1946

A Study of the Use of the Natural Law in Ten Important Decisions of the United States Supreme Court

David Cowan Bayne
Loyola University Chicago

A STUDY OF THE USE OF THE NATURAL LAW IN TEN IMPORTANT DECISIONS OF THE UNITED STATES SUPREME COURT

BY

DAVID COWAN BAYNE, S.J.

AN ESSAY SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF ARTS IN PHILOSOPHY IN LOYOLA UNIVERSITY CHICAGO

1946

VITA

David C. Bayne, Jr., S.J., was born in Detroit, Michigan, January 11, 1918.

He was graduated from the University of Detroit High School, Detroit, Michigan, June, 1935 and from the University of Detroit, as a Bachelor of Arts with a major in Philosophy in June, 1939.

Two years were then spent in the Law School of the University of Detroit.

In August of 1941 the author entered the Society of Jesus at Milford, Ohio. The next three years were spent at Xavier University in the Graduate School.

During the last year he has been registered in the Graduate School of Loyola University, West Baden College division, with a view to obtaining a Master's degree in Philosophy.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION: PURPOSE, SCOPE AND METHODS OF THIS THESIS

The Necessity of the Philosophy of Law

> You may think that there is nothing practical in a theory that is concerned with ultimate conceptions. That is true, perhaps, when you are doing the journeyman's work of your profession. You may find in the end, when you pass to higher problems, that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in anything else.
> ...
> The genesis, the growth, the function and the end of law - the terms seem general and abstract, too far dissevered from realities, raised too high above the ground, to interest the legal wayfarer. But, believe me, it is not so. It is these generalities and abstractions that give direction to legal thinking, that sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. ... Often the philosophy is ill coordinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the

less, the goad is there.[1]

These words of Justice Cardozo have been quoted often because they are well said and true. It is this same conviction, that there is a necessity for a philosophy of law, that gave the first impetus to this thesis. In this do we concur with Cardozo, but no farther. His own philosophy of law cannot receive such approbation.[2]

Robert M. Hutchins expressed the same need in a recent article. His words, however, are important as well for their sound philosophy, which stands in sharp contrast to that of Cardozo.

> Unless it is admitted that men can and should have common ideals, that the natural moral law underlies the diversity of the mores, that the good, the true, and the beautiful are the same for all men, no world civilization is possible.[3]

Practice Follows Theory

The average American jurist, however, does not give much thought to the philosophy of law, as fundamental as it is. He merely makes practical use of the Christian patrimony of legal

---

1 Benjamin N. Cardozo, The Growth of the Law, Yale University Press, New Haven, Connecticut, 1931, 23, 25.

2 On this see: Mr. Justice Cardozo's Relativism, by Miriam T. Rooney, The New Scholasticism, XIX, 1, January, 1945. A further word on this will appear in the Conclusion.

3 Robert M. Hutchins, Toward a Durable Society, Fortune, June, 1943, 159.

common-sense bequeathed to him by honest, God-fearing, clear-thinking progenitors, and leaves the theorizing to others. In this precisely lies the danger. Were we assured that our average American jurist could so continue to make practical use of this patrimony our alarm would not be great. The fact is, however, that this "theorizing" of the "others" is making definite inroads on the practice of the nation. It could not do otherwise. The theory of today is the practice fifty years hence.

Natural Law Contemned

Thus we have reason to be alarmed when we hear the men who are forming the foundation of the law of our nation speak lightly of our traditional law and natural rights. These men commonly think along the line of Morris R. Cohen:[4]

> Natural rights are, and by right ought to be, dead. ...
> While in this country only old judges and hopelessly antiquated text-book writers still cling to the supposedly eighteenth century doctrine...[5]

A reviewer in the Yale Law Journal shows the same sentiments, but is more detailed than Mr. Cohen. He gives us

---

4 Mr. Cohen has at one time or another taught and lectured at Harvard, Columbia, Chicago, Johns Hopkins, et alii. He is both a doctor of philosophy and an attorney, and has written extensively on both subjects. At present he is at Chicago University in philosophy.

5 M. R. Cohen, Jus Naturale Redivivum, in the Philosophical Review, XXV, November, 1916, 761.

another insight into the tendency of the times.

> When we come to a general philosophy of law, writers are still chopping the old worthless chaff of what they call the analytical or the historical or the jus naturale school, which have been the work of men not lawyers. They go on classifying, reclassifying, subdividing and resubdividing the writers upon philosophy and their conceptions, which have never had the slightest influence on the actual development of the law...
>
> What has always been needed is scientific study. That study asks for facts and facts alone, unclouded by hasty generalizations.[6]

And this reviewer is representative of a considerable section of American writers and commentators.[7]

---

6 John M. Zane, in his review of Custom and Right, by Sir P. Vinogradoff, 35 Yale Law Journal 1026, June, 1926.

7 Thus we hear the great John Dewey: "The sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular." From John Dewey, Logical Method and Law, in the Cornell Law Quarterly, X, December, 1924, 27. With Dewey in philosophy, we have the same expressed by the political scientists. See: A.N. Holcombe, The Foundations of the Modern Commonwealth, Harper and Brothers, New York, 1923, 438. Also: W.F.Willoughby, The Government of Modern States, Century, New York, 1919, 166, 168. Among treatises on international law we find: T.J.Lawrence, A Handbook of Public International Law, 10th edition by Percy H. Winfield, Macmillan, London, 1925, 88. Thus it goes through the writers, commentators and professors. We find Nathan Isaacs remark concerning the natural-law philosophy of Chief Justice John Marshall that: "Exploded as this notion may seem to us, it is certainly in keeping with the philosophy of the eighteenth century." The sublination is added. This comment appeared in the article: John Marshall on Contracts, A Study in Early American Juristic Theory, 7 Virginia Law Review 413, March, 1921. There is much similar comment among the judges and justices. Treatment of these statements and attitudes will be made in the body of the thesis.

This attitude is not confined to writers[8] alone. Probably the most influential jurist of the present age has been Oliver Wendell Holmes.[9] Already Holmes' philosophy of law is being felt in practice.[10] His views on natural law, at least in the abstract (for his decisions do not generally and exactly reflect his philosophy), are characteristic of his school of thought:

> Law is merely a statement of the circumstances in which the public force will be brought to bear upon men through the courts.[11]
>
> The object of the study of law is prediction, the prediction of the incidence of the public force through the

---

8 For a more lengthy treatment of such, see C. G. Haines, The Revival of Natural Law Concepts, Harvard University Press, Cambridge, Mass., 1930, 75, 76, 77, 348, 349, and passim.

9 "There seems to be unanimity on one point with regard to Oliver Wendell Holmes, Jr., the late Justice of the Supreme Court of the United States. No one man has had greater influence on the ethico-legal tendencies of our generation." John C. Ford, S.J., in The Fundamentals of Holmes' Juristic Philosophy, in Phases of American Culture, Holy Cross College Press, Worcester, Mass., 1942, page 1 of the article.

10 "It becomes clear that decisions of the courts are functions of some juristic philosophy." He, Holmes, above all others has given the directions of contemporary jurisprudence. He wields such a powerful influence..." Felix Frankfurter, The Early Writings of O. W. Holmes, Jr., Harvard Law Review, 44, 717, 725, 1931.

11 Oliver Wendell Holmes, Jr., Holmes, His Book Notices and Uncollected Papers, edited by H. C. Shriver, Central Book Co., New York, 1936, letter to Dr. Wu, 157. This reference to physical force as the essence of law was not isolated. He was consistent throughout his writings. "From his earliest writings in the American Law Review, through his judicial decisions, and legal papers, and down to his latest letters to Pollock and Wu, Holmes has maintained this fundamental principle: that the essence of law is physical force...", Ford, The Fundamentals of Holmes' Juristic Philosophy, 3.

instrumentality of the courts.[12]

> The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.[13]

We will not discuss the correctness of Justice Holmes' concept of natural law, nor his substitution of physical force as the essence of law. That his philosophy is false is not the point at the moment, but rather that he represents the modern attitude and tendency to contemn natural law and natural-law reasoning. This attitude consigns the natural law and natural rights "to the museum of juristic relics."[14]

Purpose of this Thesis

Contrary to such opinions, this thesis shows that natural-law reasoning (1) ought to have, (2) has, and (3) ought to retain a definite and substantial place in the tradition of the American Federal Judiciary. In doing this it certainly will go far towards exposing the common misconception that natural rights and natural law have long since ceased to influence American law.[15]

---

12 O. W. Holmes, Collected Legal Papers, Harcourt, Brace and Co., New York, 1920, 169.
13 Ibid., 312.
14 Manley O. Hudson, Advisory Opinions of National and International Courts, 37 Harvard Law Review 971, June, 1924.
15 For a pertinent discussion, see Haines, Revival of Natural Law Concepts, 78 and footnote.

But withal, this is a philosophical study, not a debate. True, the factors already discussed which have given us the goad in beginning this work will never be neglected. The need for a sound philosophy will be in our mind throughout. The failure of many to connect practice with theory will impel us to point out clearly the nexus between the philosophy of law and the actual decisions. When we trace the tradition itself we will be mindful of the sneers and contentions of the positivist, the relativist and the pragmatist.

But in the main we will calmly prosecute the aim of our thesis by attention to the positive aspects. We will present the true and correct philosophical foundation of all law - the Scholastic concept of the natural moral law. We will elaborate and analyze this concept and hence arrive at one conclusion: that natural-law reasoning ought to have a definite and substantial place in our judicial tradition. This conclusion comes irrespective of the tradition itself, from the very nature of law. It is a logical conclusion from sound premisses.

To show that natural-law reasoning actually has such a position, we study the work of the court itself from the beginnings to the present day. It is not contended that every case handed down was based immediately on the law of nature, nor that the court ever acted in any single instance in contravention of natural law doctrines, though this might well be true. The sole task allotted to the study of the cases

themselves is the demonstration that natural-law reasoning does have a definite and substantial place in our judicial tradition. The final conclusion that such reasoning ought to retain the position it holds de facto as well as de jure is patent. A word on this will be in the Conclusion.

Thus our single purpose will be achieved in two parts. In Part I we present the philosophy of law and society that is the necessary fundament to all law. We state and elaborate the Scholastic concept of the natural moral law. We analyze its nature, discuss its properties and show the way to its practical application in the decisions of the Supreme Court of the United States. In Part II this practical application is shown by the study of ten important decisions. Around these ten major cases is woven an historical network which is supplemented by a discussion of many subsidiary and related cases.

Criterion of the Scholastic Stand

Pope Leo XIII has directed us to a norm and given us a guide in our discussion of the philosophy that is the basis of this essay:

> The teachings of Thomas on the true meaning of liberty, which at this time is running into license, on the divine origin of all authority, on laws and their force, on the paternal and just rule of princes, on obedience to the highest powers, on mutual charity one towards another, on all these and kindred subjects, have

> very great force to overthrow these principles of the new order which are well-known to be dangerous to the peaceful order of things and to public safety.[16]

Saint Thomas will be our guide in the elucidation of the Scholastic concept of the natural law, in the analysis of that concept, in its application to the cases discussed. This does not mean that it will be Thomas and Thomas alone. Wherever the words of others, Suarez, Augustine, the Popes, are deemed more forceful, more clear or more to the point, they will be used, but with Thomas present the while, as the principle guide.

Criteria in Selection of Cases

In the choice of the ten important cases of the Supreme Court many factors contributed, all of them serving in the end to give a unified picture to the essay and to accomplish the aim of the thesis.

The first limitation in general came in confining the treatment to <u>adjudicated cases</u> rather than to general legal works and treatises. In this wise the actual law of the United States is treated, not the philosophy of law of the justices. It is true, of course, that much of the philosophy of the

---

16 Pope Leo XIII, Aeterni Patris, 1879, in <u>The Great Encyclical Letters of Pope Leo XIII</u>, edited by John J. Wynne, S.J., Benziger, New York, 1903,

individual justices does come into the discussion, at times as an aid to understanding the actual decision, and at times in the very decision itself. For this reason, for example, all the wealth of James Wilson is for the most part outside the scope of this essay.

Once it was determined to treat of the actually adjudged cases of the courts of the United States, limitation to the Supreme Court appeared to be appropriate, and this for several reasons. The Supreme Court is the court of final resort. It is in a sense the norm of the land. It is the embodiment of American justice. Further and most important, the nature of Supreme Court adjudications tends to the ultimate and fundamental; hence resort to the ultimate principles of the natural law is had more frequently and with greater length and elaboration in its decisions. With this the excellent exposition of Chancellor Kent of the New York bench is foregone, as his writings and commentaries were foregone with the imposition of the original limitation to adjudged cases made above. The conclusion, however, should not be made that there is any dearth or absence of natural-law decisions in Federal Circuit Courts or state courts.[17] It merely shows that the purposes of this essay

---

17 A complete treatment of the use of the natural law in these lower courts can be found in Charles Grove Haines' The Law of Nature in State and Federal Judicial Decisions, 25 Yale Law Journal 617, June, 1916. This is an excellent study.

are better served by the decisions of the Supreme Court.

Once we have restricted the essay to the decisions of the Supreme Court it is possible to present an unbroken historical progression from the beginnings of the court to the present time. This points out one of the criteria in the selection of the cases themselves. First, of course, the case must have importance in its own right, must be a suitable expression of natural-law reasoning, but in addition to this the factor of historical continuity was great in our selection. Thus it might well be that there are many more important decisions in other periods than our choice of Harris v Hardeman[18] in the Transition. Yet to maintain the historical continuity we chose Harris v Hardeman as the best in a period that was almost totally lacking in natural law reasoning. As an example in point, it might be true tha t Pierce v Society of Sisters in 1924 surpassed Harris v Hardeman in 1852 in wealth of natural-law references, but Harris v Hardeman was the finest example of the period and helped maintain the continuity and tradtion that this essay desired to portray. Thus our choices were guided by the desire to present the use of the natural law through all the years of the court.

---

18 To obviate constant repetition of citations to the cases discussed throughout this thesis a Table of Cases Studied and a Table of Cases Discussed have been placed in the appendix to this thesis. A perusal of the former will give the picture of historical continuity that has been achieved. The latter table will give the citations of all cases.

Superimposed on these considerations is another criterion. Wherever a certain period in our history produced an outstanding justice, it has been our aim to investigate a prominent adjudication handed down by that justice. In this category is listed Terrett v Taylor which gives us a sampling of the work of Joseph Story who was a prominent writer, commentator and jurist, as well as an outstanding justice. In the Monongahela Navigation Company v United States case David Josiah Brewer, a worthy contemporary and younger follower of Stephen Field, gives us an indication of his philosophy of law in an important case. Again, in Chicago, B. and Q. R. Co. v Chicago, although the case is important for many reasons, it gives us the reasoning of Justice John Marshall Harlan, as militant and influential a justice as the age produced. It might be said that each of the cases is the work of an outstanding justice and thus all come under this norm. In only one case, The Coppage Case, could it be said that the adjudicating justice was not exceedingly prominent in his age. Even then many list Justice Pitney as just that. The Coppage Case, however, in addition to excelling in natural-law reasoning, joins hands with the Adair Case and maintains the continuity between the century preceding and the final Minnesota Moratorium Case.

Some other cases were chosen because they were monuments of authority and carried in their wake hundreds of other cases that looked to them for authority. Among this type are Fletcher

V Peck, the Butchers' Union Case, and the Minnesota Moratorium Case (this last to a less degree perhaps; its very recentness, 1933, precludes too outspoken a statement in this regard).

There is yet another criterion. In Ogden v Saunders Chief Justice John Marshall presents an elaborate discussion of his philosophy of the law of contract. In no other case do we have such a fine exposition of his philosophy of law. For this reason there was no hesitancy in selecting Ogden v Saunders. As in all the other decisions chosen, Ogden v Saunders was important for other considerations, but this feature is predominant. The twin cases, Adair v United States and Coppage v Kansas, share this feature with Ogden v Saunders, in that they are excellent expositions of the philosophy of the natural law.

So in fact the bald statement of the title of the thesis falls short. When the cases were selected in accordance with the criteria just noted there resulted an historical analysis of the natural-law reasoning of the most prominent justices of the Supreme Court of the United States from the beginnings of the court to the present in decisions that are outstanding as monuments of authority or excellent expositions of the philosophy of law.

In arriving at the final selection of these ten cases many cases were read. Of those read many were found to have definite value as natural law cases. For the most part some

mention was made of these, but it is obvious that not all could be cited. The list of these cases is found in the Table of Cases Discussed. These, supporting the ten major cases and interwoven in an historical background, form a long, unbroken line through the generations and help to a unity of impression that is fitting in any presentation of a tradition.

One might be inclined to reason from a reading of this essay that the court had resort to natural law only in cases of contract or some few other types of law. This would be false. It so happened that when the norms of selection were applied there was a preponderance of cases involving contract. It is patent that most of these norms operate independently of the intrinsic nature of the law involved. Further, it would be wrong to conclude that it was only in cases involving citizen and state that natural law had applicability. Thus we might well have used the fine expression of the precepts of Domestic Justice in Pierce v Society of Sisters, but for the fact that the Minnesota Moratorium Case was equally rich in natural law and moreover formed an excellent link with earlier natural-law cases. Further, the Minnesota Moratorium Case appeared to be fully as important in other respects as the Society of Sisters Case but had not been treated so thoroughly in school journals, educational articles and the like. The exclusion of the case, however, does not minimize the force of these words:

The child is not the creature of

> the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[19]

The Society of Sisters Case, therefore, might well have chosen for its own merits had not other factors indicated that the Minnesota Moratorium Case was better. The same reason caused the exclusion of Meyer v Nebraska in 1922. So also in the rather lean period of the Transition is the excellent decision handed down in West River Bridge v Dix in 1848. In this case we find the most outspoken references to the natural law, yet Harris v Hardeman is a better selection. It is better because it offers more matter for analysis and because the bulk of the natural-law reasoning is repeated in later cases in this essay and there the matter is seen more fully and to even greater advantage.

These are the norms that we have used in selection and rejection. There is much overlapping in application of criteria. There will be no difficulty, however, in ascertaining the exact norm or norms that have been applied.

There perhaps could be a separate dissertation written on the false concepts of the natural law. This essay, however, will confine itself to the positive. The Scholastic concept

---

19 Pierce v Society of Sisters, 268 US 510, 534 (1924).

will be presented and the very force of its logic and the solidity of its stand will serve as a refutation of the misconceived notions. There will be a word in the Conclusion, however, on some of the more current and important errors.

PART I

THE SCHOLASTICS ON NATURAL LAW

The only logical way to show that natural-law reasoning ought to have a definite and substantial place in the tradition of our Federal Judiciary is to establish beyond a doubt the inherent reasonableness of such natural-law reasoning. There is only one way to do this. That is by a presentation of the concept of the natural law in its fundamental aspects and an elaboration of that concept in its more particular reference to the Federal Judiciary. This is the purpose of this part of the essay. In Chapter II the broad foundation will be laid. The discussion will lead us to an understanding of the natural law itself, its nature and properties. On this foundation Chapter III will build the natural law in the civic and social life of man. Here the treatment will be limited to man in society. The positive law will be considered. Step by step we will progress to the point where the complete understanding of the Scholastic position on the natural law will permit us to conclude that the natural law at least ought to have a definite and substantial place in the Federal Judiciary. The way will then be clear for an analysis of the cases themselves.

CHAPTER II

THE CONCEPT OF THE NATURAL MORAL LAW

In laying this foundation we begin at the beginning. Nothing will be presupposed. Law in its broadest meaning will first be discussed. Then the kinds of law. Narrowing more, the eternal law as the pivotal base of all law will lead us to a consideration of man and human acts. This prepares us for the treatment of the natural moral law itself, its nature, origins, causes, and its properties of unity, universality, immutability and adaptability. With this we are ready to elaborate the concept in the civic life of man.

Section 1: Foundations of the Natural Moral Law

The Concept of Law

When we use the word <u>law</u> in our daily conversation we are faced with such a multiplicity of variations as to warrant Webster in giving twelve separate listings under the term in his small desk dictionary. Hence there can be no talk of the natural moral law until we unfold these various meanings.

As is the case with most words in any language the term

law has taken on many patently metaphorical uses. Thus, for example, the laws of economics are no more than an orderly grouping of general maxims expressing the regular recurrence of observed phenomena, with no reference to the inner principle that is responsible for the recurrence. Such as these are laws only in a very loose sense.

Saint Thomas does not even mention these metaphorical applications of the term in his treatise on law. With one broad stroke he eliminates all uses that do not refer to the underlying reason for the constancy of the activity. In the strict sense, "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting; for lex [law] is derived from ligare [to bind], because it binds one to act."[1]

Thomas uses this definition as his starting point. He immediately adds that reason is the first necessary note in the definition of law. Law is an ordination to an end. "For it belongs to the reason to direct to the end, which is the first principle in all matters of action,..."[1] He makes a distinction, however, between the two ways that law can possess this reason:

> Since law is a kind of rule and measure, it may be in something in two ways. First, as in that which measures and rules; and

---

1 Thomas Aquinas, Summa Theologica, translated by Anton C. Pegis, Random House, New York, 1945, 2, 743. I-II, q. 90, a. 1. Unless otherwise indicated this translation is used.

> since this is proper to reason, it follows that, in this way, law is in the reason alone. -Secondly, as in that which is measured and ruled. In this way, law is in all those things that are inclined to something because of some law; so that any inclination arising from a law may be called a law, not essentially, but by participation as it were.[2]

This means that the law is in the lawgiver essentially since it is in his intellect that it is found in its first and most perfect form; since it is his reason that is responsible for it. In the subject, however, the law is also found, and in varying degrees of perfection and participation. The subject, in so far as its ordered activity is the reflection of the reason and wisdom of the lawgiver, partakes of the reason that ordered it. It is in that sense participating in the law. The inclination in the subject to obey (the law in the subject) is not the law "essentially, but by participation, as it were."[2]

Certainly Thomas agrees that another distinction must be made. He proceeds to show that law in the fullest sense is found only in rational beings. At the same time he gives further indication that reason is the first essential note to any law in the strict sense. True, he admits that all subjects partake of the reason of the lawgiver,-

> ...it is evident that all things partake in some way in the eternal law, in so far as,

---

2 Ibid., a. 1, ad 1, 743. Throughout this entire essay the sublineation is mine unless otherwise noted.

> namely, from its being imprinted on them, they derive their respective inclinations to their proper ends and acts.[3]

-but he is clear that it is only in those subjects that have reason themselves that law is properly found.

> Even irrational animals partake in their own way of the eternal reason, just as the rational creature does. But because the rational creature partakes thereof in an intellectual and rational manner, therefore the participation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason, as was stated above. (Q. 90, a. 1.) Irrational creatures, however, do not partake thereof in a rational manner, and therefore there is no participation of the eternal law in them, except by way of likeness.[4]

By rational creatures the law is clearly understood, the ends of the law are consciously striven for and known as ends. It is only analogously and secondarily that the irrational creature tends towards its end. Their natures do partake[5] of the

---

3 Ibid., q. 91, a. 2, 750.
4 Ibid., a. 2, ad 3, 750.
5 These will serve to illustrate the point more fully. "Irrational creatures neither partake of nor are obedient to human reason, whereas they do partake of the divine reason by obeying it; for the power of the divine reason extends over more things than the power of the human reason does. And as the members of the human body are moved at the command of reason, and yet do not partake of reason, since they have no apprehension subject to reason, so too irrational creatures are moved by God, without, for that reason, being rational." Aquinas, S.T., q. 93, a. 5, ad 2, 769. "Hence, some things are like God first and most commonly because they exist; secondly, because they live; and thirdly because they know or understand." Aquinas, S.T., I, q. 93, a. 2, 1, 887. "Although in all creatures there is some kind of likeness to God, in the rational creature alone do we find a likeness of image, as we have explained above; whereas in other creatures we find a likeness by way of a trace." Ibid., a. 6, 893. Italics Thomas'.

reason of the lawmaker but they do so through instinct in the animate, and material lifeless natures in the case of the inanimate. Reasoning beings reflect the reason of the lawgiver in the fullest sense. In a less perfect way they exhibit the same rational qualities of foresight, adaptation of means to end, providence, that the lawgiver himself exhibits. Thus:

> Now among all others, the rational creature is subject to divine providence in a more excellent way, in so far as it itself partakes of a share of providence, by being provident both for itself and for others.[6]

The work of the will in this matter cannot be overlooked. "To direct to the end"[7] has been designated as the work of the reason, and this is true. It is true, however, only in this sense that the reason recognizes the order that must be observed or followed, know the means that will accomplish this end, and presents, as it were, the rule to the will. The reason directs, but it is to the will to effect. Once the proper order has been decided upon by the reason, the will must apply this order. Thus law is formally in the reason as the rule and measure, and efficaciously in the will.

> Reason has its power of moving from the will,...; for it is due to the fact that one wills the end, that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the

---

6 Aquinas, S.T., I-II, q. 91, a. 2, 2, 750.
7 Ibid., q. 90, a. 1, 2, 743.

> saying that the will of the sovereign has the force of law: or otherwise the sovereign's will would savor of lawlessness rather than of law.[8]

From this we can declare that the lawgiver must first make a judgment in which he concludes to the reasonableness of the law. Next he wills that the law become binding. Finally he actually ordains through an act of the reason that the law is law. This last act of the reason is the ordination itself.

Thus far we have seen that law in the proper sense can be applied only to rational creatures, that it is an ordination of reason. In unfolding his definition of law properly so called, Saint Thomas next inquires, in article 2 of question 90, whether the law can be directed to the good of individuals, to private groups or whether it must be directed to the good of all. He seeks to ascertain the <u>final cause</u> of law.

We have seen that it is the work of the reason to order to an end. We know that the ultimate end of human acts is beatitude.[9] The law that governs human acts must order to the beatitude of man.

> Moreover, since every part is ordained to the whole as the imperfect to the perfect, and since one man is a part of the perfect community, law must needs concern itself

---

8 <u>Ibid.</u>, a. 1, ad 3, 2, 743, 744.

9 Aquinas, Summa Contra Gentiles, Marietti, Taurini, 1894, III, C. 115 (The divine law principally orders man to God): C. 116 (The end of the divine law is the love of God). Both chapters will indicate this point.

> properly with the order directed to universal happiness.
> ...
> Consequently, since law is chiefly ordained to the common good, any other precept in regard to some individual work must needs be devoid of the nature of law, save in so far as it regards the common good. Therefore every law is ordained to the common good.[10]

The third essential note in the concept of law in the strict sense refers to the efficient cause.

> A law, properly speaking, regards first and foremost the order to the common good. Now to order anything to the common good belongs either to the whole people, or to someone who is the vicegerent of the whole people. Hence the making of a law belongs either to the whole people or to a public personage who has care of the whole people; for in all other matters the directing of anything to the end concerns him to whom the end belongs.[11]

From a certain aspect each person is the law to himself; in the sense that we have already noted, that each participates in the law of the lawgiver in so far as each participates in the order of the lawgiver. It remains to the one who has the care of the community, however, to be the true source of the law. An individual in the community could not efficiently enforce the ordinations of the law. He would have no external force to apply.

> A private person cannot lead another to virtue efficaciously; for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in

---

10 Aquinas, S.T., I-II, q. 90, a.2, 2, 744, 745.
11 Ibid., a. 3, 2, 746.

> order to prove an efficacious inducement to virtue,... But this coercive power is vested in the whole people or in some public personage, to whom it belongs to inflict penalties, ... Therefore the framing of laws belongs to him alone.[12]

The last note in the concept of law is in many respects the most important, for "promulgation is necessary for law to obtain its force,"[13] and without it there is no obligation. So important did Saint Thomas reckon the promulgation that he made this categorical statement:

> Wherefore no one is bound by a precept without knowledge of that precept; and therefore one incapable of knowing is not bound by precept; nor is anyone ignorant of God's precept bound to performance except in so far as he is held to know it. If, however, he is neither required to know it nor does he know it, he is no wise bound by it.[14]

With this we can conclude with Saint Thomas to the full definition of law in the strict and proper sense: "an ordinance of reason for the common good, promulgated by him who has the care of the community."[15]

Kinds of Law

Derived from the eternal law are several divisions or kinds of law. As direct reflections of the eternal law there

---

12 Ibid., a. 3, ad 2, 2, 746.
13 Ibid., a. 4, 2, 747.
14 Aquinas, De Veritate, Marietti, Taurini-Roma, 1931, q. 17, a. 3 (Vol. 2.); translation mine.
15 Aquinas, S.T., I-II, q. 90, a. 4, 2, 747.

is, first, the natural moral law governing human acts, and , second, the law governing irrational creatures. In the cases where the natural moral law requires explanation, determination and special sanction there is the support of the positive human law, both ecclesiastical and civil. It should be noted here also that for the supernatural order especially (but also as a help on the natural level) the divine positive law, both old and new, is a necessary branch of law. It is obvious that for the purposes of this treatment a consideration of the natural moral law as it stems from the eternal and founds the positive human is all that is in order. We will pretermit the divine positive law. References that do occur to the positive human law will be made with the understanding that the ecclesiastical must be subject to approximately the same limitations, qualifications and considerations as the civil.

Eternal Law as the Pivotal Foundation

Equipped with our concept of law in the strict sense we can ask whether that law which is "a dictate of practical reason emanating from the ruler who governs a perfect community,"[16] can be posited of God and the providence of his universe?

