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# THE COHERENCE OF THE NATURAL LAW OF PROPERTY

DOUGLAS W. KMIEC\*

Property has played a central role in our republic, and it is fitting to examine that role on the occasion of the bicentennial of the Bill of Rights. Ratified on December 15, 1791, the Fifth Amendment grandly proclaims that no person shall "be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."<sup>1</sup> The drafter of this Amendment, James Madison, opined that: "Government is instituted to protect property of every sort; . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."<sup>2</sup> Against the proposition that the singular purpose of our government is the protection of property, there is the curiosity that the original constitution scarcely mentions the term.<sup>3</sup> While at least two states demanded every other provision that we know today as the Bill of Rights, not one requested the Taking Clause.<sup>4</sup> What explains this anomaly?

The beginning of an answer, I suggest, can be found in Hamilton's observation that the true protection of men's rights are to be found not "among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, . . . and can never be erased or obscured."<sup>5</sup> This, of course, is natural law. In this, Hamilton was referencing what Cicero termed "the highest reason, implanted in Nature, which commands those things which ought to be done and prohibits the reverse." The eminent Columbia legal historian, Edward Corwin documented that "[i]t was during the Middle Ages . . . that the conception of Natural Law as a code of human rights first took on real substance and importance."<sup>6</sup> Natural law not only took on substance, but

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1. U.S. CONST. amend. V.

2. JAMES MADISON, *PROPERTY* (1792), *reprinted in* 14 PAPERS OF JAMES MADISON 266-68 (emphasis in original).

3. Property is mentioned in Article IV, Section 3, which provides that Congress shall have power to make all "needful rules and regulations" for property belonging to the United States.

4. EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 161-63 (1957) (outlining the amendments proposed by the states).

5. 1 PAPERS OF ALEXANDER HAMILTON 122 (Harold C. Syrett ed., 1961) (emphasis in original).

6. Edward Corwin, *The Natural Law and Constitutional Law*, in 3 NATURAL LAW INSTITUTE PROCEEDINGS 47, 50 (1949) [hereinafter Corwin].

also, and perhaps more importantly, it was thought indistinguishable from the common law. In this, “[t]he Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. . . . [The Common Law] is *above*, rather than below that of Acts of Parliament or royal ordinance, which owe their fleeting existence to the caprice of the King or to the pleasure of councilors, which have a merely material sanction and may be repealed at any moment.”<sup>7</sup>

The understanding of natural law has declined since 1949 when Corwin wrote those words, and hence, it is important to underscore that insofar as natural law is implanted in men, it is not optional. Thus, the question put to a recent Supreme Court nominee of whether he intended to apply natural law in judicial decisionmaking on the Supreme Court is a nonsense question. Only those prepared to forfeit the reasoning process, itself, and the purpose of that effort -- namely, the pursuit of objective good or truth -- would make such admission. Of course, the question merely highlighted the ironic, post-Borkean liberal embrace of the positive law, since as a matter of crude politics, liberals presently control the Congress, not the Court. But the question does reveal that to the modern mind the prevalent conception of judicial review is merely the mechanical juxtaposition of one written document [the Constitution or the Bill of Rights] against another [whatever legislative enactment is before the Court]. This obscures, as Corwin demonstrated, that “judicial review initially had nothing to do with a written constitution. In point of fact, the first appearance of the idea of judicial review in this country antedated the first written constitution by at least two decades.”<sup>8</sup>

Insofar as the right to acquire or possess property was embedded by reason in the common law or natural law, there was little need to create additional parchment protections. It was unthinkable that members of legislative bodies would attempt to thwart the very essence of their own natures. In this, the natural law was aided by religious belief, and the revealed law of the Bible. If the natural law precept of seeking the good and avoiding evil was insufficiently precise to guide behavior, the Biblical admonition against stealing cleared matters up nicely. Madison, to be sure, knew that men were not angels, and that free will may lead men astray and against their natures. Thus, parchment barriers were created. Only if we survey these, and the contemporaneous commentary about them, in the context of natural law will we gain a genuine insight into why property was thought to be a matter of paramount importance in the period leading up to the founding and the subsequent fashioning of the Bill

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7. *Id.* at 50-51, quoting Figgis.

8. *Id.* at 58.

of Rights.

### I. COLONIAL DECLARATIONS OF RIGHT

Many of the early colonial and state charters explicitly protected certain inherent rights. For example, the Virginia Declaration antedating the Declaration of Independence provides for, "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."<sup>9</sup> Other declarations in Pennsylvania [August 16, 1776], Vermont [July 8, 1777], Massachusetts [October 25, 1780], and New Hampshire [June 2, 1784], referenced the natural, essential and inherent rights of "acquiring, possessing and protecting property." In his first proposed bill of rights on June 8, 1789, Madison generously borrowed this terminology to provide that "Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety."<sup>10</sup>

#### A. *An Explanation for Property's Omission from the Declaration*

It is sometimes erroneously argued that Jefferson's omission of property from the trilogy in the Declaration of Independence of "Life, Liberty and the Pursuit of Happiness" illustrates a lack of respect for property, suggesting that property is but a means for the enhancement of the salient values of life and liberty. In fact, it has been persuasively documented that Jefferson's omission was traceable not to a lack of respect for property, but his distinction between natural rights that are inalienable and those that may be transferred.<sup>11</sup> Jefferson's experience as a Minister to France gave him a strong distaste for feudal structures that preserved aristocracy and the royal estates. He wrote Madison: "I am conscious that an equal division of property is impracticable. But the enormous consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind."<sup>12</sup> Jefferson acted upon his own advice, introducing into the Virginia legislature a bill to abolish "entails,"

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9. VIRGINIA DECLARATION OF JUNE 12, 1776, reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 234 (1971).

