Government, if, from misconduct, the general welfare of the community demands its sacrifice or restraint; or as allowing every one to acquire, possess and enjoy property after his own unregulated manner, and according to his uncontrolled will, but in such a manner, and by such means, as the general welfare of the community may require him to observe; or as allowing every one to seek safety and happiness in his own way, or according to this own notion, but by such ways and methods as the general good may demand.”¹⁵³ In *Ex parte Smith*, the Court evinced its commitment to the principle embodied in these words by refusing to grant writs of habeas corpus to two women convicted of violating a law barring “the fairer sex” from saloons during certain hours of the day. Echoing Locke’s general the-

151. *Id.* at 325.

152. *Id.* at 326.

153. *Ex parte Smith* (1869) 38 Cal. 702, 705.

sis, Justice Sanderson opined that “governments are formed for the purpose of securing and protecting men in the enjoyment of their natural rights, and they would fail of accomplishing that object if the power to regulate or prescribe the mode in which such rights are to be exercised be not lodged in the law-making department.”¹⁵⁴ No government could exist without such a compromise. “Without it,” he said, “all men would be in a state of Nature, that is to say, without any restraint upon their conduct, except their own wills and the forcible opposition of their fellows.”¹⁵⁵ Rights are essential to a free society, and to the extent possible, they must be protected by the Courts and respected by the Legislature. The people must be free to pursue their private interests, to life, to work, to acquire property, to be happy. If these pursuits are impaired impermissibly by the legislature, the people may effect a change through the ballot box. Should the exercise of the franchise prove ineffective to remedy legislative tyranny “a further remedy lies in revolution, or the right which the people have to change their form of government whenever it becomes oppressive or fails to afford that security for the rights of men which it was intended to provide.”¹⁵⁶ Mere restraint on the rights of the people, however, could not be construed as oppression and did not justify revolution. The legislature can only allow individuals to pursue their natural interests “in a way and by means which will not prevent others from doing the like.”¹⁵⁷ While an individual “may pursue and obtain safety and happiness, he cannot be allowed to do so in a manner which may endanger or unreasonably impair the safety and happiness of others.”¹⁵⁸ All law is a restraint on freedom, or an interference with the natural rights of persons. But far from being repugnant to the principles embodied in Article I, Section 1 of the State Constitution, laws restricting human liberty are “indispensable to the preservation and inviolability of the very rights in question.”¹⁵⁹ Without some restriction, society would disintegrate into a state of conflict, with each individual the sole judge of right and wrong, executing his own concept of justice in the pursuit of what he himself believed to be his rightful due. The social compact must be upheld, and if the fundamental freedoms of mankind as derived from Nature and for the protection of which California’s own government was formed, must be curtailed to do so, such was a necessity of which no reasoning person could complain.

154. *Id.* at 704-705.

155. *Id.* at 705.

156. *Id.* at 707.

157. *Id.* at 706.

158. *Id.*

159. *Id.*

B. The Impact of the Fourteenth Amendment on California's Natural Law Jurisprudence

1. California's Courts Construe the Fourteenth Amendment Narrowly

Ex parte Smith, though rightfully castigated today by proponents of gender equality, was significant not only for its exposition of the Court's then thinking on the balancing of Locke's principles of natural rights and the fundamental role of the state in preserving the forum in which these rights might be exercised, but also for the opportunity the case provided the Court to consider, for the first time, the impact of the Fourteenth Amendment upon state regulation and restriction of individual freedoms thought to be derived from the state of Nature. The petitioners in this case sought release from prison on the grounds that their liberty had been curtailed contrary to the State Constitution, because their imprisonment ran afoul of the Fourteenth Amendment's prohibition on States making or enforcing any law abridging the privileges or immunities of citizens of the United States, depriving any person of life, liberty or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. The Amendment had its origins in the partisan conflict between President Johnson and the House of Representatives led by Thaddeus Stevens. When Congress attempted to pass a law extending protection to free blacks in the southern States, President Johnson vetoed it because, in his view, it violated the procedural guarantees of the Fifth Amendment and permitted the Federal government to regulate not merely state misconduct, but the misconduct of private citizens in violation of the principles of federalism. The House responded to the President's veto with a new amendment to the Constitution. Those who drafted and sponsored the amendment (though not necessarily those who voted in favor of it) believed it did more than protect the nascent freedoms of former slaves. Its primary author, John A. Bingham of Ohio, explained that the privileges and immunities clause was lifted directly from Article IV, Section 2 of the United States Constitution and incorporated the entire federal Bill of Rights as a limitation on State restrictions on individual liberties.¹⁶⁰ Bingham's colleague on the drafting committee, Roscoe Conkling of New York, stated in a brief submitted to the United States Supreme Court in the case of *County of San Mateo v. Southern Pacific Railroad* that while the condition of former slaves "brought on the occasion for constitutional amendment. . .the accumulated evils falling within the purview of the work, were the surrounding circumstances in the light of which" the drafters "strove to increase the safeguards of the Constitution and the laws."¹⁶¹ When Justice Sanderson and the Supreme Court of California reflected upon the meaning and scope of the Fourteenth Amend-

160. Kelly & Harbison, *op. cit.*, p. 461.

161. See Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Hamden, Conn: Archon Books, 1963), pp. 415-416.

ment, the Supreme Court of the United States had yet to provide any guidance in the interpretation of the Amendment's language. Without more authoritative exegesis, Justice Sanderson fell back upon the traditional discretion granted the Legislature in passing laws touching upon the health, safety, morals and well-being of individuals and society.¹⁶² Though the law in question prohibited conduct in women that it permitted in men, this distinction was not, in his view, sufficient to deem the law contrary to the requirements of the Fourteenth Amendment that no person be denied equal protection of the laws. The Legislature routinely made distinctions between classes of persons when drafting legislation. Certain classes of persons were statutorily prohibited from entering into binding contracts; other classes were exempted from military service and jury duty. Law in general recognized differences between women and men and consequently treated them differently. To rule that the law in question was a violation of the Fourteenth Amendment simply because of a distinction between genders and unequal treatment of the two "would be to erase three fourths of the statutes of this State, to overturn the foundations of the common law itself and to discard as useless, the main pillars of the social compact."¹⁶³ The Legislature should be left to discern the needs of society and what protections classes require in order that their life and liberty might not be more greatly impaired than the law itself allows. "If the wrong is of that character which permits of its being done only by certain classes of person, or by one sex and not by the other, neither reason nor the Constitution. . . of the United States, requires that the remedy should be broader than the evil, or be made to act upon persons other than those whose conduct produces the mischief, or stands in the way of the Legislature's directing the remedy, by special designation, against the class or sex to which, if so be, the wrong or evil is exclusively due."¹⁶⁴

The appeal to the Fourteenth Amendment by Ms. Smith was in truth a minor point. The Fourteenth Amendment was as yet an unknown quantity, its scope was uncertain, and its power to restrict state action untested in the one forum where it most counted: the Supreme Court of the United States. In 1872, in its opinion in the *Slaughter-House Cases*, the nation's highest court finally did interpret the Amendment.¹⁶⁵ The interpretation proved remarkably narrow. In considering the validity of a State law banning all but a single slaughter-house from operating within a particular locality, the Court held that States *could* impair the rights and liberties of their citizens pursuant to the States' legitimate power to regulate dangerous and inconve-

162. Interestingly enough, after Justice Sanderson left the bench, he would become one of the nation's pre-eminent advocates of a broader interpretation of the Fourteenth Amendment, joining with Roscoe Conkling in an attempt to convince the Supreme Court of the United States that corporations had rights which the Fourteenth Amendment was designed to protect.

163. *Ex parte Smith*, supra, at 711-712.

164. *Id.* at 712.

165. *In re Slaughter-House Cases*, supra.

nient activities. Though the law infringed upon the right of individuals to freely pursue their trade, and granted a particular corporation exclusive privileges, the Fourteenth Amendment's provisions regarding privileges and immunities and equal protection of the laws were inapplicable. These provisions did not apply because the Amendment itself represented a remedy to a particular historical problem—the problem of negro slavery—and to the issue of whether rights long thought to be natural to men and predating their entry into organized political society would be recognized as belonging to former slaves. “The process of restoring to their proper relations with the Federal Government and with the other States,” wrote Justice Samuel Miller, . . . “notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before.”¹⁶⁶ Recent history had revealed the fate of the former slave under regimes free from the authority of military governors committed to the political equality of the races. By empowering the Federal Government to protect the liberties of former slaves, the Congress provided a mechanism whereby the States might be restrained from impairing these liberties. To determine that the Fourteenth Amendment was anything more than a means of preventing the disenfranchisement of recently liberated bondmen, or to hold that the appellants' contentions that the Fourteenth Amendment remedied the impairment of purely economic rights would be “to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character.”¹⁶⁷

It is a remarkable testament to the stubbornness and perhaps the desperation of Americans that, despite the narrow ruling of the Supreme Court in the *Slaughter-House Cases*, citizens continued to attempt to raise the Fourteenth Amendment when States impaired the freedoms which either their State Constitutions guaranteed, or which they believed were theirs by right regardless of any formal warranty in the organic law. No doubt they took heart in the words of dissenting Justice Stephen Field, pointing out the existence of “the fundamental idea upon which all our institutions rest,” which “unless adhered to in the legislation of the country our government will be a republic only in name.”¹⁶⁸ The idea he referred to was the idea that the laws enacted by States pursuant to their right and authority to foster the health, safety and well-being of the people be uniform in operation, without exception or exemption granted to any class of person. Field's fellow dissenter, Justice Joseph Bradley, was by far more evocative of traditional Lockean natural rights theory in his declaration that “there are certain fundamental rights which [the government's] right to regulate cannot in-

166. *Id.* at 70.

167. *Id.* at 78.