As it is clear that the whole world and the entire universe is subject to the divine government, there can be no

---

16 Ibid., q. 91, a. 1, 2, 748.

doubt that the whole community of the universe[17] is governed by the divine reason. So, just as the law of a kingdom is conceived and found in the reason of the king, so also does the rule of all things exist in the divine reason, and thereby the governance of the universe partakes of the nature of law. Since the divine reason, or anything divine, can in no wise have existence in time, that law of the universe existing in

---

17 The exact interrelation between providence and the eternal law is perhaps best expressed in the following: "Divine providence is not properly called the eternal law, but something consequent on the eternal law. For the eternal law in God must be considered in God as we have principles of activity naturally known to us by which we are guided in our plans and choices, and which pertain to prudence or providence. Wherefore, in this way is the law of our intellect related to prudence as a principle is related to demonstration. And so it is in God. The eternal law is not providence, but is, as it were, the principle of providence. Wherefore, acts of providence are properly attributed to the eternal law, just as all acts of demonstration are referred to indemonstrable principles." Aquinas, De Veritate, q. 5, a. 1, ad 6 (Vol. 1); translation mine. In this it can be seen that the use of the divine providence is in the nature of an a posteriori proof. Also: "For the same reason is God the ruler of things as He is their cause, because the same cause gives being that gives perfection; and this belongs to government. Now God is the cause, not of some particular kind of being, but of the whole universal being,... Therefore, as there can be nothing which is not created by God, so there can be nothing which is not subject to His government. This can also be proved from the nature of the end of government. For a man's government extends over all those things which come under the end of his government. Now the end of the divine government is the divine goodness, as we have shown. Therefore, as there can be nothing that is not ordered to the divine goodness as its end, as is clear from what we have said above, (q. 44, a. 4, 1, 431.) (q. 65, a. 2, 1, 611.) it is impossible for anything to escape from the divine government. Foolish therefore was the opinion...that the corruptible lower world or individual things or that even human affairs were not subject to the divine government." Aquinas, S.T., I, q. 103, a. 5, 1, 956.

the divine reason must be as eternal as the divine essence itself.[18]

> Just as in every artificer there pre-exists an exemplar of the things that are made by his art, so too in every governor there must pre-exist the exemplar of the order of those things that are to be done by those who are subject to his government. And just as the exemplar of the things yet to be made by an art is called the art of model of the products of that art, so, too, the exemplar in him who governs the acts of his subjects beats the character of a law, provided the other conditions be present which we have mentioned above as belonging to the nature of law. Now God, by His wisdom, is the Creator of all things, in relation to which He stands as the artificer to the products of his art, as was also stated in the First Part (q. 103, a. 5.)(q. 14, a. 8.). Moreover, He governs all the acts and movements that are to be found in each single creature,... Therefore, just as the exemplar of the divine wisdom, inasmuch as all things are created by it, has the character of an art, a model or an idea, so the exemplar of divine wisdom, as moving all things to their end, bears the character of law. Accordingly, the eternal law is nothing else than the exemplar of divine wisdom, as directing all actions and movements.[19]

It is from this all-embracing government of the eternal Legislator that all law derives its force and efficacy. As Saint Augustine says, referring to the eternal law:

> ...that law, which is called the highest reason, which must always be obeyed, and through w hich all the bad merit misery, the good a blessed life; through which, finally, that which we said ought to be called temporal is properly managed and changed... I see this

---

18 Aquinas, S.T., I-II, q. 91, a. 1, 2, 748.
19 Ibid., q. 93, a. 1, 2, 763.

> law as eternal and incommutable. At the same time I also believe that you see that nothing is just and legitimate in that which we called temporal which man does not derive from the eternal;...[20]

This is certainly true, for law carries with it, as we have said, the notion of ordination of acts to an end. It is necessary that in all such beings tending towards an end that the force of the tendency should be derived ultimately from the force of the first mover or cause, since nothing that is moved is so moved except through the power and force of the first mover.

> Therefore we observe the same in all those who govern, namely, that the plan of government is derived by secondary governors from the governor in chief. Thus the plan of what is to be done in a state flows from the king's command to his inferior administrators; and again in things of art the plan of whatever is to be done by art flows from the chief craftsman to the under-craftsmen who work with their hands. Since, then, the eternal law is the plan of government in the Chief Governor, all the plans of government in the inferior governors must be derived from the eternal law. But these plans of inferior governors are all the other laws which are in addition to the eternal law. Therefore all laws, in so far as they partake of right reason, are derived from the eternal law.[21]

With this general understanding of the eternal law we ask immediately if it can be said to a law in the strict and proper sense. Let us analyze its four elements. God as the Creator

---

20 Aurelius Augustinus, De Libero Arbitrio, Migne, Paris, 1877, I, cap. 6, (15). Tom. XXXII, Pat. Lat., Mig. I, Aug.
21 Aquinas, S.T., I-II, q. 93, a. 3, 2, 765, 766.

of all things is at the same time and in the same act of creation the Eternal Legislator and the just Remunerator. In the one marvelous act God creates, ordains and sanctions. He is Maker, Lawgiver, Judge. Of all possible lawmakers He most fully and truly is he "who has the care of the community."[22] We have shown that the final cause of the universe is God Himself. So also is the ultimate end of man God Himself. From man's viewpoint God is best served by the attainment of eternal beatitude.[23] The eternal law directs man to God and to this beatitude of necessity. It is, therefore, directed "for the common good"[22] in the fullest sense also. Is it an ordination of reason? Wisdom Itself has ordained. The eternal law is part of the divine essence. And what of the promulgation of the eternal law? This is achieved through the natures of the subjects. The promulgation, therefore, is proportioned to the nature of the subject. In the case of irrational creatures the divine order is imprinted in their natures by means of an interior motive principle that acts without the drive of personal intellection of an end, but is rather the result of divine providence.

> Now just as man, by such pronouncement, impresses a kind of inward principle of action on the man that is subject to him, so God imprints on the whole of nature the principles of its proper actions. And so it is in this

---

22 Ibid., q. 90, a. 4, 2, 747.
23 See footnote 9 supra.

> way that God is said to command the whole of nature,... And thus all actions and movements of the whole of nature are subject to the eternal law. Consequently, irrational creatures are subject to the eternal law, through being moved by the divine providence; but not, as rational creatures are, through understanding the divine commandment.[24]

For our purposes, then, this eliminates irrational creatures from consideration. We saw that "...because the rational creature partakes thereof in an intellectual and rational manner, therefore the participation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason,..."[25] Thus the promulgation of the eternal law in the case of rational creatures is achieved through their rational natures. " And this participation of the eternal law in the rational creature is called the natural law."[26] Our essay is concerned only with rational creatures, human nature and human acts, for it is only with these that the natural law is concerned. A word, then, about this human nature and these human acts.

The Nature of Man and Human Acts

That man is essentially above the brutes, that he has a rational soul, is a necessary postulate of this essay. It is of his essence to have a spiritual faculty joined with his merely animal body. It is true that man shares with the brute

---

24 Aquinas, S.T., I-II, q. 93, a. 5, 2, 768, 769.
25 Ibid., q. 91, a. 2, ad 3, 2, 750.
26 Ibid., a. 2, 2, 750.

purely animal powers and to this extent it is correct to compare him with the brute. But it is for the essentially higher and spiritual soul, capable of rational cognition and rational appetite, that he is distinguished. The work of this rational soul enters into man's activity in a very intimate way. Thus we see in Saint Thomas' definition of a human act the full effect of this faculty.

> Therefore, whatever so acts or is so moved by an intrinsic principle that it has some knowledge of the end, has within itself the principle of its act, so that it not only acts, but acts for an end.

And then he goes on further to distinguish for us man from all other creatures.

> On the other hand, if a thing has no knowledge of the end, even though it have an intrinsic principle of action or movement, nevertheless, the principle of acting or being moved for an end is not in that thing, but in something else, by which the principle of its action towards an end is imprinted on it.[27]

It is this combination of action proceeding with deliberation and without coaction from the internal principle of the will, and the fact that that action tends to a known end, that merits the designation free and voluntary. Thus those acts are called human which are proper to man as man, as a rational animal, which proceed from an internal principle with an intellectual cognition of the end as end.

> ...for this reason man, above all other animals, is said to be endowed with freedom of

---

27 Ibid., q. 6, a. 1, 2, 227.

> the will, because man is moved to will, not by an urge of nature as the brute, but by a judgment of the reason.[28]

As we proceed to the discussion of the natural moral law itself we can recall that it is through this distinctly human nature that the eternal law of God is promulgated in rational creatures; that since this natural moral law is concerned only with rational creatures so also it is, ipso facto, concerned only with those human acts which flow from the human natures of those rational creatures.

Section 2: Nature of the Natural Moral Law

Origins

When Saint Thomas first began his discussion of law he told us that as a rule and measure of actions it could exist in two ways and still be the same law. It could be in the reason of the lawgiver as the rule ordering and it could be in the reason of the one governed as the rule to be followed. We saw that the rule and measure of every being and action in the universe existed in the Divine Reason from all eternity and was known as the eternal law. Thus the eternal law extends to every creature subject to the divine providence and reaches these

---

28 Aquinas, Summa Contra Gentiles, I, C. 88 (Voluntas Divina), Translation mine.

creatures through the individual natures of each. Through the eternal law each creature is directed to its respective end by the inclination imprinted in it.

> Now among all others, the rational creature is subject to divine providence in a more excellent way, in so far as it itself partakes of a share of providence, by being provident both for itself and for others. Therefore it has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law.[29]

So we can say that the law governing the actions proper to man is the natural law when considered as existing in the reason of the one governed. It is part of the eternal law when considered as the rule ordering in the reason of the lawgiver.

It should be clear that the natural moral law could not be other than a participation of the eternal law and a promulgation of its decrees. No man could bind himself of himself. Self-binding leaves a man free to do one's own whim. He must go to a superior being. Further, he is patently subject to his Creator. Hence it is this Creator who is his lawmaker. Joining these concepts the only conclusion is that the Creator of man chose the natural law as an expression of his divine plans. The only difference, then, between the natural law and the eternal law whence it has its origin is that the natural law is the eternal passively considered.

---

29 Aquinas, S.T., I-II, q. 91, a. 2, 2, 750.

We might ask why this law is called natural? Principally because its very foundation and mode of promulgation is the human nature itself. Further, it comes from the Author of nature Himself, who ordained the natural order of the entire universe. The word can be used, moreover, in contradistinction to the supernatural order. By the natural law man's actions are governed irrespective of the life of grace. The law comes from the Creator, not God the Saviour. That it possesses all the elements of a law in the strict and proper sense is clear from what has been said in this connection in regard to the eternal law.

Causes

The natural law looks ultimately to God as its end. Thus in following the order laid down by the divine reason man tends to God, merits beatitude for himself and further serves God in receiving the promised reward or punishment implicit in the very same natures that promulgate the law itself.[30] This is the ultimate end of the natural law. More proximately considered it is the common good. Thus, as we will see, man must be considered both as an individual and as a member of society. The natural law looks to the good of the individual as well as to the good of the member, but since it is the entire order that God as the Supreme Orderer must look to, it is the common good

---

30 The entire question of sanction, as important as it is in itself, cannot warrant fuller treatment here.

that must be his principal concern.

We have sufficiently indicated the material cause. It is only to rational creatures that the natural law looks. Rational creatures are capable of acts proper to the brute and human acts. It is only the human acts flowing from the rational nature that are objects of the natural law. Man as man is the subject. His acts as proper to him are the object.

The efficient cause ultimately considered is God Himself, the eternal law in the divine essence. Proximately considered it is the human nature of man.

It will aid in clarifying our notions of the natural law to consider it under the various possible aspects. We will begin by considering it formally. Just as the speculative intellect produces universal principles so does the practical intellect produce its universal moral principles. These universal moral dictates, practical judgments by which man knows he is bound to strive for the good, comprise the natural law formally considered.

> ...the precepts of the natural law are to the practical reason what the first principles of demonstrations are to the speculative reason,[32] because both are self-evident principles.[31]

Immediately, however, the distinction should be made between

---

31 A precept is a particular and single application of the law. Thus there are many precepts that form the whole of the law.

32 Ibid., q. 94, a. 2, 2, 774.

these judgments of the practical intellect (in which the natural law formally consists) and the habit or special aptitude in forming these moral judgments. This habit or special aptitude is called syderesis. Thus Saint Thomas distinguishes and thereby also tells us more of the natural law formally considered:

> Synderesis is said to be the law of our intellect because it is a habit containing the precepts of the natural law, which are the first principles of human actions.[33]

At another time we hear Saint Thomas thus define the natural law: "That light of reason given us by God by which we know what we ought to do and what we ought to shun."[34] Considered from this aspect the natural law is a power, a faculty by which the principles of morality are formed. Virtually considered, therefore, the natural law is "...the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, ..."[35]

Nature the Norm

Proceeding still further in this consideration, the natural law fundamentally considered is the human nature itself. It will be noticed that we have been approaching step by step

---

33 Ibid., a. 1, ad 2, 2, 773.
34 Aquinas, Opusculum III, In Duo Praecepta Caritatis, P. Fiaccadori, Parma, 1859, (Vol. XVI, O.O., 97, initio.)
35 Aquinas, S.T., I-II, q. 91, a. 2, 2, 750.

the innermost aspect of the natural law. We began with the declared first principles, we next saw the law as the faculty itself. Now we penetrate to the natural law in its most ultimate aspect. True, considered actively and ultimately in the truest sense, this law is the divine plan, the eternal law, but passively it is man's nature in man as a reflection and participation of the divine order.

At a first inspection of Thomas and the other Scholastics there would seem to be considerable discord in the matter of the fundamental norm of morality, the natural law fundamentally considered. Thus in one place we hear Thomas say: "...the proximate rule is the human reason, while the supreme rule is the eternal law."[36] In another he says: "...this rule is the power itself of nature..."[37] Then Suarez would seem to have his own individual theory. Suarez indicates that the norm is the rational nature as such.[38] It is clear, indeed, that this rational nature must be viewed comprehensively and fully, with a full consideration to the end of human nature and reference to the ultimate norm of the eternal law. Donat in his treatise on the matter uses the phrase, as expressive of Saint Thomas, "the order and finality of the universe." (In the original: ordo rerum finalis.)[39]

---

36 Ibid., q. 21, a. 1, 2 360.
37 Ibid.
38 See Suarez, II, XIII, 2.
39 J. Donat, Ethica Generalis, F. Rauch, Innsbruck, 1935, 25.

It can readily be shown that all these modes of expression resolve themselves into the same concept. Essentially all the scholastics agree. Perhaps the best manner of expressing it is that of Donat when he says that fundamentally the natural law is the order and finality of the universe. The entire universe, - God, angels, men, brutes, plants, the rocks and stones, - is ordered in one magnificent whole. " All things which are in the universe are ordered in some way, but all things do not have their order in the same way."[40] With God the Creator, Orderer and Remunerator at the head governing all through His Divine Providence and ruled by His Eternal Wisdom, each creature is possessed of his own peculiar nature. This nature is endowed with special tendencies and inclinations driving it on to its own particular end and joining it in the common end of furthering man's good proximately and thereby adding to the glory of God ultimately. These natures and the parts thereof are all interelated in a total unity. God is superior to all. Man demands subservience from the brute, the plant and the inanimate matter. Each nature has its own place in the whole; and must act in accord with the rule of the whole. In the center of this universe, as it were, is man with his rational nature and tendency to beatitude. Now when Suarez says that the norm, fundamentally, is man's rational nature adequately considered, he is

---

40 Aquinas, In XII Libros Metaphysicorum, P. Fiaccadori, Parma, 1859, Lib. XII, Lectio xii (Vol. XX, 0.0., 652).

looking at the nature of man directly and considering only indirectly all other natures surrounding man and man's relations to them. When Donat used the phrase "the order and finality of the universe" he was concentrating on the whole of the universe directly and then fitting man into the entire picture as a part, making him conform to the whole. Further we might say that when Saint Thomas says simply that it is "right reason" he is directing his attention to the fact that man through his reason must apprise himself of this order of things and thus conform.

With these considerations it would be well to hear Saint Thomas lead us through the reasoning that has led, for example, Donat to state that the order and finality of the universe is the natural law fundamentally considered.

> Now the due order to an end is measured by some rule. In things that act according to nature, this rule is the power itself of nature that inclines them to that end. When, therefore, an act proceeds from a natural power, in accord with the natural inclination to an end, then the act is said to be right; for the mean does not exceed its limits, viz., the action does not swerve from the order of its active principle to the end. But when an act strays from this rectitude, it comes under the notion of sin.
>
> Now in those things that are done by the will, the proximate rule is the human reason, while the supreme rule is the eternal law. When, therefore, a human act tends to the end according to the order of reason and of the eternal law, then that act is right; but when it turns aside from that rectitude, then it is said to be a sin. Now it is evident ... that every voluntary act that turns aside from the order of reason and of the eternal law is evil, and that every good act is in accord with reason and the eternal law. Hence it follows that a human act is right or sinful by reason of

41

its being good or evil.

Not only is man part of a great order and hierarchy to which he must conform, but within his own nature there are further subordinations which are governed by the same natural law, which are apperceived by right reason, guided by the inclinations of human nature:

> ...hence it is that all those things to which man has a natural inclination are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Therefore, the order of the precepts of the natural law is according to the order of natural inclinations.[42]

This inner hierarchy of inclinations is an excellent reflection of the hierarchy of the universe. Thus there is a certain analogy or parallel between the order that man must observe in his use of other creatures in the universal order and the order that must subsist when he is faced with separate demands on the part of disparate inclinations within his own nature. So we see:

> For there is in man first of all [and this is the first and lowest grade and obviously comparable to the merely material creatures in the universe as a whole] an inclination to good in accordance with the nature which he has in common with all substances, inasmuch, namely, as every substance seeks the preservation of its own being, according to its nature; and by means of this inclination, whatever is a

---

41 Aquinas, S.T., I-II, q. 21, a. 1, 2, 360.
42 Ibid., q. 94, a. 2, 2, 775.

> means of preserving human life, and of warding off its obstacles, belongs to the natural law.[43]

Thus man must satisfy the demand of his nature for conservation. He must, moreover, respect the tendency of all other things to remain in existence, and thus not destroy needlessly.

> Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals; and in virtue of this inclination, those things are said to belong to the natural law which nature has taught to all animals, such as sexual intercourse, the education of offspring, and so forth.[43]

On this second level we find the ordinations concerning man's purely animal needs and exigencies. The sensitive appetite is superior to that inclination "which he has in common with all substances,"[43] but must in turn subserve the rational, which is next treated:

> Thirdly, there is in man an inclination to good according to the nature of his reason, which nature is proper to him. Thus man has a natural inclination to know the truth about God, and to live in society; and in this respect, whatever pertains to this inclination belongs to the natural law: e.g., to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.[43]

This gives us the last grouping. It is clear that in this we have the final rounding out of the whole order. In this group

---

43 Ibid.

of precepts of the natural law are contained those which regulate man's conduct towards other men, his superiors, his inferiors, his equals. Here also are the precepts which dictate the care man must have of himself as a rational animal. Here is indicated the precedence of the rational over the sensitive and vegetative. It is here that man as man, not as animal or mere substance, is governed.

It is this human nature[44] (this <u>one</u> human nature, in spite of the analysis), adequately considered in relation to all other natures in the universe, which Suarez advances as the natural law fundamentally considered. It is this nature considered as part of, the central part of, "the order and finality of the universe" of Donat. When Thomas says:

> But there are two rules of the human will: one is proximate and homogeneous, viz., the human reason; the other is the first rule, viz., the eternal law, which is God's reason, so to speak.[45]

it is this same concept that he has in mind.

By some reflection and a mulling over of these notions we

---

44 Such a norm obviously will involve ultimately the entire system of Scholastic philosophy. It is clear that a full understanding of man as man, man in relation to hisGod, to his fellow men, to brute creation, to plant and inanimate creation will in the end cover the whole field of philosophy once the ramifications have been followed out. Here only the basic indications in so far as they pertain to this study have been given.

45 Aquinas, <u>S.T.</u>, I-II, q. 71, a. 6, 2, 568.

can come to a fuller appreciation of the natural moral law.[46]

Section 3: Properties of the Natural Moral Law

Just as in the animal kingdom one species is set off and distinguished from another by certain essential characteristics that are peculiar to it and exclude it from another, so does the natural law have certain essential properties that are always and of necessity present wherever the natural law itself is found. These properties flow from the essence of the natural law, as it were, and are inseparably linked with it and distinguish it from all other law. Chief among these properties, and those which we will consider now, are the Dependence on the Eternal Law, Unity, Universality in regard to Subjects, Universal Knowability, and Immutability.

---

46 An excellent final word: "There are present in all beings certain principles by which these beings are able not only to effect their own proper operations, but also by which they direct these operations to their end,... Thus in things acting from the necessity of nature there are principles of action proper to the essence of each by which their operations are directed conformably to their end; so in those beings which participate in cognition there are principles of cognition and appetite. Whence it follows that there is natural conception in the cognoscitive sense and a natural appetite or inclination in the appetitive power by which operation...is directed to its end. But man among all animals knows the true significance of finality and the relation of a work to its end, since a natural tendency is imprinted in his nature by which he is directed to act properly, and this is called the natural law... In other beings, however, it is called a natural estimative power, for brutes are forced by nature...rather than regulated as it were by their own free will." Aquinas, Commentum in IV Libros Sententiarum, P. Fiaccadori, Parma, 1859, IV, d. 33, q. 1, a. 1 (VII, 00.) Translation and italics mine. The remainder of this section is worthwhile.

Dependence on the Eternal Law

The fact of the dependence of the natural law on the eternal is perhaps so obvious and fundamental as to be overlooked in a consideration of the properties of the natural law, but the fact of this dependence is most important, for the natural law would be nothing without this dependence. It is through this that the nexus is made with God the Creator, Orderer and Remunerator. It shows us that the natural law is just another part of the divine plan of the universe, a work of Divine Wisdom. It is only by reason of this reference to the Immutable Divine that gives us the absolute immutability of the law. In an age of relative values it connects us with the absolute of the Eternal Law, that is the Divine Essence, that is God Himself. Thus in truth we can consider the natural and the eternal as one law from different aspects, though of course they are really distinct since the law in the nature of man is certainly only a reflection of the law in the Divine Essence.

Unity of the Natural Moral Law

In the latter part of the preceding section we were brought to face with a plurality of precepts of the natural law. We saw that man was ruled with special ordinations corresponding to the multiplicity of inclinations of his nature. Our logical query now is: do these many precepts of the natural law have any further unity than the grouping which we have already seen, or rather do they exist as separate and isolated commands? Saint

Thomas answers immediately: "All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept."[47]

Thomas leads to an understanding of this unity of the natural law by drawing a parallel. He has already compared the work of the practical intellect to the work of the speculative. He continues in that vein:

> Now a certain order is to be found in those things that are apprehended by men. For that which first falls under apprehension is being, the understanding of which is included in all things whatsoever a man apprehends. Therefore the first indemonstrable principle is that the same thing cannot be affirmed and denied at the same time, which is based on the notion of being and not-being: and on this principle all others are based, ...[48]

From this unity in the speculative order he proceeds to the unity in the practical order.

> Now as being is the first thing that falls under the apprehension absolutely, so good is the first thing that falls under the apprehension of the practical reason, which is directed to action (since every agent acts for an end, which has the nature of good). Consequently, the first principle in the practical reason isone founded on the nature of good, viz., that good is that which all things seek for. Hence this is the first precept of law, that good is to be done and promoted, and evil is to be avoided. All other precepts of the natural law are based upon this; so that all the things which the practical reason naturally apprehends as

---

47 Aquinas, S.T., I-II, q. 94, a. 2, ad 1, 2, 775.
48 Ibid., a. 2, 2, 774

> man's good belong to the precepts of the natural law under the form of things to be done or avoided.[49]

And this is the unity of the natural law.[50] At the base of every precept lies the one universal edict: Do the good. Permeating every act of the human nature as such is the first precept of the natural law: good is to be done and evil avoided.[51]

---

49 Ibid.

50 Suarez indicates other special aspects from which the natural law may be said to be one. These come after he has elaborated the unity which is paramount, the unity in the order of evidence. He states: "Finally, it may be added that all natural precepts are united in one end; in one author or lawgiver, also; and in the one characteristic of avoiding evil because it is evil, and prescribing good because it is right and necessary; so that these suffice to constitute a moral unity." Francis Suarez, S.J., De Legibus, translation prepared by Williams, Brown and Waldron with revisions by H. Davis, S.J., in the The Classics of International Law: Selections from Three Works of Francisco Suarez, S.J., Oxford, London, 1944, 2, 218, 219. Henceforward, unless otherwise noted, all translations of Suarez will be from this work. The above was II, VIII, 2. These lesser aspects of the unity of the natural law are placed here in order not to detract from the unity of the one first great principle, which is deductively the first principle in the order of our knowledge and reductively the ultimate principle. Also: "Finally, all these precepts proceed, by a certain necessity from nature, and from God as the Author of nature, and all tend to the same end, which is undoubtedly the due preservation and natural perfection or felicity of human nature; therefore, they all pertain to the natural law." Ibid., II, VII, 7, 2, 212.

51 Suarez has this further to say: "...we must state that with respect to any one individual, there are many natural precepts; but that from all of these there is formed one unified body of natural law. ... The basis of this unity, apart from the common manner of speaking, consists, according to St. Thomas, in the fact that all natural precepts may be reduced to one first principle in which these precepts are (as it were) united; for where there is a union there is also a certain unity." Ibid., II, VIII, 2, 2, 218. This is put most clearly in another place: "... no

This principle is ultimate, self-evident, indemonstreble.

> All the inclinations of any parts whatsoever of human nature, e.g., of the concupiscible and irascible parts, in so far as they are ruled by reason, belong to the natural law, and are reduced to one first precept, as was stated above. And thus the precepts of the natural law are many in themselves, but they are based on one common foundation.[52]

Universality in regard to Subjects

What we have seen thus far indicates to us that the natural law must apply universally to all men.[53] It is the very nature of man that embodies in it the law of nature, participating in the eternal law of God. Thus human nature itself is the norm. Granting, therefore, the presence in anyone of a human nature, subjection to the law of nature must also be admitted.

---

one is doubtful as to the primary and general principles; hence, neither can there be doubt as to the specific principles, since there, also, in themselves and by virtue of their very terminology, harmonize with rational nature as such; and, therefore, there should be no doubt with respect to the conclusions clearly derived from those principles, inasmuch as the truth of the principle is contained in the conclusion, and he who prescribes or forbids the one, necessarily prescribes or forbids that which is bound up in it, or without which it could not exist. Indeed, strictly speaking, the natural law works more through these proximate principles or conclusions than through universal principles; for a law is a proximate rule of operation, and the general principles mentioned above are not rules save in so far as they are definitely applied by specific rules to the individual sorts of acts or virtues." Ibid., II, VII, 7, 2, 212.

52 Aquinas, S.T., I-II, q. 94, a. 2, ad 2, 2, 775.

53 Some modern ethicians refer to an objective and subjective universality. These generally only import what we have termed "Universality in regard to Subjects," and "Universal Knowability," respectively. Nothing beyond terminology.

Saint Thomas refers to the matter in his treatment of the old law, but it indicates well his word on the natural:

> ...the Old Law showed forth the precepts of the natural law, and added certain precepts of its own. Accordingly, as to those precepts of the natural law contained in the Old Law, all were bound to observe the Old Law, not because they belonged to the Old Law, but because they belonged to the natural law. But as to those precepts which were added by the Old Law, they were not binding on any save the Jewish people alone.[54]

Thus Christ could not abolish that part of the Old Law that contained natural law precepts, because these precepts were first of the law of nature and secondly of the Old Law, and being of human nature were not separable from it. Thus, in so far as those precepts were reflections of the natures of all men, and specific ordinations for an individual group, the Hebrews, they were applicable to all men. Certainly if human nature is the natural law (in the sense that we have seen) and human nature is found in every man (or he is not a man), the natural law is also applicable to every man in so far as he is a man, which is the clearest sort of criterion of applicability. Denial of subjection to the natural law, is, reducibly, denial of membership in humanity.

Universal Knowability

Since the Divine Wisdom sincerely intends that its eternal plan of government be observed by all men, it must have

---

54 Aquinas, S.T., I-II, q. 98, a. 5, 2, 614.

apprised all men of this order, and that through the one manner of promulgation that it has chosen: the human nature, the natural law. It would be a damaging reflection on Divine Intelligence to posit the sincere desire to effect an order and concurrently declare there were some persons were essential to the prosecution of this order were not informed of the plans to be followed. Every rational being who is to perform acts in this order must be told what he is to do; must know the natural law.

Further, could the Divine Goodness constrain man on pain of punishment to obey its dictates without informing him of the dictates themselves? Man must know the natural law because only through the natural law can he attain to the full development of his nature. Were man not able to know his own nature, he could in no wise be held to the dictates of it.

It could be further noted that inasmuch as the natural law is embedded in the human nature it would be impossible for any man to have such a nature and not know the law. The knowability of the natural law is as universal as human nature.

The question always arises as to the extent to which man's knowledge penetrates into the content of the natural law. Recall that the natural law extends its dictates to every act of virtue. Does every man, therefore, know the natural law in its totality? Is he able correctly to arrive at every precept? This subject is somewhat intricate and requires discussion.

There is no doubt about the more general principles.

> It is therefore evident that, as regards the common principles whether of the speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all.[55]

However, when we recall that not all men are endowed with equal powers of reasoning, nor capable of subtle ratiocination, we would not expect all men to arrive at the correct conclusion when the process must proceed through many subtle and devious turns involving the application of broad principles, perhaps well enough known themselves, to a complex situation concerned with a multitude of facts and involving apparent conflicts. When it comes to the finer application of the general principles, however, it is not a question strictly of the knowability, but rather of possible deficiency in powers of intellection. On this very point there is considerable indecision in Saint Thomas. The problem does not become too acute in regard to this cognoscibility of the natural law, but comes home to us abruptly in our consideration which follows of the property of immutability. Even so it is better to follow the lead of Suarez in our presentation. Most of the modern Scholastics hold with him. In one brief paragraph he at once divides the precepts of the natural law into the three generally accepted categories and asserts the consensus as to their knowability.

> ...my opinion shall be briefly stated here, as follows: it is not possible that one

---

55 Ibid., q. 94, a. 4, 2, 777.

> should in any way be ignorant of the primary principles of the natural law, much less invincibly ignorant of them; one may, however, be ignorant of the particular precepts, whether of those which are self-evident, or of those which arededuced with great ease from the self-evident precepts.
>
> Yet such ignorance cannot exist without guilt; not, at least, for any great length of time; for knowledge of these precepts may be acquired by very little diligence; and nature itself, and conscience, are so insistent in the case of the acts relating to those (precepts) as to permit no inculpable ignorance of them. The precepts of the Decalogue, indeed, and similar precepts, are of this character. ... However, with respect to other precepts, which require greater reflection, invincible ignorance is possible, especially on the part of the multitude,...[56]

There is generally some slight variance among authors as to what precepts are to be placed in which category, but there is not much difficulty. There is certainly none in regard to the first principles. Under these are included as a rule only paraphrases of the first great principle: Do the good; avoid the evil. And we have already seen that this is the first indemonstrable principle of the practical reason, forcing itself on the consciousness of all men in whatsoever he does. It is the counterpart of the principle of contradiction in the speculative order.