10. FIRST PROPOSED BILL OF RIGHTS (JUNE 8, 1789), reprinted in SCHWARTZ, *supra* note 9, at 1026.

11. Jean Yarbrough, *Jefferson and Property Rights*, in *LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION* 66 (Ellen Frankel Paul & Howard Dickman eds., 1989).

12. Letter from Jefferson to Madison (Oct. 28, 1785), in 8 *THE PAPERS OF THOMAS JEFFERSON* 682 (Julian P. Boyd ed., 1950).

restrictions on the line of inheritance that keep property within the same family. Thus, Jefferson did not dispute that property was a natural or inherent right, he simply refused to posit that particular legislative conceptions of the inherent right to acquire or possess property were, themselves, immutable.

In this, Jefferson had identified indirectly an aspect of natural law teaching that is often overlooked. Natural law supplies precepts and principles operating at a fairly high level of generality. These principles cannot be denied, and they are applicable everywhere and at all times. Natural law does not supply a detailed, unchangeable code of conduct or the content of specific property definitions or regulation. These definitional and regulatory exercises depend on the application of precept or principle to contingent facts. Certainly some of these applications result in decisions -- or as law students know it, "line-drawing" -- to which the natural law is jurisprudentially indifferent. It was in this way that Jefferson could advocate legislative redefinition of the feudal aspects of property tracing their origin to social convention or legislation without undercutting the inherent right. Such legislative redefinition, of course, could not be so inventive and far-reaching as to do violence to the underlying precept in favor of property acquisition and possession, itself.

#### *B. Differentiating Natural and Positive Law Supplies Coherence to Property Jurisprudence*

Jefferson's distinction between the natural and positive law aspects of property addressed a confusion that beset the founding generation, and that to some degree, continues today. A failure to appreciate Jefferson's distinction can make modern property and Taking Clause cases appear intractable, when they are not. The confusion crystallized when Blackstone seemingly classified property rights as both absolute and relative. He declared that "[t]he third absolute right, inherent in every Englishman, is that of property . . . ."<sup>13</sup> Blackstone believed that property was an absolute right because "every man [would be] entitled to enjoy [it] whether out of society or in it."<sup>14</sup> In this, Blackstone was reflecting the natural law, pre-societal basis of property. Like the original, unamended constitution that said little about property directly, Blackstone went so far as to observe that this absolute right would not be founded on any "human municipal law" for its explanation or enforcement.

Matters became tangled, however, when Blackstone classified the laws relating to property ownership as relative. These were not the absolute rights of persons, but qualified rights concerning things. Such relative rights for

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13. 1 WILLIAM BLACKSTONE, COMMENTARIES 134 (1796).

14. *Id.* at 119-20.

Blackstone -- as Jefferson later deduced -- were determined within society in relation to others, not brought to society in an inherent, natural law form. In his lectures on law, James Wilson sought to dispel the confusion caused by the strictness of the word "absolute" in Blackstone in a manner quite similar to Jefferson.<sup>15</sup> Wilson writes: "Our law recognizes no such thing as absolute power or absolute rights, but does recognize the distinction between the abstract right to acquire property as one of the civil rights of persons and the right or property as applied to things."<sup>16</sup> From this, Wilson concludes that Justice Patterson's opinion in 1795 that acquiring and possessing property "is a right not *ex gratia* from the legislature, but *ex debito*"<sup>17</sup> -- a natural, inalienable right of man -- is fully reconcilable with Chief Justice Marshall's later opinion that "property is the creature of civil society and subject in all respects to the disposition and control of civil institutions."<sup>18</sup>

In fairness to Blackstone, the confusion attributed to his terminology is probably less attributable to him, than to legal advocates who have subsequently and selectively emphasized the absolute or relative features of property to suit their purposes. Even when discussing the absolute nature of the right, Blackstone carefully commented that it consists of "free use, enjoyment, and disposal of all . . . acquisitions, without any control or diminution, save only by the laws of the land."<sup>19</sup> Private property, he wrote, is founded in nature, "but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty."<sup>20</sup>

## II. THE ORIGINAL CONSTITUTION

With the natural law or inherent right of property distinguished from its positive law counterpart, a further question merits exploration: did the founding generation view the positive law being created or authorized by the original constitution as a threat or enhancement to the natural law of property? A little of both. I submit that the founders viewed the legislative power as neither wholly beneficent nor wholly antagonistic toward private property.

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15. 2 THE WORKS OF JAMES WILSON 309 n.1 (James DeWitt Andrews ed., 1896).

16. *Id.*

17. *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (Paterson, Circuit Justice and signer of the Constitution).

18. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 211 (1796).

19. BLACKSTONE, *supra* note 13, at 134.

20. *Id.*

At the convention, Hamilton and Governor Morris clearly saw the positive law as enhancing the security of property ownership. Morris went so far as to state that "property was the main object of society"<sup>21</sup> and that the state of nature was "only renounced for the sake of property which could only be secured by the restraints of regular Government."<sup>22</sup> This sentiment finds direct support in Locke's *Second Treatise on Government* where he ascribes the "original right and rise of both the Legislative and Executive Power"<sup>23</sup> to the chief end of the preservation of property. In correspondence after the convention, Madison wrote to Jefferson that without the positive law, "rights of property would become absolutely defunct, and the most violent struggles ensue between the parties interested in reviving, and those interested in reforming the antecedent state of property."<sup>24</sup> Such rivalry and uncertainty would not only depreciate the value of property, it would yield anarchy. In the positive law, property rights would be stable and society would flourish.

This is not to say that legislative power -- especially state legislative power -- was not also perceived as threatening private property. Madison identified the "major source" of unjust laws as various forms of debtor relief, and worse, the requirement that creditors accept paper money in the payment of debts.<sup>25</sup> Madison saw this legislative mischief as not only a threat to property, but to republicanism and popular government. He openly pondered: "Was it to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States?"<sup>26</sup>

It is interesting to note how specifically the original constitution dealt with the threats to property from legislative power that Madison perceived. Article I Section 10 expressly prohibits the State from making anything other than gold and silver coin a "tender in payment of debts."<sup>27</sup> As for the "wickedness"<sup>28</sup> of providing wholesale debtor relief, this would be precluded by the prohibition of any law "impairing the obligation of contracts."<sup>29</sup>

21. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 1966) (remarks by Governor Morris as recorded in Madison's notes for July 5, 1787) [hereinafter 1 Farrand].

22. *Id.*

23. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 127 (1714).

24. LETTER FROM MADISON TO JEFFERSON (Feb. 4, 1790), reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 177 (Marvin Meyers ed., 1981).

25. 1 Farrand, *supra* note 21, at 135-36.

26. *Id.*

27. U.S. CONST. art. I, § 10.

28. Madison recited his concerns with: "[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project," in THE FEDERALIST NOS. 10, at 84 (Clinton Rossiter ed., 1961).

29. U.S. CONST. art. I, § 10.

No state to my knowledge, with the possible exception of the Civil War period, has dabbled in currency, and at least until the onset of the Great Depression,<sup>30</sup> the Contract Clause effectively precluded retroactive contractual impairments. Even after the Depression, the Contract Clause has made an occasional reappearance,<sup>31</sup> never quite in its literal form, but strong enough to keep municipalities from welshing on their bond financing promises<sup>32</sup> or states from imposing pension plans on employers who did not promise them.<sup>33</sup> However, modern regulators have more than these ways to devalue property. Could it be that Madison gave no thought to this likelihood and was content to leave open other legislative opportunities for property depredation?

In point of fact, Madison proffered a number of other solutions to majoritarian abuses. To ensure that those elected to the federal House of Representatives were favorable to property interests, Madison urged the enlargement of election districts. Special interests, or factions, would presumably be less likely to capture their representative. As Madison put it, "it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; . . ."<sup>34</sup> Similarly, Jennifer Nedelsky argues that Madison wanted the Senate to be the branch representing property.<sup>35</sup> However, "once it was clear that the Senate was to be composed of an equal number of members from each state, appointed by the state legislatures, . . . Madison's plans for representing property through suffrage or apportionment became irrelevant."<sup>36</sup> Another proposed Madisonian check on legislative overreaching -- the council of revision -- was also rejected by the convention. Combining the judiciary and executive, the council would pass upon federal law before it would become effective. Four times the convention resisted Madison on this because of concern that this would too

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30. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding a Minnesota mortgage moratorium on foreclosure as an emergency measure, even as against the literal terms of the contract clause, on the theory that the core obligation was left unaffected).

31. Immediately following the Depression, the Court issued a series of cases that suggested a return to the original understanding of the Contract Clause. See *W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934) (invalidating an Arkansas law that retroactively exempted life insurance proceeds from judgment creditors); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1934) (invalidating an Arkansas law that diluted the rights of mortgage bondholders); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1935) (invalidating a Louisiana law that modified existing withdrawal rights from savings accounts).

32. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

33. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

34. THE FEDERALIST NO. 10 (James Madison), *supra* note 28, at 82.

35. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 56 (1990).

36. *Id.* at 57.

greatly involve the judiciary in the "policy of public measures."<sup>37</sup> Finally, Madison unsuccessfully advanced a national veto over state laws that, among other things, he thought would prevent the undermining of the protection of property.<sup>38</sup>

In all these proposals, Madison relied on structure to protect property rights. This indirect security seems odd in light of the importance of the interest -- the main objective of the government and the specificity with which Madison went after debtor relief and paper money. Two possible explanations for this initial structural reliance suggest themselves: Madison's lack of faith in the judiciary's ability to counteract the ingenuity of the legislature to encroach upon property<sup>39</sup> and the fact that the dual origin of property as both pre-societal and societal made it next to impossible in the abstract to define those aspects of property which were to be legislatively off-limits.