168. *Id.* at 110.

fringe.”¹⁶⁹ Among these rights was the right, long recognized in the English Constitutional tradition (and by Locke himself), of an individual “to follow whatever lawful employment he chooses to adopt.” This right, he said, “is one of his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not.”¹⁷⁰

Californians, like many Americans throughout the United States, responded favorably to the potential seemingly inherent in the Amendment’s broad language (and, perhaps, in the words of its former Chief Justice and his fellow *Slaughter-House* dissenters). Defeat was the fate of most early challenges to the scope of the law. Eight years after the decision in the *Slaughter-House Cases*, California’s Supreme Court opined “the adoption of the Fourteenth Amendment was one of the results of the late Civil War, and its object and purposes were to secure to the recently enfranchised people of the Southern States equal rights and protections under the law.”¹⁷¹ Even in cases involving the intended beneficiaries of the Amendment, the Court was less than sanguine in using the Amendment as the basis to strike down discriminatory laws. In *Ward v. Flood*, a case remarkably similar in certain respects to the infamous *Plessy v. Ferguson*, the Court refused to rule a school segregation law repugnant to the Fourteenth Amendment on the grounds that so long as the separate school systems provided by the district for black and for white children were equal, which the Court said was the case here, segregation was entirely permissible.¹⁷² In *Ex parte Ah Fook*, the Court refused to issue writs of habeas corpus to women of Asian race detained in accordance with a quarantine law. The law, it declared, applied to persons of all races, not merely to Asians.¹⁷³

As appellants raised the issue of natural rights and the Fourteenth Amendment’s broad scope, the Court found itself strangely backing away from the natural rights/natural law discussion. Some have credited the spirit of the age and the moving intellectual impulses of the era with the general abandonment of natural law by the judicial caste.¹⁷⁴ Prominent continental political philosophers such as Hegel and Marx had argued in the early and mid-Nineteenth Century that rights themselves were the result of historical processes initiated by warring elements in society. The positivist school of legal and political thought elevated codification and practicality as the preferred approach to the issue of law in general and rights in particular. Law, too, had become more plentiful. Gone were the days when treatises were rare, laws uncodified, and reports unheard of. The first law

169. *Id.* at 114.

170. *Id.* at 113-114.

171. *Kolloch v. Superior Court of San Francisco* (1880) 56 Cal. 229, 239.

172. *Ward v. Flood* (1874) 48 Cal. 36.

173. *Ex parte Ah Fook* (1874) 49 Cal. 402.

174. See Timothy Sandefur in “A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,” 32 *Southwestern University Law Review* 569, 633.

library in the State was organized in San Francisco in 1853.¹⁷⁵ The State itself began publishing the Reports of its high court soon thereafter. A formal written code, encompassing myriad areas of the law, took shape under the supervision of Creed Haymond, and was officially enacted by the State legislature in 1872, with amendments proposed by a committee composed of Justice Field, Jackson Temple and John Dwinelle.¹⁷⁶ With access to the law itself facilitated by the wider currency of published sources, and the steady accumulation of a reasonably substantial body of common law decisions, California's justices could seek guidance and enlightenment in more than mere theory. Consequently, natural law became less important, less crucial to the decision-making process, and less substantial a source, in the eyes of justices, of a law they were charged with interpreting and applying. And it wasn't merely justices who cast their eyes and imaginations beyond the natural law tradition. The individuals who came together in 1879 at the State's second constitutional convention for the purpose of reformulating California's organic law were not entirely enamored with natural law. Some, indeed, were outrightly hostile to it. Those delegates affiliated with the more radical political elements in the State, such as the Workingman's Party, openly advocated confiscation of private property contrary to any notion of natural right articulated by Locke and other natural law theorists. Property for them, as noted by delegate Patrick Dowling, was whatever the positive law declared it to be.¹⁷⁷ This radical break by Dowling and others with the natural law tradition, however, was not so widespread as to permit a fundamental alteration of the organic structure of the law in California. Though they significantly altered the State's constitutional system, the delegates ultimately voted to retain virtually intact Article I's verbiage recognizing the natural law origins of the social compact and of those rights that individuals allegedly retained even after their exit from the state of Nature. This view continued to compete with a broader conception of what law truly was and how rights originated, influenced in part by the intellectual currents of the day, in part by the plentitude of competing legal authorities. Not surprisingly the Court's own articulation of rights shifted with the new intellectual fashion, replacing the traditional natural law justification for the state's curtailment of individual rights with what, in other parts of the country, had become known as the Police Powers Doctrine.

What the Police Powers Doctrine was (and is) was a reformulation of Locke's concept of the State's duty, purpose and right to provide security for the people through the passage of laws designed to positively affect the

175. Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 1991), p. 27-28.

176. Jeremiah F. Sullivan, "Seventy-Five Years of Law in California," in *The San Francisco Bulletin*, September 8, 1925, and Arvo Van Alstyne, *The California Civil Code*, originally published in 6 West's Annotated California Codes 1-42 (1954).

177. Sandefur, *op. cit.*, at 641.

health, safety, morals and well-being of society. An early reference to this doctrine in California appeared in *Ex parte Koser*, in which Justice Samuel Bell McKee explained “under our free form of government, the Legislature of the state has authority, in the exercise of the police power of the state, to establish for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with a correspondent enjoyment by others.”¹⁷⁸ So ambivalent with natural rights and natural law in general had the Court become that when faced with the question of whether “the right to dispose of one’s own property, either by conveyances *inter vivos* or by device [was] a natural and fundamental right, existing independently of statute, and cherished as a part of the liberties of the citizen” or “a mere evanescent vapor springing from the breath of a capricious legislature,” the Court refused to answer.¹⁷⁹ Instead, the Court said there was no impairment of *any* rights. Rather there was merely a prescription of rules on how rights might be exercised, and such prescriptions, as issued by the legislature, were perfectly permissible.

In its restrictive reading of the Fourteenth Amendment, the California Supreme Court was not in conflict with the Supreme Court of the United States. Throughout the 1870s and 1880s the latter tribunal followed the rule laid down in the *Slaughter-House Cases*: the Fourteenth Amendment applied only in situations where State action deprived a former slave or descendant of a slave of his (and sometimes her) due process rights, privileges and immunities or equal protection of the laws. With the drastic increase in attacks by state legislatures on the activities of corporations, corporate interests joined the ranks of the dispossessed of the land and raised the Fourteenth Amendment as a potential defense. In 1885, the Supreme Court of the United States considered an early Fourteenth Amendment based claim arising from an appeal of a decision in a California trial court case involving one of those familiar local ordinances regulating laundry businesses within municipal limits. Writing for the majority, California’s former Chief Justice, Stephen Field, set down words entirely consistent with the view he expressed in *Ex parte Newman* nearly thirty years before: the Fourteenth Amendment, “broad and comprehensive as it is. . . was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.”¹⁸⁰ The ordinance at issue, he explained, was “purely a police regulation within the competency of any municipality possessed of the ordinary powers belong-

178. *Ex parte Koser* (1882) 60 Cal. 177, 196.

179. *Henry v. McCabe* (1886) 68 Cal. 519, 520, 9 P. 554.

180. *Barbier v. Connolly* (1885) 113 U.S. 27, 31, 5 S. Ct. 357.

ing to such bodies.”¹⁸¹ Any interference with such regulations by the courts would, he concluded, amount to “an extraordinary usurpation of the authority of the municipality.”¹⁸² Two years later, the Supreme Court again considered a Fourteenth Amendment-based defense in the case of *Mugler v. Kansas*, and though it rejected the appellant’s assertions and upheld the state law at issue, Justice John Marshall Harlan and the majority seemed slightly more amenable to a broader construction of the Fourteenth Amendment.¹⁸³ Not “every statute enacted ostensibly for the promotion” of “the public morals, the public health, or the public safety” would be accepted, wrote Harlan, “as a legitimate exertion of the police powers of the State.”¹⁸⁴ “If,” he continued, “a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.”¹⁸⁵ This substantial relationship test was subsequently adopted by the Supreme Court of California, which applied it in the case of *Ex parte Whitwell*, not in response to a Fourteenth Amendment challenge to a state law, but rather as a means of adjudicating a cause of action implicating the State’s own Constitution.¹⁸⁶ Remarkably, the Court struck down the law— an ordinance regulating private insane asylums— but not without admonishing future courts that the power to invalidate laws “be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law.”¹⁸⁷

The exercise of its power of judicial review to invalidate the handiwork of the State Legislature proved an exception to the Court’s general stance regarding the police powers. It is no surprise that when faced with a Fourteenth Amendment-based challenge to a state law in *People v. Bray*, it reverted to its long-standing affirmation of the Legislature’s prerogatives.¹⁸⁸ The law in question prohibited the sale of liquor to Native Americans. The rationale supporting the law was based in part on a concern for the public good, in part on unfair racial stereotyping. It was motivated by an interest in preventing the exploitation and impoverishment of what later would become known as a “discreet and insular minority.” The defendant raised the Fourteenth Amendment as a defense, and then, upon his conviction, appealed to the Supreme Court on Fourteenth Amendment grounds.

181. *Id.* at 30.

182. *Id.*

183. *Mugler v. Kansas* (1887) 123 U.S. 623, 8 S. Ct. 273.

184. *Id.* at 661.

185. *Id.*

186. *Ex parte Whitwell* (1893) 98 Cal. 73, 32 P. 870.

187. *Id.* at 79.

188. *People v. Bray* (1894) 105 Cal. 344, 38 P. 731.

Oddly, it was not his own Fourteenth Amendment rights the appellant sought to uphold, but those of the person to whom he had sold the liquor. Since that person was a Native American who had left the reservation, she was considered an American citizen and thus eligible to enjoy the privileges and immunities of any other citizen, and deserving of equal protection of the laws. The law itself, he asserted, violated equal protection, in that it took from Native American citizens a right that is available to other citizens of the United States who are not Native Americans. Ignoring the question of whether or not there exists a fundamental right to purchase and consume liquor, the California Court instead examined the rationale supporting the law, and though it found the Fourteenth Amendment to be relevant, it concluded that the state action implicated was substantially related to its object: the protection of native peoples. Similarly, the Court upheld a laundry-licensing ordinance the violation of which had led to the conviction of Yick Wo. In a case that ultimately landed in the United States Supreme Court's docket, the California high court was so unimpressed by Mr. Wo's Fourteenth Amendment argument that it did not deem "it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States."¹⁸⁹ Aimed at preventing fires in urban areas, and requiring that any Laundromats be operated from brick, as opposed to wood, buildings, the law, said the Court, was substantially related to its object. In essence, its purpose was to regulate one of those occupations that New York's legendary Chancellor James Kent said "may be indicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."¹⁹⁰

2. *New Theories and New Formulas: The Emergence of the Police Powers Doctrine*

That the Court found such inspiration in the wisdom of Chancellor Kent was no indication that it was returning to a more traditional natural law jurisprudence. America's first great judge in Equity and the first framer of America's general equitable principles, Kent was, by the 1890s, a relic of the past, relevant more for his compact definitions of legal doctrines than for the natural law philosophy he espoused. Far from encouraging a renaissance of natural law thinking, the High Court of California was actually moving further from that jurisprudential approach. Rights were now

189. *In the Matter of Yick Wo* (1885) 68 Cal. 294, 308, 9 P. 139.