> For those things which are recognized by means of natural reason, may be divided into three classes. First, some of them are

---

56 Suarez, II, VIII, 7, 2, 321, 222.

> primary and general principles of morality, such principles as: 'one must do good, and shun evil', 'do not do to another that which you would not wish done to yourself', and the like.[57]

We might phrase it: Live according to reason; Be virtuous. Injure no one. Or as Saint Thomas puts it in another place: "Hold to the middle; observe rectitude, and other phrases of the sort."[58] Of these there is no doubt. "Consequently, we must say that the natural law, as to the first common principles, is the same for all, both as to rectitude and as to knowledge."[59]

Among the secondary principles, those "conclusions derived from the first principles, conclusions, however, which are very proximate and easily deduced,"[60] are found: Children must honor their parents; Man must not kill; Man must not steal; Man must not commit adultery; Every man must be given his due; Lying is forbidden; Legitimate authority must be obeyed; and as Suarez says in one place: "'justice must be observed'; 'God must be worshipped'; 'one must live temperately'; and so forth."[61] These also are generally conceded to be known by all who have the ordinary use of their reason. Thus in isolated cases it is possible to find cases of those who have failed to come to the

---

57 Ibid., II, VII, 5, 2, 211.
58 Aquinas, Commentum in IV Libros Sententiarum, III, d. 37, q. 1, a. 4 ad 2. Translation mine.
59 Aquinas, S.T., I-II, q. 94, a. 4, 2, 778.
60 Donat, 76. Translation mine.
61 Suarez, II, VII, 5, 2, 211. By a short study of this section it will be seen that this grouping is Suarezian.

knowledge of one or another of these secondary principles. This could come about from defective social education over a period of yeats due to laxity of parents, or the purposive depravation of the young. There are also cases of a nation or tribe erring on some particular precept through corruption. These isolated cases of error come, as Thomas says,

> either by evil persuasions, just as in speculative matters errors occur in respect of necessary conclusions; or by vicious customs and corrupt habits, as, among some men, theft, and even unnatural vices, ... were not esteemed sinful.[62]

Yet even with these isolated cases of ignorance, it is agreed with Suarez above that these precepts

> cannot be unknown to anyone with the sufficient use of reason, unless by chance in the case of one or another where the rational nature has been corrupted by vices or perverted teachings, and yet this is not without personal guilt.[63]

This fact of universal knowability of the natural law is not left to stand on reason alone. Modern investigation has added further evidence and silenced the claims that human nature is mutable and deficient in the knowledge of the essential moral precepts. Outstanding among modern investigators is Schmidt, who gives us this report:

> Among all Pygmy tribes of whom we have fairly full information, and also among

---

62 Aquinas, S.T., I-II, q. 94, a. 6, 2, 781.
63 Donat, 77. Translation mine.

> Samoyeds, Ainu, North Central Californians, Algonkin, Tierra del Fuegians, and South-East Australians, He (the Supreme Being) is the author of the moral code.[64]

It can be concluded, then, that as far as these first and second principles of the natural law are concerned there is universal knowledge.

> The last statement to be advanced is that the natural law is a single law with respect to all times and every condition of human of human nature. So Aristotle teaches... using the phrase 'everywhere and always'; and Cicero...supports the same view; as does Lactantius..., who says: 'all nations in every time,' &c. The reason for these statements, indeed, is the same; namely, that the law in question is the product, not of any (particular) state in which human nature is found, but of human ature itself in its essence. [And he adds that this is true, not only "with respect to the universal principles of the ntural law," but also "with respect to the conclusions drawn therefrom; ..."][65]

It stands to reason, as was indicated at the outset of the treatment of this point, that the Divine Wisdom could not fail in the necessary promulgation of its plan, that it could fail in no wise in a necesnary point of the eternal order, nor that the Divine Goodness could expect to punish a violation committed "withoutknowledge."[66]

---

64 W. Schmidt, The Origin and Growth of Religions, translated by H.J.Rose, Dial Press, New York, 1931, XVI, 274.
65 Suarez, II, VIII, 8, 2, 222.
66 Aquinas, De Veritate, q. 17, a. 3 (Vol. 2.). Translation mine.

As the practical intellect, however, descends more and more to the particular there enters in a greater and greater chance of error. In the so-called tertiary precepts of the natural law all admit there can be invincible ignorance, as Suarez told us above. These tertiary principles are yet very much a part of the natural law, but are derived from the first general order: Do the good, by a more difficult process of reasoning and are more remotely contained in the first principle.

> Other conclusions require more reflection, of a sort not easily within the capacity of all, as is the case with the inferences that fornication is intrinsically evil, that usury is unjust, that lying can never be justified, and the like.67

We could add to this group of more remotely deducible principles: Duelling is evil; A joking lie is a lie (this would be a specification of that noted above by Suarez); Private property may be acquired; Divorce is an evil; Promises must be kept. It should be clear that it might take considerable ratiocination to arrive assuredly at some of these conclusions.[68] It should be noted here that throughout this discussion of the knowability of the natural law we have been speaking of men as united in possible groups. Clearly an individual in some specific case at some specific time could be invincibly ignorant of any of the principles beyond the primary.

---

67 Suarez, II, VII, 5, 2, 211.

68 Only hesitatingly is any specific principle categorized in the secondary or the tertiary, due to the impossibility of saying just where it should be with real certitude.

Recall these general categorizations in dealing with the last two properties of the natural law: immutability and adaptability.

Section 4: Immutability and Adaptability

Of all questions concerned with the natural law this one of immutability and adaptability has caused the greatest concern and misunderstanding. It is the constant cry of the modern relativist that the natural law (because it does present an absolute norm) in its "arbitrariness" is incapable of dealing with the exigencies of the moment, the mutability of things temporal, the changes and flux of modern life. It is the fear of the Scholastic proponent that these challenges will not be adequately met, that the feature of the adaptability of the natural law will not be sufficiently indicated, that perhaps there is something of truth in these assertions of inflexibility.

Immutability

In a certain very true sense Saint Thomas himself fell victim to such fears. He had heard from Aristotle so often of the variability of matter, of the contingency of the things of this life. This lack of stability in matter, and in things finite, he even ascribed to human nature. Prompted, as the case would appear, by the words of Aristotle, he seems to be not fully consistent with all he has said of the unvarying unity and

Recall these general categorizations in dealing with the last two properties of the natural law: immutability and adaptability.

Section 4: Immutability and Adaptability

Of all questions concerned with the natural law this one of immutability and adaptability has caused the greatest concern and misunderstanding. It is the constant cry of the modern relativist that the natural law (because it does present an absolute norm) in its "arbitrariness" is incapable of dealing with the exigencies of the moment, the mutability of things temporal, the changes and flux of modern life. It is the fear of the Scholastic proponent that these challenges will not be adequately met, that the feature of the adaptability of the natural law will not be sufficiently indicated, that perhaps there is something of truth in these assertions of inflexibility.

Immutability

In a certain very true sense Saint Thomas himself fell victim to such fears. He had heard from Aristotle so often of the variability of matter, of the contingency of the things of this life. This lack of stability in matter, and in things finite, he even ascribed to human nature. Prompted, as the case would appear, by the words of Aristotle, he seems to be not fully consistent with all he has said of the unvarying unity and

stability in human nature. He is led to deny that human nature is in all places and all times essentially the same human nature, and he denies immutability in all the precepts of the natural law. There were other forces pushing him to this besides Aristotle, it is true. He had the apparent instances of mutability in the scriptures and history. Actually these difficulties are answerable on other grounds, but he feels constrained to admit mutability to answer them. Further, his classification of the precepts themselves was not well done. We went to Suarez for that, it will be recalled. This inadequate classification gave Thomas a poor start in discussing whether or not these precepts were immutable, although he should have arrived at immutability irrespective of this categorization. More of this will be seen as we proceed. The fact is, however, that Suarez has handled the situation admirably and represents, as he did in the matter of the universal knowability, the consensus of the modern Scholastics.

In any law, change can be effected in one of two ways, either by <u>addition</u> or <u>subtraction</u>. The former is not strictly a change "since addition does not constitute a change when the earlier law is left in its entirety, but rather, there takes place a perfecting and extension which contribute to human utility,..."[69] Practically speaking, it is thus wise that the

---

69 <u>Ibid</u>., II, XIII, 1, 2, 257.

positive law is erected in many of its branches.

> And, in like manner, Ulpian...says that the civil law is built up by the addition of various precepts to the natural law. Furthermore, the divine law, too, has added many precepts to the law of nature, as has the canon law to both of these. For, ...human laws determine many points which have not been determined by the natural or the divine law, and which were not capable of being suitably determined by them.69

But where there is subtraction there is true change. It is of this actual removal of the law itself, or of the obligation of it, that we are speaking. This true change in law can be effected "either as a change in a thing that becomes intrinsically defective, or as one occurring externally through some agent having the necessary power."[70] By the former it would happen that the law of itself would become useless or harmful or by some change inside itself would become irrational. Extrinsically, the change would come from the ruling authority. Thus in both intrinsic and extrinsic types of change the law could be totallly abrogated, or, by a partial revocation, its total vigor could be derogated. Further also there could be dispensation from the law in given cases.

Can the natural law become <u>intrinsically</u> deficient? Is intrinsic mutability of the natural law possible?

> I maintain, then, that properly speaking the natural law cannot of itself lapse

---

70 <u>Ibid.</u>, 2, 257.

> or suffer change, whether in its entirety, or in its individual precepts, so long as rational nature endures together with the use of reason and freedom (of the will).71

And this is the position of most of the modern Scholastics. This is most logical, certainly. Man's nature is always going to be animal and rational. A rational soul informing an animal body. If this is not so, the result is not a man, with a human nature. Yet it is man's nature, adequately considered, that is the foundation of the natural law. The stability of human nature postulates the unvarying immutability of the natural law.

> The first proof of this view, indeed, is the fact that the natural law may be considered as existing either in God or in man. As it exists in man, it cannot suffer change, since it is an intrinsic property which flows of necessity from that human nature as such or (as some persons maintain) this natural law is the rational nature itself; and, therefore, a contradiction would be involved, if that nature should remain fitted for the use of reason while the natural law itself was abolished. If, on the other hand, the law in question is considered as it exists in God, then, as has been demonstrated above, it is impossible not only for it to be abolished by a judgment of the divine intellect, but also for it to be abolished by that will, whereby He wills either to prescribe certain good things, or to avert certain evil things.72

The natural moral law in the mind of God is eternal and has been decided upon by Divine Wisdom from all eternity. There can be no change there. The natural moral law in the nature of

---

71 Ibid., II, XIII, 2, 2, 258.
72 Ibid., 2, 258, 259.

man is as immutable as that nature itself.

As to the difficulty that has arisen (in the case of Thomas, as we will see later) concerning the possible mutation of the precepts of the natural law, we ask: How can there be any question of the mutability of the less general principles if there is no question of the mutability of the first principles? The secondary and tertiary principles, as we saw, are but reasoned conclusions from the first. Posit the immutability of the first and the immutability of the dependent principles follows of necessity.

> For a judgment which is necessarily inferred from self-evident principles can never be false; and, therefore, it cannot be irrational or unwise. But every judgment derived from the natural law is of such a character that it rests either upon self-evident principles or upon deductions necessarily drawn therefrom; and, therefore, however much things themselves may vary, there can never be a variation in such judgment.73

From every consideration there can be no intrinsic mutability strictly speaking in any of the precepts of the natural law, neither the first which are self-evident, nor the second which are easily deduced from them and partake of their stability, nor the third which, theough they require some ratiocination, nevertheless are still part of the law of nature and partake of its immutability.

---

73 Ibid., 3, 2, 260.

There can be considerable discussion regarding the possible changes from outside the natural law, but the same essential conclusion remains. God is the author of the natural law. He has imprinted it in the nature of man. He determined freely on His course from all eternity. It would be a reflection on His Wisdom, His Goodness, His Holiness, to attribute the possibility of a change to His work. His initial act was free, but once the course was determined, He is by hypothesis necessitated to persevere in His course. The many subsidiary questions that arise in this connection are not sufficiently relevant to this section of the paper to warrant treatment. There is no power that can abrogate <u>extrinsically</u> the natural law. Neither man,

> ...the natural law cannot be subjected, in any of its true precepts, to abrogation, diminution, dispensation, or any other change of a similar sort, by means of any human law or power.74

nor God:

> Furthermore, from the above remarks, it may incidentally be deduced that whenever the subject-matter of a precept issuch that the rectitude or evil involved does not depend upon the divine power of dominion, the said precept is not only one which does not admit of dispensation, but it is also immutable in sucha way that what is prohibited by it cannot <u>for any reason</u> be made licit.75

---

74 <u>Ibid.</u>, II, XIV, 5, 2, 268, 269.
75 <u>Ibid.</u>, II, XV, 22, 2, 300, 301. Italics mine.

Further even:

> Notwithstanding the foregoing, we must assert that God does not, properly speaking, grant disponsations with respect to any natural precept; but That He does change the subject-matter of such precepts or their circumstances, apart from which they themselves do not possess binding force, of themselves and without dispensation.76

Adaptability

And this brings us very appropriately to the consideration of any possible mutability (or mor properly, adaptability) in the natural law. It was on this point that Saint Thomas was ready to concede too much. Instead of realizing that all his difficulties could be answered by resort to principles other than mutability in the strict sense he derogated from the stability of human nature, admitted change in man's rational nature and hence the possibility of change in the law of that nature. Suarez treats of this problem of Thomas, and at the same time gives us an admirable introduction to a consideration of a very important feature of the natural law, its variability.

> St. Thomas also makes this statement..., saying that the natural law, in so far as relates to its primary pbinciples, is entirely immutable; while with respect to its conclusions for the most part, it is unchanging, yet it does change in certain cases, which are in the minority, owing to

---

76 Ibid., 26, 2, 304.

> particular causes which then occur. St. Thomas confirms the above view, be means of the example afforded by the natural precept which commands that deposit shall be returned to the owner when the latter asks for it, a precept which is not binding in cases where the deposit issought for the purpose of harming the commonwealth. The same argument may be applied in connexion with the natural precept of keeping of secrets,... ... Finally, St. Thomas confirms this view by reasoning, arguing that speculative and natural science is characterized by more certitude than moral and practical science, while, nevertheless, in physical and natural science, although the universal principles do not fail, the conclusions - even those that are necessary - at times fail; therefore, the same may happen in moral matters, and accordingly, the natural law may undergo change. The truth of the consequent is proved by a parity of reasoning; for, just as physical matter is changeable, so also human affairs, which are the matter of the natural law, are much more changeable; and, therefore, that law itself is likewise subject to change since, even as it derives its specific form from its subject-matter, so does it imitate and participate in the very nature of that matter.77

This is the problem. In order to explain the apparent mutability that Thomas saw and also to point out the true variability and adaptability that is a necessity to proper working of the natural law, Suarez explains that in those things which comprise any given relation there are two possible changes, one which is intrinsic to the subject itself and another which is extrinsic.

> However, all these statements, rightly explained, confirm rather than weaken

---

77 Ibid., II, XIII, 5, 2, 261.

> our assertion. We should consider, then, that those things which stand in a certain equivalence and relationship, as it were, (to other things), are in two ways liable to actualchange, or to virtual change (that is to say, a cessation of being), as follows: these things may change either intrinsically, in themselves - as when a father ceases to be a father, if he himself dies - or extrinsically, simply through change in another - as when a father ceases to such, owing to the death of the son. For this cessation on the part of the father is not (actually) change, but is (merely) conceived or spoken of, by us, as being a manner of change.78

And this is applicable to our considerations of the natural law in regard to its immutability and adaptability. For the natural law can never suffer any change formally,[79] as has been shown previously, but can, as it were, change materially, which is not a real change in the law itself, but in the matter with which the law deals. There is such formal change in the positive law, as is understandable. This is, in a sense, only part of the variability and adaptability of the natural law. This will be indicated briefly later in this section. It gives us a stepping-off point to a further discussion of the positive law itself.

> In the positive law, then, change may occur in the former of the two modes Suarez is referring to the two types of change, formal and material, which he indicated above , for this law may be abrogated; whereas, with regard to the natural law, that is by no means

---

78 Ibid., 6, 2, 261, 262.
79 These are the terms generally used by the moderns.

> the case, since, on the contrary, it is liable to change only in the second manner, that is, to change through changing subject-matter; so that a given action is withdrawn from the obligation imposed by the natural law (with respect to it), not because the law is abolished or diminished, since it is always and has been binding in this sense, but because the matter dealt with by the law is changed, as will ...80

So when Thomas was referring to the mutability of the natural law "in some particular cases of rare occurrence,"[81] he was intending to speak of a change improperly so-called and say that "according to our manner of speaking and by an extrinsic attribution, it would seem, after a fashion, to undergo change,"[82] and he did not have any intention, or should not have had, of impugning the formal immutability of the natural law.

Take the first principle of the natural law: Do the good. There is no chance here for any change in the circumstances surrounding the act to affect the principle itself. Also, if we proceed to the more particular: Lying is forbidden, which is on the second level, there is still not much room for limitation. These precepts apply in all their force in their blunt enunciation; there is no thought of an exception.

> ...while there are other precepts which can undergo a change in the matter involved and therefore do admit of limitation and exceptions of a sort. Consequently we often speak

---

80 Ibid., 2, 262.
81 Aquinas, S.T., I-II, q. 94, a. 5, 2, 779.
82 Suarez, II, XIII, 9, 2, 264

> of these latter precepts as if they were framed in absolute terms under which they suffered an exception, the reason for this apparent exception being that those general terms do not adequately set forth the natural precepts themselves, as they are inherently. For these precepts, thus viewed as they are inherently, do not suffer any exception; since natural reason itself dictates that a given act shall be performed in such and such a way, and not otherwise, or under specific concurrent circumstances, and not unless these circumstances exist. Indeed, upon occasion, when the circumstances are changed, the natural law not only refrains from imposing the obligation to perform a certain act - such, for example, as the return of a deposit - but even imposes the (contrary) obligation to leave the act undone.83

And with this we have the first great adaptability of the natural law. We work with the fundamental principles, the primary, secondary, tertiary, and apply them to the concrete and singular instances of given acts. Since in every given case man is faced with a concrete singular act the broad principles must be adapted to the given case at hand. As Suarez noted, it is the circumstances often in any case that may change the morality of an act completely. Thus it is by the application of the three determinants of morality to the act under consideration and in the light of the broad principle applicable that the morality of an act is determined. Thomas, and Suarez after him, uses the example of the deposit that must be returned. We ourselves can use this same example to illustrate the basic immutability tempered with the ever-present adaptability of the

---

83 Ibid., 7, 2, 262, 263.

natural law by following this example through its successive stages from the first principle on down. This will help to understand how there is no formal change in the law, and illustrate the part that a material change can play.

We have in our possession a deposit of money. The depositor comes to us. He requests the money. Under any circumstances we must: Do the good. If this is the only fact, or matter, at hand, we simply give him the money. It is his. We would have done the same had we proceeded to: A deposit must be returned, for that, without more, was also clear in the case. We can now add the fact that the depositor advises us to hand the money over to an enemy of the country. To the case as altered we apply the determinants of morality. We see that the act itself is good, for: A deposit must be returned, and the depositor has a right to assign his deposit. But when we consider the end of the agent, the ratio finalis (the purposive intent) of the person to whom we are to hand the money, we realize that the atural law itself would have us return the deposit "to one who seeks it rightfully and reasonably."[84] It is as fully much the command of the natural law to act rationally (and to have that understood along with the promise of returning the deposit) as is: A deposit must be returned. To further illustrate, another circumstance apart from the end of

---

84 Ibid., II, XIII, 6, 2, 262.

the act and the end of the agent may impinge on the case. Were we to know that the man to whom the money was to be given was going to add further a crime to the fact of his aiding the enemy, there would be further reason for withholding the deposit, and further guilt in releasing it.

In any particular case, therefore, the immutable principles of the natural moral law are accompanied by a saving adaptability, or "change in the loose sense of the term, simply by metonymy and extrinsically, by reason of a change which occurs in the matter (dealt with by that law)."[85] Every particular application of the law is a combination of the general principle and the facts. With the general principle as the major premise the practical intellect, acting as conscience, applies the principle to the facts, invokes the criteria of morality and forms a judgment, then and there, as to the licoity of the act. The natural law is in no wise arbitrary, no wise outmoded. This ever-variable adaptability answers perfectly the derogators who speak of inflexibility, arbitrariness, antiquated maxims unfitted for the changes of modern life and the progress of the race and humanity. However the times may change, whatever the circumstances there are always the immutable principles and precepts, conscience, the determinants of morality to cope with them. This is the adaptability of the natural law,[86] the last of the properties.

---

85 Ibid., 7, 2, 262.
86 In a limited sense only, as the next chapter will show.

The foundation is laid. The natural law, part of the eternal, is the base on which all our further, more particular considerations will rest. This natural law - universal in applicability and knowability, one and immutable - intimately affects man in every phase of his life, private and public, business and social, domestic and civilian. Our essay, however, has one chief interest over all possible applications of the natural law to the manifold life of man. On to our more general foundation we now will build our own special superstructure. For us it is man as he lives in society that is the prime concern. The natural law extends its influence most definitely into man's life in society. Ultimately, law as it governs man in his civic life is the culminating point of consideration. More particularly we will treat of the natural law governing the civic life of man as it is expressed by the Supreme Court of the United States. Our next treatment will lead us to this culminating point. We will build on to the natural law slowly. We will lead to the positive human law, its nature and dependence on the natural. We will specialize further by a consideration of natural rights, justice. Then, coming closer still we will discuss equity, the duties of judges and then finally the way will be clear to apply ourselves specifically to the actual adjudicated cases of the Supreme Court of the United States. Thus will our superstructure be complete.

CHAPTER III

THE NATURAL LAW IN THE CIVIC LIFE OF MAN

Section 1: The Natural Precept of Sociability

> For it cannot be doubted but that, by the will of God, men are united in civil society; whether its component parts be considered; or its form, which implies authority; or the object of its existence; or the abundance of the vast services which it renders to man. God it is who has made man for society, and has placed him in the company of others like himself, so that what was wanting to his nature and beyond his attainment, if left to his own resources, he might obtain by association with others.[1]

So did Leo XIII express it some sixty years ago. Rooted in the heart of man is this tendency to live with other men. Just as it is natural for man to eat, to sleep, to enjoy things intellectual, to produce offspring, it is a basic natural inclination to live in society.

---

1 Leo XIII, "Humana Libertas," 1888, translated in Social Wellsprings, edited by Joseph Husslein, S.J., Bruce, Milwaukee, 1940, 128.

> Thirdly, there is in man an inclination to good according to the nature of his reason, which nature is proper to him. Thus man has a natural inclination ... to live in society;...[2]

This inclination was not placed in man by Almighty Wisdom out of whim. The actual needs of man, of man more than any other creature, demand the services and cooperation of his fellow men from birth to the grave, in every department of human existence, - mere sustenance, and bodily care and protection; education in simple animal activity; full development and flowering of the mind; help and guidance in the things of the spirit and God. In short, his whole perfection. "It is not good for man to be alone,"[3] and that means in every way.

> However, it is natural for man to be a social and plitical animal, to live in a group, even more so than all other animals, as the very needs of his nature indicate. For all other animals nature has prepared food, hair as a covering, teeth, horns, claws as a means of defence, or at least speed in flight. Man, on the other hand, was created without any natural provision for these things. But, instead of them all he was endowed with reason, by the use of which he could procure all these things for himself by the work of his hands. But one man alone is not able to procure them all for himself; for one man could not sufficiently provide for life unassisted. It is, therefore,

---

2 Aquinas, S.T., I-II, q. 94, a. 2, 2, 774.
3 Suarez, III, I, 1. Translation mine. Suarez handles this same point, as a commentary on Thomas, in this place. It is a discussion of the same general argument as is presented here, but follows the general practice of Suarez of giving a fuller treatment.

> natural that man should live in company with his fellows.[4]

Saint Thomas carries this argument further, indicating the various interdependencies of man on man in the rational order as well.[5]

But it remains to Pius XII to touch at the essence of the matter and to give the complete raison d'etre of this sociability of man. He has just spoken of the picture Saint Paul had of the unity of mankind.

> A marvelous vision, which makes us see the human race in the unity of one common origin in God "one God and Father of all, Who is above all, and through all, and in us all;" (Ephesians, iv, 6.) in the unity of nature which in every man is equally composed of material body and spiritual, immortal soul; in the unity of the immediate end and mission in the world; in the unity of the dwelling place, the earth, of whose resources all men

---

4 Thomas Aquinas, Opusculum XVI. De Regimine Principum ad Regem Cypri, translated by G. B. Phelan, Sheed and Ward, London, 1938, 34. I, 1. Henceforward this translation will be used wherever this work is quoted.

5 Thus Thomas continues: "Moreover, all other animals are able to discern by inborn skill what is useful and what is injurious; just as the sheep naturally regards the wolf as his enemy. Some animals even recognize by natural instinct certain medicinal herbs and other things necessary for their life. Man, however, has a natural knowledge of the things that are essential for his life only in a general fashion, inasmuch as he has power of attaining knowledge of the things which are essential for human life by reasoning from universal principles. But it is not possible for one man to arrive at a knowledge of all these things by his own individual reason. It is, therefore, necessary for man to live in a group so that each one may assist his fellows, and different men may be occupied in seeking by their reason to make different discoveries, one, for example, in medicine, one in this and another in that." Ibid., I, 1, 34,35.

> can by natural right avail themselves, to sustain and develope life; in the unity of the supernatural end, God Himself, to Whom all should tend; in the unity of the means to secure that end.[6]

If we look at man under all these aspects we will find all the possible and necessary points where cooperation and mutual help and aid are demanded in society.[7] On every level of existence man needs man. So Pius concludes:

> In the light of this unity of all mankind, which exists in law and in fact, individuals do not feel themselves isolated units, like grains of sand, but united by the very force of their nature and their eternal destiny, into an organic, harmonious mutual relationship which varies with the changing times.[8]

Section 2: Human Positive Law

Once we have man in society[9] we logically ask: What of him then? Is he to be left without more? Will man by merely possessing this inclination and realizing his need, thereby

---

6 Pius XII, Summi Pontificatus, translated and published by The Paulist Press, New York, 1939, paragraph 53, 11.

7 Before leaving this point it is well to note that Thomas also uses the argument from conceptual language (loquela) to adduce the natural inclination to live in society. See Aquinas, De Regimine Principum, I, 1, 35.

8 Pius XII, para. 37, 12.

9 We may note the general definition of society according to general view: A stable, moral union of many persons for the purpose of the common good to be attained by mutual cooperation. A perfect society is one that has at hand (by command from its members) any and all requisites for the attainment of its particular end or aim. Of this type of society there are two: the church and the state. For our purposes these distinctions will suffice for the present. Here we will consider only the state.

effect a society? Will the common good be furthered by the aggregate of velleities of all men in that direction?

> If, therefore, it is natural for man to live in the society of many, it is necessary that there exist among men some means by which the group may be governed. For where there are many men together, and each one is looking after his own interest, the group would be broken up and scattered unless there were also someone to take care of what appertains to the common weal. In like manner the body of a man, or any other animal, would disintegrate unless there were a general regulating force within the body which watches over the common good of all the members. With this in mind Solomon says (Prov. XI. 14): "Where there is no governor, the people shall fall."[10]

Certainly this is logical. Once posit the precept to live in society and the corollary need of some one to order the society through positive enactments follows immediately. In all things where there is diversity there is the need for a unifying force.[11]

> Yet the unity of man is brought about by nature, while the unity of a society, which we call peace, must be procured through

---

10 Aquinas, De Regimine Principum, I, 1, 35, 36.

11 "Consequently, there must exist something which impels towards the common good of the many, over and above that which impels towards the private good of each individual. Wherefore, also in all things that are ordained towards a single end there is something to be found which rules the rest. ... So, too, in the individual man, the soul rules the body; and among the parts of the soul, the irascible and concupiscible parts are ruled by the reason. Likewise, there is, among the members of a body, one that is principal and moves all the others, as the heart or the head. Therefore, in every group there must be some governing power." Aquinas, De Regimine, I, 1, 36. There is a further elaboration in this paragraph and following ones on the underlying rationale of this need for a ruler.

the efforts of the ruler.[12]

There are more specific considerations that serve to impress this need[13] for the rule of one who has the common good at heart. Ultimately all are reducible to the one aim: the common good and order. The first need is sanctive.[14] Some citizens deliberately and sinfully act contrary to the law of nature written in their hearts, for these[15] the lawmaker must impose punishment, lest the common good suffer through the baseness of a few.

> Men who are well disposed are led willingly to virtue by being admonished better than by coercion; but men whose disposition is evil are not led to virtue unless they are compelled.16

Secondly, there are many men whose intellects, as we have seen, are deficient in leading them to the knowledge of their social duties and obligations, for them the wisdom of the ruler is offered as explicative of the natural law. Thirdly, in many instances the manner of implementing the natural law itself is

---

12 Ibid., I, 15, 103.

13 Confer Thomas: S.T., I-II, q. 95, a. 1, 2, 782 and following, where he discusses these somewhat more fully.

14 Thus: "A private person cannot lead another to virtue efficaciously; for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue,... But this coercive power is vested in the whole people or in some public personage to whom it belongs to inflict penalties,... Therefore the framing of laws belongs to him alone." Aquinas, S.T., I-II, q. 90, a. 3, ad 2, 2, 746.

15 This does not deny positive sanction for positive law.

16 Aquinas, S.T., I-II, q. 95, a. 1, ad 1, 2, 783.

is not provided for specifically in the natural law, thus there must be further law determinative of the natural law. These briefly are the impelling forces that demand a ruler and a law instituted by him.[17]

Our discussion of the need of a lawgiver has given us an appropriate introduction to the necessary properties of this positive law. The lawgiver must be he "who has the care of the community."[18] We saw that it could not be a private person. Only one representing the whole group has all the means at his hand for the proper governance of the whole.[19] No law is just that does not proceed from the person who is duly established over the community.

Next, any law must an ordination of reason. Thus

> ...when he [Isidore] goes on to say that it should be just, possible to nature, according to the customs of the country, adapted to place and time, he implies that it should suitable to discipline. For human discipline depends, first, on the order of reason, to which he refers by saying just. Secondly, it depends on the ability of the agent, because discipline should be adapted to each one according to his ability of nature (for the same burdens should not be laid on children as on adults); and it should be according to human customs, since man cannot live alone in society, paying no heed to others.

---

17 These are mentioned here merely with a view to show the necessity of the positive law. Fuller elaboration will follow when consideration is given to the dependence of the positive on the natural law.