It might be posited that the *ex post facto* clause was intended to protect property explicitly. At the convention, John Dickinson of Delaware opined to the contrary. Based upon his review of Blackstone, Dickinson said that the term "related to criminal cases only."<sup>40</sup> Edward Corwin has argued that other members of the convention disagreed thinking that "the clause would rule out *all* 'retrospective' legislation, meaning thereby legislation which operated detrimentally upon existing property rights."<sup>41</sup> In 1798, the Court took

37. Constitutional delegate Rufus King, *quoted in* Madison's notes, *reprinted in* Farrand, *supra* note 21, at 97-98.

38. LETTER FROM MADISON TO GEORGE WASHINGTON (April 16, 1787), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 346 (Gaillard Hunt ed., 1900).

39. Madison commented upon the slowness of the judiciary, and that state assemblies could pass laws harmful to property before they could be invalidated "by the National Tribunals." *Id.* at 27. As is well known, Madison at first was skeptical of the wisdom or need for a bill of rights. Part of this skepticism was a distaste for judicial review. In 1788, Madison commented on Jefferson's draft constitution, writing:

In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.

REMARKS ON MR. JEFFERSON'S DRAUGHT OF A CONSTITUTION, OCTOBER 1788, *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 65-66 (Michael Meyers ed., 1973). To obviate this "impropriety," Madison urged the council of revision discussed in the text which the convention rejected. It can be speculated that Madison grew somewhat more congenial to judicial review with the council's rejection and Madison's later conversion to the importance of the bill of rights.

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448-49 (Max Farrand ed., 1966).

41. Corwin, *supra* note 6, at 66.

Dickinson's side of the issue in *Calder v. Bull*.<sup>42</sup> Corwin posits that this was a severe blow to property interests.<sup>43</sup> In retrospect, however, it was cushioned by two factors: First, Justice Chase openly invited local judiciaries to fill the gap in property's protection created by the Court by recourse to extra-constitutional limitations such as natural law.<sup>44</sup> Second, there was the parchment barrier of the Taking Clause that Madison had penned nine years earlier.

### III. NATURAL LAW PROTECTION OF PROPERTY IN STATE COURTS

As ratified, the provisions of the Fifth Amendment did not apply to the states.<sup>45</sup> "This, however, was no obstacle to a bench and bar learned in the juristic theory of the time, for in the central concept of that theory they had a much stronger peg to tie to -- natural law."<sup>46</sup> In *Vanhorne's Lessee v. Dorrance*,<sup>47</sup> Justice Patterson had shown the way by instructing a jury in 1795 that "the right of acquiring and possessing property and having it protected, is one of the natural, inherent and unalienable rights of man. . . . Property is necessary to [men's] subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society . . . ." <sup>48</sup> Fifty years later, the Georgia Supreme Court would rhetorically ask:

Does the amended Constitution of the United States, by declaring 'Private property shall not be taken for public use without just compensation,' introduce, or create, a *new principle of restriction*, which did not exist before? Did not the same principle of restriction exist, both as it regards the federal and state governments, before the adoption of the amendment in question?<sup>49</sup>

The answer to the Georgia court, and most state courts, was self-evident: the principle embodied by the Fifth Amendment "was distinctly asserted, as a part of the common law, long *anterior* to its adoption into the amended Constitution of the United States."<sup>50</sup>

In what contexts did the state courts use natural law to protect property?

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42. 3 U.S. (3 Dall.) 386 (1798).

43. Corwin, *supra* note 6, at 59.

44. 3 U.S. (3 Dall.) at 387-89.

45. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

46. J.A.C. Grant, *The 'Higher Law' Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71 (1931).

47. 2 U.S. (2 Dall.) 304 (1795).

48. *Id.* at 310.

49. *Young v. McKenzie*, 3 Ga. 31, 41 (1847).

50. *Id.* at 42.

Chancellor Kent of New York, without referencing any state constitutional provision, but instead relying on the natural law writing of Grotius, Pufendorf, and Bynkershoek, invalidated a statute that would have diverted the water from a stream for municipal water purposes.<sup>51</sup> The state had not formally sought to take the riparian interests in the case, even though it had provided for compensation to the owners of the actual spring and the land over which the municipal pipes were to be laid. While the absence of explicit compensation for the riparians may have been a legislative oversight, the factual context makes the case an early example of compensation being required for what was, in essence, an inverse condemnation or regulatory taking.