190. *Id.* at 297. It should be noted that the Court's decision was actually overturned by the Supreme Court of the United States in *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 S. Ct. 1064. Deciding the matter on slightly different grounds than those on which the California Court relied, the United States Supreme Court held that Yick Wo should go free because the law at issue, though facially neutral, was administered with a discriminatory eye and thus was violative of the equal protection clause of the Fourteenth Amendment

viewed less as the emanations of the human soul, writ there by a benevolent Creator, which must be recognized by the government men combine to form lest that government be wracked by righteous rebellion, than the products of a political process of ancient origin and ongoing manifestation. The new articulation of the origin of political rights was best exemplified in the case of *In re Begerow*, a case in which a criminal defendant accused of murder sought a writ of habeas corpus after two successive mistrials.¹⁹¹ In an *en banc* decision, Justice Jackson Temple wrote of the “great battle for liberty” waged by the English and “the agitation which wrung from power the Great Charter, the Petition of Right, and the Habeas Corpus Act.”¹⁹² “All the great achievements in favor of individual liberty,” he declared, “may be said to have come through contests over the rights of persons—False”¹⁹³ Rather than an accord of consenting individuals, equal in the eyes of Nature and of God, guaranteeing inherent liberties even as it placed all under the protective and legislative aegis of the State, Temple and his brethren saw only the bloody conflicts of the Anglo-Saxon ages: the revolt of the nobles in 1215, the acrimonious declarations of parliaments in the era leading up to the English Civil War, and the overthrow of the Stuart Monarchy by the partisans of a foreign king in 1688.

The historicism embraced by the Court in lieu of Locke’s mythology may well have been the more accurate explanation, at least with respect to how rights came into being, but it undoubtedly reduced the mystery surrounding rights, and stripped them of their sacerdotal quality—a quality which, so long as its existence was conceded, provided a basis for their existence more authoritative than man’s arbitrary will and the power he possessed to express his will in the form of law. Science, of course, was more prominent in the culture than it had been in the days of the framers of the State Constitution: the science of the law no less than the science permitting a dramatic technological transformation of society. Holmes’ treatise, *The Common Law*, had been in circulation for twenty years, and more recently, in his famous lecture, entitled “The Path of the Law,” he had called for the theoretical exploration of the law, its meaning and further development.¹⁹⁴ Inspired by researchers in Europe, American scholars and practitioners had developed a more jaded eye regarding older doctrines and approaches and were seeking to test, disprove and replace them with more pragmatic, more realistic, alternatives. Reason, once considered to be a near-divine guide toward perfection, was largely doubted. “The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men,” declared Holmes, “have had a good deal more

191. *In re Begerow* (1901) 133 Cal. 349, 65 P. 828.

192. *Id.* at 352.

193. *Id.*

194. Holmes, “The Path of the Law,” in Christie & Martin, *op. cit.*, p. 821.

to do than the syllogism in determining the rules by which men should be governed.”¹⁹⁵ In order to understand the current state of the law, he asserted, “we must alternately consult history and existing theories of legislation.”¹⁹⁶ All was historical process for Holmes— a mix of politics, ideology and expediency— and under his influential teaching, this became the prevailing view of the California bench, at least when its members considered the issue of so-called natural rights and the body of natural law principles from which those rights had long ago been derived. Even dissenting justices, such as Walter Van Dyke— one of the framers of California’s second constitution— in opposing a law prohibiting the sale of quail, but not the killing of them, appealed not to principles of natural justice and the natural right of men in the unclaimed bounty of the earth, as Locke and Grotius certainly would have, but to “history” and history’s teaching that “game laws such as this, enacted and enforced in the interests of a privileged few, have been the fruitful source of the oppression of the masses of the people, and have caused more popular discontent and resentment than almost any other subject.”¹⁹⁷

Regardless of the shift in the theoretical justification of rights, rights once known as natural rights, but now increasingly referred to as fundamental rights, retained a prominent place in California’s jurisprudence. In place of Locke’s theory of government, the Court substituted the police powers doctrine, and instead of natural law, the Court credited the origin of rights to an often bloody dialectic between power and the people. And, when these rights were impaired, individuals continued to seek relief from the State’s Supreme Court on the basis of the Fourteenth Amendment. *Mugler* had already signaled an opportunity to reconsider the primacy of the will of the legislature. The subsequent case of *Chicago, M. & St. P. Ry. Co. v. Minnesota* prompted, for the first time, the United States Supreme Court to strike down a state law on the grounds that it interfered with fundamental rights protected by the Fifth Amendment of the United States Constitution and applicable as a shield against State action via incorporation into the Fourteenth Amendment.¹⁹⁸ Still, California remained committed to its conservative take on the latter amendment. In *People v. Coleman*, the Court quoted the 1890 federal opinion in *In re Kemmler* to support its own decision rejecting an appellant’s request for constitutional succor.¹⁹⁹ “The Fourteenth Amendment,” Justice Van Dyke reiterated, “did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people.”²⁰⁰ “Protection

195. Holmes, *The Common Law* (Boston: Little, Brown and Company, 1946 ed.) p. 1.

196. *Id.*

197. *Ex parte Kenneke* (1902) 136 Cal. 527, 530-531, 69 P. 261.

198. *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U.S. 418, 10 S.Ct. 462.

199. *People v. Coleman* (1904) 145 Cal. 609, 79 P. 283.

200. *Id.* at 614.

to life, liberty, and property,” he continued, “rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure.”²⁰¹

C. The *Lochner* Era in California: Favoring Natural Rights of the People Over Natural Rights of the Person

1. Natural Rights Renewed: The Lochner Precedent

The determination by the Supreme Court of the United States that certain rights enumerated in the United States Constitution were incorporated into the Fourteenth Amendment and could thus be appealed to by litigants seeking to stave off oppressive government action, was soon enough followed by a finding in the Fourteenth Amendment of substantive rights inherent in the concept of due process of law that might impair State regulatory interference with individual freedom. These rights were of a sort not necessarily formally incorporated into the Constitution, but which were nevertheless said to be protected by implication, having an origin antedating the framing of the organic instrument of law. In short, they were natural rights, founded in natural law, the articulation of which by the Court spawned a renaissance in natural law thought at the national level. Drawing on *Mugler* for inspiration, the Court, in *Allgeyer v. Louisiana*, unanimously struck down a State law as repugnant to the Fourteenth Amendment on the grounds that the law in question impaired a fundamental freedom of the individual to contract.²⁰² “The liberty mentioned in that amendment,” wrote Justice Rufus Peckham for the majority, “means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.”²⁰³

Revolutionary though *Allgeyer* was in employment of the Fourteenth Amendment to overrule State courts and State legislatures and in its conception of due process of law, the decision came to be overshadowed by the more famous *Lochner v. New York*.²⁰⁴ In that case, Justice Peckham again wrote for the majority, which again struck down a State law on the grounds that one’s liberty to contract as embodied in the Fourteenth Amendment had been impermissibly violated. Acknowledging the continued viability of the Police Powers Doctrine, Peckham nevertheless explained “that there is a

201. *Id.*

202. *Allgeyer v. Louisiana* (1897) 165 U.S. 578, 17 S.Ct. 427.

203. *Id.* at 589.

204. *Lochner v. New York* (1905) 198 U.S. 45, 25 S.Ct. 539.

limit to the valid exercise of the police power by the State.”²⁰⁵ Without such limits, he continued, “the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be.”²⁰⁶ This law, said Peckham, went too far in regulating the relations between employer and employee, preventing them from freely negotiating the terms of their relationship.²⁰⁷ And it was not the only such law. “This interference on the part of the legislature of the several States with the ordinary trades and occupations of the people seems to be on the increase.”²⁰⁸ And as the legislatures continued to impose “meddlesome interferences with the rights of individuals,”²⁰⁹ so would the Court, its members implied, continue to apply scrutiny commensurate with the requirements of the Fourteenth Amendment.

2. *A Tepid Embrace: Lochner and California's Courts*

Perhaps inspired by the bold pronouncement of the nation's high court, the California Supreme Court took up a Fourteenth Amendment case several months after the *Lochner* decision and invalidated the implicated law as violative of that right to contract which Story and others (including Rufus Peckham) thought to be deeply rooted in the law of Nature. In *Ex parte Hayden*, a defendant was convicted and imprisoned for breaching a product labeling statute.²¹⁰ In considering the defendant's petition for a writ of habeas corpus, the Court invoked both *Allgeyer* and *Lochner* in its assertion that “it has come to be well recognized that the liberty and the pursuit of happiness in which the individual is protected by the Constitution of the United States. . . applies as fully to his right of contract, his right to follow a legitimate vocation, untrammelled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person.”²¹¹ The police power, derived “from the rule that the safety of the people is the supreme law,” may well justify legislation upon matters pertaining to the public welfare, the public health, or the public morals,” but “anytime the legislature imposes onerous and unnecessary burdens upon business and property” Fourteenth Amendment considerations of due process must always be invoked.²¹² The Court followed its decision with a similar one several

205. *Id.* at 56.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 61.

210. *Ex parte Hayden* (1905) 147 Cal. 649, 82 P. 315.

211. *Id.* at 650.

212. *Id.* at 650-651.

months later, in the case of *Ex parte Drexel*.²¹³ Hearing the claim that use of coupons in the marketing of goods and services was an activity related to the concept and practice of contract, which here had been impermissibly interfered with by the Legislature in its exercise of the police power, the Court recalled the words of a Virginia tribunal in defining the term liberty.