18 Ibid., q. 90, a. 4, 2, 747.

19 On this see footnote 14 supra.

> Thirdly, it depends on certain circumstances, in respect of which he says, adapted to place and time.[20]

All these considerations[21] blend in to the total reasonableness of the law. All are required that a law be such as to command obedience.

Of all the properties ofthe positive law, the most necessary is that it be directed to the common good.

> Now the intention of every lawgiver is directed first and chiefly to the common good; secondly, to the order of justice and virtue, whereby the common good is preserved and attained.[22]

There is really no other reason for having the lawgiver at all if he is not there to preserve the order of society and bend all his efforts to the good of the group.[23] Isidore remarks that they must be necessary and useful laws. Thomas comments:

> The remaining words, necessary, useful, etc., means that law should further the common welfare: so that necessity refers to the removal of evils, usefulness, to the attainment of good,...[24]

If the legislator dparts from this end, the binding force of law ceases.[25] In short, all that we said of the matter in regard to law in general in Chapter II[26] applies with full force

---

20 Ibid., q. 95, a. 3, 2, 786, 787.
21 See Aquinas, S.T., I-II, q. 96, a. 4, 2, 795.
22 Ibid., q. 100, a. 8, 2, 842.
23 Confer Aquinas, Summa Contra Gentiles, III, 146, "On Common Good."
24 Aquinas, S.T., I-II, Q.95, a. 3, 2, 787.
25 Confer: Ibid., q. 96, a. 4, 2, 755.
26 Chapter II, Section 1, "The Concept of Law."

to the positive law.

The last note of any law is promulgation. This is, therefore, an essential property of the positive law. The subject must be able to know that whereto he isbound. There is never obligation "without knowledge."[27] Moreover, the words, once promulgated, must be clear, without ambiguity, so as to be adapted to the minds of all the people. When confusion and uncertainty arise from the ineptitude of the framer, the fuilt and responsibility lie on the shoulders of the lawgiver. It is he who must yield; the subject cannot be bound to such laws.

Thus Isidore expressed in one short sentence all the properties of the positive law when he said:

> Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to time and place, necessary, useful; clearly expressed, lest by obscurity it lead to misunderstanding; framed for no private benefits, but for the common good.[28]

Through this we can see all the essential notes originally postulated for any law.

From these considerations we can rightly conclude to the applicability of the secondary principle of the atural law which we noted in our treatment of those principles.[29] Our

---

27 Aquinas, De Veritate, q. 17, a. 3. Translation mine.
28 Isidore, Etymologiarum Libri Viginti, Migne, Paris, 1877, Pat. Lat., Vol. 82, 203.
29 Confer Chapter II, Section 3, "Universal Knowability."

progress from the precept of sociability, through the necessity of a ruler and rules, leads us inevitably to the precept of obedience: Legitimate authority must be obeyed.

> Moreover, the highest duty is to respect authority and obediently to submit to just law. By this the members of a community are effectually protected from the wrongdoing of evil men. Lawful power is from God, "and whosoever resisteth authority resisteth the ordinance of God." Wherefore, obedience is greatly ennobled, when subjected to an authority which is the most just and supreme of all. Where the power to command is wanting, or where a law is enacted contrary to reason, or to the eternal law, or to some ordinance of God, obedience is unlawful, lest while obeying man, we become disobedient to God.30

In this dictate of the natural law: Legitimate authority must be obeyed, we have the foundation-stone for the whole positive law structure. It is through this precept that the positive law gains its vigor and force. This leads us, moreover, directly into a discussion of what could be well called another property of the positive law, its complete dependence on the natural.

Section 3:
Dependence of the Positive Law on the Natural

This dependence of the positive law on the natural is the most thorough-going possible dependence. From every possible aspect that we view the positive law, we see it looking to the

---

30 Leo XIII, 123.

natural.

At the very outset it is the dictate: Live in society that carries with it the corollary command to inaugurate the positive law itself. The very existence of the positive law comes as an exigency of nature. The natural calls into being the positive.

Once in existence, the positive law receives its force and vigor from the precept of the natural law: Obey just authority. All the inclinations of nature lead man to this conclusion. Were man not commanded by the higher law of God implanted in his heart he would in no wise be bound to obey the enactments of his rulers.

Probably the most essential form of dependence that the positive has on the natural comes in its subjection to the natural as to the ultimate norm of all its enactments.

> Where the dependence of human right right upon the Divine is denied, where appeal is made only to some insecure idea of a merely human authority, and an autonomy is claimed which rests upon a utilitarian morality, there human law justly forfeits in its more weighty application the moral force which is the essential condition for its acknowledgement and also for its demand of sacrifices.31

This right reason in man is absolute. There is no act that does not come under its scrutiny. Thus when man sets out to

---

31 Pius XII, 50, 14.

bind man by positive enactments he must first ask himself whether the enactments are in accord with the higher law of nature that is imprinted in his nature by God Himself. Just as in every act of an individual or personal nature the natural law must be consulted, so too must every act of the human legislator consult the ultimate norm of the Eternal Law.

> ...it is manifest that the eternal law of God is the sole standard and rule of human liberty not only in each individual man, but also in the community and civil society which men constitute when united.32

This is nothing else than repeating the primary precept of the natural law: Do the good. This precept pervades the enactments of the positive law.

Saint Thomas expresses the reasoning behind this dependence on the natural law:

> I answer that,...,that which is not just seems to be no law at all. Hence the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, itis no longer a law but a perversion of law.33

These are general dependencies, nevertheless they are

---

32 Leo XIII, 121
33 Aquinas, S.T., I-II, q. 95, a. 2, 2, 784.

most intimate and essential. There is a more detailed nexus between the positive and natural. This nexus is threefold and there has been forewarning of its nature. It is here that the positive builds, more patently, on the foundation of the natural that was established in Chapter II.

Sanction

The first of our three derivations of the positive from the natural comes from the need of the natural law for some temporal sanction. True, the natural law has its adequate sanction in the hereafter. The sanction which the positive law supplies is such as will further the temporal good and order here and now desired. When we understand that the natural law in its essence looks to the intrinsic morality of human acts, and that positive on the other hand does not penetrate into the soul and heart of man but merely considers his acts from the outside and insofar as they are extrinsically moral or not, this matter of sanction will become more clear. Thus the positive law as a sanctive agent supplementing the natural law, applies itself to the maintenance of the temporal order and the inducement to virtue.[34]

---

34 Under this general need for coercive power on the part of the state should be mentioned the need to educate young citizens in habits of virtue, since "the habit of justice is effected by works; and thus wise does the civil law make men just, in so far as, through the training by works, it imprints the habit of justice in its observers." Aquinas, In III Sent., d. 40, 1, 3. Translation mine. St. Thomas

> ...the duty of the civil legislator is ...to keep the community in obedience by the adoption of a common discipline and by putting restraint upon refractory and viciously inclined men, so, that, deterred from evil, they may turn to what is good, orat any rate avoid causing trouble and disturbance to the state.35

This need of sanction as a supplement to the natural law comes from the perversity of men.

> ...a(n)...impediment to the preservation of public good comes from within and consists in the perversity of the wills of men, inasmuch as they are either too lazy to perform what the state demands, or, still further, they are harmful to the peace of society, because, by transgressing justice, they disturb the peace of their neighbors.36

It is because of such as these that the positive law must impose punishments: "It is necessary that punishment be inflicted

---

has this to say: "...man has a natural aptitude for virtue; but the perfection of virtue must be acquired by man by means of some kind of training. ... Now it is difficult to see how man could suffice for himself in the matter of this training, since the perfection of virtue consists chiefly in withdrawing man from undue pleasures, to which above all man is inclined, and especially the young, who as are more capable of being trained. Consequently a man needs to receive this training from another, whereby to arrive at the perfection of virtue. And as to those young people who are inclined to acts of virtue by their own good natural dispositions, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be dissolute and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that they ... by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment is the discipline of the laws." Aquinas, S.T., I-II, q. 95, a. 1, 2, 783.

35 Leo XIII, 120.

36 Aquinas, De Regimine, I, 15, 104.

on evil-doers if peace is to be maintained among men."[37] It is clear from this that the sole sanctive purpose of the positive law is not as a supplement of the natural-law precepts reiterated in the positive law. It must, perforce, carry with it its own sanctions for its own peculiarly positive-law enactments. This point will be clear when we distinguish the other two derivations of the natural law.

Explanation

Saint Thomas groups the other two derivations from the natural law together.

> But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from principles; ...like that to which, in the sciences, demonstrated conclusions are drawn from the principles; ... e.g., that one must not kill may be derived as a conclusion from the principle that one should do no harm to no man;... Accordingly, ...those things which are derived in the first way are contained in human law, not as emanating therefrom exclusively, but as having some force from the natural law also.[38]

This burden of explaining the natural law is one of the chief duties of the positive law. It is essentially nothing else than declarative of the natural law. These declarations[39] of the natural law supply a twofold exigency.

---

37 Aquinas, Summa Contra Gentiles, III, 146. Translation mine.

38 Aquinas, S.T., I-II, q. 95, a. 2, 2, 785.

39 Speaking of these reasoned conclusions of the natural law expressed by the positive, Leo XIII has this to say: "Of

When we treated of the knowability of the natural law we saw that there were some precepts of the natural law that certain men at certain times had not reasoned to. This was due to several reasons resolving themselves into some form of corruption. This ignorance of the law was deemed vincible in the main, and hence culpable, but the fact remains that the ignorance is de facto present. A further group of precepts, more remotely derived from the first, was without the comprehension of some of the people and that invincibly and guiltlessly due to their intricacy and complexity.

> It was fitting that the divine law [Thomas is referring to the divine positive law, but the same may be said for the human positive with slight modifications] should come to man's assistance not only in those things for which reason is insufficient, but also in those things in which human reason may happen to be impeded. Now as to the most common principles of the natural law, the human reason could not err universally in moral matters;

---

the laws enacted by men, some are concerned with what is good or bad by its very nature. They command men to follow after what is right and to shun what is wrong, adding at the time what is a suitable sanction. But such laws by no means derive their origin from civil society; because, just as civil society did not create human nature, so neither can it be said to be the author of the good which befits human nature, or of the evil which is contrary to it. Laws come before men live together in society, and have their origin in the natural and consequently in the eternal law. The precepts, therefore, of the natural law contained bodily in the laws of men have not merely the force of human law, but they possess that higher and more august sanction which belongs to the law of nature and the eternal law." Leo XIII, 120. The force and importance of these words cannot be stressed too greatly.

> but through being habituated to sin, it became darkened as to what ought to be done in the particular. But with regard to the other moral precepts, which are like conclusions from the common principles of the natural law, the reason of many men went astray, to the extent of judging to be lawful things that are evil in themselves. Hence there was need for the authority of the divine [and the human positive as well] to rescue man from these defects.40

In short, the complexity of modern affairs; the intricacy of many moral problems; the maze of conflicting rules; the apparent clash of principle with principle, all lead our weak intellects to cry for the finished reasoning of the lawmakers and the assistance and supplementation of the positive law.

Determination

The third division of this threefold dependence of the positive on the natural law is that of <u>determination</u>.

> But it must be noted that something may be derived from the natural law in two ways: ...; secondly, by way of a determination of certain common notions. ...the second is likened to that whereby, in the arts, common forms are determined to some particular. Thus, the craftsman needs to determine the common form of a house to this shape of this or that particular house. ...e.g, the law of nature has it that the evil-doer be punished, but that he be punished in this or that way is a determination of the law of nature. Accordingly, both modes of derivation are found in the human law... But those things which are derived in the second way

---

40 <u>Ibid.</u>, q. 99, a. 2, ad 2, 2, 819.

> have no other force than that of human law.41

It is this vast body of enactments that we generally think of when we first hear the term "positive law." In these positive precepts, however, the ever-present force of the natural law is present. The right reason, again, is behind the law. It is the precept of the natural law commanding us to: Act according to reason, that forces us to make an election from one of several indifferent possibilities, which in themselves have no greater desirability than that some choice must be made. Thomas gives us the rationale of this:

> In all things which are ordered towards some end, wherein this or that course may be adopted, some directive principle is needed through which the due end may be reached in the most direct route. A ship, for example, which moves in different directions, according to the impulse of the changing winds, would never reach its destination were it not brought to port by the pilot.
>
> Now, man has an end to which his whole life and all his actions are ordered; for man is an intelligent agent, and it is clearly the part of an intelligent agent to act in view of an end. Men, however, adopt different methods in proceeding towards their proposed end, as the diversity of men's pursuits and actions clearly indicates. Consequently man needs some directive principle to guide him towards his end.42

So, then, although the ship could go to port in any number of routes, some bad, some good, one of these routes must be

---

41 Ibid., q. 95, a. 2, 2, 785.
42 Aquinas, De Regimine, I, 1, 55.

chosen, action of some kind must be taken. This is the duty of the positive law in its <u>determinative</u> capacity. This branch of positive law draws on the natural-law principle: <u>Obey legitimate authority</u>,[43] more completely than the conclusioned declarations of the natural law itself. So also would its respective sanctions, in contradistinction to the sanctions supplementing the merely declarative principles.

It is worthwhile to hear Leo XIII speak on this same point.

> Now, there are other enactments of the civil authority, which do not follow directly, but somewhat remotely, from the natural law, and decide many points which the law of nature treats only in a general and indefinite way. For instance, though nature commands all to contribute to the public peace and prosperity, still whatever belongs to the manner and circumstances, and conditions under which such service is to be rendered must be determined by the wisdom of men, and by nature herself. It is in the constitution of these particular rules of life, suggested by reason and prudence, and put forth by competent authority, that human law, properly so-called, consists. This law bids all citizens to work together

---

43 Saint Thomas indicates more specifically whence the obligatoriness of this group of positive-law precepts derives: "The human will can, by common agreement, make a thing to be just provided it be not, of itself, contrary to natural justice, and it is in such matters that positive right has its place. Hence, ... in the case of the legal just, it does not matter in the first instance whether it takes one form or another; it only matters when once it is laid down." Aquinas, <u>S.T.</u>, II-II, q. 57, a. 2, ad 2. Translation here is that of the English Dominicans, Burns, Oates, London, 1915. An important point in connection with this matter and the special application to our essay: the reason here leads to obligation in conscience to our Constitution.

> for the attainment of the common end proposed to the community, and forbids them to depart from this end; and the same law, in so far as it is in conformity with the dictates of nature, leads to what is good, and deters from evil.44

Such, then, is the utter dependence and derivation of the positive from the natural. It has its origin and being from the exigencies of nature expressed in the precept: Live in society. Its force, vigor, obligatoriness, come from the natural-law precept: Obey legitimate authority. The end of the positive law is reducible to the end of man's nature. The specific matter of the positive-law enactments must look to the natural law as to an ultimate norm. It is always: Do the good. Whether as sanctive, explicative or determinative, the positive-law precepts are derived either mediately or immediately[45] from the natural. In fine

> ...the binding force of human laws lies in the fact that they are to be regarded as applications of the eternal law, and are incapable of sanctioning anything which is not contained in the eternal law, as in the principle of all law. Thus Saint Augustine most wisely says: "I think that you can see, at

---

44 Leo XIII, 121.

45 Since all law is based on the natural in some way, we can distinguish between the immediacy and mediacy of this dependence. Thus consider an example pertinent to our essay. The Supreme Court may resort to principles already enunciated in the body of our positive law. Thereby it depends mediately on the natural law. Or it may go directly to the principles of the natural law perhaps unexpressed in the Constitution or other positive laws. In this case it has immediate recourse to the natural law. In either case, however, if the court acts justly, it is either mediately or immediately dependent on the natural law.

> the same time, that there is nothing just and lawful in that temporal law, unless men have gathered it from this eternal law." (De Libero Arbitrio, I, 6, 15.)[46]

With this we have stepped over into the positive law. Our nexus is complete.

Section 4: Human Rights and Justice

Hitherto we have spoken only of laws and the obligatory duties consequent on, or collateral to, them. A moment's consideration will tell us that a just and wise and good Creator and Orderer of the universe would not impose obligations and duties on man without at the same time supplying the means whereby these duties can be fulfilled. In short, wherever man has a duty to do something, he a right to the necessary means in performing that duty, and others have the consequent duty of respecting that right.[47]

Immediately parallel, therefore, to the whole body of duties imposed by the law, both natural and positive, is a homologous body of rights to the unhampered performance of those duties.[48]

---

46 Leo XIII, 121.

47 The term right is technically defined thus: A moral, inviolable power of possessing, doing or exacting something.

48 It should be noted that the terms duty and right are not exactly coterminous. Every right, true, springs from a duty in the person possessing the right and carries the duty in others to respect the right; but every duty, on the other hand, does not give rise to a consequent right in another to exact the performance of the duty. For example,

The natural law placed man in society with the precept of sociability. Now the natural law protects man in society with the social precept of justice in society: Give every man his due. From this precept flows forth all the rights of man as a social being. Thus the body of precepts of Justice is the body of precepts protecting the rights of man in the fulfillment of his duties. Thus the precept of Justice: Act justly, is a secondary precept of the natural law reasoned immediately from: Do the good.

The precepts of Justice[49] concern us most intimately because in them are the precepts governing man in his social and civil life in contradistinction to man as an individual.[50]

> It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it denotes a kind of equality, as the very name implies; indeed we are wont to say that things are adjusted when they are made equal, for equality refers to some other. On the other hand the other virtues perfect man in those matters only which befit him in relation to himself.[51]

---

first, I have the duty from the natural law to preserve my life. Therefore I have the right to the means to that preservation, and also consequently others have the duty to respect that right, and to be forced to do so. But, secondly, although I have the duty to give thanks, there is no consequent right in him to whom the thanks are due to exact the performance of that duty from me.

49 Justice, though strictly one of the cardinal virtues, is often referred to as the body of commands of that virtue.

50 "Wherefore human law makes precepts only about acts of justice; and if it commands acts of other virtues, this is only in so far as they assume the nature of justice." Aquinas, S.T., I-II, q. 100, a. 2, 2, 629

51 Aquinas, S.T., II-II, q. 57, a. 1. Dominican translation.

Just as the first precept of the natural law embraced or permeated every act of man, so does the secondary precept: Act justly permeate every social act of man.

The parallel with the law is complete. There is a body of the natural just collateral to the peculiarly natural-law precepts and a body of the positive just parallel to the properly positive enactments. Every duty, natural or positive, therefore, carries with it its corresponding right in justice. In this limitation to the consideration of the precepts of Justice we have narrowed our field further towards the final treatment of the work of the Supreme Court.

Section 5: Commutative Justice

Justice in its general use, as applicable to all of the various relationships which man as a member of society may have is subject to several subdivisions according to the several types of relationships which man enjoys in society. The first of these is denominated: Commutative Justice. This subsists between two persons, distinct and equal. Thus it shares the same general note of justice in that each must give to each his due, and adds the specification that the parties concerned be distinct moral persons and equals. The two persons must be perfectly distinct one from the other. This would eliminate one citizen, as citizen, in his relation to the state of which he was a member. When the word person is used, it designates a moral or juridical person. Commutative justice can subsist

between any two equals, citizen and citizen, citizen and alien, a nation and nation, a corporation and a corporation, even a citizen and a nation insofar as that nation is a moral person and dealing equally with the citizen. The equality of the persons is essential to commutative justice. This arises out of the essential independence of man from the domination and will of another. Further, the matter dealt with in the commutation must also be equal.

> ...in commutations something is delivered to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of what belonged to the other.52

The three essentials to this specific form of justice, therefore, are equality between the persons, equality of the matter of the commutation and perfect distinction between juridical persons. We saw that the aim of all social precepts was the common good. Commutative justice protects the common good in particularly looking to the personal independence and liberty of each single person.

Section 6: The Natural Right to Property

Outstanding among the rights of commutative justice is the

---

52 Ibid., q. 58, a. 5. Dominican Translation.

moral inviolable right of each man to acquire, hold as his own in a stable and permanent possession, alienate or otherwise use to his own proper advantage, the material goods of the earth. "For every man has by nature the right to possess property as his own."[53]

This demand on the part of man's nature for the right to have and use as his own the goods of the earth is certainly consonant with all the exigencies and inclinations of human nature that we have already seen.

In common with all creatures man isordered by nature to conserve and perfect himself. But with man this duty takes on a singularly different aspect. The brute is ruled by instinct, but not so with man.

> He possesses, on the one hand, the full perfection of the animal being, and hence enjoys, at least as much as the rest of the animal kind, the fruition of things material. But animal nature, however perfect, is far from representing the human being in its completeness, and is in truth but humanity's humble handmaid, made to serve and obey. It is the mind, or reason, which is the predominant element in us who are human creatures; it is this which renders a human being human, and distinguishes him essentially from the brute. And on this very account - that man alone among the animal creation is endowed with reason - it must be within his right to possess things not merely for temporary and momentary use, as other living things do, but to have and to hold them in

---

53 Leo XIII, Rerum Novarum, (1891), translated and published by the America Press, New York, 3, 4.

> stable and permanent possession; he must have not only things that perish in the use, but those also which, though they have been reduced to use, continue for further use in after time.54

It is the whole of man's nature that demands property for himself and permanently. The rational being alone is able to see the future, to desire unceasingly to provide for it, "being provident both for itself and for others."[55]

> This becomes still more clearly evident if man's nature be considered a little more deeply. For man, fathoming by his faculty of reason, matters without number, linking the future with the present, and being master of his own acts, guides his ways under the eternal law and the power of God, whose Providence governs all things. Wherefore it is in his power to exercise his choice not only as to matters that regard his present welfare, but also about those which he deems may be for his advantage in time yet to come.
> ...
> Man's needs do not die out, but for ever recur; although satisfied today, they demand fresh supplies for to-morrow. Nature accordingly must have a source that is stable and remaining always with him from which he might look to draw continual supplies. And this stable condition of things he finds only in the earth and its fruits.54

But to limit the exigencies of nature for private property only and solely to the physical needs would be absurd; nor did Leo intend this. Ultimately all the higher needs of man, moral, intellectual, spiritual, can be satisfied only if the

---

54 Ibid., 4.
55 Aquinas, S.T., I-II, q. 91, a. 2, 2, 750.

stability of possession of the material goods of the earth is present.

Thus, where nature has implanted the duty of conservation, perfection, providence for the future, for the family, so has nature given the right that is consequent, the right to the necessary means to fulfillment: the right to private property.

But certainly, further, right reason demands that the laborer be allowed the possession of the works of his labor.

> Here, again, we have further proof that private property is in accordance with the law of nature. ... Now, when man thus turns the activity of his mind and strength of his body towards procuring the fruits of nature, by such act he makes his own that portion of nature's field which he cultivates -- that portion on which he leaves, as it were, the impress of his individuality; and it cannot but be just that he should possess that portion as his very own, and have a right to hold it without anyone being justified in violating that right.56

What else than the thought of possession of the fruit will induce man to work? Is there any other stimulus that can appeal to the rational being?

We might even go deeper in this analysis. Essentially there is only one person who is going to be responsible for the perfection of each person, and that is the person himself.

---

56 Leo XIII, Rerum Novarum, 5.

Each man has his own personal duties, his own eternal destiny, his own immortal soul, a distinct and separate personality, independence and liberty. All these tell us that man should have the right to pursue his own needs, duties and obligations as an individual person. Ultimately, then, private property alone is consentaneous with the human nature, and is a fit and worthy means to the ends demanded.

Section 7: The Justice of Contract

This is a corollary notion, in one sense, to the right of property. It is broader, true, but it follows directly. If man has the right to hold things as his own, he has the right to use them as he wishes, to dispose of them howsoever he desires.[57] Thus a contract is a means of disposing of the property held, and of acquiring more. It is a valid and appropriate means of passing the possession and control of material g goods. It is, of course, broader than this, for it is merely the consent of two or more persons in some regard by which a

---

57 Lest there be any misunderstanding, we add that the precepts of social justice, looking to the common good, are always to be weighed in any concrete case. As Pius XI said, commenting on the words of Leo XIII on private property: "First, let it be made clear beyond all doubt that neither LeoXIII, nor those theologians who have taught under the guidance and direction of the church, have ever denied or called in question the twofold aspect of ownership, which is individual or social accordingly as it regards individuals or concerns the common good." Pius XI, Quadragesimo Anno, (1931), translated and published by the America Press, New York, 12.

right is conferred one to the other. This would include the wage contract, which, unless taken in a broad sense, is not over property.

Here, again, we see the personal independence and liberty of the human being as the substantiating factor for the essential validity of contracts. Man as free can bind himself. Man has the dignity and freedom of the human person. Man as owner has dominion over his goods and hence can dispose of them. If man respects the same liberty in others, therefore, he has the foundation of a society of commutative justice. This fact, then, of the personal destiny, personal liberty, the independence of the will of others, has given man the right to contract freely.

For this reason, the binding force of contracts arises, in the main, from commutative justice. Once a man has validly entered into a contract he has the right to its fulfillment. There has been something given. The principle of commutative justice demands that its equal be returned. Thus commutative justice sees to the protection of this individual right.

The binding force of contracts, however, comes from another precept of the natural law as well. There is the non-juridical precept of fidelity. Just as a man must not lie, man must keep his promises. To contract is to promise.

Section 8: Legal and Distributive Justice

Legal Justice[58] is the second great division of Justice. It looks to the rights of society as a whole. "...Legal justice ... directs man immediately to the common good."[59] Again the precept: Give each man his due, is present. This time it is from the aspect of those duties which each person has towards the community as a whole. The aim of legal justice is to protect the existence and foster the aims of the civil society. Thus whatever the common good of the group as a society demands, each member of the group, as well as the society itself, must look to.[60] Not only would such just demands (which are patently legal) as taxes, observance of police regulations and the like,

---

58 There is a controversy today concerning the use of the term "social" as synonymous with "legal" when referring to justice. It seems to be the modern tendency among Scholastics and led by the Popes to so use the term social justice as the modern counterpart of legal justice. Context generally renders the use clear.

59 Aquinas, S.T., II-II, q. 58, a. 7. Dominican Translation.

60 Thomas accords the striving for the common good with man's individual destiny in these words: "He that seeks the good of the many, seeks in consequence his own good, for two reasons. First, because the individual good is impossible without the common good of state, family, kingdom. Hence Valerius Maximus says of the ancient Romans that 'thy would rather be poor in a rich empire than rich in a poor empire.' Secondly, because, since man is a part of the home and state, he must needs consider what is good for him by being prudent about the good of the many. For the good disposition of parts depends on their relation to the whole ..." Aquinas, S.T., II-II, q. 58, a. 7, ad 3. Dominican translation. Thus the ultimate end of society is the good of each single one of its citizens. The proximate end is the public prosperity. The state provides the common conditions and means, so that the citizens can themselves provide for themselves.

be postulated by legal justice, but also the less obvious requirements concerning the use of private property, as we saw above (in footnote 57 of this chapter), consideration of the common good in the use of surplus wealth, and many such.

Distributive Justice is the last of the three main divisions of justice.[61] It is, in a sense, the inverse of legal justice. By the precepts of distributive justice the society as a group renders to the individual member what is his just due. Thus, under distributive justice, there must an equal and proportionate distribution of benefits and burdens, proportioned to the merits and capacities to bear of the persons. Some must rule, some be governed. The wealthy must bear the greater burden; the poor must be cared for. The aim of distributive justice is to protect the rights of the individual to receive his due from the group. Man as citizen must not be forced to contribute more or receive less than his station and situation warrant.

> ...in distributivejustice something is given to a private individual, in so far as what belongs to the whole is due to the part, and in a quantity that is proportionate to

---

61 Thomas refers to a fourth, which we will not treat beyond this mention since it is self-explanatory: "The household community, ... a threefold fellowship, namely, of husband and wife, father and son, master and slave, in each of which one person is, as it were, part of the other. Wherefore between such persons is not justice simply, but a species of justice, viz., domestic justice,..." Aquinas, S.T., II-II, q. 58, a. 7, ad 3, Dominican translation. Italics mine.

> the position of that part in respect of the whole. Consequently, in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community.62

With this, we have seen that justice in all its divisions protects the common good of man in society.

Section 9: Equity

The important question of Equity might well have come up specifically when we spoke of the immutability and adaptability of the natural law in Chapter II. At that time we silenced all discussion by the conclusive statement: "There is no power that can abrogate ... the natural law. Neither man ... nor God."[63] And the legal device of equity was and is no exception. Does this mean that equity can in no wise affect the natural law? This will become clear if we define and analyze equity and distinguish it from similar devices and practices.

Bear clearly in mind the distinction that was already made between immutability and adaptability of the natural law and then hear Suarez say:

> ...it behooves us to distinguish between the interpretation of a law and true epieikeia. For 'interpretation of law' is a

---

62 Aquinas, S.T., II-II, q. 61, a. 2. Dominican translation. As a final word on justice, read: Aquinas, S.T., II-II. This in entirety gives Thomas' best word on the matter.

63 II, 4, "Immutability."

> term much broader than epieikeia; inasmuch as the relationship between the two is that of a superior to an inferior, since every instance of epieikeia is an interpretation of law, whereas not every interpretation of law is, conversely, and instance of epieikeia. Cajetan ... has noted this distinction, saying that often - or rather, always - laws require interpretation because of the obscurity or ambiguity of their terms or for other, similar causes; yet, not every interpretation of this kind is an instance of epieikeia, but only those interpretations in which we consider a law as failing in some particular instance, owing to its universal character - that is, owing to the fact that it was established for all cases and so fails to meet the requirements of some given instance that it cannot justly be observed with respect thereto. ... Aristotle calls epieikeia a rectification of legal justice, since it interprets a law as not calling for observance in cases in which such observance would be a practical error and opposed to justice or natural equity, wherefore it is said to be a rectification of the law. ...other interpretations of law ... may not relate to its rectification, but only to the explanation of its sense in regard to those points in which given laws are ambiguous.64

The natural law itself, therefore, is such that "no power ... can abrogate it." There can be no emendation of the natural law in itself; hence no equity. We have already left opportunity for interpretation of the natural law when we outlined its adaptability.

But the natural law is not considered only in itself. It

---

64 Suarez, II, XVI, 4, 2, 312, 313.

has received expression in the natural-law declarations in the positive law.

> Thus, the natural law may be considered either as it is in itself, just as it is conceived or dictated by right reason, or else as it is expressed in a certain number of set words, through some written law.65

This eliminates all possibility of the use of equity in the case of the natural law in itself, because equity results in a formal change in the law. Parallel to the adaptability, or much more correctly, part of it, is the interpretation of the natural law as explanation or re-declaration. The natural law in itself will often require interpretation or declaration, but never emendation.

