The Natural Law Influences on the First Generation of American Constitutional Law: 
Reflections on Philip Hamburger’s *Law and Judicial Duty*

By

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In his magisterial book, *Law and Judicial Duty*, 1 Philip Hamburger presents us with a picture of law, which portrays historically how wise and circumspect judges crafted a sophisticated legal order by stressing judicial modesty, continuity, and slow change. Under this view, certain key elements of the legal system get introduced at a very early stage, and much of legal doctrine lies in its careful elaboration by judges over time. The mode of evolution is Burkan2 (or in more modern terms Hayekian3) in the sense that the uncoordinated actions of individual judges, bound by a common oath and sharing an implicit world view, grope towards a coherent conception of the law which they, sitting as they do at the crossroads between legal principle and political power, never quite achieve. The acceptance of judicial duty helps judges to cabin this process of constitutional evolution, because individuals who regard themselves as bound by office are more likely to respect the tradition of which they are a part.

In this short article, I hope to examine some of the key elements of the Hamburger approach and to apply it to the early stages of American constitutional

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law. In order to achieve this objective, I divide this article into four parts. Part One gives an analysis of the natural law framework as it came down from Justinian to the modern times, with its normative emphasis upon reason, custom, and nature, and how it has faced the realities of sovereign power. Part Two explores briefly the intellectual foundations of this natural law system, and argues that it is best understood in consequentialist or instrumentalist terms that were not entirely congenial to its founders. Instrumentalism is a term that carries negative connotations insofar as it applies to how any individual or group can use its powers to trample the rights of others. But it should be viewed more favorably as an approach that explains the good practical sense that lies behind the major categories of natural law thought. Part Three then examines the imperfect way in which Hamburger's version of the natural law tradition works its way into early American constitutional decision-making.

The Natural Law of Gaius and Justinian

This natural law tradition has, I think, far greater intellectual coherence than its modern day critics are prepared to acknowledge. My direct knowledge of this tradition does not come so much from reading either Aristotle or Thomas Aquinas,4 but from reading the works of Roman lawyers who consciously relied on the natural law principles in their various guises to explain fundamental social institutions.5 In this regard, it is clear that the Roman lawyers are themselves derivative on the Roman philosophers in how they set up their problems. Thus one of the early themes in Cicero’s De Officiis strikes at themes that later become so critical within

4 For a defense of Aquinas, see Lloyd Weinrib, ______ this volume

5 For examples of its use, see Gaius, Institutes Book I, Title I (161 CE); Justinian's Institutes, Book I, Title I, §1 (Peter Birks and Grant McLeod, trans., Cornell 1987)(535 CE). Unfortunately, Hamburger gives these texts at most passing attention.
the legal system. In short order Cicero starts from the need for self-preservation which translates into the notion of individual self-rule free of external attack. He also stresses the importance of the reproductive instinct as a means for the continuation of the species. But he then promptly notes that law is possible only among persons with higher intellectual capabilities so as to see the consequences of their actions, and thus form political communities to organize them. Although much of his discussion is about conceptions of moral duty, he clearly stresses, the key elements of any system of private property when he declaims: “The first office of justice is to prevent one man from doing harm to another, unless provoked by wrong; and the next is to lead men to use common possessions for the common interests, private property for their own.” He then (not quite correctly notes) that “long occupancy” or “conquest” is the source of property, at which point he anticipates one common difficulty in the reconciliation of a strong normative theory of property rights with the brute facts on the ground that conquest is often the source of many Roman titles. And to complete the picture, Cicero is of course concerned with the obligations of promise and trust, which are usually but not always binding. Themes of harm, wrongfulness, property, both private and common, and promise loom large as the backbone of his overall system.

I do not wish to discuss these passages at any length. But I set them out to indicate that the dominant legal texts in the natural law tradition resonate with the underlying philosophical temper of the times, which also reminds us to “treat Nature as our guide.” Thus the themes just mention are found in short passages of both Gaius and Justinian whose influence is inverse to their length. I shall set them out here before discussing them in some detail.

The key passages in Gaius read:

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6 Marcus Tullius Cicero, *De Officiis*, Book I, iii, iv (trans Walter Miller, 1913).
7 Id. Book I, vii.
8 Id. Book I, x
9 Id. Book I, vii.
Book I. I. CONCERNING CIVIL AND NATURAL LAW.

(1) All peoples who are ruled by laws and customs partly make use of their own ius[fundamental law], and partly have recourse to those which are common to all men; for what every people establishes as ius is their own and is called the ius civile, just as the ius of their own city; and what natural reason establishes among all men and is observed by all peoples alike, is called the ius gentium, as being the ius which all nations employ. Therefore the Roman people partly make use of their own ius, and partly avail themselves of that common to all men, which matters we shall explain separately in their proper place.

(2) The iura of the Roman people consists of laws, plebiscites, decrees of the Senate, constitutions of the princes, the edicts of those who have the right to promulgate them, and the opinions of jurists.

(5) An Imperial Constitution is what the Emperor establishes by a decree, an edict, or a letter, and there was never any doubt that it had the force of a law, as the Emperor himself derives his authority from a statute.

The key passages in Justinian read:

Book I, Title II. Natural, Common, and Civil Law.
The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the earth, the air, or the water. Hence comes the union of the male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides men are considered as having knowledge of this law. Civil law is thus distinguished from the law of nations. Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state and is called the civil law, as being the law of the particular state. But
the law which natural reason appoints for all mankind obtains equally among
all nations, because all nations make use of it. The people of Rome, then, are
governed partly by their own laws, and partly by the laws which are common
to all mankind. We will take notice of this distinction as occasion may arise.

6. That which seems good to the emperor has also the force of law; for the
people, by the Lex Regia, which is passed to confer on him his power, make
over to him their whole power and authority. Therefore whatever the
emperor ordains by rescript, or decides in adjudging a cause, or lays down by
edict, is unquestionably law; and it is these enactments of the emperor that
are called constitutiones.

A quick inspection of these two sets of parallel passages reveals three
dominant modes of analysis in Roman thought: reason, custom, and a naturalist, or
evolutionary, account of human behavior. Each of these types of analysis supports a
model of continuity and orderly evolution that is the hallmark of the Hamburger
edifice. And as it turns out, all of these elements are in play throughout the history
of natural law thinking. The texts also make explicit reference to a fourth element,
the reality of sovereign power that works against the normative component of
natural law, both in Justinian's time and today. It is useful to take these four key
elements in sequence.