The word liberty as used in the constitutions of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned.²¹⁴

Any statute “prohibiting, regulating, or interfering with private business can be upheld only under the police power,” but “the police power can be rightfully exercised only when the statute in question is for the protection of the public safety, the public health, or the public morals.”²¹⁵ The statute at issue here was found to be repugnant to the fundamental liberty to contract, and like the statute at issue in *Hayden*, the Court confidently struck it down.

The California Supreme Court’s exercise in “Lochnerizing” did not long endure. After a short indulgence of the heady powers of judicial review, the Court reverted to its traditional deference to legislative action. Rights rooted, or once thought to be rooted, in Nature, remained important and vital. But so too did the prerogatives, rights and needs of the People as a whole, acting through the government formed pursuant to the social compact. As the population grew, as society exhibited greater complexity and as the economy broadened and became more impersonal, the role of government as protector of the People’s fundamental rights to health and happiness expanded. And while Locke’s natural law theory encompassing the supremacy of the legislative branch of government, so long, of course, as it limited its activities by laws both organic and natural, may well have been a near forgotten memory, the practice of the theory, shorn of its Seventeenth Century authorship and mythology, and the respect paid to it by the Court in its application of the Police Powers Doctrine, survived. In upholding what today would probably be considered an impermissibly vague law prohibiting, on pain of punishment, one from being an idle, lewd and disso-

213. *Ex parte Drexel* (1905) 147 Cal. 763, 82 P. 429.

214. *Id.* at 764.

215. *Id.* at 764-765.

lute person, the Court declared that “any practice the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it. . .is a legitimate subject for regulation or prohibition by the state. . .and unless it clearly appears that a statute enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of the police regulation, the action of the legislative department is conclusive.”²¹⁶ In rejecting a Fourteenth Amendment based challenge to a law prohibiting pool halls save those operated within the confines of hotels, the Court used similar language, adding that “a public billiard hall and pool room may, by reason of its environment or conditions existing in some communities, constitute a menace and danger to the morals and well-being of the citizens thereof; and it is, therefore, a subject for regulation or absolute prohibition”²¹⁷ Finally, in the case of *In the Matter of the Petition of San Chung*, the newly formed Third District Court of Appeals upheld the conviction of a man who violated a municipal ordinance banning the operation of laundries within the same buildings occupied by general stores.²¹⁸ Convicted of the crime of conducting his laundry business in the same building as a store pursuant to the city ordinance, the defendant sought his freedom via a petition for a writ of habeas corpus. The law, said Justice Albert Burnett in response to the defendant’s request, was not a violation of the defendant’s “constitutional right (under the Fourteenth Amendment) to pursue a useful occupation without unlawful interference or unnecessary restraint” because “the abstract right of the individual to pursue any lawful occupation where it can be the most conveniently and advantageously carried on must yield to the superior right of the public to be protected from the menace of disease.”²¹⁹ “What is known as the police power,” said Burnett, “is one of very extensive application, involving many variant circumstances, and. . .is incapable of exact definition, and depends for its just and intelligent exercise so largely upon knowledge of local conditions, that a very wide discretion must be conceded to the legislative body, clothed with the presumption, as it is, that it will be guided by a rational and conscientious regard for the rights of the individual as well as for the interests of the community.”²²⁰ The Fourteenth Amendment, in words borrowed from Justice Field’s opinion in *Barbier v. Connolly*, broad and comprehensive though it was, was simply not “designed to interfere with the power of the State. . .to prescribe regulations to promote the health, peace, morals, education, and good order

216. *In re McCue* (1908) 7 Cal. App. 765, 766, 96 P. 110.

217. *Ex parte Murphy* (1908) 8 Cal.App. 440, 445, 97 P. 199

218. *In the Matter of the Petition of San Chung* (1909) 11 Cal. App. 511, 105 P. 609.

219. *Id.* at 517.

220. *Id.* at 513.

of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.”²²¹

The California Court’s robust defense of the authority of the legislature, and of that possessed by municipal law making bodies, to craft laws trumping the fundamental, even natural, rights of citizens, as sound and valid as its judicial reasoning might have been, nevertheless stood in conspicuous contrast to the nullifying tendencies of *Lochner*. *Lochner*, and to a lesser extent *Allgeyer* before it, had proclaimed the incorporation of due process of a substantive nature, derived in part from the Fifth Amendment, in part from concepts originating in natural law, into the Fourteenth Amendment, and its application to defeat State legislation found to impair an individual’s rights. The justices of California, no doubt proud of their State and their own status as arbiters of the State’s organic and positive law, seem to have questioned the limits of the United States Supreme Court’s proclamation. Were they right to reject the scope of *Lochner* that the nation’s highest court said overshadowed all acts of all state legislatures, including California’s? Surely a justification of the State Court’s resistance to the sway of *Lochner* was necessary, if only to ease the second thoughts and discomfort that must surely have arisen following the State Court’s contradiction of the higher tribunal. Such a justification came in 1909, with the California Supreme Court’s decision in the case of *In the Matter of the Application of Martin*.²²² In this case, a defendant sought release from jail after conviction for violating a law regulating labor hours in mines. Interestingly, the case did not arise from the Fourteenth Amendment. Instead, the defendant’s appeal was rooted in the State Constitution. Consequently, though the decision was a challenge to *Lochner* and the United States Supreme Court’s new interpretation of the scope of the Fourteenth Amendment and the potency of substantive due process as it pertained to economic rights, it risked not the certiorari of the High Federal Bench and further refinement of the *Lochner* doctrine at the expense of State legislative discretion. Finding precedent in a pre-*Lochner* decision in the case of *Holden v. Hardy*, Justice M. C. Sloss quoted that earlier case extensively to the effect that the States have an ever increasing obligation to exercise their inherent police powers for the public good. This power, declared Justice Sloss in words borrowed directly from the text of *Holden*, “has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property.”²²³ While the power “cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the pur-

221. *Id.* at 515-516.

222. *In the Matter of the Application of Martin* (1909) 157 Cal. 51, 106 P. 235.

223. *Id.* at 53-54.

pose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interest of the public requires, but what measures are necessary for the protection of such interests.”²²⁴ The law at issue in *Martin*, like the law in *Holden*, was deemed constitutional. That *Lochner* was an obstacle to this end, Justice Sloss clearly recognized, hence for that reason he specifically addressed that imposing case. “The limitations of the doctrine,” he noted, “are well illustrated by the subsequent decision in *Lochner v. New York*, in which the Court, reversing the decision of the Court of Appeals of New York, declared invalid a law limiting the hours of labor of bakers.”²²⁵ *Lochner*, however, said the Justice, had been subject to tremendous misunderstanding. Far from representing the principle that States cannot regulate lawful activities touching upon contact and an individual’s livelihood, *Lochner* was narrower in scope. *Lochner*, he said, was really about limiting the power of the legislature to impair *all but inherently dangerous activities*.²²⁶ Since baking bread was not inherently dangerous (unless, of course, one took to heart the dissent of Justice Harlan), the Police Power was improperly employed, with the consequence that the fundamental right to due process of law, as embodied in the Fourteenth Amendment, had been impermissibly restricted.

The Court continued to demonstrate its commitment to the police powers of the State in a series of legal challenges to State action allegedly impairing the rights of citizens under the Fourteenth Amendment. In *Ex parte Quong Wo*, the Court upheld the conviction of a man who had violated a zoning restriction by operating a laundry business in a residential area.²²⁷ Again citing a pre-*Lochner* decision as authority, this time *Fischer v. St. Louis*, Justice Frank Angelotti declared that “it is, of course, primarily for the legislative body clothed with this power to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts, unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation.”²²⁸ In *State Savings and Commercial Bank v. Anderson et al.*, the Court upheld the State Banking Act after the owners of the bank alleged a procedural due process violation prohibited by the Fourteenth Amendment.²²⁹ Though not what might be considered a case in which natural rights lay in the balance, the case is nevertheless rele-

224. *Id.* at 54.

225. *Id.*

226. *Id.* at 55.

227. *Ex parte Quong Wo* (1911) 161 Cal. 220, 118 P. 714.

228. *Id.* at 230.

229. *State Savings and Commercial Bank v. Anderson et al.* (1913) 165 Cal. 437, 132 P. 755.

vant to this discussion with respect to the Court's familiar reliance upon the Police Power Doctrine and the justification of broad State action when faced with matters of public concern, even as it acknowledged that the "principle embodied in the Fourteenth Amendment was substantially incorporated into the constitutions of the states at the time the amendment was adopted."²³⁰ The case is remarkable, too, in that it relies heavily on a post-*Lochner* United States Supreme Court case upholding State action at the expense of individual rights. That case was *American Land Co. v. Zeiss*. Closer scrutiny of that case reveals the canniness of the California Court in selecting its authorities; for that case was one originating in California's trial courts and involved a law passed by the California legislature in the wake of the great San Francisco earthquake for the purpose of re-establishing record title within the city. Without question, the situation the legislature confronted was shocking and unprecedented in American history: a major city entirely leveled and its title records almost completely lost in the fires that erupted in the immediate aftermath of the quake. In that case, Justice Edward White had stated: "the Fourteenth Amendment does not operate to deprive the States of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted."²³¹ "On the contrary," he said, "the provisions of the due process clause only restrain the arbitrary and unreasonable exertions of power which are not really within lawful State power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."²³² After parroting this language in his *State Savings* opinion, Justice William Lorigan of the California Supreme Court added: "the amendment was never designed to interfere with the police power of the State to regulate for the public good on some particular subject which in the judgment of the legislature called for regulation."²³³ Thus, having chosen their authorities wisely, and found a case in which the Supreme Court of the United States defended the actions of the California Legislature, the high court of California maneuvered itself safely around the potential impasse posed by *Lochner* and upheld the freedom of the legislature from subordination to the authoritative scope of the United States Constitution with respect to its adjudication of individual rights reputedly originating in a state of Nature.

3. *Natural Rights Upheld: Parental Power and Race*

The Court's reluctance to challenge the Legislature was never so constant as to prevent the Court from occasionally declaring an act of the Legislature violative of individual freedoms as embodied in the California and Federal Constitutions. And yet the areas where the Court felt comfortable

230. *Id.* at 445.

231. *American Land Co. v. Zeiss* (1911) 219 U.S. 47, 66, 31 S.Ct. 206.