It would take more than a century for the U.S. Supreme Court to draw a comparable conclusion under the federal constitution.<sup>52</sup> Even then, the Supreme Court standards for finding a regulatory taking, which the Court itself has termed "ad hoc factors,"<sup>53</sup> provide far less security for property interests than that articulated under natural law by Chancellor Kent. Unlike the subjective and ungenerous taking calculus applied by the modern Court, Kent wrote in his *Commentaries* that "we cannot but admire the intrepidity and powerful sense which led Lord Coke . . . to declare, as he did in *Doctor Bonham's Case* [7 Coke 118 (1610)] that the common law doth control the acts of parliament, and adjudges them void when against common right and reason."<sup>54</sup> The requirement of compensation, insisted Kent, "is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."<sup>55</sup>

A few years later, another New York justice in *People v. Platt*<sup>56</sup> invalidated a statute that imposed the affirmative obligation on a dam owner to build a slope or fish-ladder for salmon. Here again, no explicit exercise of eminent domain had been undertaken. Rather, like many modern land use controls that impose affirmative duties to maintain landmarks or open space, this was clearly a regulatory exercise. In point of fact, the *Platt* case bears a strong resemblance to the easement burden invalidated by the U.S. Supreme Court in 1987 in *Nollan v. California Coastal Commission*.<sup>57</sup> Just as the Nollans were told that they could only obtain a building permit for their home upon the grant of a beach easement to the public, so too, the dam builder in *Platt* was

51. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816).

52. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (invalidating a state law limiting mining that results in subsidence because the coal company had a vested property interest that allowed it to mine notwithstanding the subsidence).

53. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

54. I JAMES KENT, COMMENTARIES ON AMERICAN LAW 420 (1826).

55. II JAMES KENT, COMMENTARIES ON AMERICAN LAW 275-76 (citations omitted).

56. 17 Johns. Ch. 195 (N.Y. 1819).

57. 483 U.S. 825 (1987) (invalidating a beach easement condition on a building permit).

precluded from constructing or maintaining a dam without providing for the salmon's unimpeded access to the waterway. Salmon or people, the point is the same: a vested right to use cannot be summarily taken for the public benefit, except where "a fair and just equivalent is awarded to the owner of the property thus taken."<sup>58</sup>

Again, these early state cases provide useful clues to the appropriate boundary between natural rights that ought to remain free of legislative interference and the more contingent property claims that may be redefined or reformed by legislative bodies. For natural law purposes, these early decisions suggest that it should make no difference whether the government intended to take the property or not, whether the loss imposed on the landowner is large or small, whether it involves a physical invasion, whether the property owner has distinct, investment-backed expectations, or whether the remaining property rights leave the property owner with an economically viable asset in the judgment of the Court. None of these modern ornamentations of Supreme Court thought go as directly as the natural law to the heart of the matter: namely, whether there is a common law right of acquisition, possession, or use that is being transferred from the private owner to the government for public benefit purposes. Neither did the natural law draw artificial distinctions between tangible and intangible property interests. Thus, a New Hampshire statute that canceled an exclusive franchise for a toll bridge in order to permit the legislature to construct a second bridge was found illegal and void since no provision for adequate compensation had been made.<sup>59</sup>

#### IV. THE PROTECTION OF PROPERTY AS A MATTER OF DUE PROCESS

In writing the majority opinion in *Nollan*, Justice Scalia observed that the easement requirement amounted to a taking because it failed to substantially advance a legitimate state interest.<sup>60</sup> A number of commentators argue that in this, Justice Scalia was substituting a *Lochner*-esque<sup>61</sup> substantive due process standard for the Court's "ad hoc" taking factors alluded to above.<sup>62</sup> Yet, Justice Scalia effectively answered this criticism by distinguishing *Lochner*. Scalia's opinion pointedly differentiates between judicial scrutiny of the "means-end" nexus, an appropriate judicial practice, and *Lochner*'s inappropriate judicial

58. 17 Johns. Ch. 195, 215 (N.Y. 1819).

59. *Piscataqua Bridge v. N. H. Bridge*, 7 N.H. 35, 66 (1834).

60. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

61. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a state law regulating the hours of bakery workers) is modernly associated with illicit judicial lawmaking or judicial decisionmaking improperly second-guessing the wisdom or policy of legislation.

62. Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1609 (1987).

second-guessing of governmental ends.<sup>63</sup> Moreover, Scalia pointed out in a footnote that had the landowner argued that he was disproportionately burdened by the easement requirement, this might well give rise to a due process or equal protection claim.<sup>64</sup>

Property and due process is something of a discrete topic, but it is worth pausing just for a moment to examine whether there is a natural law base to Justice Scalia's due process footnote suggestion in *Nollan*. The Constitution's due process language has been traced to article 39 of the *Magna Charta*, which provided that no individual should be deprived of his property, but by the "law of the land." In his *Institutes*, Lord Coke interpreted the "law of the land" reference in the great charter as providing for jury trial and immunity from arbitrary arrest.<sup>65</sup> Justice Story echoed this interpretation,<sup>66</sup> and a number of courts held that the due process phraseology or its more ancient counterpart was not a constraint on legislative power at all.<sup>67</sup> This seems the better view, yet in the mid to late Nineteenth Century, state courts<sup>68</sup> and the Supreme Court<sup>69</sup> employed due process to set aside interferences with vested property rights.

Corwin reports that due process was turned to by the bench and the bar to rectify the gap created by the Court's limitation of the *ex post facto* clause to the criminal context and also as an answer to Jacksonians who frowned on extra-constitutional, natural law doctrines.<sup>70</sup> Thus, "[t]he original significance of the clause was purely procedural . . . . In the revamped clause the term 'due process of law' simply fades out and the clause comes to read, in effect, 'no person shall be deprived of property, period.'"<sup>71</sup>

There is danger in such constitutional transfigurations, not only to the Constitution, but also in the misunderstanding and misinterpretation of natural law. Corwin illustrated the danger by demonstrating how the revamped due process clause was indeed far afield from natural law. Quoting former Supreme

63. 483 U.S. 834-35, where Justice Scalia observes that the Court has "made clear . . . that a broad range of governmental purposes and regulations satisf[y]" the requirement of a "legitimate state interest."

64. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 & n.4. Justice Scalia refers to Fourteenth Amendment due process as the "incorporated Takings Clause." For a discussion of this point, see Douglas Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obuse*, 88 COLUM. L. REV. 1630, 1650-52 (1988).

65. 1 SIR EDWARD COKE, *INSTITUTES* 45 (1628).

66. III JOSEPH STORY, *COMMENTARIES* § 1783 (1833).

67. *Mayo v. Wilson*, 1 N. H. 53, 57 (1817).

68. *Wynehamer v. People*, 13 N.Y. 378 (1856).

69. *Lochner v. New York*, 198 U.S. 45 (1905).

70. Corwin, *supra* note 6, at 67-68.

71. Corwin, *supra* note 6, at 68.

Court Justice John Campbell's unsuccessful, but later influential brief, in *The Slaughter House Cases*,<sup>72</sup> due process came to mean "freedom, free action, free enterprise -- free competition."<sup>73</sup> This formulation of due process is surely not merely procedural, but neither was it natural law. The new due process was an admixture of political economy and natural science, and quoting William Graham Sumner, stood for the proposition that "one man, in a free state, cannot claim help from, and cannot be charged to give help to, another."<sup>74</sup> Whereas natural law operates *through* the reasoning of men and conceived of men *in* society, the Lochnerians and their new due process "set man, the supreme product of a highly competitive struggle for existence, *above* society -- an impossible station in both logic and fact."<sup>75</sup>

Corwin was right to be highly critical of this revamped, pernicious due process doctrine. But do not misunderstand his criticism. His concern was not that legislative enactment was being subjected to review under principles of universal justice binding upon constitutional government, it was that judicial review had become not the exercise of reasoning, but the application of mechanical formula. In 1949, when Corwin wrote, he posited that such automated jurisprudence was fast becoming the basis for the incorporation doctrine and the discovery of new rights -- like the right to be *above* society in the "freedom of contract" sense. By the same historical, nontextual route, later Courts would find other rights as "implicit in the concept of ordered liberty,"<sup>76</sup> or as an emanation of equal protection or due process.<sup>77</sup> Judicial inventions of this variety may not only be non-constitutional, they may also contradict essential elements of the natural law.<sup>78</sup>

Corwin decried the mindless elevation of such "invented" rights into a "*super-constitution*, so that any law touching them is *ipso facto* 'infected with

72. 83 U.S. (16 Wall.) 36 (1872).

73. Corwin, *supra* note 6, at 72; quoting Campbell's brief at 42-44. John Campbell was himself a former Justice of the Supreme Court from 1853 to 1861, the only appointment of President Franklin Pierce.

74. *Id.* at 73; quoting WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE EACH OTHER (1883), *reprinted in* MASON FREE GOVERNMENT IN THE MAKING 607-08 (1949).

75. *Id.* at 75.

76. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Other terminology the Court employs for incorporation purposes includes "principles of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," *Id.*, or "those principles that are basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948).

77. *See generally*, GERALD GUNTHER, CONSTITUTIONAL LAW 819 (12th ed. 1991) discussing *Griffin v. Illinois*, 351 U.S. 12 (1956) (rights to free trial transcripts); *Douglas v. California*, 372 U.S. 353 (1963) (appointed counsel); *Reynolds v. Sims*, 377 U.S. 533 (1964) ("one person/one vote" apportionment limitations that seemingly disregard section 2 of the Fourteenth Amendment).

78. *Roe v. Wade*, 410 U.S. 113 (1973).

presumptive invalidity'.<sup>79</sup> Such slide-rule jurisprudence is contrary to the instruction from natural law, in matters of property, or anything else. "Any patent formula or device which relieves the Justices from considering relevant, however recalcitrant facts, or which exonerates them of the characteristic judicial duty of adjusting the universal and eternal to the local and contingent, the here and now, is to be deplored."<sup>80</sup>

Is Justice Scalia's due process suggestion in *Nollan* a patent formula unrelated to man in society? I think not. Putting aside the debate over the historical meaning of due process vis a vis the *Magna Charta*, Scalia's concern with disproportionate burden is very much a natural law inquiry -- which is not affixed to any specific constitutional provision, but the backdrop of the entire constitutional enterprise. As Justice Scalia outlined in his subsequent dissent in *Pennell v. City of San Jose*,<sup>81</sup> which questioned placing the burden of impoverished tenants on landlords, his is not the Sumner proposition that "one cannot be charged to give help to another," but that such charges must be equitably apportioned through general taxation, rather than the confiscation of property.

## V. THE FIFTH AMENDMENT

It has been amply demonstrated that the states had little need for the parchment barrier of the Fifth Amendment so long as the natural law origin of property was openly admitted. Under Madison's extended-republic notions, the natural law of property was assumed safe at the federal level as well, although

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79. Corwin, *supra* note 6, at 78.