10 For discussion of the medieval sources that follow this division, see R.H.
Helmholz, Judicial Duty and the Law of Nature, this issue

11 Justinian's Institutes, Book I: Title II, ¶ 6.

12 For the modern equivocation, consider this quotation from Calvin Coolidge:
Men speak of natural rights, but I challenge any one to show
where in nature any rights existed or were recognized until there
was established for their declaration and protection a duly
promulgated body of corresponding laws.
First, natural law is defined as a form of naturalis ratio, which quite literally means the “reason of nature”. This seductive phrase is meant at least in part to make it appear as though the law is deductive in nature, as the use of the term “ratio” seems to suggest. Hence we can find in this natural form of reason a kind of invariance that should be appreciated by all individuals who have made the requisite effort to understand the internal logic or operation of the system. The clear sense here is that the empirical and the experiential take a back seat in the overall analysis to prolonged reflection, which in turns depends upon the application of some form of practical reason, with much of the stress on that second word.

Second, and quite distinctly, those institutions and practices that are common throughout the civilized world deserve of the title of natural law. In dealing with these we resort to a different constellation of ideas—custom, tradition, and practice, and not deduction or abstract reflection—which indicates which particular set of rules we should follow. But how can one arrive at universality when the law is based on customs that vary from place to place?

The answer is that there is widespread social agreement over the kinds of transactions that are desirable, and the kinds of transactions or events that are apt to raise serious difficulties. Yet, at the same, the formalities used to bring these dominant practices into fruition can vary widely by time and place. For example, cultures differ in the way in which they solemnize marriage between the sexes, but no culture is prepared to dispense completely with formalities for entering into the relationship. Whatever variation may be found in ceremonies, there is a universal desire to recognize and protect these unions, given that procreation and the rearing

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**Calvin Coolidge**

Men speak of natural rights, but I challenge any one to show where in nature any rights existed or were recognized until there was established for their declaration and protection a duly promulgated body of corresponding laws.

The difficulty remains that unless these principles are articulated and accepted, no social institutions of support can emerge.
of the young to maturity is an inescapable obligation of any society that wishes to perpetuate itself.

The same point, and for the same reason, holds true with respect to the parent-child relationship. It is not possible to name a society that denies that parents have any obligations to support their children, even though there are surely important differences as to how that duty should be quantified and discharged. The level of care with which animals treat their children supports both Justinian’s cryptic observation and much of modern sociobiological thought. No society allows parents to treat their children as though they were strangers to whom only a duty of noninterference is owed.

By the same token, there is some general consensus that all individuals are subject to some moral duty to assist those in need, either in cases where immediate rescue is required or where there is a generalized need for material assistance and support. These duties of assistance, moreover, are always taken seriously in light of the enormous gains that small interventions can generate. Yet at the same time, most societies shy away against impose legal duties to rescue strangers, as is evident from the parable of the good Samaritan, which stresses the moral obligation and urges people to lead by example, but which does not impose on them any legal obligation. The willingness to interpose state force to coerce assistance for strangers forms no part of the natural law tradition, either in theory or practice.

The natural law approach toward marriage and children applies to the world of strangers through the law of contracts and conveyance. The nature of the formalities may differ from culture to culture, but there will be no culture that will require heavy formalities for low value transactions that quickly run their course, and few that will allow the relatively few transactions of valuable and durable assets, the sale of land for example, to proceed without some formal device for the

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13 Luke 10:30-37; Buch v. Amory Manufacturing Col., 44 A. 809, 810 (N.H. 1897), which is explicit in both the recognition of the moral duty, referring to the Biblical passage, but denying the legal duty with equal emphasis.
creation and enforcement of the transaction.\textsuperscript{14} The risk of misfire is so great that casual memory cannot be used to resolve all future disputes, including those that could arise when either or both of the parties to the immediate transaction are dead or otherwise unavailable.

By the same token all societies will condemn common aggression, and in rare cases may tolerate limited forms of aggression, e.g. duels, but only when subject to detailed rules. But in the ordinary case of aggression that lies outside the law, no formal device will shield it from social condemnation. The law of tort is not concerned with formalities. Again this basic pattern cut across cultures.

In dealing with these customary patterns of behavior it could and should be objected that reliance on custom cannot be trusted if it tolerates slavery. The point was not lost on Justinian who in his Institutes wrote: "The reality of the human condition led the peoples of the world to introduce certain institutions. Wars broke out. People were captured and made slaves, contrary to the law of nature. By the law of nature all men were born free."\textsuperscript{15} The passage shows great clarity for its candor—and for its realism. The negative moral judgment on slavery is absolute and unqualified.

The social institution of slavery through conquest creates an institution that cannot be ignored. But the reason for its illegitimacy in theory is evident from its origin in force. The commercial and social customs viewed with favor today have evolved over time through reciprocation and adaption. All persons bound by the

\textsuperscript{14} For example mancipation a formal transaction that covered both conveyances of real property, rustic servitudes, slaves, and certain herd animals. For description, see Gaius, Institutes, Book I, 119-122, Book II, 14-23. The ceremony was also used to different effect in dealing with guardianship and marriage arrangements. Gaius, Institutes, Book I, 110-119.

\textsuperscript{15} Justinian’s Institutes, Book I: Title V. The sentiments drove the judicial abolition of slavery in England, and to the tortured decisions over slavery in the United States where it was first recognized that slavery was inconsistent with both justice and natural law, Hamburger, at 345, yet the statutes that governed slavery were subject to the standard rules of statutory interpretation, including the usual set of equitable excuses that could excuse compliance with the statute in particular cases.
custom participate to some extent in its formation.\textsuperscript{16} It is for that reason that Justinian rightly notes "by the law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others."\textsuperscript{17} In those cases full participation from all parties governed by the rule is the norm, as is the steady evolution by the accumulation of small adaptations to changed circumstances. But in the case of slavery, the unilateral custom of one group (the winners) is said to bind the outsiders (the losers). The risk of favoritism is too great to give the practice any moral respect.

It is therefore possible for jurisprudes to deplore the situation, but it is not possible for them to deny the existence of that all too durable institution. Jurists must perforce make rules that govern its application, and these rules will take the same form, and be subject to the same type of equitable treatment, as any other positive law, so long as its orderly explication does not serve to undermine the institution that "reality" requires. There is therefore a strong element in the natural law tradition that is in tension with the positivism of state-created law. The carryover of this anomaly to the evolution of the American Constitution requires little explication, either before or after the Civil War.

The last of the three positive sources of natural law looks in a somewhat different direction. It asks what we know from biology and psychology of man about the basic drives, desires, and needs that all people have. First, let's take a moment to dispose of the foolish assumption that use of human nature assumes that we can operate no law at all. Natural law, the critics can complain, is simply what it is that people do in a state of nature. We have both compassion and aggression as a matter of brute fact and thus cannot distinguish between them on moral grounds. Lacking any independent normative perch, we have to accept the second just as we accept the first. A descriptive account does not allow us to find any recurrent


\textsuperscript{17} Justinian's Institutes, Book I: Title II, ¶2, cl.3.
actions of human beings that fall outside the class of natural events. So natural law necessarily embraces a social Darwinist regime of nature red in tooth and claw.\textsuperscript{18}

Clearly, this account of natural law is only offered by the critics, but never the defenders, of the natural law theory. It is flatly inconsistent with the cryptic treatment of the morality of slavery in Justinian. No defender of natural law has ever denied the existence of those actions that he would condemn as contrary to human nature. The use of the phrase “natural law” in this context is on normative grounds to single out for social praise those individual practices and social norms that contribute to some measure of human flourishing. Accordingly, natural law properly condemns and/or punishes aggressive actions that allow one person to advance at the expense of the lives and fortunes of other individuals.