232. *Id.*

233. *State Savings and Commercial Bank v. Anderson et al*, *supra*, at 445.

acting were to a degree circumscribed. Areas where the Court was sufficiently confident its intervention on behalf of individual claimants was appropriate included family relations and race. Family relations, of course, were among the oldest recognized subject of natural rights. In keeping with a much older tradition ascribing to Nature the origin of the right of parents to control the upbringing of children, John Locke had acknowledged the “duty which. . .nature has laid on man, as well as other creatures, to preserve their offspring till they can be able to shift for themselves.”²³⁴ Nature, he explained, “gives. . .paternal power to parents for the benefit of their children during their minority, to supply their want of ability.”²³⁵ The grant of parental power was, said Locke, for no less grand a purpose than of “continuing the race of mankind.”²³⁶ This power invested in parents was theirs to exercise by grant of Nature, and as the power existed in a state of Nature, and was not a power or right that conflicted with the fundamental purpose of the social compact, but rather furthered it, the right was one which was not surrendered to the State or generally subject to the restrictive authority of the legislature. In *Hardwich v. Board of Trustees of Fruitridge District School*, the Third District Court of Appeals considered the right of parents to control the upbringing and education of their children, and in so doing invalidated the application of a local rule requiring school children to attend dance class.²³⁷ The case arose when two children were expelled from school after their parents refused to allow them to take part in such a class. The parents sued for injunctive relief, requesting that the Court order the school to reinstate their children without any obligation to partake in the class at issue. While the Court noted the free exercise basis of the action, grounded as it was in Article I, Section 4 of the State Constitution, as opposed to the First or Fourteenth Amendments of the Constitution of the United States, it understood the primary issue to be “the right of parents to control their own children.”²³⁸ Since the school’s mission would not be disrupted by permitting two children to forego attending the class, the Court simply could not “give sanction to a power over home life that might result in denying to parents their *natural* as well as their constitutional right to govern or control, within the scope of just parental authority, their own progeny.”²³⁹ Under the circumstances, the Court believed that despite there being no subject “as to which the sovereign power of a State may be exercised of greater importance than that of the matter of education,”²⁴⁰ the

234. Locke, *op. cit.*, VI.60.

235. *Id.* at XV.173.

236. *Id.* at VI.66.

237. *Hardwich v. Board of Trustees of Fruitridge District School* (1921) 54 Cal. App. 696, 205 P. 49.

238. *Id.* at 709.

239. *Id.*

240. *Id.* at 701.

natural right of parents to raise their children consistent with their values was far superior.

Race and racial exploitation, of course, was the impetus behind the ratification of the Fourteenth Amendment, which had its theoretical foundations in the natural law thesis that “all men are created equal.” Deprivation of due process, privileges and immunities and equal protection of laws was so fundamental, and so rooted in natural rights theory, that it is no wonder higher State Courts made some effort to find creative solutions to racial injustice. One such case in which the California Supreme Court confronted racism was *Title Guarantee & Trust Co. v. Garrot*.²⁴¹ The case involved an invidious restrictive covenant, whereby sale of land to an African American would trigger a reversion of interest to the original conveyer. Such a sale took place, prompting the holder of the reversionary interest to sue for specific performance of the conditional provision. The *Civil Rights Cases*, which included actions originating in California, was the primary authority here. This proved unfortunate for the defendant, in that the *Civil Rights Cases* clearly defined the scope of conduct prohibited by the Fourteenth Amendment as public in nature, as opposed to private.²⁴² Since the conduct here was private, it did not fall within the ambit of the protections afforded by the Fourteenth Amendment. The Court did consider the argument that State action occurred when a court enforced such a restrictive provision, though, contrary to a later decision by the United States Supreme Court in *Shelley v. Kraemer*, it could not adjudge such enforcement as state action per se, but merely a reaction to requests to adjudicate contracts between private parties. The Court nevertheless found a way to refuse to enforce the covenant by identifying it as a restriction on alienation of a kind deemed repugnant to California law. The law prohibiting restrictions on alienation was itself derived in part from natural law and the ancient recognition that “the tying upon real property. . . [was] an evil that is incompatible with the free and liberal circulation of property as one of the inherent rights of a free people.”²⁴³ Sadly, the Court narrowly failed to craft an equally creative solution some months later in *Los Angeles Investment Co. v. Gary* when it upheld a covenant requiring forfeiture of a property to the original conveyer should a mesne owner permit occupation of that property by African Americans.²⁴⁴ The law, said Justice Warren Olney, was clearly no restraint on alienation, thus it was not repugnant to the laws of the State. Chief Justice Angellotti tried to persuade his brethren that the intent of the law was merely to prevent black tenants from occupying land, not to bar black purchasers from living thereon, but his efforts proved unavailing.

241. *Title Guarantee & Trust Co. v. Garrot* (1919) 42 Cal. App. 152, 183 P. 470.

242. *In re Civil Rights Cases* (1883) 109 U.S. 3.

243. *Title Guarantee & Trust Co. v. Garrot*, supra, at 157.

244. *Los Angeles Investment Co. v. Gary* (1919) 181 Cal. 680, 186 P. 596.

4. *Restricting Political Rights as an Exercise in Natural Law Based Legislation*

Even though the Court was occasionally willing to seek out rationales to uphold individual liberties constrained by the legislative power, no such willingness ever entered the hearts or imaginations of justices on the bench with respect to those who agitated or conspired against the legislature and the state itself. For all those unrepentant souls who were brought before criminal tribunals on charges of violating the Criminal Syndicalism Act of 1919, none ever won the sympathy of the Court. The Act itself is a fascinating piece of legislation, passed in the midst of the so-called Red Scare, in the immediate aftermath of the end of actual hostilities associated with the First World War. Its statutory inspiration lay in the Espionage Act of 1917, a federal war-time measure aimed at combating Teutonic fifth-columnists and saboteurs, but which soon morphed into a legal device to impair the activities of partisans of international communism, centered, funded and directed by the Bolshevik leadership in Soviet Russia. The Supreme Court of the United States had upheld convictions pursuant to the Act on the grounds that criminal appellants posed a clear and present danger to the well-being of the United States, its people and its government.²⁴⁵ The opinions were formal. The rights at issue were those embodied in the First Amendment. The cases brought under the Criminal Syndicalism Act of 1919 implicated not the First Amendment—at least not directly—but the Fourteenth. California's law was said to be a violation of the Fourteenth Amendment of the United States Constitution and other sections of the State Bill of Rights. The rights at issue were purely enumerated rights—rights that might have been derived from natural law principles, or been part of the natural law heritage at one time, but had, through the process of express incorporation by statute and organic instrument, become part of the positive law of the land. Such rights are no part of this examination, save in their importance in the evocation of the larger, underlying issue of natural law as considered by California's Courts. The underlying issue in the line of cases arising out of the Criminal Syndicalism Act of 1919 is a central theme of this paper: the natural right of the people, as represented by the State, to defend themselves from external or internal assault. Locke himself had articulated this principle many years before the formation of the Federal Union and the several States. "The first and fundamental positive law of all commonwealths," he proclaimed, "is the establishing of the legislative power; as the first and fundamental *natural law*, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it."²⁴⁶

245. *Schenck v. United States* (1919) 249 U.S. 47, 39 S.Ct. 247; *Frohwerk v. United States* (1919) 249 U.S. 204, 39 S.Ct. 249; *Debs v. United States* (1919) 249 U.S. 211, 39 S.Ct. 252; and *Abrams v. United States* (1919) 250 U.S. 616, 40 S.Ct. 17.

246. Locke, *op. cit.*, XI.134.

The threat posed the people and the State by the activities of the so-called Criminal Syndicalists, or Communists, was not insignificant. Benjamin Gitlow was the protagonist in one of the great Free Speech cases to come before the Supreme Court of the United States during this era. Many years after his unsuccessful appeal he repudiated his radical past. In reflecting on the time immediately following the formation of the American branch of the Communist Party which he himself had taken a prominent part in, he recalled that

the communists challenged the labor unions and their officials. They injected themselves into strike situations, attacking the strike leaders and calling upon the workers to turn their strikes into political struggles for power. They openly defied the United States government and violated its laws. Every leaflet, every newspaper, every communist magazine bristled with revolutionary slogans calling upon the American proletariat to take up arms and overthrow the capitalist government of Wall Street. The communists backed up their revolutionary romanticism with an inexhaustible store of energy—energy of dynamic power generated by the fires of fanaticism. From the moment representatives of the American communists arrived in Moscow to arrange for affiliation of the movement with the Communist International, from that moment on the American Communist party became a branch office of Moscow. Moscow made the decisions governing the actions of the American communists. The Russians laid down the Communist party line. The Comintern played the tune, the American communists danced accordingly.²⁴⁷

The Criminal Syndicalism Act aimed to put an end to the overt and covert activities of these professed enemies of the State, who often worked in league with foreign powers toward the goal of overthrowing by force the institutions rooted in the Constitution and replacing them with institutions derived from a radically different model. Consistent with Locke's principles, and the principles of natural justice that provided so fecund a source of California's jurisprudence, the Act was the product of a legislature conscious of its duty and its right to defend the interests of the people and the State that governed them.

One of the first, and certainly the most significant, convictions under this law that came to the attention of the State Supreme Court was *People v. Steelik*.²⁴⁸ Charged and convicted for having "willfully, unlawfully and feloniously, by spoken and written words and personal conduct advocate, teach, aid and abet Criminal Syndicalism and the duty, necessity and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and effecting political changes," Steelik appealed on the grounds that the law itself was so vague and overly broad as to leave him bereft of any reasonable or meaningful notice.²⁴⁹ After thorough examination of this point, Justice Curtis Wilbur and the majority ruled against the appellant,

247. Benjamin Gitlow, *The Whole of Their Lives* (Boston: Western Islands, 1965), p. 53.

248. *People v. Steelik* (1921) 187 Cal. 361, 203 P. 78.