But it is another matter in the case of the precepts of the natural law as they are expressed or declared by the positive law. Here equity is present.

> ...if the natural precepts are considered in so far as they have been established through positive law, then they admit of exception by epieikeia, especially in relation to the intention of the human legislator; although considered in themselves and (purely) as natural precepts, they do not, strictly speaking, admit of such epieikeia.

The use of equity in this case arises out of the inability of human law to express adequately and completely the natural law.

---

65 Ibid., 5, 2, 313.
66 Ibid., 16, 2, 324.

The natural law itself, we saw, contains all possible contingencies within its precepts. It is only a matter of reasoning to the proper conclusion. The positive law, however, is to be taken, generally, at its letter. This results in cases which are not covered by the law since they are too particular.[67] Further, the positive law could fail completely in expressing the natural law. This would result in something actually contrary to the natural just. In addition to the use of equity in correcting precepts declaratory of the natural law, there is the further use in regard to purely positive enactments. When the positive law determines the natural law there is possibility that laws result that are contrary to the positive just. Here there is nothing intrinsically wrong, as was the case in the mal-declaration of the natural law itself, but there is injustice of some kind due to the circumstances of the case.[68]

---

67 So Thomas explains: "No man is so wise as to be able to consider every single case; and therefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion; but he should frame the law according to that which is of most common occurrence." Aquinas, S.T., I-II, q. 96, a. 6, ad 3, 2, 799.

68 "Since, then, the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Hence, if a case arise wherein the observance of that law would be injurious to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule; but if it were to happen that the enemy are in pursuit

Thomas indicates this distinction:

> Even as unjust laws by their very nature are either always or for the most part contrary to the natural just, so too laws that are rightly established fail in some cases, when if they were observed they would be contrary to the natural just. Wherefore in such cases judgment should be delivered not according to the letter of the law but according to equity, which the lawgiver has in view... In such cases even the lawgiver himself would decide otherwise; and if he had foreseen the case he might have provided for it by law.69

It should be noted that, strictly, equity is not a part of the law, but a device to give adaptability to it. Wherefore, equity is administered by judges, or by the ruler acting in the capacity of a judge. Although equity effects variability of the positive law, it should be recalled that it is strictly outside it. Where the letter fails, equity interprets the spirit.

Actual variability of the positive law has been indicated indirectly already. That there is always some need for change is evident.[70]

---

of certain citizens, who are defenders of the city, it would be a great calamity for the city if the gates were not opened to them; and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common welfare, which the lawgiver had in view." Aquinas, S.T., I-II, q. 96, a. 6, 2, 798.

69 Aquinas, S.T., II-II, q. 60, a. 5, 2. Dominican translation.

70 This matter does not warrant, in this essay, more than a brief treatment here: "The king ... should have for his principle concern the means whereby the multitude subject to him may live well. Now this concern is threefold: first of all, to establish a virtuous life in the multitude, ...

Section 10: The Judge

The final rounding-out of the law comes with the judge; in him is the last safeguard, the last application of *right reason* in the form of "animate justice."[71] When the laws have been framed and embodied in the law of the land, there still remains the need for decisions of fact, -

> Certain individual facts which cannot be covered by the law have necessarily to be committed to judges, ... e.g., concerning something that has happened or not happened, and the like.[72]

- for interpretation, trial and conviction of malefactors, for imposition of sanctions.

It is the duty of the judge to effect justice, to be the living embodiment of the law.

---

second, to preserve it once established; and third, having preserved it, to promote its greater perfection... he performs this duty when ... he *corrects* what is out of order, and *supplies* what is lacking, and, if any of them can be done better, he tries to do it." Aquinas, *De Regimine*, I, 15, 102, 105. "The law can be rightly changed on account of the changed condition of man, to whom different things are expedient according to the difference of his condition." Aquinas, *S.T.*, I-II, q. 97, a. 1, 2, 801. "The purpose of human law is to lead men to virtue, not suddenly but gradually. Therefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz., that they should abstain from *all* evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils." Aquinas, *S.T.*, I-II, q. 96, a. 2, ad 2, 2, 792, 793.

71 This is a phrase first used by Aristotle and adopted by Thomas, *S.T.*, II-II, q. 60, a. 1.

72 Aquinas, *S.T.*, I-II, q. 95, a. 1, ad 3, 2, 784.

> A judgment is properly called the act of a judge in sofar as he is a judge. The judge, moreover, is, as it were, the voice of right, and rights are the object of justice. Therefore the first meaning of the word judgment imports a definition or determination of the just, or rright. ... A judgment, therefore, since it is the right determination of what is just, properly pertains to justice. Wherefore, the Philosopher says that "men have resort to the judge as to animate justice." (Ethic. Lib. v., cap. 4, ante med.)73

Every man in society is subject to the natural law, the precepts of justice. The judge is no exception. From the supreme ruler down, through all the administrators of the state, the precepts of natural law and justice impose their obligation.

A judge's claim to be obeyed lies first in his proper possession of authority. Without this he cannot even begin to judge. Once established on his bench his foremost care must be to enforce the precepts of the natural law and justice. In all his actions prudence and right reason must be present.

> A judgment is licit in so far as it is an act of justice. There are three essentials to the justice of a judgment. First, the judgment must spring from justice itself. Second, it must come from due authority. Third, it must be founded in the right reason of prudence. If any of these be lacking, the judgment will be iniguitous and and illicit. In the first case, the judgment is against the rectitude of justice;... in the second, the man judging has not the

---

73 Ibid., q. 60, a. 1. Translation mine.

> authority; ...in the third, the certitude of reason is lacking, ...74

From this we can see the duties of the justices of the Supreme Court of the United States. In all things they are subject to the natural and positive just. Their authority must come from the duly established government of the United States. They must permeate their judgments with the reasonableness of prudence. Which is to say that they must be governed in their decisions by the natural law in all its multitude of implications and commands, in its ramifications from the first great precept: Do the good, on out to the most minute order derived therfrom. The natural law as we have briefly outlined it in this essay is their guide and norm.

Section 11: The Administration of the Law

We have now come to the point where we can consider the fundamental principles we have been outlining in a closer application to the administration of the law in the United States Supreme Court. We will not restate the principles; nor will the application be detailed. In fact, the manner in which the three branches of our government, or any government, are effected and affected by the natural law should have been patent as we progressed.

---

74 Ibid., a. 2. Translation mine.

Mediately, as we have seen, there is not a law or enactment of the United States government, - executive, legislative, judicial, - that does found itself on the natural law. All lawmaking bodies in the United States must form the body of the positive law in accord with the standards which we have outlined. Our Constitution, therefore, either declares, determines, or sanctions the natural law.

In any given case the Supreme Court decides according to the written law of the United States - statutes, precedents, the Constitution (all mediately founded on the natural law), - unless one of four general situations arises.

First, if there is no written law on the matter and the matter requiring adjudication is indifferent, that is, not involving anything intrinsically moral or immoral, the court determines (in the technical sense we have used so often) the natural. This determination is guided by the supreme norms of human nature and the common good.

Second, if there is no written law on the matter and the situation involves matters intrinsically moral or immoral, the court must go directly, immediately to the natural law and make a declaration of natural-law precepts. Here the matter is not indifferent. The court is held more strictly to the natural law.

> It sometimes happens that something has to be done that is not covered by the common rules of actions, ... Hence it is necessary to judge such matters according to higher principles than the common rules ...75

Third, if there is written law, but it is contrary to the natural just, the court must invoke equity. It this situation the court goes directly and immediately to the natural law. In this we have a mal-declaration of the natural law in the positive, and emendation through equity is in order.

Fourth, if there is written law, but it is merely contrary to the positive just, that is, that there is injustice resulting from the circumstances and not from intrinsic evil, the court again resorts to equity, but only in so far as the emendation corrects the positive law.

It should be quite clear that all these principles have been explained more fully already. This is merely a schematic presentation to aid in application. In the light of this outline of the administration of the law by the court, it should be noted again that, in the main, this essay will confine itself to the instances where the Supreme Court has gone directly and immediately to the precepts of the natural law. This will not always be the case, however, since it will be of advantage at times to reflect on the presence of the natural law in the written law of the nation.

---

75 Ibid., q. 51, a. 4. Dominican translation.

PART II

THE UNITED STATES SUPREME COURT ON NATURAL LAW

We have arrived at the point where we can step from principle to practice. We have established the inherent reasonableness of natural-law reasoning. We have shown that the natural law is a true juridical norm for both legislators and jusges, and so by right ought to have a definite and substantial position in the tradition of our Federal Judiciary. In addition to this juridicalposition it is now our aim to show that factually and historically the natural law merits this position. It should be expected that such sound principles would not be ignored by such a distinguished body as the Supreme Court of the United States.

Before proceeding to the actual adjudications there is a needed word concerning the terminology employed by the court in resorting to the natural law. This matter will be treated in the following chapter and will serve tocomplete the nexus between this part and the one preceding.

CHAPTER IV

THE CRITERIA OF NATURAL-LAW LANGUAGE

Words, we know, are nothing but arbitrary signs or symbols invented by man to signify ideas or concepts. At best, words can be vexatious things when there is attempt to exactly categorize their precise meaning. Certainly the words or symbols used the philosopher and lawyer are no exception. In all the sciences, and those of law and philosophy in particular, words representing concepts must be closely scrutinized.

It is the particular instance of this general problem that we are faced with in our analysis of the adjudications of the Supreme Court of the United States. In any evaluation of these decisions in the light of their natural law content we must know when the justices are in fact resorting to the natural law in founding their decisions and when not. We must be able to separate the wheat from the chaff. It is as much to us to know that a justice has mere parallelism of language and no substance as it is to apprise a decision as founded on the natural law.

How, then, will we get to the true nature of terms employed and be guided in our study of these adjudications? A close consideration of the decisions of the court, the terminology and phraseology of the justices, and the progress of the reasoning, will indicate that there are certain apparent and outstanding criteria or norms of evaluation which aid us in our apprisal of natural-law content. These criteria or canons logically divide themselves into five general categories and are either extrinsic or intrinsic. Intrinsic if they go the very nature of the reasoning used or of the situation in the case; extrinsic if not. Reference to these canons will be made constantly throughout the essay, hence they will be numbered and, as far as possible, clearly defined and distinguished one from the other. It should be noted, further, that generally two or three of the canons will be applicable to any of the cases studied.

Canon One

Identity of Terminology

This is perhaps the least forceful of all the canons, but it is, nonetheless, a most necessary one. When a justice employs the identical terms that have had immemorial use in the Schools and been employed by natural-law writers from Aquinas through Bracton and Blackstone, and Suarez and Bellarmine, down to the present day, there is at least first face cause for an investigation. True, without more such identity of terms

could well serve as a cloak for principles sharply antagonistic to the natural law. However, when there is substantiative evidence otherwise the indication made by the bare term is confirmed. This might be said to be the prime purpose of this canon - to put us on the track.

The courts use many natural-law terms. It will be best to list them in a schematic order:

prudent..... wanton
just..... unjust
reasonable..... unreasonable
appropriate..... inappropriate
convenient..... inconvenient

inherent rights
intrinsic obligation
fundamental laws

Natural law
Natural justice
Natural equity
Natural reason
Eternal justice
Natural rights

principles of natural justice
maxims of eternal justice
great principles of justice
first principles
principle of universal law
absolute and eternal justice
distributive justice

Laws of nature
Common sense of mankind
State of nature
Reason and nature of things

Charles Grove Haines has investigated this matter thoroughly. He has given us an excellent evaluation of our first canon in these words:

> All of these terms, used as grounds for the determination of the validity of statutes, are to a certain extent, at

> least, a developement from the ancient and medieval concepts, law of nature and law of reason, and whether held to be a part of written constitutions or independent of the fundamental law, they involve the use of the law of nature theory and philosophy in accordance with the methods and terminology peculiar to modern jurisprudence.1

Haines was referring, obviously, to the same general terms noted above, as well as others to follow in the next canon.

Canon Two

Comparative Contemporary Usage

This canon is closely allied to the former, embodies for the most part all the terms already noted and is different in this that it indicates the nexus between the terminology now employed by the court with that of the old common law which in turn was most intimately bound up with the ecclesiastical law whence it sprang. Thus we find many of the present-day terms came to us from Blackstone who was in a direct line with Bracton a canon lawyer.[2] Therefore, when we see such phrases as:

---

1 Charles Grove Haines, The Law of Nature in State and Federal Judicial Decisions, 25 Yale Law Journal 617, June, 1916, 652.

2 "Henry De Bracton, the Blackstone of the thirteenth century, a learned ecclesiastic and one of the regular and permanent judges in the reign of Henry III. His great and epoch-making work, modelled on the Institutes of Justinian, De Legibus et Consuetudinibus Angliae, according to Vinogradoff (Athenaeum, July 19, 1884), "testifies to the influence of Roman jurisprudence and of its medieval exponents, but at the same time remains a statement of genuine English law, a statement so detailed and accurate that there is nothing to match it in the whole legal literature of the Middle Ages." (Catholic Encyclopedia, II, 726, f.)" This note in its entirety was taken from a footnote in William F. Obering, S.J.,

reasonably prudent man
equal, just and impartial laws
common good
common welfare
sound reason

just and reasonable purport
reasonable and appropriate
conclusions of reason and common sense
by the clearest principles of equity
broad and fundamental reasoning

Essential liberties
General welfare
Inherent rights
Self-evident truths

we can generally make the connection with the natural law through the fathers of the common law such as Blackstone.[3] A short example would perhaps make this point clearer. Thus we have the instance of Justice John Marshall Harlan citing the words of Justice Joseph Story which are in direct reference to Blackstone:

> "The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded on natural equity,

---

The Philosophy of Law of James Wilson, A Study in Comparative Jurisprudence, The American Catholic Philosophical Association, Catholic University of America, Washington, D.C., no date of publication given, 15.

3 It should be evident that a complete study would be involved were we to endeavor to trace the influence of the natural-law reasoning of Bracton and his predecessors on Blackstone and his age. Reliance in this essay will have to be great on other sources to indicate this connection in all its implications. Our Canon Two will be merely a reference to this situation with the support of the example which will follow. Collateral reading on the subject is suggested for a further treatment.

> and is laid down as a principle of universal law. Indeed almost all other rights would become worthless if the government possessed an uncontrollable power over the private property of every citizen."4

This quotation in its entirety occurred in the case of Chicago, Burlington, and Quincy Railroad v Chicago in 1896. The quotation within was from Story's Commentaries on the Constitution[5] in 1833, in which Story makes acknowledgement to Blackstone as his source. This indicates the import of this canon. It bridges the gap between the present-day terms and the early natural-law language of Aquinas, Bracton, Suarez, Bellarmine, et alii, by reference to the founders of the common law and shows the transposition of terminology.

Canon Three

Collateral Sources

This canon is most cogent. We have the bare words of a justice. The context gives us much, but we hesitate. We can then consult other substantiative sources. We can go to other decisions of the same justice. There he may tell us fully his concept behind his words. We may go to other writings or to his speeches. There we will have his own word as to what his meaning is, what philosophy guides him. Finally, we could consult the works of investigators and commentators who have sear-

---

4 166 US 226, 236.

5 "Story was steeped in the common law and his thinking reveals the strong influence of Blackstone." V.L.Parrington, The Romantic Revolution in America, H-B, New York, 1927, 300.

ched the works of the justice and are qualified to discuss his philosophy and background. These four collateral corroborative sources form the general content of this third canon. We will have occasion to use this often.

Canon Four

The Fourteenth Amendment and the Declaration of Independence

The Fourteenth Amendment to the Constitution was passed by the states in 1868. Up to that time the justices had been more free in their resort to out-and-out natural-law terminology, but with the passage of this amendment a convenient support was given without the necessity of going beyond the constitution.

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.6

It was around this paragraph that most of the reliance centered. Thus in 1872, the great justice, Stephen J. Field declared in unmistakable terms that the Fourteenth Amendment was designed 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.7

---

6 Constitution of the United States, Amendment 14, Section 1.

7 Justice Stephen J. Field in the Slaughterhouse Cases, 16 Wall. 36 (1872), 105. Also see Cummings v Missouri, 4 Wall. 277.

Some few years later, but still in the days close to the passage of the amendment, Chief Justice Waite suggested that the Fourteenth Amendment

> furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.8

That was in 1875.

It may appear ill-timed to mention the Declaration of Independence now, but the fact is that it and the Fifth Amendment are both now mentioned only in passing, as falling into the same canon with the Fourteenth Amendment. Just as the justices did not feel constrained to go behind the Constitution when they could resort to the Fourteenth Amendment, so did they often refer to the Declaration of Independence[9] and the Fifth Amendment, as the embodiment of the principle they desired for the foundation of their decisions.

In the light of these facts we might well add such terms

---

8 Chief Justice Waite in United States v Cruickshank, 92 US 542 (1875), 554.

9 Again the problem of tracing the natural-law influences in the Declaration of Independence is a separate task in itself and beyond the scope of this thesis. The actual extent of influence of men like Suarez and Bellarmine on the philosophy of our first fathers is too great a matter to even consider here, but that the natural-law influence was present seems to be uncontroverted. Again the problem of estimating its verity, soundness and reliability is present, as is it present in consideration of a philosophy that appears to be founded on the natural law.

as the following:

Due process of law
Privileges and immunities of citizens
Equal protection of the laws
Life, liberty and property

Self-evident truths
Inalienable rights
Life, liberty and the pursuit of happiness
Just powers

Canon Five

Thus far all of the canons have been what we would call extrinsic, with the possible exception of the last, which was an admixture of both. This present canon, however, is intrinsic. When we come to the real study of any decision we must in the end rely on the intrinsic reasoning of the justice to decide on what he had based his decision. It is true that all the other canons aid in this conclusion, but very often we must ultimately depend on the reasoning inherent in the case, considered in the light of the philosophy of the natural law, to make our complete analysis. For the most part the analysis of each case will do this for us, but there are some helps that can lead us in the right direction. We have an indication of the mind of the court when we hear such expressions as these:

Not given by human legislation
Brought with men into society
Obligations ... anterior and independent.
Reaches back of all constitutional provisions
A pre-existing intrinsic obligation

Thus in general when the court clearly goes beyond and behind

the constitution; refers to a law as God-given, which man only recognizes and enforces; relies on a law higher than any law of states - then, we have indication of genuine natural-law reasoning. Further, when the courts assigns to the law qualities or properties that are clearly not assignable to human law, when it cites rights as independent of government, inalienable, given by the Creator, again there is indication of founding the decision on law of God, not of man.

Under this Canon Five, therefore, are grouped all the intrinsic indications of natural-law reasoning on the part of the justices. The application of the canon will vary in each case, but its applicability will be unmistakable.

We must remember that these canons have been given merely as aids in detection. Ultimately a given adjudication will be evaluated in the light of the treatment outlining the concept of the natural law as it was presented in Chapters II and III. These canons cannot be considered as more than directives. In many decisions, moreover, many or all the canons might apply.

CHAPTER V

TEN IMPORTANT DECISIONS OF THE UNITED STATES SUPREME COURT

Over two decades before the beginning of the United States Supreme Court, in the year 1764 James Otis expressed the fact that all laws and government have "an everlasting foundation in the unchangeable will of God, the Author of nature, whose laws never vary," and that "there can be no prescriptions old enough to supersede the law of nature and the grant of Almighty God, who has given to all men a natural right to be free."[1]

James Otis began a long series of enunciations of a similar kind that were expressive of the tradition of natural-law thinking that so characterized the entire governmental philosophy of the United States from its conception.

In July of 1776 the thirteen united States' spoke of "the laws of nature and of nature's God" in the Declaration of

---

1 James Otis, The Rights of the British Colonies Asserted and Proved, Edes and Gill, Boston, 1764. Otis was a prominent Massachusetts attorney and member of the General Court.

Independence, and went on to say:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable 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; ...[2]

These words indicate the mind of our first fathers and "formulate a general political philosophy - a philosophy on which the case of the colonies could solidly rest."[3]

But it is not the place here to trace the historical development of the natural law itself, that has been ably done elsewhere by Frederick Pollock;[4] nor does it devolve on this essay to consider the early American tradition of the natural law in all its broader relations to government and political science as B. F. Wright has done.[5] We begin with the tradition[6] of natural-law principles in the judiciary of the United States.

---

2 Declaration of Independence, first part of second paragraph.

3 Carl Becker, The Declaration of Independence, A Study in the History of Political Ideas, Knopf, New York, 1942, 8.

4 Frederick Pollock, The History of the Law of Nature: A Preliminary Study, 1 Columbia Law Review 11, 1901.

5 B.F.Wright, Jr., American Interpretations of Natural Law, in The American Political Science Review, Banta Publishing Co., Menasha, Wisconsin, 1926, XX.

6 It was indicated in the Introduction (C.I) of this essay that there was great effort made to weave an historical continuity of natural-law reasoning from the beginnings of the Supreme Court to the present day. To highlight this unity the chapter has been divided into four periods. These periods will be treated in separate sections and the ten cases will be properly apportioned to the periods.

Section 1: The Age of Marshall

The period from the foundation of the United States Supreme Court in 1789 until the year 1835 can well be called "The Age of Marshall." The great justice himself did not ascend the bench till 1801, but the years preceding that time were either inactive (very few cases were heard during the first three years)[7], or fell within the shadow of Marshall himself.

There is one prominent figure in these earliest days, however, that looms higher than the others, both as a justice and as an exponent of the natural law. He is Justice James Wilson. The work of Wilson was voluminous, exactingly accurate and very trustworthy. Perhaps not another justice in the history of the court could be compared with him as a thorough-going, and correct, natural-law philosopher. His work and his philosophy have been most comprehensively treated elsewhere[8], but some word from him is necessary to complete the picture of the age of Marshall of which he could be called a member.

---

7 "During the first three years the Supreme Court had practically no cases to decide, though the Justices were called upon to settle a few important issues on the circuits." C. G. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835, U. of Cal. Press, Los Angeles, 1944, 184.

8 Quotation has already been made (C. IV, footnote 2) from Wm. F. Obering, S.J., in his research work: The Philosophy of Law of James Wilson. This work by Father Obering is so exhaustive as to preclude any detailed consideration of the decisions of Wilson in this essay. His inclusion, moreover, was further blocked by other criteria noted in Chapter I, in spite of his outstanding natural-law exposition.

> We shall probably find that, to direct the more important parts of our conduct, the bountiful Governour of the universe has been graciously pleased to provide us with a law; and that, to direct the less important parts of it, he has made us capable of providing a law for ourselves.9

Wilson[10] left the bench in 1798 and closed the century and the early part of the period. After Wilson, and for the next thirty-five years, the American legal scene was dominated by a trio of great American jurists, Marshall, Kent[11] and Story. Thus we find B. F. Wright, Jr., referring to

> the very important part played by the natural-law theory in the legal writings and the court decisions of the times. In the opinions of men like Marshall, Kent and Story, as well as in their formal treatises, the influence of natural-law ideas is apparent. Many of the teachings of the earlier natural-law school continued to be in the ascendant during this most important period of American legal history; ...12

---

9 James Wilson, Of the Law of Nature, from The Works of the Honorable James Wilson, Lorenzo Press, Philadelphia, 1804, excerpt from the first paragraph.

10 "His [Wilson's] conviction that jurisprudence is a science subordinated to ethics, and that government, in the exercise of its powers, is subject to the moral law, meets us on every page of his writings, and is enshrined in the one great judicial decision connected with his name - the case of Chisholm's Executors v Georgia (2 Dall. 419)." Ehering, S.J., The Philosophy of Law of James Wilson, 19.

11 Kent is mentioned here only by the way. He was on the New York bench. Both as a writer and as a jurist his use of the principles of the natural law was wholehearted and his influence exceedingly great. The fact of his being on a state bench has already placed him outside this essay.

12 B.F.Wright, Jr., American Interpretations of Natural Law, 535. This is an obvious application of Canon Three in leading us to conclusions concerning the philosophy of law of all three of these men. Wright is in a position to aid.

The work of these men, Marshall and Story, will comprise this first period in our study.

FLETCHER V PECK 1810[13]

Although John Marshall was surrounded by able men, Wilson before, Story during and after, there is no hesitancy in saying that the Chief Justice thoroughly dominated the period. One author has put it even more strongly:

> For the next thirty-four years, Marshall was, in point of actual sovereignty, the ruler of the United States, and by force of decisions handed down by him, has, it may be safely said, ruled the courts (which rule the United States) ever since.14

Whether we say that John Marshall was the greatest and most influential justice in the court's history (and it seems we should) or not, the fact is certain that his influence was indeed great and is felt deeply down to the present day.[15] It

---

13 6 Cranch 87 (1810). Henceforward only the actual page of the quotation will be given in citing the loca for the ten decisions analyzed, once the initial citation has been given.

14 Gustavus Myers, History of the Supreme Court of the United States, Kerr, Chicago, 1912, 227.

15 Justice Benjamin Cardozo remarked: "Marshall's own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the Constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he molded it while it was still plastic and malleable in the fire of his own intense convictions." Cardozo, The Growth of the Law, 169, 170.

would be difficult to suggest his equal.

"During the 1810 term of the Court an important case was decided. In fact, it ranks as one of the foremost constitutional pronouncements of Chief Justice Marshall."[16] This case was Fletcher v Peck. This case is important and interesting from nearly every possible aspect from which it may be considered. It was the first case involving the 'impairment of contracts;' it had tremendous and immediate economic implications; it was regarded by some as another skirmish in the Hamilton-Jefferson struggle; the facts of the case and the numerous involvements of circumstances make its history fascinating. For our purposes, however, Fletcher v Peck is important as a towering monument to the use of the natural law, a case which carries in its wake hundreds of other cases[17] which rely on it wholly or in part for authority. This emphasis on authority and

---

16 Haines, The Role of the Supreme Court in American Government and Politics 1789-1835, 309.

17 Some of the more outstanding and clearly traceable cases are here given. As will be shown definitely later, the proposition of Fletcher v Peck (in its natural-law implications), and therefore the proposition that the following cases serve to substantiate, is as follows: That completely apart from any constitutional provisions, the very nature of society establishes limitations on legislative power. The full meaning of this particular proposition will be discussed in the study of the case which follows. The cases, then, in which the language of Chief Justice Marshall, in Fletcher v Peck, has been quoted are: Satterlee v Matthewson, 2 Pet. 413, 7 L. Ed. 469; Poindexter v Greenhow, 114 U.S. 297, 29 L. Ed. 195, 5 Sup. Ct. 918; Legal Tender Cases, 12 Wall. 551, 20 L. Ed. 322; Chicago, etc. R.