80. CORWIN, *supra* note 6, at 79. Ironically, Justice Blackmun who imposed such mechanical formulae to concoct the abortion right later echoed Corwin's sentiments in *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), stating his "unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'Compelling [state] interest' and 'least drastic [or restrictive] means' . . . . [These phrases] are too convenient and result oriented, and I must endeavor to disassociate myself from them." *Id.* at 188. (Blackmun, J. concurring).

81. 485 U.S. 1 (1988). Justice Scalia observed that the problems of the impoverished tenant are most appropriately addressed by "the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps)." *Id.* at 21. In contrast, it is constitutionally wrong "to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants." *Id.* at 22. Addressing the concern of natural law due process directly, Justice Scalia continued:

[s]ingling out landlords to be the transferors may be within our traditional constitutional notions of fairness, [only when] they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that be accomplished . . . .

*Id.*

Madison was persuaded that there was no harm making the point explicit as had been done in the Northwest Ordinance. The natural law protection of property weakened, of course, with the rise of positivism, and thus, it is useful in this concluding section to briefly examine how true the construction of the Fifth Amendment, as incorporated against the states in the Fourteenth,<sup>82</sup> has been.

From the above discussion of state cases, several criticisms of the Court's modern regulatory taking cases already have been stated. Perhaps, their greatest deficiency is reliance upon mechanical or categorical formulas to avoid natural law reasoning. This has yielded some rather odd outcomes. For example, Justice Marshall found the permanent physical occupation of a 4 inch by 4 inch cable television box on a roof to merit protection in *Loretto v. Teleprompter*,<sup>83</sup> while Justice Brennan held that the deprivation of air rights worth millions of dollars as office space was a noncompensable event.<sup>84</sup> So too, 27 million tons of coal and accompanying support estates could be rendered valueless by state law without compensation.<sup>85</sup> Something is amiss. If natural law is to be respected in the regulatory context, the Fifth Amendment must mean that no property owner will be singled out disproportionately for the public weal and that the common law features of property acquisition, possession, transfer and use will not be set aside retroactively, except where property, itself, is being used to contradict nature by causing a harm or when compensation is tendered.

As to compensation, and as a matter of history, William Stoebuck has documented that "compensation was the regular practice in England and America . . . during the whole colonial period"<sup>86</sup> for formal exercises of eminent domain. There was some exception, but it occurred mostly with regard to unimproved or unenclosed land taken for road purposes. Even here, the variation from the compensation principle was not at odds with natural law since it rested on an assumption of off-setting benefit "that a new road would always give more value than the unenclosed land it [had] occupied."<sup>87</sup> The theoretical justification for compensation was the avoidance of disproportionate burden. As Pufendorf wrote in 1672: "[n]atural equity is observed if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another."<sup>88</sup>

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82. *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U.S. 226 (1897).

83. 458 U.S. 419 (1982).

84. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

85. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

86. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 583 (1972).

87. *Id.* at 583.

88. SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM* 1285 (Charles Henry and William Abbott Oldfather trans., 1934).

There is no analytical reason from natural law to not apply the formal eminent domain compensation principle to regulatory takings. As discussed above, this was well recognized in early state practice, and the U.S. Supreme Court finally got it right in *First English Evangelical Lutheran Church v. Glendale*,<sup>89</sup> in which the Court rejected California's invalidation only rule for government overreaching and jettisoned specious distinctions between temporary and permanent takings. In the Court's words, the Fifth Amendment is self-executing<sup>90</sup> -- that is the Constitution textually fulfills the natural law principle of full indemnification. The natural law requirement of compensation gives honor to the proposition of Locke and Madison that the principal end of government is the preservation of property. Obviously, to allow government to unduly burden any citizen would diminish, rather than preserve, property and would be destructive of the government's own end. In this, it can be seen that it is misleading to describe eminent domain as an inherent or reserved sovereign power, since such inherence or reservation could only be true where property was not a pre-societal, natural law claim.<sup>91</sup>

The tough cases, of course, in the regulatory taking context are those that deal with legislative modification of common law rights of acquisition, possession, transfer and use. As stated earlier, even Blackstone recognized the difficulty of these cases in drawing his distinction between the absolute right of acquisition and possession and the more relative claims that flow from day-to-day ownership. In seeking to modify entail and other feudal structures, Jefferson worked this out by protecting property from legislative interference so long as property was serving to advance man's industriousness.<sup>92</sup> Arguably, his concern for the relationship between industry and property and his desire to abolish ancient, hereditary or feudal monopolies is what explains Jefferson's famous dictum that "the earth belongs in usufruct to the living."<sup>93</sup> However, Jefferson did not indulge the government's involvement in redistributionist schemes, writing:

To take from one, because it is thought that his own industry and that of his father's has acquired too much, in order to spare to others,

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89. 482 U.S. 304 (1987).

90. *Id.* at 315.

91. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 65 (Maurice Cranston trans., 1970) (property originates with the sovereign to be doled out in accordance with need).