249. *Id.* at 363.

then turned to the issue of the impairment of speech that the Act at issue allegedly represented. “The right to free speech,” he said, “was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish.”²⁵⁰ What the right does not include, he continued, is “the right to advocate the destruction or overthrow of government or the criminal destruction of property.”²⁵¹ Where the safety of the people, their private interests and the State itself are imperiled there is no question but that the Legislature might act to produce means by which the threat might be mitigated or removed. The Criminal Syndicalism Act, Justice Wilbur implied, was exactly this. Similarly, in *People v. Taylor*, the Court upheld the conviction of John Taylor, a leader in the Communist Labor Party based in Oakland, who likewise had run afoul of the 1919 Act after allegedly disclaiming “any hope of success of political change through the ballot, and [advocating] getting results by force,” favoring “sabotage as a weapon of the working class against the employers and capitalists,” “destroying machinery in factory disturbances,” “wrecking street cars in traction troubles,” and “burning hay stacks in order to bring the farmers to terms.”²⁵² *Taylor* itself became precedent drawn upon by the First District Court of Appeals in upholding the conviction of Charlotte Whitney in the famous case of *People v. Whitney*.²⁵³ A leading figure in the nascent Communist Party of the United States, as well as a member of the family of the late Justice Field, Ms. Whitney was prosecuted under the Act following her prominent role in the conventions that organized the Party nationally in Chicago (under the leadership of Benjamin Gitlow and others) and state-wide in the City of Oakland in the fall of 1919. Thanks in part to her own prominence and the enduring strength of her family connections, her case reached the Supreme Court of the United States, which, in partial reliance on the *Steelik* decision, vindicated the Legislature of California and the State’s Supreme and Appellate Courts by declaring the Act fully consistent with that familiar recasting of Locke’s natural rights theory of government: the Police Power’s Doctrine.²⁵⁴

What the Supreme Court implied in these two cases, the Third District Appellate Court expressly proclaimed in *People v. Cox*.²⁵⁵ In upholding the conviction of three members of the Industrial Workers of the World for violation of the 1919 Act, Justice John A. Plummer all but quoted Locke in his articulation of the right, power and duty of the state to defend itself from attack. “The fundamental principle upon which government is established,”

250. *Id.* at 375.

251. *Id.*

252. *People v. Taylor* (1921) 187 Cal. 378, 389, 203 P. 85.

253. *People v. Whitney* (1922) 57 Cal. App. 449, 207 P. 698.

254. *People v. Whitney* (1927) 274 U.S. 357, 47 S.Ct. 641

255. *People v. Cox* (1924) 66 Cal. App. 287, 226 P. 14.

he wrote, “is the right of self-preservation against every form of illegal or violent assault.”²⁵⁶ Free speech he distinguished from license. “One may freely state his reasons why a change in government is desirable, but he has no license by reason thereof to advocate the destruction of or take steps to incite others to destroy the property or imperil the lives of those who do not agree to such changes.”²⁵⁷ One method, he explained, remained within the bounds of the law, the other did not, “because it strikes at the basis of all government and denies the right of self-preservation.”²⁵⁸ The state itself may not be perpetual, or destined for too much longer a life. Its positive and organic law may yet be changed in the future. But such changes in the “existing order, condition, and structure of society” must be effected “only by peaceable means.”²⁵⁹ The case, he explained, represented no struggle between labor and capital, the proletariat and the bourgeoisie. Instead, it was but a consequence of “an act of the legislature which seeks to enforce the right of the state to exist.”²⁶⁰ The same issue dominated the case *In the Matter of the Application of Wood*, in which criminal defendants— members of the I.W.W. all— sought release from imprisonment for violating an injunction requiring they “desist and refrain from further conspiring with each other to carry out, and from carrying out, or attempting to carry out, their conspiracy to injure, destroy and damage property in the State of California, and to take over and assume possession of the industries and properties in said State as well as the government thereof,” or any other action said to be contrary to the Criminal Syndicalism Act of 1919.²⁶¹ Equity, it is well known, generally will not enjoin a criminal act. And no contempt of a court order can be successfully pressed against one found guilty of committing a crime; for criminal sanctions alone, with all the due process protections they entail, are deemed sufficient punishment for those adjudged guilty of criminal conduct. Ordinarily the High Court would not likely have permitted such an innovative use of the powers of the lower courts in equity. The High Court permitted it here only after reading and hearing the Attorney General’s words in favor of upholding the contempt citations. It was, he said, not so much criminal acts that the lower court enjoined. The acts were, in truth, more “closely analogous” to public nuisances, which a court does have jurisdiction to prospectively restrict. “It is well settled,” said Chief Justice Louis Myers, “that an injunction may issue to restrain the commission of acts which are violative of public policy, which create a nuisance or assail the rights of property, although such acts are specific crimes and punishable as such.”²⁶² If persons conspire and then take action

256. *Id.* at 290.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *In the Matter of the Application of Wood* (1924) 194 Cal. 49, 52-53, 227 P. 908.

262. *Id.* at 56.

to destroy property, the court can intervene to prohibit their carrying out the conspiracy on pain of contempt. If persons conspire to overthrow the government, contempt actions are all the more appropriate for those in violations of orders to desist from following through with their schemes. The State must be protected, and the State, as embodied in the Executive Branch of government, has every right and every obligation to defend itself, the people and the State's broad interests from attacks aimed at subverting those institutions which the people empower for the purpose of establishing and maintaining conditions whereby they might attempt to realize the promise of life, liberty, and the pursuit of happiness.

Not unrelated to the Criminal Syndicalism Act was the Act of 1923, which prohibited unnaturalized, foreign born persons from owning or possessing a firearm. When Gevino Ramirez was convicted for breaching this law, he appealed on the grounds that the law violated the equal protection clause of the Fourteenth Amendment, infringed the right to bear arms, and applied retroactively so as to deprive gun owners of vested rights in property.²⁶³ The Court conceded that the regulation of guns was a proper subject for the exercise of the police power. The primary issue was not the authority of the Legislature to regulate firearms, but whether in doing so its segregation of aliens constituted an unlawful discrimination against that class. The outcome of the case had far reaching implications. A determination that the Legislature had overstepped its bounds and passed a law in excess of its police powers meant not only an invalidation of the law under which Ramirez had been convicted, but a striking down of that provision of the State Constitution permitting the Legislature to "prescribe all necessary regulations for the protection of the State. . .from the burdens and evils arising from the presence of aliens who are or may become. . .criminals. . .and from aliens otherwise dangerous or detrimental to the well-being or peace of the State."²⁶⁴ In pleading the protective nature of the law, and how it tended to safeguard the public peace and security, the Attorney General noted the "danger of permitting aliens to arm themselves" and putting themselves in a position to dispute, with force of arms, the sovereignty of our nation and our people," and that "while such a danger may seem improbable at the present time, yet in the time of war, it becomes a very real danger indeed, particularly as a few thousand organized aliens, in the course of a few hours, could so cripple our basic industries and our transportation facilities as to make us practically powerless in conducting war."²⁶⁵ Recalling the large number of foreign born persons living in the State, and the upheaval of war and revolution that had, for the past decade, enveloped much of the world, the Court found the argument persuasive,

263. *In the Matter of the Application on Behalf of Gevino Ramirez* (1924) 193 Cal. 633, 226 P. 914.

264. *Id.* at 637.

265. *Id.* at 642.

noting that “the purpose of the act is to conserve the public welfare, to prevent any interference with the means of common defense in times of peace or war, to insure the public safety by preventing unlawful use of firearms,” and as such “constitutes a proper exercise of the police power and is not invalid under the Fourteenth Amendment.”²⁶⁶ The Court saw no reason to second-guess the Legislature. “It cannot be assumed that the Legislature did not have evidence before it, or that it did not have reasonable grounds to justify the legislation. . . .that unnaturalized, foreign-born persons. . . .were more likely than citizens to unlawfully use firearms or engage in dangerous practices against the government in times of peace or war, or to resort to force in defiance of the law.”²⁶⁷ As contingent as these consequences might be, it was no abuse of the Police Power to attempt to ensure that they never come to pass. If a particular group is reasonably deemed to pose a threat, any discriminatory effect of any law aimed at reducing the threat posed to society hardly ran afoul of the Fourteenth Amendment. That the law divested persons lawfully within the jurisdiction of California and the United States of vested rights in property retroactively, and deprived them potentially of the means whereby they might defend themselves from deadly assault, *did* rise to the notice of the Court. Both these natural rights— to lawfully acquire property and to defend oneself by effective and otherwise lawful means— the Court deemed subordinate to the great right of the State to defend itself from attack, and the right of the people as a whole to be safe from disruptions of the peace.

5. *Economic Rights: The State’s Police Powers Reaffirmed*

During the 1920s, and throughout the post-*Lochner* period, the Supreme Court and several Appeals Courts of California were not solely concerned with the great issues of war and peace and the survival of the State. Nor did the Court always side with the Legislature, or those executing the laws the Legislature passed. *Garrot* and *Hardwich* were cases in which the Court invalidated particular applications of the Police Power Doctrine, though the laws themselves the Court left undisturbed. In 1925 two California Appeals Courts dared go farther than merely invalidating the *application* of laws by *striking down* statutes said to impermissibly interfere with fundamental rights possessed by individuals and the people at large. The First District Appeals Court struck down a law prohibiting disbarred attorneys from representing themselves in court in actions touching upon their interests in property in *O’Connell v. Judnich*;²⁶⁸ while in *People v. Pace*, the Second District Court of Appeals invalidated a portion of the State Corporate Securities Act insofar as it placed onerous burdens on persons seek-

266. *Id.* at 650.