Exactly how we determine which activities are praised and what legal norms are defended is never crystal clear, but certainly when we read the opening paragraphs of Justinian, which contain such “bloodthirsty”\textsuperscript{19} observations as “Justice is the constant and perpetual wish to render every one his due.”\textsuperscript{20} There is nothing in natural law theory that allows any individual to show a reckless impartiality for his or her own interests. Further on we are told that “The maxims of law are these: to live honesty, to hurt no one, to give every one his due.”\textsuperscript{21} You may call these sentiments banal if you will, but certainly not venomous. And you will be mistaken on the banality, which always becomes painfully evident when these injunctions are systematically disregarded. No one should take this, or any other, self-evident truth for granted. Without missing a beat Justinian then claims that “The law of nature is

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\textsuperscript{18} See Lord Tennyson, \textit{In Memoriam A.H.H.}, Canto 56
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\textsuperscript{19} See Robert Browning, \textit{Justinian and Theodora}, 118, (First Gorgias Press 2003) (he carried out his mission with bloodthirsty efficiency, according to a contemporary witness, who writes that the earth trembled before him).
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\textsuperscript{20} Justinian, Institutes, Book I: Title I.
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\textsuperscript{21} Id. at ¶ 3.
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that law which nature teaches to all animals,"22 by which he meant all creatures, not just human beings. Thereafter there is a reference to marriage, and the discussion of the role that reason and custom play in the articulation of general rules.

The hard question is how to make sense of the previous three standards, which look in somewhat different ways at the same basic problem. Historically the problem was one that caused acute anxiety because of the constant presence of a fourth theme that also resonates in Justinian—the sovereignty and authority that work in opposition to reason, custom and common practice. Thus shortly after Justinian praises the main sources of law, he iterates without much comment or conviction the well known expression, quod principi placuit legis habet vigorem, or, that which is pleasing unto the prince has the force of law.23 Note that in using this transaction I deviate from the language that is found in Moyle's early sanitized version: “That which seems good to the emperor has also the force of law.” I do so because his translation softens the baldness of the assertion, by making it appear that there must be some objective standard of goodness that cabins in the decision, when the Latin offers no such clean escape from the wholly subjective interpretation of the phrase, which necessarily enhances imperial power. That inference about the Latin text is fortified in the following sentence, which notes that the source of royal authority was a vote of the people that conferred on him that power.

But as a matter of constitutional organization, that stated rationale is still far too pliable for it means that the permanent structure of a constitution can be changed by a once and for all vote of its members, to something unrecognizable in form and substance from the original scheme. The only way any constitution can endure as a basic or fundamental document is to make sure that the current holders of any particular office or station cannot bargain away their powers, or the powers of their successors, even by unanimous consent.

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22 Justinian's Institutes, Book I: Title II.

23 Justinian's Institute, Book I: Title VI.
By way of parallel, within the American context, the Senate could not vote in advance, even unanimously, to affirm any and all votes that come out of the House of Representatives. Nor could the Senate decide in advance to waive its right in all cases to vote up or down on key Presidential nominees. Only the regular business of making laws within the framework can be subject to majority votes. The structural features cannot be changed by ordinary political decisions. We see therefore in this passage of Justinian a clear conceptual dodge that allow the king to gain power at the expense of the other branches of government who in principle should not be allowed to "waive" any structural rights. The extent to which norms and legal institutions can restrict the power of the sovereign then becomes the great challenge posed to the other three legs of the natural law stool. Their reconciliation turns out to play a powerful role going forward.

**The Foundations of Natural Law**

In dealing with these four uneven legs in the natural law synthesis, I have been careful to insist that all four play a continuous role in the messy unfolding of the basic theory. In so doing, I am reluctant to put undue weight on any one leg of the stool while disdaining or disregarding the others. The good news is on legal norms for daily conduct, the first three approaches all tend to converge on the same outcome. If a custom lasts for a long time it is because it embodies some deep logic of sound human behavior, and these instincts are only understandable to those who are sensitive the promptings of human action, such that legal rules help to weed out bad conduct and to give great support for good conduct.

It is worth noting that there is no explicit consequentialism built into these rules. In one sense, that may well explain why it is that natural law theories have by and large fallen into disfavor in recent times, as they may be remote and detached from a wide range of human concerns. People ask whether these legal rules, or the philosophy that animates them, contribute in some sense to the well-being of society. If they do not, the common modern attitude is why care about them at all. But the earlier versions of natural law was congenial to consequentialist thinking.
That integrative pattern took place before later day theorization insisted on the sharp separation between antecedents and consequences, between—as modernists like to say—deontology and various forms of consequentialism. Forcing people to choose sides has become fashionable today, but that process had little or no influence on the earlier writers in the natural law tradition, who were after the grander theme of social organization, and less interested in disputes as to the proper classification of their insights.²⁴

In this spirit, I think that the reconciliation of these three different points of view is less difficult than one might suspect. The only rules that last are those that conform to natural reason, and the only rules that conform to natural reason are those that match the norms "instilled" into human nature. Indeed the general drift of modern psychology on this question is in an odd sense a confirmation of these older views.²⁵ The sociability of individuals is inbred for survival, so much so that individualistic models of human behavior that ignore, for example, the family, cannot offer an accurate and complete account of how human beings behave. Indeed so much of my career is summarized in the title of one of my articles, The Utilitarian Foundations of Natural Law."²⁶ When anyone is willing to use tools that go beyond the intuitionism of many defenders of natural law, it is possible find real explanations drawn from the modern biological and social sciences to help explain why some rules should be preferred to others.

At this point, the distinctions between cooperation and aggression becomes clear. The former is a positive sum gain and the latter is a negative sum game, which

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ought to incline rational people to embrace the cultural norms that so strongly disfavor the latter. Put otherwise, the really big choices among substantive norms are defined as “moral” precisely because the choices that they embody are so clear that no one in his right mind would want to question them as the starting point of the overall analysis. On this view it would be bizarre to have someone start with the working presumption that contracts are bad until shown to be a good, while beating, taking, and killing are good until they are shown to be an evil.

To be sure, there are systematic ways to overcome these presumptions but only insofar as a qualification of the basic rule serves the same end as the original presumption—to expand the scope of positive sum games and limit the scope of negative sum games. Thus contracts to kill third persons have huge negative consequences that outweigh the gains to the contracting parties, and hence (consistent with natural law tenets) are everywhere condemned as illegal.