R. Co. v Chicago, 166 U.S. 237, 41 L. Ed. 985, 17 Sup. Ct. 525; Avery v Fox, 1 Abb. 253, Fed. Cas. 830; Albee v May, 2 Paine 80, Fed. Cas. 134; Baltimore etc. R.R. Co. v Van Hess, 4 Cr. C. C. 600, Fed. Cas. 850; Bleecker v Bond, 3 Wash. C. C. 541, Fed. Cas. 1534; Ex parte Martin, 13 Ark. 207, 58 Am. Dec. 327; Jacoway v Denton, 25 Ark. 643; Hooker v Van Haven & N. Co., 14 Conn. 153, 36 Am. Dec. 479; Campbell v State, 11 Ga. 370; Beebe v State, 6 Ind. 525; Petition of New Orleans Drainage Co., 11 La. Ann. 349; Kennebec Purchase v Laboree, 2 Me. 289, 11 Am. Dec. 90; People v Collins, 3 Mich. 396; People v Gallagher, 4 Mich. 251; Clark v Mitchell, 64 Mo. 575; Griffin v Nixon, 38 Miss. 434; Wynehamer v People, 13 N.Y. 391; Kelly v Pittsburg, 65 Pa. St. 182, 186; Bristoe v Evans, 2 Overt. 546; Peerce v Carskadon, 4 W. Va. 247, 6 Am. Rep. 292; Baugher v Nelson, 9 Gill 307, 52 Am. Dec. 699. Mr. Justice Johnson's observations are quoted, on the same matter, in Burkee v Janesville, 28 Wis. 468, 9 Am. Rep. 503, and in Milwaukee v. Milwaukee, 12 Wis. 100. In Charles River Bridge v Warren Bridge, 11 Pet. 617, 9 L. Ed. 851, Mr. Justice Story says: "It would be against the first principles of justice to presume that the legislature reserved a right to destroy its own grant. That was the doctrine of Fletcher v Peck, 6 Cr. 87, in this court, and in other cases turning upon the same grand principle of political and constitutional duty and right." In the Legal Tender Cases, 12 Wall. 581, 20 L. Ed. 322, Chase, C.J., after quoting the words of Chief Justice Marshall, said: "These remarks of Chief Justice Marshall were made in a case in which it became necessary to determine whether a certain act of the legislature of Georgia was within the constitutional prohibition against impairing the obligations of contracts. And they assert fundamental principles of society and government in which that prohibition had its origin (consult Canon Four). They apply with great force to the construction of the Constitution of the United States. In like manner and spirit, Mr. Justice Chase had previously declared (Calder v Bull, 3 Dall. 388, 1 L. Ed. 649) that an act of the legislature contrary to the great first principles of the social compact (See Canon Two on this) cannot be considered a rightful exercise of legislative authority." In Poindexter v Greenhow, 114 U.S. 297, 29 L. Ed. 195, 5 Sup. Ct. 918, the words of Chief Justice Marshall are quoted and referred to as expressing the doctrine on which the constitutional provision rests. In Chicago etc. R. R. Co. v. Chicago, 166 U.S. 237, 41 L. Ed. 985, 17 Sup. Ct. 585, Mr. Justice Harlan said: "In Citizens' L. & S. Ass'n. v Topeka, 20 Wall. 663, 22 L. Ed. 461, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the state, and that a government, by

whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all a despotism, said: "The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined power. These are limitations on such power which grow out of the essential nature of all free governments." (Recall Canon Five especially here.) In accordance with these principles it was held in that case that the property of the citizen could not be taken under the power of taxation to promote private objects. The principle enunciated at the very beginning of this footnote is also approved in Eberhart V United States, 204 Fed. 893, 123 C. C. C. 180, where Congress had fixed limitation for suits upon contractor's bond either by United States or by creditors, it could not thereafter revive such liability; and in the dissenting opinion in McLendon v State, 179 Ala. 81, Ann. Cas. 1915C, 691, 60 So. 401, the majority upholding proviso in revenue law which exempted ex-Confederate soldiers from payment of occupation tax. In Boswell v Dickerson, 4 McLean 267, Fed. Cas. 1683, Fletcher v Peck is cited to sustain the proposition that "an act assuming the power to dispose of the property of nonresidents without notice would be opposed to the immutable principles of justice, and under the doctrine of the Supreme Court of the Union, the law would be held void." (Recall here Canons One, Two, Four and Five.) In Wildery v Lumpkin, 4 Ga. 215, it is said that "the fundamental principles of the social compact and free government require that private rights be held sacred." (Canon Two.) In Campbell v State, 11 Ga. 370, it is held that "any law subversive of the principle of personal liberty and natural justice is invalid, independently of written constitutions." (Canons Two, Four and Five.) In Bleecker v Bond, 3 Wash. C. C. 541, Fed. Cas. 1534, and Griffin v Mixon, 38 Miss. 434, the language of Chief Justice Marshall is expressly approved. In Schroder v Ehles, 31 N. J. L. 50, the court said: "If in England at this day an act should be passed totally subversive of the great natural rights of man, a question by no means settled would be presented for adjudication. In this country likewise, that important subject has received considerable attention at the hands of both judges and speculative writers, and the preponderance of authority seems to be adverse to the omnipotence of the legislative power. This side of the controversy is certainly sustained by the great names of Marshall and of Story." (Recall Canon Three in particular here.) In State v Flanders, 24 La. Ann. 71, a quotation is made from Story on the Constitution, 1399, on this point. (Recall Canon Three.) In

Wynehamer v People, 13 N.Y. 391, it is said that "aside from the special limitations of the Constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive, but where the Constitution is silent, and there is no clear usurpation of power, there would be great difficulty and danger in attempting to define the limits of the power." In Kelly v Pittsburg, 85 Pa. St. 182, 186, 27 Am. Rep. 639, Chief Justice Agnew quotes words of Chief Justice Marshall with approval, and in support of the invalidity of an act taxing farming lands within the boundaries of a city, which could derive no benefit from municipal taxation, which, it was urged, infringed the fundamental rights of the citizen. In Peerce v Carskadon, 4 W. Va. 247, 6 Am. Rep. 292, the court expressly approves the language of Chief Justice Marshall. In Durkee v Janesville, 28 Wis. 468, the language of Mr. Justice Johnson is quoted with approval, and a number of cases are referred to similar effect. But in Bridgeport v Housatonic R. R. Co., 15 Conn. 497, it is said that "a conflict of opinion is noted as to whether the legislature may take away vested rights by retroactive legislation, without just compensation, as being opposed to the spirit of the Constitution and fancied social compact, though not within the letter of any consititutional prohibition." To similar effect is Bass v Mayor etc. of Columbus, 30 Ga. 851. In Stewart v Supervisors of Polk County, 30 Ia 17, 1 Am. Rep. 244, it is said that "there is no paramount and supreme law which defines the law of nature independent of the Constitution, and courts cannot assume the rights of the people to correct unwise legislation." This is, on its face, a clear case where equity is denied in contravention to the principles enunciated in C. III, Section 9, "Equity," and Section 11, "The Administration of the Law." In Beebe v State, 6 Ind. 525, the language of Chief Justice Marshall is distinguished as inapplicable to the exercise of the police power in prohibiting the liquor traffic. In Petition of New Orleans Drainage Co., 11 La. Ann. 349, it is said: "This is very delicate ground. It is asking us to hush the declared will of a co-ordinate branch of the government, not because it contravenes any provision of the organic law which we are to expound, but because it contradicts our notion of justice (we cannot help remarking that this should be an appalling thought to a judge, indeed!) Perhaps we have such power; like the right of revolution, it is continuously hinted in judicial opinions." In People v Gallagher, 4 Mich. 251, a conflict of opinion is declared upon the point stated; but in the dissenting opinion, 275, the language of Chief Justice Marshall is quoted with approval. In State v Allmond, 2 Houst. 640, the court declines to make the first judicial precedent, ... as the guarantees of the Constitution afforded sufficient grounds." Canon Four.

influence, however, must not be considered to be in derogation of its importance as an excellent exemplification of the resort to natural law by a great justice. It is of further value to our study as a companion-case to Ogden v Saunders[18] which comes at the latter end of Marshall's life on the bench. In the light of Canon Three there is mutual support here.

Fletcher v Peck was the culminating point, from the legal or almost any view, of the notorious and multi-millioned "Yazoo Frauds." In 1795 the entire state legislature of the state of Georgia was bribed - with one lone exception - and the result was the legislative grant of more than thirty-five million fertile and wooded acres to the four land companies formed for the purpose. The price: less than a cent and a half an acre. The profits: more than a million dollars the first day.

To the credit of Georgia, the populace was indignant. A new legislature went in. Action was immediate. The original

---

In Milwaukee v Milwaukee, 12 Misc. 100, which cites the opinion of Mr. Justice Johnson, it is said: "There are those who, independently of constitutional restriction, (see Canon Five) and upon general principles, and the reason and nature of things, hold that legislative bodies have no such authority (as to divesting vested rights), and that such a proceeding would be an act of lawless violence. The Constitution, State and Federal, furnish ample grounds against such abuses, without resort to such general principles." On this last statement confer Canon Four. This entire reflection in Milwaukee v Milwaukee serves to illustrate the manner that the justices will employ to secure the basis for the decision within the four corners of the Constitution.

18 12 Wheat. 214.

grant was rescinded by a second act of the legislature. The old grant was even burned on the Statehouse steps. Meanwhile the speculators were not deterred in the least. The land was passing from hand to hand. "Innocent purchasers for value" were by now thinking of homesteads; thousands had bought and sold the land. In short, the Rescinding Act of the legislature was ignored on all sides.

As can well be imagined, with the millions - of dollars, and acres, and people - involved, there was no immediate step from this state of affairs right into the Supreme Court and Fletcher v Peck. There were bills, lobbies, proposals, speeches,[19] - the entire nation seemed involved - and finally a resort to the courts seemed the only way out, for the land companies and, more important, for the thousands of innocent grantees and their grantees. Peck was a Boston owner of many acres of the

---

19 So much has been written about the intriguing story of the Yazoo Frauds that some references are in order in the case that further reading is desired. For an excellent short account of the history of the Fraud read the account in C. G. Haines' The Role of the Supreme Court in American Government and Politics, 1789, 1835, 309 through 325. A more detailed treatment is in Charles H. Haskins, The Yazoo Land Companies, American Historical Association, Papers, 1891, 395 et s. Of course the account is full in American State Papers, Public Lands, I: 79 et s. A further collateral study is in Robert Goodloe Harper, The Case of the Georgia Sales on the Mississippi Considered with a Reference to Law Authorities and Public Acts, 5 American Law Journal 554, 594, 1814. A study of these collateral facts will aid greatly in an appreciation of the magnitude of the situation involved in the instant case.

disputed land. Fletcher was a New Hampshire man to whom Peck deeded a small share. The suit was a friendly one, and hence a test case, but it nonetheless represented a tremendous issue, and was by no means an imposition on the court, as some have felt moved to claim.

The suit was begun in the Circuit Court for the District of Massachusetts, on the diversity of citizenship, in an action of covenant[20] brought by Fletcher against Peck. The suit was instituted on several covenants in the deed of conveyance, but the one on which the action centered was that the title had not been impaired by the second act of the Georgia legislature, the Rescinding Act. It was averred that here the covenant had been breached since the act had rendered the conveyance of Peck as well as of Peck's grantors, void. These were the salient legal facts in addition to those already accounted in the brief history. The Circuit Court held for Peck on all counts. The second act of the Georgia legislature had not impaired the title; Peck conveyed validly; there was no impairment of the contract of covenant. On this the matter went to the Supreme Court. The Supreme Court affirmed and made legal history.

The court at the time of the decision consisted of Chief Justice Marshall, Justices Washington, Livingston and Todd with

---

20 Covenant: the name of a common-law form of action ex contractu, which lies for the recovery of damages for breach of a covenant, or contract under seal.

Justice Johnson dissenting on minor points and concurring with the majority in the main. Justices Cushing and Chase were absent due to ill health. Marshall wrote the majority opinion.

There were four major allegations presented by Fletcher in the declaration. Marshall decided against the plaintiff in all four.[21] Of these only one will concern us directly and that one is, ultimately, the one for which the case is famous and on which the whole stood or fell. With the three lesser questions answered in favor of the defendant, Marshall had to decide whether the second act of the legislature had actually rescinded the original grant and thereby rendered null all succeeding grants and conveyances of the land involved.

Marshall was fully cognizant of the magnitude of the task before him, and said so in the early paragraphs of the opinion.[22] He then made his first move indicative of the tack that he was finally to take in settling the case. Even though the state of

---

21 The three other points involved, as might be expected, are: first, had Georgia acted beyond the scope of her state powers as delineated by the state constitution. Marshall said she had not for the state possessed the "power of disposing of the unappropriated lands within its own limits, in such a manner as its own judgment shall dictate." 128. Second, could fraud invalidate the contract? Held that, if all on the face appeared in order, one citizen while suing another could not found hiscase on the nullity of an act of a state not involved directly in the suit. Further, the legislature could not pass, by its own second act, on the validity of titles. Third, Marshall held that the state of Georgia had a good title to the lands in the beginning and could make the original grant in 1795.

22 132.

Justice Johnson dissenting on minor points and concurring with the majority in the main. Justices Cushing and Chase were absent due to ill health. Marshall wrote the majority opinion.

There were four major allegations presented by Fletcher in the declaration. Marshall decided against the plaintiff in all four. Of these only one will concern us[21] directly and that one is, ultimately, the one for which the case is famous and on which the whole stood or fell. With the three lesser questions answered in favor of the defendant, Marshall had to decide whether the second act of the legislature had actually rescinded the original grant and thereby rendered null all succeeding grants and conveyances of the land involved.

Marshall was fully cognizant of the magnitude of the task before him, and said so in the early paragraphs of the opinion.[22] He then made his first move indicative of the tack that he was finally to take in settling the case. Even though the state of

---

21 The three other points involved, as might be expected, are: first, had Georgia acted beyond the scope of her state powers as delineated by the state constitution. Marshall said she had not for the state possessed the "power of disposing of the unappropriated lands within its own limits, in such a manner as its own judgment shall dictate." 128. Second, could fraud invalidate the contract? Held that, if all on the face appeared in order, one citizen while suing another could not found hiscase on the nullity of an act of a state not involved directly in the suit. Further, the legislature could not pass, by its own second act, on the validity of titles. Third, Marshall held that the state of Georgia had a good title to the lands in the beginning and could make the original grant in 1795.

22 132.

Georgia could be considered above and beyond the submission to judicial tribunals for the purpose of adjudicating concerning the titles of the land passed by the first act (and Marshall did not think the state should be so considered), nevertheless there was still remaining the moral law which they were bound to subject themselves to. Thus he begins:

> If the legislature of Georgia was not bound to submit to those tribunals which are established for the security of property and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.23

In short, whatever unwarranted arrogation of powers to itself the legislature of Georgia may see fit to make, there always remains the great precepts of natural justice, in short, the natural law, to hold us to rectitude in whatever we do, even if it be a second act of legislation. Marshall, here, prescinded completely from any consideration of courts of law - that was his first hypothesis in the above quotation - and he placed the matter wholly as one of personal conscience - that was his second hypothesis - and still he held them to a law. And that law was universal.[24] Here we see reasoning that leads us to an eternal law of God, universal in application, applicable at all times - in court, or out of it - and places.

---

23 133, sublineation mine.

24 Recall Canon Five in this particular place. Certainly Canons One and Two are applicable here as well.

Marshall proceeds to act on the supposition that the matter had been brought before a court of equity (which was contrarily supposed above). What would a court have done, if without a court the unsupported precepts of justice had bound the legislature? Note well what Marshall says. This is a perfect instance of the transit, implicit and veiled as it is, from clearly natural-law terminology to a terminology and phraseology that gradually becomes a part of the court's tradition, becomes hallowed by constant usage until a sanctity grows up around a phrase which might lead on to place the reason for the sanctity and the force of its binding power in the phrase itself rather than in the natural law itself. Note the juxtaposition of "by its own rules" with the phrase following. That is how, after many uses, the transit is made. So Marshall continues:

> A court of chancery, therefore, had [the word 'had' is in the subjunctive, introducing the supposition referred to at the top of this page] a bill been brought to set aside the conveyance by the first act of the legislature of the state of Georgia, as being obtained by improper practices with the legislature, whatever might have been its decisions as respected the original grantees [these were the land companies who were the grantors of Peck], would have been bound [the subject of this verb is the 'court of chancery'], by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration [these would be Peck and Fletcher]. 25

---

25 134. Sublineation mine.

Logically enough, Marshall holds a court of equity to the same principles of justice that he held the legislature to when it, hypothetically, adjudged its own case outside the court.

Marshall carries on the analysis of his position, gives us further explanation of his reasoning:

> If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone ...26

There is latent here a possible thrust at the 'might-makes-right' school of philosophy of which Mr. Justice Holmes has an ample smattering.[27] This does appear to be reading too much into Marshall's words, however, for it would seem that he is merely reiterating his former statement, that Georgia had taken the matter into her own hands and had really no higher approval of her action than her own word, which, in the light of the eternal law of God, will avail little if the act done is in fact immoral. Marshall continues:

> The question is a general one and is treated as such. For although such powerful objections to a legislative grant as are alleged against this may not again exist, yet the principle on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will

---

26 134. Sublineation added. Here consult Canon Two.
27 See the remarks in C. I, "Natural Law Contemned." Also footnotes in that chapter 9, 10, and 11. Also C. VI.

of any legislature to apply it.[28]

This is a characteristicephrase of Marshall's -"the question is a general one" - when he is approaching a matter from an angle that is ultra-constitutional.[29]

There are many other passages[30] that would merit quotation as Marshall progresses, but the final word in the case is a very fit denouement to our study since it clearly states the basis for his decision.

> It well may be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation? ...
>
> It is, then, the unanimous opinion of the court, that in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff could be legally impaired.31

---

28 134. Sublineation mine. Consider Canons One and Two.
29 See: Bank of the United States v Deveaux, 5 Cr. 61, 87.
30 Thus: "And yet, if a state is neither restrained by the general principles of our political institutions, ..." 139. Again we hear him say: "The past [here the contract] cannot be recalled by the most absolute power." Certainly this is merely another mode of referring to a power beyond and above man. 135. Sublineation added.
31 135 and 139. Sublineation mine.

We can well see from this how a later court would be able to rely on Fletcher v Peck and these words of Marshall rather than be forced to go beyond the precedents or the Constitution itself, since Marshall here impliedly put some onus for the decision on "the particular provisions of the Constitution of the United States." This latter attempt, however, as we have certainly indicated, appears to be "mere camouflage, designed to ... sanction constitutional principle about to be announced."[32] "But it is apparent, not only from the opinion itself, but also from Marshall's political ideas and faith, that the argument predicated on general principles and on implied limitations on legislative powers was the primary and fundamental part of his opinion and that the reasoning founded on the constitutional inhibition was secondary."[33] Here we can pause and recall our Canons. Certainly, the first three, as well as the fifth are applicable.

As a Parthian shot, and to avoid laboring the obvious, it might be an appropriate summary and conclusion of Marshall's

---

32 Horace H. Hagan, Fletcher v Peck, 16 Georgetown Law Journal 3, November 1927. This article will give the strictly legal approach to the entire question and is recommended. It will be valuable for a fuller consideration of the other points involved which we were unable to treat fully. (It should not be thought from this, however, that these points were altogether neglected here relative to their import. They were definitely, even from a strictly legalistic aspect, lesser points.)

33 Haines, The Role of the Supreme Court, 319.

share in this case to quote:

> In his opinion in Fletcher v Peck, starts by showing that according to the inherent nature of governmental institutions, natural law and justice, and the attributes of a just society, there was a contract which the state could not abrogate.34

It would be an incomplete treatment of the case of Fletcher v Peck if some attention were not given to the adjudication of Associate Justice Johnson, the only other justice who contributed any word on the case. Johnson wrote a dissent in part. It could better be called a distinction, since he concurred with the other justices that a state could not revoke its original grant. In the one point that he wanted made, Johnson is even more outspoken in his reliance on principles higher than the Constitution than even Marshall himself. So he says:

> I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle and the reason and nature of things; a principle which will impose laws even on the Deity.35

After all that has been said this appeals as a clear instance of an immediate resort to the natural law, above and beyond the Constitution. Again here, all our Canons apply with the exception of the third and fourth. Johnson continues with a

---

34 Ibid., 326. There is further comment on this same page. Sublineation is mine.

35 143. Sublineation mine.

general statement of his philosophy in such matters.

> The security of a people against the misconduct of their rulers must lie in the frequent recurrence to first principles.[36]

Not only is Justice Johnson going to the first precepts of the natural law in seeking the foundation for his decision, but he is indicating clearly the right of a people against arbitrary action by government. Such a doctrine is completely repugnant to the positivist and totalitarian, to the Holmes, the Hobbes and the Hitler.[37]

There was nothing half-way about Justice Johnson's stand. He concludes with a firm statement of where his foundation for the decision did not lie -

> I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts.[38]

Rather, he based it on the "reason and nature of things; a principle which will impose laws even on the Deity."

This is Fletcher v Peck which, rather "than the more famous Dartmouth College Case, lies at the root of the law of public contracts."[39]

---

36 143. Sublineation mine. Consult Canon One and Five.
37 See C. VI for word on this.
38 144. Consult Canon Five.
39 Haskins, 434. See footnote 19.

TERRETT V TAYLOR 1815[40]

In the latter years of the Age of Marshall, the same adherence to the fundamental principles of equity and justice as characterized by the great chief justice were evident, and "the temper of the associate justices was still substantially that of Marshall."[41]

"Foremost among these associates was Joseph Story, who from nature and close association with the chief justice had come to regard any deviation from his doctrines as akin to treason."[41] There can be no doubt that Justice Joseph Story was closer to Marshall than any other man and more fit to carry on the tradition of natural-law thinking that had characterized the supreme bench since its inception. "If Marshallcould have chosen his successor he would undoubtedly had chosen Story. No one else could have done so much to perpetuate the traditions of a great epoch in the developement of the federal judiciary. Nor was there any jurist whose qualifications were so evidently of the high character demanded by such a post."[42]

In Terrett v Taylor, added to our series of outstanding

---

40 Terrett and others v Taylor and others, 9 Cranch 41, 3. L. Ed. 650 (1815).

41 Homer C. Hockett, The Constitutional History ofthe United States 1826-1876, Macmillan, New York, 1939, 92, 93.

42 Ibid., 94.

natural-law decisions just five years after Fletcher v Peck, was fully fitted to take its place in the tradition, for in the celebrated Dartmouth College Case[43] we find that, "following the reasoning of Justice Chase in Calder v Bull,[44] and Justice Story in Terrett v Taylor, as well as Chief Justice Marshall in Fletcher v Peck, Webster aimed to place the cause of the college upon the fundamental principle that private property must be protected from confiscation. This principle he claimed was as old as Magna Carta and was inscribed in general terms in the constitution."[45] We have already quoted Justice Story from his treatise on the Constitution;[46] Terrett v Taylor merely gave practical and judicial effect to this philosophy, and corroborated other adjudications founded on the same immutable principles.[47]

---

43 4 Wheaton 518, 1819.
44 3 Dallas 386, 1798.
45 Haines, The Role of The Supreme Court, 391.
46 Read Canon Two in C. IV, as well as footnote 5 in the same chapter for these quotations concerning and of Story.
47 As late as 1829 we hear Justice Story say: "The fundamental maxims of free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people... A different doctrine is utterly inconsistent with the great and fundamental principle of republican government, and with the right of citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary it has been consistently resisted as inconsistent with just

Terrett v Taylor involved a set of circumstances, from the legal point of view, very similar to those of Fletcher v Peck. They were on the whole, however, much less involved. In the lower court, the Circuit Court for the District of Columbia, Taylor and others, plaintiffs, members of the vestry of the Protestant Episcopal Church of Alexandria in the District of Columbia, filed their bill in chancery against Terrett and others, defendants, overseers of the poor for the county. They prayed that the defendants (in the court below, that is) be perpetually enjoined from claiming the land of the church under the act of the state of Virginia (where the land was situate before the separation of the District of Columbia), which provided that, at the revolution, all the property acquired by the Episcopal Churches became the property of the state (due, ostensibly, to the loss of its character as the established church), and that their title be quieted. The plaintiffs were granted their prayer in the Circuit Court and the defendants sued out their writ of error. It is under these facts that the case came to Justice Story and the United States Supreme Court.

The Supreme Court affirmed the lower court, and agreed that the land belonged to the Protestant Episcopal Church; that

---

principles by every judicial tribunal in which it has been attempted to be enforced." Justice Joseph Story in Wilkinson v Leland, 2 Pet. 627, 658 (1829).

the overseers of the poor are perpetually enjoined from claiming under the act of the legislature.

The court at the time consisted of Marshall, Chief Justice, Washington, Livingston, Duvall and Story. No dissent was voiced. Justices Johnson and Todd did not attend. Justice Story, of course, wrote the majority opinion. Thus again we have the weight of both Marshall and Story behind an expression of natural-law reasoning.

Justice Story begins his adjudication on the particular point at hand with these strong words:

> The title thereto [to the lands that is] was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it; nor of the parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted.48

Story has referred his decision to a law, but it is not the law of any temporal ruler or body of law. He explicitly denies the power to both. This title to the lands was protected by a law superior to the crown, and if the crown were to act in contravention of that law it was doing so only because it could not be resisted. In short, if the crown so acted, it based its action on force - on might alone - and was acting against the

---

48 Id. Sublineation mine.

eternal law of God, to which the crown is subject in all things. As he continues, Story is more explicit in stating the foundation of his decision:

> ...the division of an empire creates no forfeiture of previously vested rights of property. And this principle is ... consonant with the common sense of mankind and the maxims of eternal justice.49

If we make use of the principles in Canons Two, Three and Five, there can be no doubt of Story's mind. He realized fully that force on the part of any government in wresting duly vested land or property from the owner was a manifest violation of justice. Had he been faced with the cases of seizure by the modern totaliterian states of land and property without cause or compensation he would have been compelled by his own philosophy to condemn it. His principles of eternal justice would condemn all the various species of 'rule-by-force' philosophies, Justice Holmes' included. He has recognized the God-given right to have, hold, use and dispose of, private property as one's own.

Story next traces the consequence of the opposite theory, and reaffirms his stand:

> Such a doctrine [that of permitting the use of such an arbitrary power as was referred to above - force] would uproot the very

---

49 50. Sublineation mine.

> foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of citizens to the free enjoyment of their property legally acquired.50

In Chapter III, Section 6, 'The Natural Right to Property,' we we traced the steps in reasoning from the first precept of the natural law: Do the good, down to the precept that Justice Story invokes in Terrett v Taylor on which to found his decision.

In Story's conclusion to the decision he gathers together in a summary his stand:

> But that the legislature can repeal statutes creating private corporations, or confirming them in property already acquired under the faith of previous laws, and by such repeal can vest property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of the most respectable judicial tribunals, in resisting such a doctrine.51

Perhaps the only further point in this is tendency, indicated in Canon Four, of endeavoring to transfer the onus for a decision on to the constitution. Certainly later justices will be to this after this decision.

---

50 51. Sublineation mine.
51 52. Sublineation mine.

So, with Terrett v Taylor,

> Once more the doctrines of higher law, such as the principles of natural justice and the fundamentals of free government, were appealed to as a sanction for the protection of private rights, rather than the specific language of the Constitution.[52]

OGDEN V SAUNDERS 1827[53]

We have seen Chief Justice Marshall in a monument of authority in Fletcher v Peck. We saw Justice Joseph Story, joined by Marshall, in the famous Terrett v Taylor. Now we see them together againin "one of the most important cases which came to the Supreme Court during this period, Ogden v Saunders, ..."[54] Coming as it does as the finale to the period, it has the added value for us in rounding out the Age of Marshall and insuring the continuity so greatly desired in this treatment.

But Ogden v Saunders was chosen for a greater purpose. It is able, above all, to take us deep into the minds and philosophy of Marshall and men who thought with him. "It is only in the occasional case that takes us back to fundamentals that Marshall's ... philosophy of law ... shows itself. For this, the most illuminating document is the dissenting opinion[55] in

---

52 Haines, The Role of the Supreme Court, 1789, 1835, 536.
53 Ogden, plaintiff in error, v Saunders, defendant in error, 12 Wheat. 214; 6 L. Ed. 606 (1827).
54 Haines, The Role of the Supreme Court, 1789, 1835, 526.
55 This is Chief Justice Marshall's only dissenting opinion on a constitutional question.

Ogden v Saunders, ..."[56] It is true, it is a dissenting opinion - but even then hardly overwhelming, four to three - and "if the true art of interpretation consists in ascertaining the intention of the legislative draftmen,[57] it is submitted that Marshall was right and the majority wrong in the Ogden Case."[58] Dissent or no, it is in Ogden v Saunders that we find an exposition of the background and foundation of the philosophy of law of Marshall and Story. It is from the dissent in Ogden v Saunders that Chief Justice Charles Evans Hughes quotes often

---

56 Isaacs, John Marshall on Contracts, etc., 414. Thus we hear Isaacs say: "Besides the famous cases involving interpretation of the contracts clause (Fletcher v Peck, 6 Cr. 87; New Jersey v Wilson, 7 Cr. 164; Sturges v Crowinshield, 4 Wheat. 117; and Ogden v Saunders, 12 Wheat. 214) there were many minor cases involving phases of contract law in which Marshall delivered opinions ..." (Here are cited several cases.) "An examination of these decisions does not reveal any marked divergence from the law of contracts that was rapidly being developed in the courts of the day. It is only in the occasional case that takes us back to fundamentals that Marshall's peculiar (sic) philosophy of law in relation to contracts shows itself. For this reason, the most illuminating document is the dissenting opinion in Ogden v Saunders,..." As above, 414. Recall Canon Three.

57 In line with this point, Charles Grove Haines has this evaluation of Ogden v Saunders, "The Chief Justice, dissenting in Ogden v Saunders, defended a doctrine favoring the protection of vested rights, which, though not accepted by his Associates, was later to be included in the broad scope given by interpretation of the phrase due process of law as included in the Fifth and Fourteenth Amendments." Haines, The Role of the Supreme Court, 1789, 1835, 651. This is a very obvious application of Canon Four. Also Canon Three.

58 Isaacs, John Marshall on Contracts, etc., 425. On the dissent, Isaacs had this interesting remark: "The fact that Judge Story concurred in Marshall's dissent is not surprising when we consider the readiness with which Story accepted a belief in the exercise of the general principles of justice and the power of the human mind to formulate propositions of natural law." Ibid., 425.

in the Minnesota Moratorium Case[59] as late as 1933. It is this same dissent that is later embodied in the Constitution by amendment.[60]

The facts of Ogden v Saunders, in so far as they appertain to the analysis of the obligation of contracts and to this study, are brief.[61] It was an action of assumpsit brought in the District Court of Louisiana by the defendant in error, Saunders, against the plaintiff in error, Ogden, on certain bills of exchange[62] drawn on Ogden, accepted by him and protested for non-payment. The defendant below pled several pleas, among which (and the point at issue in this discussion) was a certificate of discharge under an act of the state legislature for the relief of insolvent debtors. The court rendered a judgment for the plaintiff below and the cause was brought by writ of error before the Supreme Court of the United States. The single question for consideration was whether the act of the state legislature was consistent with the Constitution of the United States. The act in question was a bankruptcy law, providing for the relief of insolvent debtors (on the application of three-fourths of their creditors), by discharging their persons

---

59 See C. V, Section 4 'Twentieth Century.'
60 See footnote 57 supra, this chapter.
61 Assumpsit: In practice: A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal.
62 A written order directing B to pay C a sum of money named.

and future property from liability for their debts.

It was the opinion of Chief Justice Marshall and the concurring justices that this act of the legislature could not be resorted to by the defendant as a bar to the action of assumpsit. The majority felt otherwise. At the time of the decision four justices comprised the majority: Justices Washington, Johnson, Thompson and Trimble. With Marshall's dissent concurred Justices Duvall and Story.

Justice Marshall felt that the defendant could not assert this act of the legislature as a bar to the action on his promise on the principle or

> ...the idea of a pre-existing obligation on every man to do what he has promised to do ... The obligations ... exist anterior to, and independent of society, ... We may reasonably conclude that those original principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.[63]

Marshall has given us a summary here of many of the principles that will run through this case and later cases, notably the last three which we will treat, the Adair, the Coppage and the Minnesota Moratorium.[64] He has laid down the general principles from the aspect of the individual. These are two: Every man must keep his promise, and Give every man his due. Of these he

---

63 344

64 For all these: C. V, Section 4; 'Twentieth Century.'

has only implicitly, thus far, stated the latter. The former is in so many words. It will be recalled that we discussed these points in Chapter III, Section 7: "The Justice of Contract." From that discussion we see Marshall relying on the precept of commutative justice implicitly and the non-juridical precept of fidelity, explicitly. Of course, later, Marshall relies on both clearly and explicitly. But this is but the introduction. Thus, all our treatment in Section 7 of Chapter III is inherent in these words and this case. That referred more obviously to the aspect of the individual. In the same paragraph Marshall indicated another general principle. This viewed the situation from the social aspect. Thus he says: "... they may be controlled," by society. Here Marshall is indicating that all contracts have a twofold aspect, individual and social; that man can never totally prescind from the thought of the common good. In short, he fully realizes the truth of the words of Pius XI which we quoted in Chapter III when we discussed the justice of contract.[65] Throughout this and the other cases, therefore, the precept of social justice must be recognized as well, and a proper balance between the individual and the common good be achieved. These are very general considerations running through this introductory word of Marshall. We have already discussed them in Chapter III, but it is necessary

---

65 This was in Section 7, at footnote 57 of Chapter III.

to recall them fully now.