267. *Id.*

268. *O’Connell v. Judnich* (1925) 71 Cal. App. 386, 235 P. 664.

ing to sell their own securities, as opposed to those belonging to others.²⁶⁹ These decisions were exceptional and were issued by Appeals Courts, as opposed to the State's highest tribunal, hence they did not decisively signal that the Judiciary of California was prepared to embrace the principles underlying *Lochner* and assume a role in fundamental opposition to the State's Legislature. Any incentive or impulse to actually assume such a role, and with it a set of principles at odds with the traditional jurisprudence of the State, expired with the decision of the United States Supreme Court in *Nebbia v. New York*.²⁷⁰ In this case, a criminal defendant appealed his conviction for violating a law fixing a minimum price for milk. The law aimed to alleviate the alleged vagaries of competition among milk producers which, it was believed by those who authored and voted for it, would ultimately lead, in the adverse economic climate of the Great Depression, to destruction of the milk industry. Recalling the decision in *Lochner*, the defendant's attorneys raised the Fourteenth Amendment as a bar on his conviction, alleging that the law itself was an unconstitutional interference with the fundamental right of individuals to contract with others. Justice Owen Roberts and four of his brethren rejected *Lochner* and the doctrine it comprised. After acknowledging that "under our form of government the use of property and the making of contracts are normally matters of private and not of public concern, Justice Roberts declared "neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."²⁷¹ As important as any private right is, "that of the public to regulate it in the common interest" is more important still.²⁷² A State has a "bounden and solemn duty. . .to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends."²⁷³ Invoking the ghost of Chief Justice Taney, who had so steadfastly (with one notorious exception) upheld the right of States to regulate the doings of those living within their bounds, Justice Roberts noted that "this court from the early days affirmed that the power to promote the general welfare is inherent in government," including State governments.²⁷⁴ The people have rights, and many of these rights are fundamental to the concept of liberty as the term had come to be understood in America, but the Constitution, in its provisions for due process, "does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases."²⁷⁵ Business may be regulated. Certain types of business

269. *People v. Pace* (1925) 73 Cal. App. 548, 238 P. 1089.

270. *Nebbia v. New York* (1934) 291 U.S. 502, 54 S. Ct. 505.

271. *Id.* at 523.

272. *Id.*

273. *Id.*

274. *Id.* at 524.

275. *Id.* at 527-528.

may be prohibited altogether. “And statutes prescribing the terms upon which those conducting a business may contract, or imposing terms if they do enter into agreements, are within the State’s competency.”²⁷⁶ Leo Nebbia was rightfully convicted. *Lochner*, though not mentioned by name, was overthrown. And the States, for the time being, were free of a potential impairment of their right and power to regulate the affairs of their citizens, to prohibit unwanted conduct and to encourage conduct deemed to be desirable.

California, of course, had never accepted *Lochner*. Its Courts, instead, had distinguished *Lochner* as pertaining only to dangerous occupations, not to occupations or economic activities free of threats to health and safety. That the members of California’s High Court understood that *Nebbia* freed its legislature of potential constitutional overrule by the United States Supreme Court, and itself from potential conflict with its senior brethren in Washington, is all too evident in their decision in *Max Factor & Co. v. Kunsman*.²⁷⁷ The case involved the fundamental right to contract, and the power of the government to render otherwise objectionable provisions legal for the sake of a greater social good. In response to tendencies among producers and retailers to protect themselves by entering into price fixing arrangements, the State Legislature had passed the Cartwright Act, which declared “it to be unlawful for two or more persons to enter into any combination or contract by which they agree to establish the price of any commodity to the public or consumer, and declares any such combination or contract to be against public policy and void.”²⁷⁸ Two years later, a new legislature, fired with the same reformist passions that delivered the White House to Franklin Roosevelt, and convinced of the long term adversity posed to the public interest by unmitigated free competition in the market place, modified this statute by permitting price fixing agreements entered into voluntarily and providing victims of breach of such agreements with a statutory right to pursue an action for damages and injunctive relief. Just such an action was brought by the Max Factor cosmetics company and its licensee, Sales Builders, Inc., after one of the retailers of Max Factor products attempted to undercut its competitors by selling product below the contract price. Sales Builder’s quest for an injunction to prohibit the defendant’s continued violation of the contract terms succumbed to the defendant’s demurer, prompting Sales Builder to seek a second, higher, opinion regarding the constitutionality of the law on which its action was based.

Citing the *Nebbia* opinion of Justice Roberts, and impliedly evoking the language of the late Justice Holmes in his famous dissent in *Lochner*, California’s Chief Justice William Waste declared that the question of “whether the free operation of the normal laws of competition is a wise and

276. *Id.* at 528.

277. *Max Factor & Co. v. Kunsman* (1936) 5 Cal. 2d 446, 55 P. 2d 177.

278. *Id.* at 450.

wholesome rule for trade and commerce is an economic question which this court need not consider or determine.”²⁷⁹ The determination of the “wisdom of any economic policy. . .rests solely with the legislature.”²⁸⁰ Only the legislature, in its deliberations and investigation into the current divisions in popular and expert opinion touching upon economic theory and practice, is in a position, both practically and constitutionally, to render such determinations. It is, after all, “the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are *natural law* and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status.”²⁸¹ Pursuant to its police power, the Legislature has the authority, “acting in the interests of the general welfare, to regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining.”²⁸² Faced with the growing complexity of society, the necessity for regulation had grown as well. Far from needing to question its own authority to impair the rights of citizens, both those enumerated expressly in the organic and positive law, and those less precisely defined but long recognized as the heritage of natural law, the Legislature must continue to seek out means by which the vagaries of the human condition might be softened and rectified. “The process of civilization,” concluded the Chief Justice, “has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good.”²⁸³ People do have rights and these rights may well be derived from Nature. These rights do place restrictions on the powers of government. And yet these rights were not absolute. The State can impair the liberties of individuals, so long as the impairment operates equally against all individuals and does not exceed the constitutional bounds of legislative authority set forth in the Constitution. The law at issue satisfied this standard: it impaired individual rights to contract, but it did so equally against all individuals. It did so in furtherance of the greater public good, to prevent what might be characterized as a situation analogous to the state of Nature, which all individuals, theoretically at least, understood to be a less than advantageous condition, flush with freedom from restraint, yes, but wrought with potential for misunderstandings and disagreements as to the boundaries of each person’s interests. The Chief Justice did not use such phrasings, and Locke’s theory was nowhere directly cited in his decision. And yet laced within that same concept of the Police Powers which he so heartily embraced, and the deference he paid to the discretionary authority of the Leg-

279. *Id.* at 456.

280. *Id.* at 454.

281. *Id.* at 458, quoting *In re Lasswell* (1934) 1 Cal. App. 2d 183, 188, 36 P. 2d 678.

282. *Id.* 459.

283. *Id.* at 458.

islature to balance the rights of all citizens against the public good as a whole, was the ideological DNA of Locke's older concept of the Natural right of government to broker the claims of all members of a free society in a manner least offensive to any one person's conception of their fundamental, natural-born liberty. Like the modern descendant of the Australopithecus, the doctrine as proclaimed by Chief Justice Waste was not so recognizable when compared with its ancient forebear. The older theory had evolved, and so too had the jurisprudence of California.

Conclusion: Natural Law's Enduring Legacy

In reflecting on the history of our jurisprudence, one cannot but notice among the great themes that contend for our attention the tension that exists between the rights of individuals and the rights of all individuals. This particular theme is not so old as others we might pay heed to. Cicero was not so concerned with it, nor was Aquinas. Grotius may have given it some thought. It was John Locke who first articulated it, and who first attempted to develop a theory that might guide the crafters of state institutions in later years to avoid the pitfalls awaiting nations that err too far in lending protection or power to one as opposed to the other. The theory he devised was itself a product of natural law. Its elements originated in a pre-historic (or ahistoric) past, of which there was, and is, little record, but which nevertheless was inferred by Locke and others of his day. The theory addressed the fundamental equality of human beings, their rights to the produce of the world that they and their families might endure in this life, their instinctual impulse for self-preservation, and their right to inflict punishment on those who cause them harm. The fallibility of individuals would not long permit an unrestrained pursuit of private rights of action without recourse to order and due process. Hence the state was created, and to it each man was said to cede a degree of his freedom, not that he might be subject to the arbitrary will of the state's agents, but rather for the purpose of ending the chaos arising from the impassioned pursuit of justice by and on the part of each man. Not all rights, however, were, according to this theory, alienated to the state. And not all those rights that were ceded were ceded completely. How then might the determination be made as to where exactly the right of any given individual ends and that of the state begins? Locke himself provided no ready solution to this problem. Such was left to those, inspired by Locke and his notion of natural rights, who conceived of and created the national political institutions characteristic of our modern day civilization. Among those who did so were the settlers of British North America, who founded their revolutionary republics on Locke's essential principles, incorporating them into their founding document—the Declaration of Independence—and in their organic law—the United States Constitution and the Constitutions of the several states.

Early judges sitting on the federal bench, bereft of any depth of formal legal sources or precedent, necessarily made recourse to a significant degree to general natural law principles, and they leaned in favor of individuals or in favor of the state depending on their peculiar philosophies, their biases and the particular facts of the cases before them. In a much later time, Justice Roberts, in *Nebbia*, leaned a particular way, in favor of legislative curtailment of rights reserved to the people, which, in a more traditional (but by then outdated) view, originated in the state of Nature. The determination regarding which way to lean was not an easy one. The rights of an individual “to exercise exclusive dominion over property and freely contract about his affairs, and that of the State to regulate the use of property and the conduct of business,” he noted, “are always in collision.”²⁸⁴ “No exercise,” he continued, “of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property.”²⁸⁵ Justice Roberts refrained from speculating where these rights came from. He was, in truth, not unlike most judges of his time: a man of the law who had come of age in the so-called progressive era, wherein older concepts of natural justice had given way to the realism of Holmes, Pound and Cardozo.

The move toward general embrace of this realism had begun many decades before Roberts’ day, in the mid-nineteenth century. The process whereby realism came to dominate legal thinking, however, was not necessarily at the expense of the idea of natural justice. In a sense they were similar in that they aimed at addressing problems arising in the world with solutions recommended by reason. Naturalists contended that solutions to the controversies inherent in human existence in a material world were suggested by Nature itself, in man’s general tendencies, his higher aspirations, and the principles of morality originating both in man’s conscience as revealed in all cultures in all eras and in the positive teachings of scripture. The realists, for their part, were primarily concerned with overcoming the stultifying effects not of natural law, but of positive, formal law. In this sense, realism was not unlike equity, which itself was a kind of natural jurisprudence, pursued by those seeking fairness and remedy consistent with common principles of decency. The realists would never admit of any kinship with the naturalists, even when speculating, as Holmes did, of the potential, through study, of hearing “an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”²⁸⁶ They were far too committed to the novelty of their mind-set and the process of rectifying the illogical results of application of law rooted in older, less reliable sources and traditions. Natural law was but one more of these derogated causes of

284. *Nebbia v. New York*, supra, at 524.

285. *Id.* at 524-525.