The system of alternating presumptions is in fact used by strong moral intuitionists, like W.D. Ross,27 who speak rightly about prima facie rights, which then leads to their embracing basic legal theories of tort, contract and restitution. But philosophical writers are not systematic in using the method they advocate to flesh out the details of the legal system, by building out the initial system of presumption to take into account defenses, replies and further pleas.28 These writers have little knowledge of the fact dense complications that arise in any mature legal system. They therefore have no occasion to address, let alone answer, the hard questions that arise in asking when and how a correct initial presumption can be overridden. What exceptions are allowed to this deontological system, and


28 This point has been something of a small obsession with me, see Richard A. Epstein, Pleadings and Presumptions, 40 U. Chi. L. Rev. 556 (1973), and Richard A. Epstein, The Not So Minimum Content of Natural Law, 25 Oxford J. Legal Stud. 219 (2005). This system was well understood by the Romans, and a clear articulation of the use of exceptions, replications and subsequent pleas is found in Gaius, Institutes, Book IV, 124-126.
why? What remedies are given for its breach and why? The possibilities are enormous on both fronts: what is the rule of consent, self-defense, necessity, insanity, duress and the like. What is the mix between orders for damages, specific performance and injunctions and why? These questions have to be answered. Yet only a systematic form of consequentialism has a shot at achieving this goal. In the end that approach must marshal a cross of theoretical and empirical evidence. But there are no short cuts to undertaking the inquiry.

In working out the implications of an approach to legal rights, we can find many cases where the choice between rival legal principles is too close to call. Practically, that situation will arise whenever on theoretical grounds the anticipated social differences of two rules on matters of either production or distribution are sufficiently small that both deduction and experience, or the two together always lead everyone unerringly to the right choice. So a prohibition against any two parties making a contract that binds a third party has real legs everywhere: the consequences of the alternative is endless exploitive deals by everyone against everyone else. In contrast, the choice between negligence and strict liability to govern harms in stranger cases is a much closer call, because as a first approximation the welfare consequences of the two rules, whether measured by output or by distribution, are virtually identical from the ex ante perspective, so that the differences are harder to detect by either systematic study or ordinary experience. Hence the constant equivocation between the rules without real closure. But even this choice can be easier in other contexts. Thus take that same choice between liability rules into the area of medical malpractice, and the negligence approach wins hands down, given the huge number of cases where well-intentioned and well-executed treatments result in real harm. Quite simply, the supposed deontological approach follows some intuitive consequentialist analysis that rests on the welfare differences of harms to strangers and harm to consenting parties.

In many cases, the modern defenders of natural law resist this conclusion by insisting that the uncharted domain of consequentialism falls prey to two deadly objections. The first is that its serpentine byways allow the skilled practitioner to
reach any conclusion in any case. Thus this famous passage from Kant, which has implications beyond his strict theory of retribution reads as follows: “The law concerning punishment is a Categorical Imperative; and woe to him who rummages around in the winding paths of a theory of happiness, looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it…”29 At one level this passage could be read as an attack on ad hoc rules, and thus marks an early version of the ongoing debate between rules and standards in the criminal law. But in another sense it could be a general warning against taking into account matters of happiness in the formation of any theory of rights writ large. On behalf of the former proposition, there is much to be said. On the latter, I think that Kant’s pessimism is unwarranted under any sensible account of consequentialism. Indeed, I think that it is clear that virtually all of his sensible rules can be recast in ways that are consistent with the consequentialist theories that he rejects. That point has been made by modern philosophers, most notably R. M. Hare in his famous discussion, Could Kant Have Been a Utilitarian?30 makes many of these points without once invoking either the Pareto or the Kaldor-Hicks standards of social welfare that give the greatest support for this position. The second objection is that consequentialism offers no account of “the right” that is independent of its supposed account of “the good,” which deprives that theory of a firm basis on which to build its complex edifice of entitlements.

Both of these overwrought contentions miss the mark. On the former, the analytical paths look serpentine only if the analysis is done without looking first to the content those rules that have stood the test of time. But go through the analysis, case by case and institution by institution, and the practical regularities and their theoretical implications become both clearer and more powerful than might be expected. At the most general level, a basic approach that defends private actions that lead to positive sum outcomes is a good place to start, and that premise leads to

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29  (R/ A196 = B226 = 331)  
30  R. M. Hare, Sorting Out Ethics, 8.1-8.9 (1997)
a powerful defense of competitive markets in commercial affairs. The issue then is what set of rules should be applied in particular contractual contexts to help make these markets run well. For one example of how this works, I recently wrote (but will not repeat here) a close analysis of the Roman law of bailment to show that its multiple categories and distinctions do in fact rest on powerful efficiency features that are often missed by modern practitioners of law and economists, who don’t trouble themselves with mastering the details of the various transactions. This form of systematic analysis doesn’t deserve to be dismissed as “rummaging,” which carries with it the false implication that only deontological thought offers rigorous systematic thought.

On the second point, the notion of a right that has no end to serve looks attractive if one assumes that “efficiency” only covers efforts that seek to find the best means to a given end, exogenously determined and perhaps for no reason at all. The correct rejoinder to this point is to concede that point: if the end cannot be justified, there is no particular reason to pursue it, either individually or socially. But the definitions of efficiency embodied in the standard Kaldor-Hicks and Pareto accounts serve a different function. Both definitions try to set the ends by allowing all individuals to determine what preferences they have for their own lives, and then setting the legal framework to help them to achieve those goals in such a way that the gains to any one person does not trample the gains to any other.

The Pareto test—defending any improvement in the position of any one person that does not leave another person worse off—is manifestly a social test that assigns to each individual has a place in the social utility function. This is not so distinct from the Kantian categorical imperative, which counsels against treating any person as a means or instrument of another. “Act only according to that maxim

whereby you can at the same time will that it should become a universal law.”

Kant has also famously written: "Act in such a way that you always treat humanity, whether in your person or in the person of any other, never simply as a means, but always at the same time as an end." The Pareto formula does just that. To be sure, many of Kant’s particular positions on individual cases—never lie, even if self-defense or defense of others—do not sound as though they could be justified consequentialist grounds; nor for that matter do they sound smart, precisely because they represent a departure from a sensible system of presumptions that would allow, for example, someone to lie to a killer in self-defense or in the defense of an innocent third party. But stripped of those connections, these propositions taken in and of themselves are quite consistent with the usual consequentialist theory.