92. Jean Yarbrough concludes that "Jefferson believed that property was grounded in two conflicting natural principles: men's equal wants and their unequal talents for satisfying these needs. It is this need to strike a balance between these two contradictory aspects of human nature, rather than the mistaken belief that property is merely conventional, which gives Jefferson's understanding of property its distinctive character." Yarbrough, *supra* note 11, at 69.

93. LETTER TO JAMES MADISON (Sept. 6, 1798), reprinted in 15 *THE PAPERS OF THOMAS JEFFERSON* 396 (Julian P. Boyd ed., 1950).

who, or whose fathers have not exercised equal industry and skill, is to violate arbitrarily the first principle of association -- the *guarantee* to every one of his industry and the fruits acquired by it.<sup>94</sup>

Locke, too, qualified his labor theory of property to avoid accumulations that would result in waste. In his words, "the same law of nature, that does . . . give us property, does also bound that property too." Quoting Timothy, Locke continues, "God has given us all things richly, . . . But how far has he given it to us? To enjoy. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix property in. . . . Nothing was made by God for Man to spoil or destroy."<sup>95</sup>

In a similar vein, Madison proffered that natural or common law rights of property ought to be protected so long as they advance the individual reasoning faculties of man.<sup>96</sup> However, that these individual faculties were different and likely to result in an uneven distribution of property was no justification, said Madison, to empower the legislature to undertake redistribution. Indeed, protecting the unequal amount of property that results from unequal faculties was an essential component of social liberty informed by natural justice.<sup>97</sup> In Madison's own words, "[f]rom the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results . . . ."<sup>98</sup>

It may be noticed that Jefferson and Madison put the protection of common law property claims in positive terms -- that is, in light of the good they fostered: industriousness and the development of human faculties. The issue can also be approached from the negative. Blackstone stated the limitation on these natural law rights in terms of the Latin principle: *sic utere tuo, ut alienum non laedas*.<sup>99</sup> In this maxim, there is an implicit authorization to the government to prevent harm, which is no more than one would expect from a government formed to preserve property. There has been a lot of academic

94. *Prospectus* for DeStrutt de Tracy contained in a letter to Joseph Milligan (April 6, 1816), reprinted in 14 THE WRITINGS OF THOMAS JEFFERSON 456 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

95. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 31 (2d ed. 1970).

96. Madison wrote: "The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government." THE FEDERALIST NOS. 10, at 78 (Clinton Rossiter ed., 1961).

97. NEDELSKY, *supra* note 35, at 38.

98. THE FEDERALIST NOS. 10, 78 (James Madison).

99. Use your property in such a manner as not to injure another. 3 WILLIAM BLACKSTONE, COMMENTARIES 216-17 (1768).

whining about how the harm prevention/benefit acquisition distinction is illusory.<sup>100</sup> Some of this is traceable to the intellectual grip of law and economics that sees the world as a series of Coasean reciprocal harms. Others resist the distinction because, bluntly, it stands in the way of utilitarian, property redistributive schemes. Yet, common reasoning illustrates the falsity of the proposition that the harm/benefit distinction is unhelpful. One need only contemplate the difference between preventing a property owner from emitting smoke into a neighbor's air and requiring that same owner to maintain the facade of his structure for the aesthetic enjoyment of a neighbor or the public at large. Yes, in a given community at a given time it might be possible to establish the modification of a facade as a harm. It would be an unusual proposition in most places, but there is no reason to assert its impossibility.<sup>101</sup> These determinations are what the common law of nuisance and natural law is all about. It is through nuisance law, to paraphrase Corwin, that the "universal and eternal" right of property ought to be adjusted to the "local and contingent, the here and now." Far wiser to pursue this evolving, yet coherent path, than to wander aimlessly in *ad hoc* factors devised by a modern Supreme Court with the help of a legal education fraternity that rarely exhibits a sense of history or even awareness of the natural law.

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100. See generally JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1050 (2d ed. 1988). The identified failing is said to be the absence of a neutral benchmark to distinguish the prevention of harm from the acquisition of benefit. In truth, the common law of nuisance has been supplying this benchmark for centuries. That a nuisance-based benchmark may be different from place to place or over time is hardly a failing, as it is through such adjustment that the natural law of property is most fairly brought in line with modern development.

101. Cf., Professor Richard Epstein has stated that "the construction of a house that interferes with a stranger's view does not constitute a nuisance under any conceivable theory of the subject, . . ." RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 118 (1985). While view blockage in most places is highly unlikely to be a nuisance, there is no reason to believe, it could never be. See *Prah v. Maretti*, N.W.2d 182 (Wis. 1982) (finding a cause of action in common-law nuisance is presented when landowner built his residence in a manner that blocked a neighbor's solar collector). As I have previously noted, the existence of a nuisance is a mixed question of law and fact reflecting the appropriateness of a particular use to the present time and place. Moreover, the common law of nuisance provides the best insight as to what is and what is not a taking both as a matter of original understanding and natural law. See Douglas Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1638-45 (1988). Thus, determining whether or not a nuisance can be said to exist is at the core of the application of the natural law of property to the contingent facts of the here and now. In contrast, much aesthetically-based public land use control, and even some comparable private land use controls imposed by boilerplate restrictive covenants, is merely an attempt to redistribute some of the common law aspects of property to others.