286. Holmes, “The Path of the Law,” in Christie & Martin, *op. cit.*, p. 823.

error. In an age of science it resembled just so much superstition. Instead of honoring reason, which its long-ago advocates had proclaimed was the guiding light of natural justice, it shunned it, and opted instead for an unholy alliance with the teachings of religion, which stressed faith of conviction in a truth under continuous and oftentimes withering assault by the proponents of progress. Holmes, the first of the realists, more than any of his kind, expressly disdained natural law, and demonstrated in his conduct after ascending the bench his dedication to eradicating its influence from the law altogether.²⁸⁷ Through his influential books, lectures and opinions he attracted a following, but his was not the pipe of a pied piper. Instead he walked upon a path suggested by the broad horizon opening before a society radically and rapidly transforming from a simple rural one, to a complex, industry and market driven cavalcade of noise, demands and aspirations, in which large masses of people and novel ideas intermixed freely, prompting what probably were (and are) inherent urges to second guess and experiment and innovate. Evolution was all the rage in intellectual circles during his lifetime. The masses might yet still cling to the mythology of particular glossators of scripture. Some of the most radical of their leaders, such as William Jennings Bryant, might remain even more loyal to that mythology. But the chief movers intellectually in American society, of whom were included many members of the bench and bar, adopted Darwin's concept of gradual mutation prevailing in the face of the challenge posed by the environment. Holmes may not have believed that the application of Darwin's views to the evolution of society should be enshrined in the law of the land by judicial fiat,²⁸⁸ but he harbored little doubt that institutions, and the laws that girded them, were creatures which evolved with the times, often haphazardly and imperfectly, in response to the challenge of an environment composed of human beings and all of their age-old and novel problems.

Holmes' ideas endure largely because there is perceived in them some affirmation of the experience we have with the current state of our world. His work, and the work of judges and scholars since his time, prompted in part by his call for more theory and a more realistic jurisprudence, has proven the faith we, as students and practitioners of the law, have in him. The law has evolved since his day. But it had evolved prior to his day as well. Natural law itself was a subject of this general legal evolution, emerging from the murk of pre-history and taking shape first as a collection of principles applied by judges in ancient times to modify rigid formal law in the interests of fairness. In time these principles were merged with the predominant religious movements of the ancient and medieval world. Juda-

287. See Letter of Holmes to Harold Laski, September 15, 1916, in 1 *Holmes-Laski Letters* 21 (Mark DeWolfe Howe ed., Harvard University Press, 1953), as cited by Timothy Sandefur, *op. cit.*, at 569, footnote no. 357.

288. *Lochner v. New York*, *supra*, at 75.

ism, though Maimonides, Islam through Averroes, and Christianity through these two philosophers and Thomas Aquinas, each incorporated elements of the older view of a natural order originating in a pagan, polytheistic world. In time, as society changed, as older forms of governance broke down, as wealth accumulated and began to be dispersed more widely among humanity, there were those who clamored for a share of power, if not in the governance of society itself, then at least with respect to the governance of themselves. In response to this clamor those who had leisure to contemplate the world deduced the existence of rights. All men were created equal. All men had a right to live free of the arbitrary, capricious and oppressive dictates of government and other men. All men had a right to pursue a trade, to raise their families, to live in peace. The positive law of the day did not necessarily recognize these rights or even permit their free exercise. The rights deduced from observation of human wants and impulses, thus, were ascribed to another source, to one transcending the state, the elite and the prince: they were ascribed to Nature itself.

By the 1840s, the tradition of natural justice, as it was known in America, was already subject to the effects of the process of evolution to which it owed its own existence. Its doctrines were subtly being recast so as to accommodate a more formal understanding of the law. When California became a State, its leading citizens were still beholden to the natural law tradition. In fact, the Constitution its leaders framed manifested an overt commitment to the protection of natural rights and to the law of Nature out of which those rights arose, and for this reason, perhaps, natural law and natural rights survived as a potent source of law far longer in California than it did Federally. Not content to merely rely on Locke's general thesis, California's justices took to quoting him directly. Not content to sedately mouth the platitudes found in the *Second Treatise of Government*, they set about broadening the scope of Locke's reach. And yet California's jurisprudence was not an island. It was intimately connected with the jurisprudence of the nation. The leaders of its early bar were not merely established attorneys from the more developed east, they were quite frequently accomplished law-makers and politicians, well read, well educated and well-informed about the latest products of the human intellect. California's first great legal mind, Justice Stephen Field, as committed as he was to natural rights, was an avid proponent of the positive law, natural law's antithesis. He wrote the State's first codes, and assumed a prominent role in shaping its first set of comprehensive statutes. And even after his departure for Washington, D.C. in the early 1860s, his eclectic approach to the law continued to shape California's legal development.

With the reframing of the state's Constitution in 1879, natural law remained enshrined in the organic law, but its framers were less committed to it than their predecessors. Locke's social compact theory came to be replaced by the mechanical balancing of the police powers against the funda-

mental rights of the people. The rights of the people were themselves seen largely as the creation of a grand historical process marked by a long struggle for power between the elite and the masses, and between the masses and individuals. History, not God, and not Nature, was the father and mother of rights. In truth, however, the articulation of the theory of government, mythical or historic, really did not affect the outcome of the courts' decisions. Whether the theory be defined with reference to the Police Powers Doctrine, or by the high flown language of the Enlightenment, the States' high court (and later its appellate courts) remained committed, from its earliest days, until the 1930s at least, to the principle that rights of individuals must be balanced against the rights of the community, as embodied in the state. Locke said it one way, California's later courts said it another, but in fact the principle was the same. Natural law was not so much discarded in California, as modified. Many of its principle features were early on incorporated into the positive legal structure, just as they were federally at the inception of the nation. Many of its doctrines were reformulated to conform to novel and modern ways of thinking. And occasionally, it emerged as a guiding principle, stripped of all its modern guises, released from its intellectual fetters, and unleashed upon the legal landscape. Parents, for instance, quite expressly retained natural rights to raise their children. The state continued to exercise its fundamental right, originating with the formation of the social compact spoken of by Locke, to ruin those who would ruin the state. And, even in the 1930s, when the new articulation of Locke's formula, seemingly bereft of any concept of natural justice, had firmly been established, the Chief Justice himself ventured to draft an opinion upholding an act of the legislature after determining that the limits of the legislature's authority, "natural law and the written constitutions," had not been exceeded.²⁸⁹

It is difficult today to discern any commitment on the part of our State's current bench to a natural law jurisprudence. Originalists and formalists who wish to decipher the original intent of the framers of our laws and institutions abound, but few avowed naturalists are evident roaming the legal terrain. The taunts of Justice Black in such cases as *Griswold*, and equally memorably in *Rochin v. California*,²⁹⁰ no doubt lurk too prominently in the collective legal unconscious, taking on the guise of an archetype far too dangerous to be responded to in any other way than by acts of suppression. If the tradition of innovation, bold theorizing and bold application of novel principles is the light of our collective legal psyche, natural law is the shadow. It is hated and disdained. Its old-time practitioners are relegated to oblivion. Its principles are mocked, just as is the faith once so closely allied to it. Rights never conceived of in the heyday of natural law, and which were instead viewed as evils to be avoided, discouraged and

289. *Max Factor & Co. v. Kunsman*, supra, at 458.

290. *Rochin v. California* (1952) 342 U.S. 165, 72 S.Ct. 205.

punished, are now encompassed within the penumbras of those that were, while the ancient sources of the law— religious scripture— which even in modern times were thought to form a part of the common law of the nation and of the state,²⁹¹ have literally been cast from the courtrooms and their champions cast from the bench. There is something of an obsession that marks the actions and motives of those who wish to bury our legal past, and replace it with something entirely new and foreign to our traditions. In their defense it can be conceded that there is much in traditions such as natural law open to reasonable criticism and rebuke. Black was right in his assessment that natural law could be highly subjective. Ely is correct that natural law is susceptible to use for contradictory ends. And, admittedly, natural law can and has been a vehicle for the imposition of ideas unwanted and disbelieved in by many who should in all fairness have been left in peace. But these criticisms are not applicable to natural law and natural law alone. There is no approach to jurisprudence, no approach to the practical resolution of legal questions, that does not at some point rely on the faith and discretion of the jurist or the judge. In the minds of such people as these, as in the minds of our fellow citizens, what can be said in all objectivity to reside? What set of values or principles peculiar to them influence their decisions? And how far do they go in abusing that discretion which is theirs by right or by law? Natural law was never the source of the abuse. The human heart and imagination was. The higher impulse in human beings that prompts them to improve their condition has contributed to a steady push to improve the law. But in their zeal to improve, the improvers seem to have succumbed to another human impulse, this one not so admirable or high minded, and that is to discredit the achievements of those who came before them, if only to clear the way for their own tinkering and to vindicate the products of their handiwork. Natural law was a great achievement of the higher impulses of humanity. It fired the imaginations of those who created the modern nation state and the tradition of rights that is embraced, rightfully so, as the earthly salvation of peoples throughout the world. The tradition owed much to religion there is no doubt. But religion, for all its dungeons and torture chambers, is a vast metropolis with many mansions. It was, long before the law ever existed, the embodiment of our collective morality, and its history was the history, to steal a line from Holmes, “of our moral development.”²⁹² It is a shame this tradition, both the overtly religious one, and, more importantly, the natural law tradition that has long been so closely allied and associated with it, are looked upon with such disdain by so many who inhabit our legal culture. Natural law, after all, is the fount of our liberty and nationhood. Its principles are en-

291. Chief Justice Peter Burnett conceded, “that Christianity is a part of the common law,” limited in legal effect, in part, by the reach of the Constitution as interpreted by the Court. See *Ex parte Newman* (1858) 9 Cal. 502, 512

292. Holmes, “The Path of the Law,” in Christie & Martin, *op. cit.*, at p. 807.

shrined to this day in our organic legal framework, our bill of rights, our statutes and our equity. California's own legal past indicates just how important and vital that tradition has been. By subjecting this tradition to great scrutiny, perhaps we can yet find, if not a refreshing source of law, an appreciation for the enduring debt we owe a jurisprudence not entirely in harmony with the predominant trends in our ever evolving and sublime system of law.