The Kaldor-Hicks test—stressing hypothetical instead of actual compensation—is not Kantian in the sense that it tolerates the losses of some in light of the greater gains to others. But it is a social, not egoistical, test of rights in that no person is ignored in the overall utility function when it is asked whether on principle the winners could supply compensation that leaves the losers indifferent to the prior positions while making the winners better off than before. It is also identical with the Pareto test in so far it tolerates no coercive initiatives that lead to overall social losses, and it ignores no person in making these social calculations. There are hard questions as to which of these two tests should govern in what situations. Indeed it is often said that the Pareto test is far too rigorous to deal with complex social interactions involving many persons. Yet at the same time it is critical note that with respect to one key social institution—voluntary exchange—the Pareto test is routinely satisfied. The contracting parties experience gains from trade and their increased wealth increases the opportunities for further transactions with third persons.

The Incorporation of Natural Law Into the Constitution

I dwell on this analysis of natural law positions in order to explain that they endure for reasons that are quite independent of their antiquity. Their persistence over time on fundamental questions of social organization is, moreover, congruent with the Hamburger model of gradual exploration and elaboration of the legal system. By the same token, the use of these gradualist and customary models does not always work in times of rapid political and institutional changes, where the slow trial and error approach to sound legal institutions often founders on some jagged rocks.

My favorite private law illustration of this rapid change in private law involved the famous decision in *INS v. Associated Press*, where the INS departed from a long-standing and stable norm by lifting its information direct from AP bulletin boards about the state of the war on the Western Front, and only the western front and writing it up in its own words to avoid any charge of a copyright violation. Why the sharp departure from a practice that had proved stable for so long: answer, the British and French governments barred the Hearst papers from the western war front, so that they could no longer collect news in the ordinary way. When social conditions change rapidly, the hit or miss methods of legal evolution may not keep pace with the underlying social realities.

We had this situation writ large during the development of the American Constitution. The English Constitution, in contrast, is a set of practices that moves in typical Burkean fashion, customary change dominates so much that it takes a good deal of work for anyone to know exactly which norms reach constitutional level and which are just part of the ordinary law. But in the early American experience, discontinuity was the order of the day, both in the revolutionary break-away from

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England and in the conscious rejection of the Articles of Confederation by a discreetly rebellious Constitutional Convention. That Convention, after all, scrapped the Articles it was supposed to amend, only to start over with a document which they craftily concluded would be binding only when 9 of the 13 colonies signed on, and then only among those that did sign on to the new regime,\textsuperscript{34} which left of course the remaining four states without the benefit of the Articles.

This stunning turn of events was, of course, the quintessential form of a planned constitution, which took its signal on this point from the opening salvo in Federalist I—as anti-Burkean as one possibly can get.

"It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."\textsuperscript{35}

Note that Hamilton does not allow for the third, Burkean, alternative of custom and tradition. He perceived that there was no time to develop a set of customs about the complex set of institutions, if they were to have any chance of taking hold in the short run.

This difference matters. When there is no written constitution, it is difficult to develop any textual theory of constitutional interpretation, which means that the Burkean approach tends to win by default. But introduce a text that makes these fundamental choices, and custom and evolution then operate as second-order considerations to smooth out the rough edges of the system, often by employing the method of presumptions to flesh out the detail of the fundamental structural and rights-based conditions. At all times, the threshold question has to do with the construction of explicit constitutional text in a way that is faithful to the master plan of the original founders, which is why it is ultimately unwise to think of the

\textsuperscript{34} U.S. Const. art. VII.

\textsuperscript{35} Alexander Hamilton, Federalist No. 1.
American Constitution primarily in Burkean terms. Those issues will surely arise once the document has received an initial interpretation that is subsequently regarded as erroneous. Now the question is whether to respect the precedent or depart from it. But this issue only arises after the initial decisions are made, as they must be, exclusively on textual, structural and purposive grounds. And in dealing with those questions, the American judges could not rely on the older conceptions of judicial duty to see them through.

The American Constitution was a bold experiment in conscious statecraft. Most critically, it was not democratic with a small “d,” for it did not embrace either universal suffrage or rule by simple electoral majorities. Rather, it was written in reaction to the perceived abuses of power under the English system and, in part, to overcome the shortcomings of the Articles of Confederation. But there is no question that this particular most illustrative example of central judicial planning contained its fair share of constitutional whoppers. Thus the original design called for the formation of an electoral college who would deliberate in the choice of the next American president. Deliberation quickly died in favor of a strict numerical counting. The oversight on political parties led to a decision to have the vice president be the runner-up in some general election. That died as well, with the adoption in 1804 of the Twelfth Amendment.

Most critically, for the subsequent case law, the Constitution left the creation of inferior federal courts to the wisdom of Congress, which generated all sorts of unanticipated complexities for judicial review under a federalist system, with which the English judges had no experience. That problem was fixed, after a fashion, by the creation of inferior federal courts in the Judiciary Act of 1789. But it is useful to see how some of the ambiguities played out on matters of first procedure and then substance in the new Constitution. These built-in ambiguities, as applied to judicial review, had perhaps more to do with the sovereign power than with the substantive content of the natural law. Yet by the same time, the articulation of theories of individual rights and the police power had much more to do with the first three dimensions of the normative accounts of natural law—reason, custom and human
evolution. It is useful to discuss each of these points in a briefly, but hopefully instructive fashion.

**Structures and Sovereignty**

*Procedural Natural Justice*

The fundamental question of sovereignty in the natural law tradition is whether any rule that violates the precepts of natural law should be regarded as void once it receives specific statutory endorsement. In the English context, this traditional concern with “natural justice” evolved in ways that covered key procedural as well as substantive issues, more specifically in connection with the rule against bias and the rule guaranteeing the right to be heard. There are copious references to Coke and even Hobbes. The early origin of the rules is evident in the constant use of the Latin versions of the two fundamental maxims of civil procedure, without any direct attribution to Roman texts, which generally did not dwell on matters of evidence or procedure. Suffice it to say that there is no point in time where either of these two principles have ever been denied.

More concretely, the first principle is nemo judex in causa sua, or no one shall be a judge in his own cause. The second principle is audi alteram partem, or hear the other side. These eventually are brought into English law through the proposition that no person should forfeit life, liberty or property, save by


38 For the English law treatment, see Wade & Forsyth, *Administrative Law* XXX (Oxford 2004). But it is equally important to stress that this principle is engrained in the most elementary and accessible sources. See e.g. the entry on audi alteram partem on Duhaime.org, [http://duhaime.org/LegalDictionary/A/Audialterampartem.aspx](http://duhaime.org/LegalDictionary/A/Audialterampartem.aspx), which identifies this as a principle of natural justice.
procedures in accordance with the law of the land. That phrase from the Magna Carta was no simple positivist proposition that any practice, however shoddy, that was in place often enough became per force the law of the land. It was a set of rules on bias and rights to be heard that had to be respected even by governments that wanted to short-circuit the system.