Marshall then begins to elaborate his philosophy of the law of contract.[66] As he progresses we can consider his words in more detail. He begins his analysis by a discussion, somewhat Thomistically, of the argument of the adversaries:

> The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation that an individual makes that binds him, but some declaration of the supreme power of the state to which he belongs, that he shall perform what he has undertaken to perform. That though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.67

Marshall takes this argument, shows its shallowness, and adduces his own in contradistinction:

> It is an argument of no inconsiderable weight against it, that we find no trace of such an enactment. So far back as human

---

66 It is interesting to hear a law commentator indicate the value of this case from this aspect: "The recent biographers of the great judges who have 'vitalized the Constitution of the United States,' have naturally emphasized those features of his Marshall's work which the perspective of a hundred years throws into prominence. They see in such decisions as Marbury v Madison, M'Culloch v Maryland, Gibbons v Ogden, and the Dartmouth College Case, great state papers, to be interpreted in the light of the political needs of his day ... But there is another background, besides the purely biographical and political, against which it is interesting for the lawyer at least to watch the gigantic figure of John Marshall." Isaacs, Marshall on Contracts, 413.

> research takes us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces.[67]

Here Marshall has explicit reference to the contract as deriving its force of obligation from commutative justice. Implicit in his whole treatment is the essential equality of the persons contracting, the independence of their respective human persons, the dignity of man as juridically and morally free to follow his ends, with the only provision that he act rightfully. Here Marshall is recognizing that man exists for the prosecution of his own personal ends, supernatural and natural, that man must be protected in the natural means to these ends, among which is the right to contract. It is true that he does not argue here from the metaphysical concept of the human person, but his constant reference to an obligation that pre-exists, which only is

---

67 344. Sublineation mine.

enforced, not made, by human law leadsus to all the notions that would be expressed in such an approach. When Marshall states

> If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.68

he is forced by the consequences of his words to admit that God as the Author of nature so created the human person that man of his own will and disposition and natural inclination tended first to enter society, then to own his own and finally, and fully as naturally, to dispose of his own in the attainment of his ends by means of contract. Consequent on this contract, and flowing from the nature of man as made by God, man must be held obliged to fulfill his part of the bargain, and this in both fidelity to word and in commutative justice. As soon as Marshall goes beyond the positive-law enactments of society for his sanction for contracts he is faced with these considerations. There is no other conclusion to be reached when reference is made to a source of obligation that is beyond and independent of positive law. There is only one such law, that is

---

68 345

the natural. It is God's Eternal law that is the ultimate font of obligation.

Marshall continues in his exposition of the nature of the contractual obligation. He takes us back to nature.

> In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins ... another more food than is necessary... They agree to supply the wants of each other ... Is this contract without obligation? If one of them, having received and eaten the food...refuses to deliver the skin, may not the other rightfully compel him to deliver it? 69

Marshall has, in fact, here traced through the same course that was outlined in some greater detail in Chapter III. Here are the natural law precepts: Live in society, Man may acquire private property, Give each man his due, Man may contract. Then he continues, this time excluding the possibility of 'might-makes-right.'

> If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right.

---

69 345

> The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion was used. It is no objection to the principle that the injured party may be the weakest. In society the wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory, and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.70

The added note of sanction and obedience to just authority is introduced here. These are further elaborations of the law of nature as we saw it outlined in Chapter III. Again, as he did so often previously, Marshall condemns brute force as the norm of morality. He has shown that the right to contract is a corollary to the right the human person has to private property, that because it is a necessary moral means to have and obtain what is one's own, by nature, it is in turn a natural right. It does not come from society, but from nature which is anterior to society. Next he shows explicitly the part that society plays:

> Ina state of nature, these individuals their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.
>
> What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of their contracts? 70

He answers this, certainly, that there is no surrender, further

---

70 345, 346.

the inference seems to be

> ...that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property ... These rights are not given by society, but are brought into it.71

In this statement, Marshall has said explicitly much that he has been implicitly stating all along. Here again we see the reference to the law higher than the positive; the derivation of the right to contract from the right to private property. Here, too, is the indication that the proximate cause of the binding force of the contractual obligation is the consent of the parties. Consent must always be present. It is only by consent that the juridically and morally independent persons can signify their intent to so contract and to call into force the binding power that is theirs to exert as human persons.

To say anything further would be to render unnecessary all that was outlined in Part I of this essay. Surely with this discussion and the knowledge of the Scholastic concept of the natural law, we can see how Marshall progressed in his argument and what the underlying principles were on which he founded the the statements he made in his dissent in Ogden v Saunders. Lest we wonder, however, whence his philosophy and how his mind

---

71 346

has been running, he tells us:

> ... This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present, and of the past ages.72

Again, later in his opinion Marshall reverts to this point and refers to the framers of the Constitution,[73] who, as we have seen, were thoroughly impregnated with the spirit of the natural law and eternal justice.

> No state shall "pass any law impairing the obligation of contracts." These words

---

72 347. Sublineation mine. In this point recall Canon Three.

73 As a further substantiation in accord with Canon Three we will quote the words of a commentator in the University of Virginia Law Review: "But Marshall belonged to that early group of glossators of the Constitution whose interpretation can be called contemporary. He knew, as his most recent biographers have made clear, the evils that the Constitution was intended to meet; ... He had the same outlook on life as the makers of the Constitution. But in addition we must not forget that he had the same philosophy of law. In the Ogden Case he is forced to dissent from colleagues who belong to the second generation of interpreters of the Constitution. ... Talk of an obligation of contracts independent of positive law is a jargon which they do not understand." The writer goes on to comment in line with our indications in Canon Four. "It is not that they are averse to Marshall's idea about a state's inability to force a reservation of a power of impairment into contracts made under its laws -- they have practically assented to that doctrine in the Sturges Case -- but they cannot find the doctrine in the four corners of the Constitution as they understand the words." Isaacs, John Marshall on Contracts, etc., 425. This reference is an excellent indication of the continuity that Marshall effects in the natural-law tradition of our nation. He received first-hand from the framers of the Constitution their natural-law philosophy and handed it on to succeeding generations as he knew it, and as it was.

> seem to us to import, that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose, that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. When we turn to those treatises, we find them to concur in the declaration, that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our Constitution took the same view of the subject, and the language they have used confirms this opinion.74

Nathan Isaacs expresses well some of our thoughts on the position of Marshall and his philosophy in the historical pattern[75] of the court. We will close this Age of Marshall with his words:

> But the point that is interesting here is that the ideas of the super-governmental nature of the obligation of a contract which Marshall acquired in the Eighteenth Century continued to grow in the popular mind throughout the following century. ...
>
> Marshall, then, while in a sense anticipating a later developement in our Constitutional Law, really inherited his notion of a contract as something above ordinary positive law from the Eighteenth Century.

---

74 354. On this see the quotations from the framers in C. IV. Also recall in this place Canons Three and Four.

75 Do not think that Marshall was without his derogators. For some comment see passim: Haines, The Role of the Supreme Court, 1789, 1835. However, it is the exception to find any man attacking him. Even Jackson, who was a political opponent, praised him highly as a jurist. Holmes, quoted on the next page represents the consensus.

> Here we have a key, quite independent of the political considerations of the day, to unlock Marshall's views that led to the holding the State of Georgia bound to its contract in the case of Fletcher v Peck, that explain his opinion in Sturges v Crowninshield, and even in the Dartmouth Case.76

Section 8: Transition

There has been a tendency among some of the modern commentators on the work of the Supreme Court to minimize the influence of the natural law during the transitional years from the close of the age of Marshall in 1835 to the outstanding pronouncements of Field, Harlan and Brewer beginning in 1870.[77]

---

76 Isaacs, John Marshall on Contracts, etc., 426. In line with this discussion of the effect and later influence of Marshall, hear O. W. Holmes, Jr., "that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall." Holmes, Collected Legal Papers, 270.

77 This attitude of depreciation of the period in this regard seems to stem from Charles Grove Haines' earlier writings. Thus he says: "When the doctrines of the Federalists and of the conservative thinkers generally lost ground and were repudiated by all departments of the government, including the judiciary, in favor of popular theories of political control, little was heard for several decades of immutable fundamental rights in state or federal courts." Haines, The Revival of Natural Law Concepts, 173, 174. We also hear Haines' pupil, B.F. Wright, Jr., in the same vein: "The men of these years were not at all thoughtful of the problems they were creating for future scholars. Particularly is this true of those engaged in public affairs, for they seem to see no rational relation between their political ideas and the concept of natural law." Wright, American Interpretations of Natural Law, 533. This is not to say that these men denied all influence of natural law in the period; that would be false.

There will be no attempt here, of course, to claim that these thirty-five years were as expressive of natural-law reasoning as those preceding or following, but it would seem that another evaluation than that of these commentators is the correct one. It would seem to be better explained that these years had not the need of immediate resort to natural law but could avail themselves of the work of the Age of Marshall. Thus,

> These first fifty years summarize a period in the history of the United States in which the pattern of a modern industrial society is only beginning to emerge. The work necessary for that stage was well accomplished by Marshall and his immediate successors. From 1830 until the Civil War the court hardly needed to do more than apply the canons of constitutionalism already laid down.[78]

This is nothing more than an indication of the tendency forewarned of in our Canon Four.

Although the period was not particularly characterized by natural-law cases,[79] there is sufficient evidence that the tradition of the Court had not been lost and the continuity of

---

78 Harold J. Laski, The State in Theory and Practice, Viking, New York, 1935, 155.

79 Thus we hear in 1848, just thirteen years after Marshall, these striking words: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise, not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, or nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and

natural-law reasoning had been maintained. Chief Justice Taney and Justice Daniel were outstanding in this period.

HARRIS V HARDEMAN 1852[60]

Harris v Hardeman involved a judgment of a court rendered without service of process on the defendant or his appearance before the court. The plaintiff in error, Harris, instituted in the Circuit Court of Mississippi an action on a promissory note against Hardeman, and on a writ sued out in that action, the marshall made a return in these words: "Executed on the defendant Hardeman, by leaving a true copy at his residence." On this return, at the next term of the court, a judgment by default was taken against the defendant Hardeman for the amount of the note, and an execution was issued upon which a forthcoming bond was given. The defendant in error moved the Circuit Court to quash this forthcoming bond, executed by the defendant to the plaintiff; and to set aside the judgment on which the

---

need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur." Justice Daniel in West River Bridge Company v Dix, 6 Howard 507, 12 L. Ed. 535, 1848. For an excellent case at the other end of this period see: Cummings v Missouri, 4 Wall. 277. There we find: "The theory on which our political institutions rest is, that all men have certain inalienable rights..." This was in 1867.

60 Benjamin D. Harris, plaintiff in error, v William Hardeman, Henry R. W. Hill, Cotesworth P. Smith, and Henry A. Moore, defendants in error, 14 Howard 334, 1852.

the bond was founded, upon the grounds that the forthcoming bond was taken in execution of a judgment entered against the defendant Hardeman, as by default, when in truth there had been no service of original or mesne process on him to warrant such a judgment.

The Circuit Court of Mississippi, in accordance with this motion, so quashed the proceedings and set aside the judgment by default. The present case was then brought up, by writ of error, from that Circuit Court of the United States for the Southern District of Mississippi. The Supreme Court accordingly affirmed the judgment of the Circuit Court quashing the proceedings. The Court at the time consisted of Chief Justice Taney, Justices Catron, Daniel, Nelson and Curtis; and Grier, Wayne and McLean on the dissent. Associate Justice Daniel delivered the opinion of the court.

The court entered into the matter of the decision by a summary statement of its holding:

> ...it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment ... to which he was never a party or privy; ... That with respect to such a person, such a judgment is void; he is no party to it, and can no more be regarded as a party than any and every other member of the community. As amply sustaining these conclusions of law, as well as of reason and common sense, we

refer to the following decisions.81

The court then proceeds to incorporate into the body of its decision, and adopt as its own, outstanding declarations in point. Already we see the court dividing its reliance between clearly natural-law supports and the precedents of the court. Here is Canon Four and Canon Two.

Proceeding along the line indicated, the court now refers to the Chief Justice of the Supreme Court of Massachusetts and adopts his language:

> After citing a number of cases, the learned judge proceeds to say: "We have refused to sustain an action here upon a judgment ... where ... no personal summons or actual notice was given... In such cases we have considered ... the judgment having no force in personam. This principle is not considered as growing out of anything peculiar to proceedings by attachment, but is founded on more enlarged and general principles." It is said by the court, "that to bind a defendant personally by a judgment, when he was never personally summoned, nor had notice of the proceedings, would be contrary to the first principles of justice."81

Here we find Justice Daniel and the court going beyond and behind the ordinary positive-law prescriptions concerning notice and appearance and appealing to a law containing the "first principles of justice." By a recall of Canons One and Two, and the obvious reasoning of the decision, we can see that the adjudication is based on the first principles of the natural law.

---

81 340. Sublineation mine.

Again adopting the language of another court, Mr. Justice Daniel concludes his opinion in unmistakeable language:

> This doctrine does not depend merely upon adjudicated cases; it has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without the opportunity of making a defence, or have his property taken from him by a judicial sentence , without the privilege of showing ... the claim against him to be unfounded.82

An analysis of the judge's reasoning here will show his regard for the equality of the human person and the equal rights of all before the law. This results in the equal right to each to proper notice of trial, without which inequality results and hence injustice. Further is the judge's assent to the principle enunciated in Chapter II that no man may be held responsible for acts or effects which were beyond his knowledge or notice. Without notice there is no culpability, no responsibility. Even deeper in the reasoning is the affirmance of the natural right to the means to existence, the means to the ends of nature, the right to private property. This reasoning joined with the open avowal that the doctrine of the case rests on the better foundation of the principles of natural justice, places Harris v Hardeman on a high plane of natural-law reasoning, and ranks it with the best expositions of the kind of the period.[83]

---

82 341. Sublineation mine.

83 Confer also in this period: Benson v Mayer, 10 Barb. 223, 1850; License Tax Cases, 5 Wall. 462, 1866.

Section 3: Field, Harlan and Brewer: The Late Nineteenth Century

As the country settled down after the years of turmoil ending with the Civil War, there appeared a more marked return to the traditional line of reasoning that had characterized the court from the beginning. Perhaps it is this fact that has given color to the depreciation of the Transition period which we noted above. At any event, these closing years of the century brought forward a group of notable justices and a series of excellent examples of the natural-law philosophy of the men on the Supreme Court bench.

> While the theory of extra-constitutional limitations was developed in the first quarter of the nineteenth century, it was after the Civil War that there was something of a revival of the earlier natural rights theory, particularly in the interpretation of some of the general phrases relative to individual rights in federal and state constitutions.84

Thus does Haines[85] introduce us to the period and bring to face with the second great trio of American natural-law jurists: Field, Harlan and Brewer. These men were eminently worthy to carry on the tradition of Marshall, Kent and Story, of Taney and Daniel, and were respondible in the main for a further entrenchment of natural-law principles in the philosophy of the Federal Judiciary.

---

84 Haines, The Law of Nature in State and Federal Judicial Decisions, 631, 632.

85 See footnote 77 supra on this point.

THE BUTCHER'S UNION CASE 1883[86]

Of this great trio, there seems no doubt that "the foremost" is "Justice Field."[87] He was a highly creative man, and the very nature of his intellect impelled him on all occasions to go directly to fundamental and universal principles.[88] Such a philosophy of law led him to oppose sharply any governmental action that appeared arbitrary,[89] and evoked his remarkably pertinent pronouncement that the Fourteenth Amendment was meant:

> ...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.[90]

In the light of Canon Four this statement gives us a clearer idea of what we may understand in the words of Justice Field in his adjudications.

"The classic presentation of the theory of implied limitations" on arbitrary acts of government "is that of Justice Field in Butcher's Union Co. v Crescent City Co., where he amplified his notions" on the natural - law basis for such limitations and gave posterity an excellent ruling case on the

---

86 Butcher's Union Slaughter-house and Live Stock Landing Company, Appellant, v Crescent City Live Stock Landing and Slaughter-house Company, 111 US 746, 28 L. Ed. 585, 1883.

87 Haines, The Law of Nature in State and Fedoral Judicial Decisions, 631, 632.

88 George C. Gorham, Biographical Notice of Stephen J. Field, printed only for family use, Washington, D.C., 1892, 63, 64.

89 Ex Parte Wall., 107 US 265, 1882.

90 See the dissent in the Slaughter House Cases, 16 Wall. 36, 105, 1872. Also footnote 7 of C. IV and body re Canon Four.

point.[91]

The Butcher's Union Case, like Fletcher v Peck, carries in its wake a long line of cases which depend on it for authority and has been, moreover, very influential in the developement of the constitutional notion of liberty of contract.[92]

Just ten years earlier Justice Field had been with the minority on the very same question in the Slaughter House Cases. Now his holding is vindicated and the decision in the Slaughter House Cases overruled.

The facts in the Butcher's Union Case center around the question of a monopoly. An act of the General Assembly of the state of Louisiana granted to the Crescent Company the sole right of landing and slaughtering stock in the city of New Orleans. On the basis of this grant, the Crescent Company brought a suit in the Circuit Court for the Eastern District of Louisiana to obtain an injunction forbidding the Butcher's Company from exercising the business of landing or butchering livestock within the prescribed limits named in the act of the Assembly. The court granted the injunction. This is an appeal

---

91 Haines, The Law of Nature in State and Federal Judicial Decisions, 652.

92 For full treatment of influence of this case in growth of constitutional notion of liberty of contract: Pound, Liberty of Contract, 18 Yale Law Journal 454, 1909. An even more pertinent treatment, with special discussion of the cases here analyzed: John Robert Anthony, Attitude of the Supreme Court toward Liberty of Contract, 6 Texas Law Review 266, 1928.

by the Butcher's Union Co. from the Circuit Court.

The Supreme Court by Justice Miller reversed the holding of the Circuit Court. At the time the court consisted of Chief Justice Waite, Justices Harlan, Miller, Field, Bradley, Woods, Matthews, Gray and Blatchford. All were present and there was no dissent. It is interesting to note that Justice Miller is the sole justice now present who was among the majority in the Slaughter-House Cases. Then Chase, Chief Justice, and Bradley, Field and Swayne dissented to the majority which based its holding on the fact that the act of setting up a certain place for the landing and slaughtering of the stock was within the police power of the state.

It is the concurring opinion of Justice Field that is of main interest to our discussion. Field begins his discussion with an analysis of the fundamental principles on which he is going to base his decision.

> As in our intercourse with our fellowmen certain principles of morality are assumed to exist without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self-evident," that is, so plain that their truth is recognizable upon their mere statement, "that all men are endowed"; not by edicts

> of emperors or decrees of Parliament or Acts of Congress, but "by their Creator, with certain unalienable rights," that is, rights which cannot be bartered away or given away or taken away except in punishment of crime; "and that among these are life, liberty and the pursuit of happiness, and to secure these," not grant them but secure them, "the governments are instituted among, deriving their just powers from the consent of the governed."93

Field stresses the supra-governmental nature of these "inherent rights." They lie at the base of all law. He emphasizes their pre-existence. They are not granted by human legislation, but secured. It is "recognition" of them, not creation, that maintains free institutions. It is another aspect of this same point that Field reiterates when he attributes the origin of these rights, not to man, but to the Creator of men. Again he makes it clear that these rights and laws are above and beyond man. They have their source, their authority from the absolute law of God, the Eternal Wisdom. It is not within the power of man to alter these laws, to tamper with these rights, neither give them away, nor barter them, nor take them from another.[94]

---

93 756, 7. Sublineation added. It is necessary to note that the actual decision was handed down on the ground that the legislative act granting the monopoly was a limitation of the state's police power to the prejudice of the general welfare in health and morals. With Justices Field and Bradley in their reasoning (in which we are interested) concurred Harlan (as we would expect) and Woods. The rest concurred in the nullity. For some treatment of this case and its predecessor: J.R.Anthony, Attitude of the Supreme Court Toward Liberty of Contract, 6 Texas Law Review 266.

94 Field errs in his statement; "...except in punishment of

The indemonstrable nature of these first principles is also evident from Field's reference to them as "assumed to exist," and "so plain that their truth is recognizable upon their mere statement..."

In his final words of the paragraph, Field indicates the true purpose of human government - to secure these fundamental principles of right. Clear from this is the subordination of government to right reason. Government is the means to the end of right order, not the end to which the human person is subordinated and enslaved. The state is the servant of the citizen, the conserver of his rights. The citizen is not the slave of the state, the pawn of the "race" or the "nation." Field indicates these basic principles as a prelude to a discussion of the less general right to personal freedom on which he immediately bases his decision.

Throughout this essay we have stressed man's right and duty to self-perfection development. Field has this in mind as continues:

> The common business and callings of life, the ordinary trades and pursuits, innocuous in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this

---

crime;" because there are some rights which are inalienable even in punishment of crime. We have no reason to suppose Field was ignorant of them; he merely made the general statement and failed to distinguish such rights as the freedom of conscience, of faith, and the like.

> country to all alike upon the same conditions. The right to pursue them ... is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.95

Man has the right to follow any vocation notinconsistent with the rights of others which will permit him to provide the necessities of life for himself and his dependents. This includes the right of full developement of each man's faculties .

Field narrows this down to the specific application in the Butcher's Union Case.

> In this country it has seldom been held and never in so odious from as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained except by equal, just and impartial laws.
> ...
> I cannot believe that what is termed in the Declaration of Independence a God-given and inalienable right, can be thus ruthlessly taken from the citizen,...96

And with that, Field declares the act creating the monopoly void. In these final words Field has further indicated his appreciation of the dignity and freedom of the human person. This person is free and "unrestrained," except by just laws. There is the proper balance between this independence of man as an individual entity and his dependence on the Law of the

---

95 757.
96 758. Sublineation added.

Creator as a dependent and created being.

Were the words of Justice Bradley omitted from our treatment, the Butcher's Union Case would be incomplete. Justice Bradley gave a concurring opinion as did Justice Field and stressed the same line of reasoning.

> I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of the citizen of the United States. It was held by a majority of the court in the former decision of the Slaughter House Cases, 16 Wall. 67: that the "Privileges and immunities of citizens of the United States" mentioned and referred to in the Fourteenth Amendment, are only those privileges and immunities which were created by the Consitution of the United States and grew out of it. I then held and still hold that the phrase has a broader meaning; that it includes those fundamental privileges which belong essentially to the citizens of every free government, ... These primordial and fundamental rights...97

Here is the same reference to a law superior to the positive law of the Constitution or of any enactment of a human lawmaker. In this, as in his other comments, Bradley speaks the same language as Field, and with him concur Harlan and Woods.

---

97 764. Sublineation added.

98 Thus we hear him practically restate Field: "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. To deny it ... is to invade one of the fundamental privileges

MONONGAHELA NAVIGATION COMPANY V UNITED STATES 1892[99]

In David Josiah Brewer we have "a powerful reinforcement of the school of Field."[100] In every respect he was as powerful an advocate of natural-law principles as any man of his age. His personal character was unyielding. The result was an outspoken assertion of his legal philosophy in his decisions and a consistent adherence to the natural-law doctrines of the Declaration of Independence. A suitable reflection of this philosophy and of this period is the Monongahela Navigation Case.

It appears from the court record that the Monongahela Navigation Company, had, under the authority of the state of Pennsylvania expended large sums of money in improving the Monongahela River by means of locks and dams. Considerable additional commerce on the Monongahela River was made possible by these improvements.

After the effort on the part of the United States to purchase this lick and damehad failed, proceedings of condemnation were instituted in the Circuit Court of the United States for the Western District of Pennsylvania. The case was appealed

---

of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution." 762.

99 Monongahela Navigation Company v United States, 148 Us 312, 1892.

100 Charles Merrill Hough, Due Process of Law Today, 32 Harvard Law Review 218, 1919.

not on the matter of condemnation, but on the matter of the amount of compensation due the Navigation Company for the lock and dam. The case came to the Supreme Court when the members were Fuller, Chief Justice, Justices Field, Harlan, Gray, Blatchford, Brewer, Brown and Shiras. Mr. Justice Brewer delivered the opinion of the court. Mr. Justice Shiras, having been of counsel, and Mr. Justice Jackson, not having been a member of the court at the time of the argument, took no part in the consideration and decision of the case. There are no dissents on the record. The decision of the Circuit Court was reversed and the case remanded with instructions to grant a new trial.

As we might well expect Justice Brewer begins immediately to lay the foundation of his decision on the broad basis of the natural law. He states his policy:

> Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property consitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass on those rights of persons and property which by the Declaration of Independence were affirmed

to be inalienable rights.[101]

We see latent in Brewer's words full appreciation of the concept of the dignity of the human person, the role of society as the means to the betterment of the individual, as the protector of the rights of the citizen. We see his regard for the right of private property, for its use and enjoyment. Rights are God-given, not government-owned. Recall our treatment of rights, of justice, of property in the light of Brewer's words.

Brewer makes it clear that all this is behind his words. He tells us clearly that the Declaration of Independence and constitutional bills of rights

> ... equally affirm that sacredness of life, of liberty, and of property, are rights, inalienable rights, anteceding human government, and its only sure foundation, given not by man to man, but granted by the Almighty to everyone, something which he has by virtue of his manhood, which he may not surrender and of which he may not be deprived.[102]

That was what Brewer meant when he referred to the rights "affirmed by the Declaration of Independence." And what is more, "to Justice Brewer, the Declaration of Independence was the cornerstone of the Federal Constitution."[103]

---

101 324. Sublineation added. See Canon Four, especially; also Canons Two and Five.

102 David J. Brewer, Protection to Private Property from Public Attack, address given to the graduates of Yale Law School, June, 1891. Printed by Hoggson and Robinson, New Haven, Conn., 1891. Sublineation added. Quite obviously this is excellent application of Canon Three.

103 Haines, The Revival of Natural Law Concepts, 261. Canon Four.

Brewer had no illusions about the real source of authority and law. Rights "were granted by the Almighty," and anteceded "human government." Hence "he approved the doctrine of Chancellor Kent and of Justice Cooley that legislatures may not disturb vested rights, whether constitutional provisions prohibit such acts or not, ..."[104]; in short, there is a law above and superior to the Constitution or any body of positive law.[105]

Brewer then proceeds in his discussion of the twin rights of the state take private property for public use and the citizen to demand just compensation. He says in the words of the Supreme Court of New Jersey:

> ... This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is seo inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.106

Again has Brewer placed emphasis on the existence of a body of supra-governmental law. Here is reference, moreover, to the principles of commutative justice; each must give to each his due. We could recall Canons One and Two here.

---

104 Haines, Ibid., 202. Sublineation added. Canon Four.

105 Thus Brewer says: "The demands of absolute and eternal justice prevent that any private property ... should be subordinated or destroyed in the interests of public health, morals, or welfare without compensation." Ibid., Sublineation added. Canon Three.

106 324, 5. Sublineation added. Canon Four.

As further substantiation of the principle that he has laid down Justice Brewer cites Chancellor Kent speaking for the Supreme Court of New York. In that pronouncement Kent, having noted that there was no provision in the Constitution of the State of New York on the subject, concluded that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation should be made to a person deprived of his property for the common use. Thereupon Brewer adds in his own words that "in this there is a natural equity which commends it to everyone."[107]

Just before discussing the lengthy details of the manner of arriving at a just compensation, Brewer closes his pronouncement on the general subject of compensation in these words:

> The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred on the citizen by thus taking his property without consent, or to extinguish any part of such "compensation" by proppective conjectural advantage, or in any manner to interfere, ..., cannot for a moment be admitted or tolerated under our Constitution. If anything be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.[108]

---

107 325.
108 327, 8.

It was indicated in the treatment of Canon Four that there was a marked tendency in the later cases of the Supreme Court to cloak the actual principles of natural justice under the standardized phrases of the Constitution, and to disclaim any need to resort to the doctrines of the fundamental natural-law philosophy in adjudicating cases. The opinion of the court in the Monongahela Navigation Case presents a perfect example of the transition from the earlier and avowedly natural-law cases to the later disavowedly, though actually natural-law decisions. We have heard the numerous referenced to the principles of "absolute and eternal justice" of Mr. Justice Brewer. Now we hear him make this transit by stating that no need is present to rely on these principles in themselves; that actually the Constitution of the United States is capable itself of providing sufficient authority for the decision handed down in Monongahela Navigation Company v United States. It is no longer necessary to go beyond the Constitution, as it was in the earlier cases, for the Constitution is now held to have the needed principle within the four corners. Justice Brewer says:

> But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to its affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses.109

---

109 325.

In such words we have an outspoken statement of this transit. The developement of natural-law reasoning and its insertion into the spirit and substance of the Constitution is not always as apparent as it is in this decision of Justice Brewer. As time goes on it will be increasingly difficult to point to the philosophy underlying. The cliche and standard phrase will take over the onus of thinking and push the reasoning underlying the decision to the background. Brewer continues:

> And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court in Boyd v United States, 116 US 616, 635: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.110

CHICAGO B. & Q. R. CO. V CHICAGO 1896[111]

John Marshall Harlan was worthy of his name. Almost a century after his illustrious namesake he carried on the same tradition in his strict adherence to the basic principles of the natural law as a norm and guide in legal adjudication. He

---

110 325. Sublineation added.

111 Chicago, Burlington and Quincy Railroad Company, Palaintiff in Error, v City of Chicago, Defendant in Error, 166 Us 226, 1896.

was a "militant justice,"[112] and since he was "inclined to emphasize the theory of natural rights, he was readily disposed to adopt the doctrine of fundamental rights which the justices of the Supreme Court were slowly developing in connection with the interpretation of the due process clause."[113] We have already indicated this tendency of the court to let the phrases of the Fourteenth Amendment (and similar phrases) bear the onus formerly borne by reasoning more inherent to the case and reflecting natural-law philosophy more clearly.[114] The present case is of this tendency.

The Circuit Court of Cook County in Illinois handed down a judgment awarding the sum of $1.00 to the plaintiff in error, the Chicago, Burlington and Quincy Railroad Company. This sum was held to be the just compensation for the taking of a part of its right of way. The land was taken under the right of eminent domain for the laying of a public street of the City of Chicago. The street extended across the Burlington tracks. The Supreme Court of the State of Illinois affirmed the judgment of the Circuit Court of Cook County and the case was

---

112 F.B.Clark, The Constitutional Doctrines of Justice Harlan, from Johns Hopkins University Studies, XXXIII, Baltimore, 1915, 4.

113 Haines, The Revival of Natural Law Concepts, 200. The "due process clause" has already been quoted in this essay in Chapter IV, "Canon Four."

114 Mainly this was pointed out in the analysis of the case just preceding this one. A consideration of the points indicated in Chapter IV, "Canon Four" will add to the understanding.

brought on writ of error to the Supreme Court of the United States. The facts further indicate that there was no interference with the Burlington's right of way; that the only change was in the laying of the street where formerly there was merely gravel and cinders. The Supreme Court affirmed the state court.