It was these procedural issues that gave rise to early natural law challenges to sovereign power. The famous decision in Dr. Bonham’s Case did not deal with the efforts of English courts to redesign the corridors of political powers. Its area of concern was the rules of conduct that governed the disposition of individual cases. On that point, its modest conclusion was that Dr. Bonham could not be subject to fines by individuals who stood to gain from their imposition. The explosive word used in the decision was that such an act of Parliament was “void,” which carried with it the inescapable conclusion that a common law court could overturn an act of Parliament. The more modest way to read the decision was to hold that Parliament could not tell courts how cases should be decided, even if they could control all matters of legislative policy.

Ultimately, Dr. Bonham’s Case did not survive within the English tradition, under either view. Blackstone’s rejection of this attack on Parliamentary supremacy was enough to doom it. But it surely lived on in the American tradition, both in ordinary litigation and in constitutional principles.

39 Magna Carta, XXIX (“No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”).

40 “And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void;…”

41 1 William Blackstone, Commentaries on the Law of England, 91 (1765), holding that there was “no power” under English Law “with authority to control [an
On the first, Hamburger’s instructive account of the *Ten Pound Cases* from New Hampshire shows how lower court judges acted to protect their own jurisdiction when the state legislature refused to allow the question of whether a debtor was entitled to a release from debtor’s prison to be decided without a trial by jury. Under the narrower reading of the *Ten Pound case*, all courts (both state and federal) need act only in a defensive posture. The legislature cannot tell them to try the cases that are before them. That set of impulses is now embodied in the Due Process Clause of the Fifth Amendment. If Congress had not created the lower federal courts, it seems clear that the Due Process Clause of the Fifth Amendment would have to apply to state court proceedings, at least with respect to cases that in some way involved the federal government or federal statutes. Whether it would apply to state court decisions brought in state court is somewhat less clear, but at least this point is true. The Clause itself does not mention either the United States or the states, so it seems likely that its protections had to apply to at least those state court proceedings that involved claims under federal statutes, for otherwise the Constitutional guarantees would have turned into a dead letter. In similar fashion, the Due Process Clause has to apply to all state causes of action brought in federal court in diversity cases. Federalism necessarily places additional strain on the doctrine. Yet once again the role of Due Process is defensive. It allows courts to control activities within their jurisdiction, without giving courts any power to control the independent activities of either the executive or the Congress at the federal level, or the governors or the legislatures at the state level.

By the time these issues reach the United States, they play out in all relevant dimensions. The interlocking questions involved the vexed relationships between federal and state courts, the relevant spheres of influence between the political and

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42 Hamburger at 422-435.
judicial branches, and of course the underlying question of the scope of natural rights, which from time to time gets submerged in the institutional issues, all complicate the doctrine. It is useful to review some of the surprises that occurred in the ratification of the Constitution, a period that Hamburger does not address.

Sovereign Immunity

The interaction of dual sovereigns within a federal system first arose in the 1793 decision of Chisholm v. Georgia, which originated in a simple action of assumpsit brought in federal court by a citizen of South Carolina to collect from Georgia a specific sum of money, probably money payable on a Georgia bond. If the suit had been brought within state court, the doctrine of sovereign immunity would have blocked the cause of action. In good positivist tradition, no one could bring an action against the state, which is the source of all rights. The twist in Chisholm, however, was that the suit was brought in federal court, whose own operations did derive from Georgia's sovereign powers, as did its own state courts. So the justices decided that the defense of sovereign immunity could not be imposed. That was a major departure from the well established background principle of sovereign immunity, which was acknowledged, for example, by Alexander Hamilton in the Federalist Papers: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." No one thought that the shift from a unitary to a dual system of courts could have such profound effects on the outcome.

The aftermath of Chisholm was of course the passage of the Eleventh Amendment, adopted in 1798, which sought to return the law to the status quo ante when it provided: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."


In line with the natural law tradition, the Amendment did not seek to make new law. It sought only to make sure that the old law was “construed” correctly, so that it corrected Chisholm, or treated that case as though it had come out the other way. But the drafting was not quite right. On the one hand it treated sovereign immunity a question about the scope of the judicial power in federal courts, which decidedly it was not. What really mattered was the consent of the sovereign, which, if granted, would surely justify the exercise of federal jurisdiction over the states under Article III. Next it only talked about suits by “citizens of other states” which if read in isolation could mean that citizens of the same state could sue under Chisholm, which was a suit brought by a Georgia citizen against Georgia. Interestingly, that inference would still be mistaken because it assumes that the Eleventh Amendment is the source of sovereign immunity for the states. The dual tort system creates funny strains that ripple throughout the entire legal system—conceptions that the English treatment of sovereign immunity in a unitary system cannot resolve.

Judicial Review

The earlier cases that spoke on the scope of judicial review, such as the Ten Pound Case tell us a great deal about the internal ambiguity in that the epic 1803 decision in Marbury v. Madison. The question before the Court was whether it could exercise original (i.e. not appellate) jurisdiction when William Marbury claimed that he was entitled to his commission granted by the outgoing President John Adams, whose own Secretary of State, John Marshall, was unable to hand over to him in time. James Madison, Jefferson's Secretary of State, refused to issue the commission. For these purposes, the key question was not whether Chief Justice Marshall was correct in his reading of the Judiciary Act of 1789 (as modified in 1801), or even if he was correct in his view that the Congress could not expand the Court's original jurisdiction. Rather, it was the simple point that his successful

45 For extensive discussion, see Hans v. Louisiana, 134 U.S. 1 (1890).

46 5 U.S. 137 (1803).
initiation of judicial review was consistent with the earlier, defensive, conception identified by Hamburger, insofar as it held that the Court could not be forced by statute to take cases that it could not entertain under the applicable constitutional text. At this point, the case looks like a continuation of the Hamburger’s tradition of judicial duty.

As has been often remarked, once Marshall rejected the Marbury’s position (thus giving the political victory to the Jeffersonians), there was nothing left to be done in the case. On its facts the case does nothing to resolve the tension between the modest, i.e. defensive, version of judicial review and the more aggressive position of judicial supremacy, under which the Supreme Court could force the Congress and the President to obey its commands. There is only Marshall’s famous assertion that muddies, perhaps consciously, the institutional waters: ”The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”47

The power asserted seems to go beyond the Court’s defensive power to refuse to hear cases that fell outside its jurisdiction. In its application, the decision surely followed the hierarchy of authority—by which constitutions take precedence over statutes) that is so central to Hamburger’s book. The genius of Marbury was that, by indirection, it established a foothold for judicial review that neither the Congress nor the President could contest because they were not subject to any direct judicial order. Indeed it was only in Cooper v. Aaron, a 1955 decision that arose out of the federal efforts to integrate the Arkansas schools, that judicial supremacy over the other two branches of government was unambiguously established.48 It is one of those neat quirks of history that the older battle of judicial review received its first serious hearing in a case that has nothing whatsoever to do with the usual procedural requirements of a natural law system. Federalism can

47 Id. at 163.
48 358 U.S. 1 (1958)
easily divert attention from matters of individual rights to paramount issues of institutional order.

The second early decision on the scope of judicial power is likewise an artifact of federalism, but in its treatment of the priority of grants to property, it too sheds some light on the influence of natural law thinking at the Founding. In *Martin v. Hunter's Lessee*, the question put to Justice Story was whether Section 25 of the Judiciary Act of 1789 allowed the United States Supreme Court to exercise appellate review over state court cases in which the state court judges rejected a constitutional claim raised under the federal Constitution. The stakes could not be higher, for if there were no federal review on this matter, the interpretation of the federal Constitution could easily spin off into multiple directions—defined arbitrarily by warring state court decisions, and leaving everyone unable to discern a consistent reading of constitutional commands that affected them all equally. And the process could continue indefinitely because many of these cases might not get to the Supreme Court at all. Indeed, even if they did, it was far from clear that its determinations would be binding on state court judges who had equal dignity within the federal system.

Without question, the holding of the case is momentous: “the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.” Yet serious textual and interpretive difficulties stand in the way of these functional arguments for the consolidation of power in the United States Supreme Court. It was, to be sure, far from clear that judicial review as understood in 1787 allowed any court to invalidate any statute on any ground. In addition, the role of states in the overall task of ongoing constitutional interpretation was quite extensive, in light of the distinct possibility that no lower federal court system need be created at all. So the assumption of centralized federal

49 14 U.S. 304 (1816).
50 Id. at 342.
power is inconsistent with many features of the Constitution that look like they were intended to leave substantial controls within the power of the states.

That impression is actually reinforced when both parts of the Supremacy Clause are read in tandem with each other. As set out in full, that clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.51

The first part of this clause points strongly in the direction of federal dominance by stressing the strict hierarchy of laws in a manner congenial with Hamburger’s hierarchical sense of judicial duty. The lowest federal pronouncement exceeds the highest state one. But by the same token it does not state that the federal courts should have the last say on this matter. Rather, in a manner that tends to evoke images of judicial review, it points to the key role of state judges in passing on the constitutionality of individual laws. Thus the explicit only institutional safeguard that the Supremacy Clause sets out is that “the judges in every state shall be bound thereby,” because in the ordinary course of business, it is just those judges who will be routinely charged with the task of interpretation, especially if no inferior federal courts are created.

And the location of such power in state courts is consistent with system of checks and balances under federalism. Why not let the states determine the scope of federal power so that they may can protect their own states against undue aggrandizement, an issue that loomed larger then than it does now? And it is consistent with two other features of the federal judicial power that are is easy to forget. The first is that Congress can make whatever exceptions it chooses to the appellate jurisdiction of the Supreme Court, as an effective check on its power.52 The second is that the review of decisions adverse to federal constitutional claims in state courts is not listed among the types of cases that can come to the Supreme Court in Article III, section 2. Neither of these provisions looks as though they were

51 U.S. Const. art. 6, cl. 2.
52 U.S. Const. art. III, § 2, cl. 2.
drafted with an eye to creating judicial supremacy over either federal or state
decisions on anything.

As a matter of institutional design, there is a lot to the criticism that the
drafters of the Constitution created structures that were sure to fail. But it is
interesting to note the implicit natural law foundations that seem to deal with this
issue. They really thought (perhaps) that state court judges would appeal to the
timeless principles of natural law to resolve these cases, and thus would exercise the
appropriate level of judicial modesty and precision so that their decisions would in
time converge on the right answers. If law is found, not made (as current
proponents of the “living constitution” would attest), the conception of final and
authoritative state interpretations looks a bit more coherent. After all, many
common law doctrines of tort and contract were uniform across states at this time,
in large measure because common law judges did hold common views of major
questions.

In the end, this original version of the Supremacy Clause collapsed because a
uniformity of opinion could not be expected of state judges on novel matters of great
import. The constitutional stakes were so high that the decentralized system
envisioned by the Framers would have splintered into a thousand pieces, which of
course occurred even before the Civil War. Story’s view of the matter was that
decentralized adjudication cannot work well in a unitary system. At that level of
institutional judgment, he is surely correct. In litigation inconsistent outcomes
across competitions do not have the nice positive effects of economic competition
between jurisdictions. It is fine for private parties to prefer one set of courts to
another. It is not so good for multiple judges to create inconsistent interpretations
of a common document that governs them all. So if the Supreme Court Justice
cannot undo federalist system, he (or she) can nonetheless create by adroit
constitutional interpretation a unitary system of adjudication in which the Supreme
Court holds the whip hand, which is just what happened Martin v. Hunter’s Lessee.

Substantive Constitutional Questions.

The Ninth Amendment

In addition to these distinctive procedural questions, many hard substantive
questions arose about at the substantive commands of natural law. The first sign of the carryover lies of course lies in the Ninth Amendment, which has been subject to an extensive, if unsatisfactory, interpretation: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Clearly the section makes a reference to some rights that exist prior to and independent of the Constitution or the Bill of Rights. And the ambiguous use of the passive voice again leaves open the question of whether these rights are binding against the United States or the states. Finally, is there no content to these rights, either standing alone, or in connection with the rights that are delineated either in the original Constitution or in the Bill of Rights itself. As a legal matter, it is easy to read this as an empty vessel into which an ambitious court could find all sorts of rights that are retained by the people. It is for that reason that for the longest period of time, that the Ninth Amendment provoked little or no judicial analysis.

Yet some points can be mentioned. On balance, the Ninth Amendment employs the term “retained,” hearkening back to Lockean social contract theory, which speaks of rights retained by the people even after they have surrendered part of their property to the state in order to make more secure the liberty and property that they retain. But this plausible reading is not necessarily decisive, and a modern court could insist that the "retained" rights cover all positive rights from a house, to a job, to health care. So judicial quiescence has been the dominant theme, except in odd cases like Griswold v. Connecticut,\(^{53}\) where the creation of rights of marital privacy would have proved difficult to square with the traditional police powers, which gave the state extensive powers of regulation over these personal matters.\(^{54}\)

So the question thus arises, why draft an amendment with this loose content in the first place? The best answer for this appears to be that the framers intended the Amendment to be applied in a universe that did not accept judicial supremacy over legislative or executive action. Rather, in the tradition of the 1688 English Bill of Rights, this injunction was put in the Constitution as a kind of caution that a respectful Congress would heed in fashioning particular pieces of legislation.

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\(^{53}\) 381 U.S. 479 (1965).

\(^{54}\) See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986), which is a more accurate reading of the history than Justice Kennedy’s decision in Lawrence v. Texas, 539 U.S. 558 (2003), which strikes a more resonant chord with most readers.
Viewed in that context, the major ambiguities in text are far less daunting; there is no need for courts to flesh out their meaning. In addition, the use of the term “construed” hints broadly that there should be no judicial enforcement of this vision. At one level, this argument from the word “construed” proves too much because it raises fair and square the question of whether any judicial enforcement was thought to be appropriate not only for the Ninth Amendment but for the specific commands of the Bill of Rights.