The court at the time consisted of Chief Justice Fuller, Associate Justices Field, Harlan, Gray, Brewer, Brown, Shiras, White and Peckham. The Chief Justice took no part in the consideration or decision of this case. Justice Brewer dissented in part. Justice Harlan delivered the opinion of the court.

Justice Harlan begins his discussion by remarking that the mere fact of notice and appearance does not in itself constitute "due process of law" and mean that all the requirements contained in that phrase has been satisfied.

> It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the power of government unrestrained by the established principles of private right and distributive justice ... met the requirement of the law.[115]

He goes on to point out that there are other requirements to be satisfied. "IN determining what is 'due process of law,' regard must be had to substance, not to form."[116]

---

115 234. Sublineation added.
116 235.

Justice Harlan maintained this attitude toward the "due process clause" as having much in substance written in it. He stated that he concluded that it was the will of the people of the United States by this Amendment to prevent any deprivation of a legal right in violation of the fundamental principles inhering in due process of law.[117] Harlan did not confine this attitude to the use of this one phrase. He was determined that the principles of natural justice should prevail and he was ready to go beyond the technical rules of the law to see to it. After many vigorous years on the bench he proclaimed in 1910:

> The courts have rarely, if ever, felt themselves constrained by technical rules so that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.[118]

Such a philosophy of law, in the light of our Canon Three (and Four as well), gives us insight into Harlan in this case.

The question then arises whether due process of law enjoined in the Fourteenth Amendment requires compensation to be made to the owner of private property divested of that property for the public good. This is the general question that occupies Harlan in this case. He treats it in view of the broad principles of natural equity.

---

117 Taylor v Beckham, 178 US 548, 601 (1899).
118 Monongahela Bridge Co. v U. S., 216 US 177, 195 (1910).

> The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded on natural equity, and is laid down as a principle of universal law. Indeed almost all other rights would become worthless if the government possessed an uncontrollable power over the private property of every citizen.119" 120

As in the reasoning of the justices previously considered Harlan shows the same respect for the primary precepts of the natural law of commutative justice and of private property. He recognizes the dignity of the person, the inviolability of the citizen and at the same time acknowledges the authority of the duly authorized state in matters of the common good.

He continues. This time it is interesting to note that employs the words of his namesake, the great chief justice, in Fletcher v Peck:

> In Fletcher v Peck, ... this court, speaking by Chief Justice Marshall, said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to

---

119 2 Story, Const. #1790; 1 Blackstone Commentaries 138, 139; Cooley, Const. Lim. #559; People v Platt, 17 Johns. 195, 215, (8 Am. Dec. 382); Bradshaw v Rogers, 20 Johns. 103, 106; Mount Washington Road Co.'s Petition, 35 NH 134, 142; Parham v Decatur County Justices of Inferior Court 9 Ga. 341, 348; Ex Parte Martin, 13 Ark. 159, 206 et seq.; Johnston v Rankin, 70 NC 550, 555.

120 256. Sublineation added.

> be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question whether the act of transferring the property of any individual to the public be in the nature of legislative power is well worthy of serious reflection.[121]

Harlan through Marshall has here pointed out that there is a norm of morality that even legislatures must follow; that there is a power behind the legislative power. In short he wonders if there are not some acts which no power under Heaven can permit. He again stresses this supra-governmental nature of law and rights. Now in the words of Mr. Justice Miller of the United States Supreme Court:

> There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respect by all governments entitled to the name.[122]

It would be well to recall Canons One and Two when we hear such as "social compact" and "all free governments."

Harlan leaves no doubt in our minds as to what he is referring his decision. He resorts to the authority and reasoning of Chancellor Kent:

> There being no provision in the Constitution of the state of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate

---

121 237. For this our treatment of Fletcher v Peck.
122 237.

> and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of property taken for public use.123

The words of Justice Harlans next citation reiterate the God-given and God-ordaining quality of the law behind the positive law. It is the idea again of the Eternal Law.

> ...it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature "can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution."124

With this Justice Harlan feels that he has adequately established his point, that just compensation is due the owner of private property taken for the common good. Now only

> ...it remains to inquire whether the necessary effect of the proceedings in the court below was to appropriate to the public use any property right of the railroad company without compensation being made or secured to the owner.125

The result of this inquiry was the conclusion that the lower

---

123 238. See Gardner v Newburgh, 2 Johns. Ch. 162 (7 Am. Dec. 526), from which the excerpt. Sublineation added.

124 238. These cases are referred to with approval in Pumelly v Green Bay & M. Canal Co., 80 US and 13 Wall. 166, 178. and in our Monongahela Navigation Case, supra.

125 241.

court had not erred in submitting the evaluation of just what the compensation that would be equitable was in the case before them. The lower court had applied the general principles properly. It was a matter of fact for the jury to determine what the actual compensation was; it was a matter of law for the court to define what a just compensation was or would be. Thus the final point hinged on the finding of fact by the jury and not on the work of the court in defining the principles and instructing the jury. The lower court was found to have satisfied all the demands of the due process clause in respect of the railroad. In the end it was the jury that awarded the compensation of $1.00 as a just one. This matter of fact, being not one of law, is outside the jurisdiction of the Supreme Court of the United States.

It is on this last point that Justice Brewer dissents, and no other. He heartily concurs that the holding of Justice Harlan is supported by both "principle and authority." He agrees with what "is said in the first part of the opinion," but as to the fact of a just compensation having actually been made; as to the "abundant promises" made throughout the early part of the opinion, as to these, Brewer dissents. That the just compensation should be made, and for the reasons advanced by the court, Brewer concurs; that it has so been made, Brewer cannot agree.[126]

---

126 269.

Section 4: Twentieth Century

The period beginning at the turn of the century can best be characterized as one of wane in the use of natural-law principles. This is probably due in the main to the coming to the bench of men of the stamp of Holmes, men such as Cardozo and Frankfurter. But in fact we are too close to the woods. It will be to commentators of fifty years hence to evaluate properly the period.

ADAIR V UNITED STATES 1907[127]

COPPAGE V KANSAS 1914[128]

The early years of this period, however, do not seem to presage this wane. In the first two decades of this century we find those principles of government that have "an everlasting foundation in the unchangeable will of God, the author of nature, whose laws never vary," and the "law of nature" expressed "in a famous trilogy of decisions of the Supreme Court."[129] Speaking of these famous three cases, Haines observes:

> The protection of the inalienable right of liberty of contract was taken up vigorously by the state courts...; the protection in

---

127 Adair v United States, 208 US 161 (1907).
128 Coppage v Kansas, 236 US 1 (1914).
129 Wright, American Interpretations of Natural Law, 524. This was written in 1925.

> the Supreme Court culminated in the decisions of Lochner V New York, Adair v United States, and Coppage v Kansas and led to the affirmation of the dictum of Justice Harlan that "the employer and emplyee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."130

The nature of those three cases renders it unnecessary and even impractical to discuss all three. It is true that Lochner v New York[131] does have much in it worthy of notice. We will treat it, however, only in passing and confine ourselves to the later two of the famous trilogy. The similarity that is almost identity between these two will make concomitant discussion most easy. As the court put it in the Coppage Case: "In Adair v United States this court had to deal with a question not distinguishable in principle from the one now presented."[132] Since "it follows that this case (the Coppage Case) cannot be distinguished from Adair v United States,"[133] we will present the facts of the Coppage Case and comment wherever necessary on the Adair Case[134] concurrently.

---

130 Haines, The Law of Nature in State and Federal Judicial Decisions, 646.

131 Mr. Justice Peckham delivered the opinion of the court in this case. As an indication of the spirit of his approach we find him quoting the Supreme Court in Yick Wo v Hopkins, 118 US 356, to this effect: "The court looks beyond the mere letter of the law in such cases." 198 US 45 (1904).

132 9.

133 13.

134 Hence, unless noted otherwise, we speak of the Coppage Case.

The Coppage Case was brought from the Kansas State Supreme Court (87 Kansas 752) for review. The plaintiff in error was found guilty in a local court of a county in Kansas of violation of an act of the state legislature of Kansas, which made it unlawful for employers to coerce, require or influence employees not to join or remain members of labor unions. Since the judgment of the local court was affirmed by the state court, the plaintiff in error brings it to the United States Supreme Court to test the constitutionality of the state legislative act which makes such action unlawful. More particularly, the plaintiff in error, superintendant of the Saint Louis and San Francisco Railway Company, had discharged an employee who refused to withdraw from a labor organization, and was prosecuted for the action under the act of the legislature. He now challenges the constitutionality of the act.

The Supreme Court reversed the lower courts, thereby declaring unconstitutional the act of the Kansas legislature. At the time of the Coppage Case the court consisted of Chief Justice White, Associate Justices McKenna, Holmes, Day, Hughes, Van Devanter, Lamar, Pitney and McReynolds. Mr. Justice Pitney delivered the opinion of the court. Holmes, Day and Hughes dissented. Their dissents will be discussed. In the Adair Case the court was comprised of Fuller, Chief Justice, and Harlan, Brewer, White, Peckham, McKenna, Holmes, Day and Moody,

Associate Justices. Mr. Justice Harlan delivered the opinion of the court. Justice Moody did not participate and Mr. Justice McKenna dissented, with Holmes concurring in the dissent. The Coppage Case affirmed the Adair Case.

At the outset the court resorts to the words of John Marshall Harlan spoken in handing down the Adair Case for a succinct statement of the problem and a presentation of the two general principles involved in reaching the decision.

> While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government - at least in the absence of contract between the parties - to compel any person in the course of his business and against his will to accept or to retain the personal services of another, or to compel any person, against his will, to perform personal services for another. ... In all such particulars the employer and the employee has equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.135

In his opening words of this paragraph, Justice Harlan stated the age-old question of the conflict of the individual right and freedom with the common good. We remarked with emphasis the words of Pius XI on this very point. He expressed the very

---

135 Originally in 208 US 161 at 174, but quoted in 236 US 1 at 10, 11.

issue when he said:

> First, let it be made clear beyond all doubt that neither Leo XIII, nor those theologians who have taught under the guidance and direction of the church, have ever denied or called in question the twofold aspect of ownership, which is individual or social accordingly as it regards individuals or concerns the common good.136

And so it is here. The right to private property is declared by the court. This is ownership. We indicated in Chapter III, Section 7: The Justice of Contract, that the right to contract is a corollary notion to the right to private property. Thus throughout these cases we are faced with the struggle on the one hand of the inalienable right to contract and the application of the necessary restraints to this freedom which the common good may dictate. At length it was pointed out that the sole purpose of the state is the common good. Without this aim the state has no reason for existence. All of our treatment in Chapter III comes to the fore. The court was conscious of this importance.[137]

---

136 Pius XI Quadragesimo Anno, 12.

137 Thus the court remarks: "The decision in that case (the Adair Case) was reached as the result of elaborate argument and full consideration. The opinion states (and it is Justice Harlan): "This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent both with the words and spirit of the Constitution and is sustained as well by sound reason (Recall Canon Two)."" 208 US 161, at 171 originally, but quoted in 236 US 1, at 13, 14. Thus there is no doubt that the court was fully apprised of the broad principles on which they based their decision.

Faced with these two precepts of the natural law, the court betook itself to the facts and arrived at the conclusion noted above. The court felt that the equality of right which should maintain between individuals, the right of man to use and dispose of his own goods as he sees fit, the right of personal freedom in the conduct of one's life, should here maintain and that the jeopardy to the common good was not such as to overbalance it. In short, the court dealt with the facts in the light of the two great principles involved and concluded in favor of the liberty of contract.

> We are now asked, in effect, to overrule it (the Adair Case); and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result we are constrained to re-affirm the doctrine there applied. Neither the doctrine nor its application is novel; ... The principle is fundamental and vital. Included in the right of personal liberty and the right of private property - partaking of the nature of each - is the right to make contracts for the acquisition of property.[138]

Whereupon the court concluded that the statute in question would impair this right and that the "common good or the general welfare" did not, under these facts, demand "restraint," or that the restraint would be "reasonable."[139] The court next

---

138 14. Sublineation added.

139 10. Sublineation added. These phrases are scattered throughout this page and are grouped in order to aid in appreciating the force of the decision.

cited many cases in substantiation and reiterated its statement that the case had been decided on reasoning that was broad and fundamental.[140]

The dissents in these two cases serve to heighten the problem and also throw more light on the manner of application of a given set of facts to a broad precept of the natural law. We pointed out at some length in our discussion of the determinants of morality the difficulty attendant on any application of facts to a broad principle. The important factor of attendant circumstances is always present. What would be advisable in the early twenties might not be so at present. This was the problem the court was faced with in these two cases. The dissents felt that the common good was the principle that should prevail. Justice McKenna did not minimize the importance of the right to private property when he dissented. On the contrary, but he emphasized, under the conditions of the nation and the people at the time, welfare of the public.

> I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not

---

140 Referring to these decisions cited in substantiation the court says: "These decisions antedated Adair v United States. They proceed upon broad and fundamental reasoning, the same in substance that was adopted by this court in the Adair Case... Upon both principle and authority, therefore, we are constrained to hold...the Kansas act ... void." 26.

> be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a quasi-public business and therefore subject to control in the interest of the public.141

It would appear that even Justice McKenna, arguing on the dissent, is tainted with an excessive regard for the liberty of contract when he limits his right to control to quasi-public businesses. Perhaps he would say that any business whose control was demanded by the common good was quasi-public. That would place him in a better position. At any event, Justice McKenna felt that the circumstances in this case demanded the exercise of a reasonable restraint on the freedom of contract in the interests of the working man and the common welfare of the nation.

Justice Holmes voiced his dissent as well. He stressed the same point.

> ...but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.142

Whatever may be said of the materialistic philosophy of Holmes, here he is guided by the common good, and not by the force of the many.

The dissents in the Coppage Case follow the same fundamental reasoning. Holmes more or less reiterates his dissent

---

141 190. Dissent of McKenna. Sublineation added.
142 192. Dissent of Holmes. Sublineation added.

in the Adair Case. The dissent of Justice Day, with whom Mr. Justice Charles Evans Hughes concurs, is an excellent presentation of the stand of the minority.

> That the right of contract is part of individual freedom ..., and may not be arbitrarily interfered with, is conceded. While this is true, nothing is better settled ... than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interest of the public health, safety and welfare.143

As further explanation of his point, Justice Day quotes the Supreme Court in a previous decision:

> But liberty of making contracts is subject to conditions in the interest of public welfare, and which shall prevail - principle or condition - cannot be defined by an precise and universal formula. Each instance of asserted conflict must be determined by itself ... The legislature is, in the first instance, the judge of what is necessary for the public welfare,...144

How true are these words of the court. Which great principle shall apply? That is the difficult question in all such problems.

In this matter of labor unions the law has progressed in the years since these cases. Today in most of the states the minority holdings in the Adair and Coppage Cases have been made the law by statute. We must not be too ready, however, to read

---

143 28. Dissent of Day and Hughes. Sublineation added.
144 This is from the Erie Railroad Case, 233 US 665, 1913. It is at 29 here in the dissent of Day and Hughes. Sublineation added.

state of the nation in 1914 and the circumstances surrounding the Coppage Case into the present-day scene. It is submitted, of course, that the several dissents were correct, even in the circumstances of the Coppage Case, when proper consideration is given to the demands of the common good, to the depressed condition of the laborer and his need for help in spite of "strict equality of right," and when viewed in the light of later law, since in recent years we have had decisions which have in effect upheld the minority of the Adair and Coppage Cases.[145] It would seem, moreover, that the social philosophy of papal pronouncements has stressed the aspect of the common good as applicable in just such an instance.

HOME BLDG. & LOAN ASSN. V BLAISDELL 1933[146]

The Minnesota Moratorium Case is highly appropriate as a concluding discussion. It carries on the discussion of inviolability of contracts and their impairment by restraints for the common good. It forms an excellent link with the past and enhances the traditional aspect of this treatment. It presents in its own right an excellent instance of resort to the natural law.

---

145 See: National Labor Relations Board v Jones & Laughlin Steel Corporation, 301 US 1, 1937. Also 301 US 103, 1937.

146 Home Building and Loan Association v Blaisdell et al., 290 US 398, 1933.

The facts of the Minnesota Moratorium Case center around the constitutionality of an act of the legislature of the state of Minnesota granting special relief, through authorized judicial proceedings, with respect to foreclosures of mortgages during the declared emergency period. The Supreme Court of Minnesota declared the act to be an emergency measure consonant with the powers of the legislature and refused to render it void as unconstitutional. The case comes on appeal from that court. The Supreme Court of the United States found that the state court had applied the general principles well, and that the act of the legislature did not violate the constitution.

The court at the time of the decision consisted of Chief Justice Hughes, Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, Cardozo. Mr. Chief Justice Charles Evans Hughes delivered the opinion of the court. Justices Van Devanter, Mc Reynolds and Butler concurred in the dissent of Justice Sutherland.

The court realized well that it was faced with an election between two broad precepts applicable to the facts at hand:

> In determining whether the provision for this temporary and conditional relief exceeds the power of the state by reason of the clause in the Federal constitution prohibiting impairment of the obligation of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause,

> the developement of the jurisprudence of this court in the construction of that clause and the principles of construction which we may consider to be established.147

And the court did just that in a very thorough manner. Its first pronouncement was that the measure was definitely a relief one; that it was designed only for the drastic financial situation of the 1929 "depression." It was strictly an emergency enactment.

It is significant, however, in indicating that the court had full realization of both great principles involved, that in the reference to emergency, specifically war emergency, it remarked that "even the war power does not remove constitutional limitations safeguarding essential liberties."[148] Then the court proceeded to consider that aspect of the problem. It traces the history of the court's treatment of the matter of inviolability of contract and makes frequent reference to the dissent of Chief Justice John Marshall in Ogden v Saunders. In fact it is in this presentation of the "historical setting" that the court has reference to many of the cases already treated in this essay.[149] Once the court has indicated the serious

---

147 425.
148 426. Sublineation added.
149 In the course of the opinion reference is made to: Ogden v Saunders, 1827, at 354, 355, etc., etc., to Fletcher v Peck, 1810, Terrett v Taylor, 1815, and the Butchers' Union Case, 1885. Other references will be indicated in the body of the study.

implications in any impairment of the force of contracts, it distinguishes the instant case with the many cited in support of the inviolability of contracts, for

> None of these cases ... is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests ... during the ... period.150

There is no denunciation of the principles of ownership, of the right to contract, of the sacredness of contract. It is simply an instance where the interests of the group, the common good, demand some modification of the contract of mortgage. The unusual nature of the "depression" of 1929 render it the duty of the state in the interest of the general welfare to exercise its emergency power in relief from foreclosure. Thus the court gives an excellent presentation of its stand in "following statement of the controlling principle":[151]

> But into all contracts, whether made between states and indivduals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and

---

150 343.
151 435. Sublineation added.

> paramount, wherever a necessity for their execution shall occur.152

And this is the time when there is necessity for their execution.

It is interesting as indicative of the traditional importance of this case that the "statement of the controlling principle," which we quoted above, was originally made one hundred years ago in the case of West River Bridge v Dix,[153] and that it was "a statement reiterated by this Court speaking through Mr. Justice Brewer, nearly fifty years later, in Long Island Water Supply Co. v Brooklyn."[154] [155] And this was in 1933.

The court next adduces some further cases in substantiation of its stand. Finally there is some more particular incation of emergency nature of the relief:

> The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.
> ...
> The conditions do not appear to be unreasonable.156
>
> The State ... continues to possess authority to safeguard the vital interests of its people.157
>
> The court sustained the statute on the

---

152 435, 436. Sublineation added.
153 6 Howard 507, 1848.
154 166 US 685, 692. 1896.
155 435. Sublineation added.

> the ground that the private interests were subservient to the public right.
>
> ... the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.156

There is much good and logical reasoning in these words of the court. Certainly all their words concerning the common good in relation to the individual are in line with what we have seen in the first part of this essay. The final words show a well-ordered metaphysics of finality.

The court knew well that such impairment of the obligations of contracts must be only in emergency periods and cease with the end of the period. Thus they explain:

> The settlement and the consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelationship of the activities ... the complexity of economic interests, have inevitably led to an increased use of the organization of society to protect the very bases of individual opportunity.157

Here again we see reiterated all the fundamental principles of a true state which we saw in Chapter III. The state as a means to the end of the citizens. The state as a help towards letting the citizen help himself.

Whatever we may say as to the advisability of regarding the instant set of facts as emergency, however we may feel as

---

156 445. 434. 437, quoted from 199 US 473.
157 442. Sublineation added.

to the application of the general principles in this particular situation, we cannot fail to see that the court in the Minnesota Moratorium Case argued the matter well and gave proper consideration to the basic natural-law principles involved, that certainly "the controlling principle" was "the laws of nature."

CHAPTER VI

SOME CONCLUSIONS

ON THE PHILOSOPHY OF LAW OF THE AMERICAN JUDICIAL TRADITION

The crying need of the whole world today is the stability and security that comes from knowing where it is going and why, and that is just another way of saying that the world needs a guide to lead it and a goal to be led to. Certainly as part of it the law is no different from the world. As with the world the law needs a guide and a goal. The goal for all, world and law, is God. The guide is the same for both, too. It is the directive norm of conduct that will surely lead to God, the only goal.

From the standpoint of man as a spiritual animal destined for Heaven and as a social and legal animal ordained to reach Heaven by way of earth, the entire first part of this essay elaborated in logical sequence the one absolute norm of conduct that God intended for man as a guide through earth to Heaven: the Natural Law. In strict logic and as a conclusion deduced solely by reason from the nature of man himself and from the nature of things the natural law ought to be the guide of man in the conduct of his legal and social life. This conduct of

man as it is affected and directed by the Supreme Court of the United States does not find exception from this conclusion deduced in strict logic and pure reason.

Custom and tradition unsupported by right reason and moral rectitude is nothing but inveterate foolishness or vice. A custom that is reasonable and a tradition that is a reflection of the will of God is a holy and a sacred thing and not to be lightly tossed aside. When our fathers' fathers received from their fathers the heritage of a governmental tradition with "an everlasting foundation in the unchangeable will of God, the Author of nature, whose laws never vary,"[1] they received a holy and sacred thing. A large part lies to the Federal Judiciary in protecting this tradition from sacrilege. It has kept it intact, sometimes more, sometimes less, but it has kept it through the years.

In the men to whom we have had recourse in these pages - in Thomas, Suarez, the Popes - we have animate guides who are singularly at one with the spirit and genius of our nation and its background. In these great exponents of the natural law are aptly expressed the great principles on which our republic was founded, principles of popular sovereignty under God, of a government of, for and by the people.

---

1 Otis, The Rights of the British Colonies Asserted and Proved, 11.

But there is another consideration beyond right reason and tradition. Strictly it is not beyond, but it looms so large in its own right as to appear to be. Of late years especially we have had greater incentives to look to the preservation of our way of life. On all sides there have appeared ideologies and philosophies of government inherently hostile to our own. It has been also true within the law. Here is added reason for added vigor in guarding our judicial tradition.

These threats are not remote. The errors, misconceptions, the germs of evil that are latent or more often obvious in the "modern" legal philosophies are most imminent. Oliver Wendell Holmes, Jr. is the god of American law, yet he is the rankest materialist. Holmes is revered and yet his norm of morality is force and power. There is nothing merely academic about the consequences of Holmes' philosophy.

> When one thinks coldly, I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand.[2]

And Holmes does just that in Buck v Bell. He treats the defendant like a baboon:

> The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of

---

2 Oliver W. Holmes, 2 Holmes-Pollock Letters 252, 1941.

imbeciles are enough.3

There can be no doubt about the reality of the threat to our American way of life that such principles hold over us. Were we able to point to only isolated proponents of these doctrines we might fear less, but Holmes is followed by Cardozo,[4] Cardozo by Frankfurter, and all have their schools.

We have shown that right reason and true American tradition tell us that the natural law ought to retain a substantial position in the American Federal Judicial tradition. Let us add this last plea that the natural law be securely intrenched in our judiciary, that the alien philosophy of the materialist, the Godless, be purged from our courts, for

> ... his basic principles lead straight to the abasement of man before the absolutist state and the enthronement of a legal autocrat - ... - a legal autocrat who may perhaps be genial as Holmes ... but none the less an autocrat in lineal succession from Caesar Augustus and Nero through Hobbes and Austin and Mr. Justice Holmes. 5

---

3 Mr. Justice Holmes in Buck v Bell, 274 US 200, 1924, at 207.

4 Reference has already been made to: Rooney, Mr. Justice Cardozo's Relativism.

5 Ben Palmer, Holmes, Hobbes and Hitler, in 31 American Bar Association Journal 570, November 1945. Mr. Palmer is lecturer in law at the University of Minnesota. This article is singularly well written. It evidences fine reasoning and is founded throughout on Scholastic metaphysics, psychology and ethics. The extract is the concluding paragraph. The title gives the burden of the essay.

TABLE OF CASES STUDIED

1810	Fletcher v Peck, 6 Cranch 87.
1815	Terrett v Taylor, 9 Cranch 41.
1827	Ogden v Saunders, 12 Wheaton 214.
1852	Harris v Hardeman, 14 Howard 334.
1883	Butcher's Union Co. v Crescent City Co., 111 US 746 (Butcher's Union Case).
1892	Monongahela Navigation Co. v United States, 148 US 312.
1896	Chicago, Burlington & Quincy R.R. Co. v Chicago, 166 US 226.
1907	Adair v United States, 208 US 161.
1914	Coppage v Kansas, 236 US 1.
1933	Home Bldg. & Loan Ass'n. v Blaisdell, 290 US 398 (Minnesota Moratorium Case).

* * *
* *
*

TABLE OF CASES DISCUSSED

Cummings v Missouri, 4 Wall. 277.

Dartmouth College Case, 4 Wheat. 518.

Durkee v Janesville, 28 Wisc. 468.

Eberhart v United States, 204 Fed. 893.

Erie Railroad Case, 233 US 685.

Ex parte Martin, 13 Ark. 207.

Ex parte Wall, 107 US 265.

Fletcher v Peck, 6 Cranch 87.

Gibbons v Ogden, 9 Wheat. 1.

Gardner v Newburgh, 2 Johns. Ch. 162.

Griffin v Mixon, 38 Miss. 434.

Harris v Hardeman, 14 Howard 334.

Home Bldg. & Loan Ass'n. v Blaisdall, 290 US 398.(Minnesota Moratorium case).

Hooker v Van Haven & N. Co., 14 Conn. 153.

Jacoway v Denton, 25 Ark. 643.

Kelly v Pittsburgh, 85 Pa. St. 182.

Kennebec Purchase v Laboree, 2 Me. 289.

Legal Tender Cases, 12 Wall. 581.

License Tax Cases, 5 Wall. 462.

LOng Island Water Supply Co. v Brooklyn, 166 US 685.

Marbury v Madison, 4 Dall. 14.

M'Culloch v Maryland, 4 Wheat. 316.

McLendon v State, 179 Ala. 81.

Meyer v Nebraska, 262 US 390.

Milwaukee v Milwaukee, 12 Wisc. 100.

Monongahela Bridge Co. v United States, 216 US 177.

Monongahela Navigation Co. v United States, 148 US 312.

New Jersey v Wilson, 7 Cranch 164.

Ogden v Saunders, 12 Wheat. 213.

Orr v Quimby, 54 N. H. 647.

Peerce v Carskadon, 4 W. Va. 247.

People v Collins, 3 Mich. 395.

People v Gallagher, 4 Mich. 251.

Petition of New Orleans Drainage Co., 11 La. Ann. 349.

Pierce v Society of Sisters, 268 US 510.

Poindexter v Greenhow, 114 US 297.

Pumpelly v Green Bay & M. Canal Co., 80 US 13.

Satterlee v Matthewson, 2 Pet. 413.

Schroder v Ehles, 31 N. J. L. 50.

Slaughter House Cases, 16 Wall. 36.

Starbuck v Murray, 5 Wendell 156.

Stat v Flanders, 24 La. Ann. 71.

Stewart v Supervisors of Polk Co., 30 Iowa 17.

Sturges v Crowninshield, 4 Wheat. 117.

Taylor v Beckham, 178 US 548.

Terrett v Taylor, 9 Cranch 41.

United States v Cruickshank, 92 US 542.

West River Bridge v Dix, 6 Howard 507.

Wilder v Lumpkin, 4 Ga. 215.

Wilkinson v Leland, 2 Pet. 627.

Wynehamer v People, 13 N. Y. 391.

BIBLIOGRAPHY

(A)

GENERAL

Aquinas, Thomas, De Regimine Principum (Translation by Gerald B. Phelan, On the Governance of Rulers, Toronto, Saint Michael's College, 1934).

-------, Summa Theologica, (translated by the Fathers of the English Dominica Province, London, England, Burns, Oates and Washbourne, 1915). (Translation in Basic Writings of St. Thomas Aquinas by Anton C. Pegis, New York, Random House, 1945.)

Haines, Charles Grove, The Revival of Natural Law Concepts, Cambridge, Massachusetts, Harvard University Press, 1930.

-------, The Role of the Supreme Court in American Government and Politics, 1789-1835, Los Angles, U. of Cal. Press, 1944.

Suarez, Francis, S.J., De Legibus, (translation prepared by Williams, Brown and Waldron with revisions by H. Davis, S.J., in the Classics of International Law: Selections from Three Works of Francisco Suarez, S.J., London, Oxford, 1944.)

(B)

ENCYCLICALS

Leo XIII, Pope, Humana Libertas, 1868, translated in Social Wellsprings, edited by Joseph Husslein, S.J., Milwaukee, Bruce, 1940.

-------, Rerum Novarum, 1891, translated and published by the America Press, New York. No date nor name of translator given.

Pius XI, Pope, Quadragesimo Anno, 1931, translated and published by America Press, New York.

(C)

PERIODICALS

Anthony, John Robert, "Attitude of the Supreme Court Toward Liberty of Contract," Texas Law Review, Vol. VI, 266.

Haines, Charles Grove, "The Law of Nature in State and Federal Judicial Decisions," Yale Law Journal, Vol. XXV, 1916.

Isaacs, Nathan, "John Marshall on Contracts: A Study in Early American Juristic Theory," Virginia Law Review, Vol. VII, 1921.

APPROVAL SHEET

The thesis submitted by David Cowan Rayne, S.J. has been read and approved by three members of the Department of Philosophy.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

Jan. 31, 1947
Date

Bernard Wuellner, S.J.
Signature of Adviser