The Ninth Amendment did not figure in the first major Supreme Court foray that, so to speak, did put natural law on trial. In Calder v. Bull,55 the question was whether the Connecticut legislature acted within its powers when it ordered a new trial in a will contest, a decision that necessarily required it to set aside an earlier judicial decree. The actual litigation posture was quite complex because it was not all that clear whether the Connecticut legislature functioned (on an analogy to the English House of Lords) in some judicial capacity, at which point its intervention would be a bit less controversial. At issue in that case was whether the state action, here assumed to be legislation, counted as an ex post facto law, prohibited for the states by Article I, section 10. The considered opinion of the Court was that the ex post facto clause only applied to criminal statutes that had retroactive effect, which rendered it inapplicable to the dispute at hand.56

More relevant to our concerns, Calder gave rise to a spirited debate between Justices Samuel Chase and Justice James Iredell on the status of natural law under the federal Constitution in some way that was not bound to particular clauses. The expansive vision of judicial power was championed by Justice Chase who invoked principles of “free republican governments, which meant that “[a]n act of the legislature (for I cannot call it a law) contrary to the great principles of the social compact, cannot be considered a rightful exercise of the legislative authority.”57 The parenthetical obviously hearkens back to Dr. Bonham’s Case (which was however not cited by either justice). The Iredell dissent famously invoked the proposition

55 3 U.S. 386 (1798).
56 For a convenient summary of the evidence, see Currie, supra note ____ at 41-45
57 Calder v. Bull, 3 U.S. 386, 388 (1798)
that the Court was engaged in a fool’s errand because there was “no fixed standard” by which to evaluate claims of natural law.\(^{58}\) He feared the danger of a judicial free-for-all if that principle were invoked at all.

Yet, if this brief account of natural law has shown anything, the principles were more taut than Iredell supposed. If in fact the decision in Connecticut had been final and binding, it is surely a violation of natural law to violate the principle of res judicata, since it would undermine the rule of law if done routinely. And Justice Chase surely tread on dangerous ground when he gave as his two illustrations of a violation of natural law “a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B.”\(^{59}\) The first of these violates the Due Process Clause and the second the Takings Clause, so that natural law is only an issue because it was not apparent that either of the two clauses in the Fifth Amendment bound the states as well as the federal government—which ultimately they were held not to do.\(^{60}\) The hard question on federalism grounds was whether the Supreme Court could interfere with key state practices without some explicit textual authority, which once again shows the close linkage between federalism questions of dual sovereignty and Hamburger’s conception of natural law.

The tension between natural law and sovereign power also came to a concrete boil in *Johnson v. M’Intosh*\(^{61}\) which called into question one of the most venerable of the natural law maxims, the rule that prior in time is higher in right, (prior in tempus is potior in iure), so that first in time is necessarily highest in right. Thus at root in *Johnson* was the question of whether a prior title derived from an conveyance Piankeshaw Indians could take precedence over a later grant from the United States. As a matter of common law, the answer to that question is that the Indian title prevails, but not in the United States court, which gave the claimant from the United States the decisive home court advantage. There can be little clearer

\(^{58}\) Id. at 399.

\(^{59}\) Id. at 388.

\(^{60}\) See *Barron v. Baltimore*, 32 U.S. 243 (1833)

\(^{61}\) 21 U.S. 543 (1823).
evidence that the same tension between natural right and sovereign that is found in Justinian's Institute works today. And it is not because the principle of substantive law that was invoked was subject to any real substantive doubt within the natural law tradition.

The tension is of course even deeper than this. The question arises whether the defense of sovereign immunity could apply with equal force in cases where the United States chooses to condemn property without compensation in the teeth of the Fifth Amendment's Takings Clause, "nor shall private property be taken for public use, without just compensation."62 At this point, the application of sovereign immunity renders one of the great protections of the Constitution a dead letter, so that the difference is split. Sovereign immunity remains for government torts that cause damage,63 but for government occupations on a permanent basis. So a sonic boom gives no compensation,64 but flooding the land for a reservoir generates a judicially cognizable claim for compensation.65 Inelegant yes. But if the contract claims in Chisholm are blocked by sovereign immunity, it becomes odd (but not impossible) to give a different rendition to tort claims. These could be distinguished (at least in stranger cases) from the contract cases, where parties are able to steer clear of the government or obtain some security interest that is not caught by sovereign immunity. The job here, however, is not to resolve the dilemma. It is just to show the lineal descent from the same issues that appeared in cryptic but unmistakable form in Justinian.

There were, however, other instances, in which the incremental method of the earlier judges did make it into constitutional interpretation. There is no question that one of the great heads of constitutional jurisprudence asks quite generally whether or not a state is acting within the scope of its admitted "police power." That term first enters federal constitutional discourse in Brown v.

62 U.S. CONST. amend. V.
63 See, e.g., Keokuk & Hamilton Bridge Co. v. United States, 260 U.S. 125 (1922).
65 Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).
Maryland, where the precise question was whether a Maryland tax of $50 on each importer should be regarded as a tax on imports, falling under the constitutional text that prohibits the states "to lay any imposts or duties on imports or exports." Chief Justice Marshall saw this tax as an indirect attack on the open market, and thus announced the famous rule that the tax was improper so long as the item was in its "original form or package."67

Not surprisingly, Marshall also had nagging doubts about whether this limitation would impose excessive controls over the states, and thus invoked the notion of the police power to account in part for those powers that survive in the states after the adoption of the Constitution. "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States."68 The question of the interaction between the state police power open borders still remains in connection with the dormant commerce power.69 But it is of equal importance in dealing with all matters of individual rights. The traditional legal sources, of which the Lex Aquila—the key text on the Roman law of tort—is surely one, stated their substantive provisions in broad terms, and then explicated the basic text. The key point is that no protection of liberty or property, the central constitutional values, can be made absolute. Yet there is nothing in the Constitution (just as there was nothing in the Lex Aquilia) that hinted which limitations on these individual rights were permissible and which were not. By necessity, the incremental style of argument that Hamburger champions is the major technique by which various police power justifications are accepted or rejected.

The control of gunpowder was both then and now an easy case, which explains why health and safety top the list of legitimate police power justifications. It does not so clearly explain how either "morals" or "general welfare" get added to the canonical list of the four heads under the police power. Nor does it indicate how

66 25 U.S. 419 (1827).
67 Id. at 437.
68 Id at 442.
we deal with mixed cases, such as purported safety regulations that come with anticompetitive implications. All of those tasks lay in the future, and the earlier precedents provide far less guidance on those matters than might be hoped, especially with the major innovations (think rate regulation, workers compensation, maximum hours law) that lay in the future. It is for good reason that most of the late nineteenth and early twentieth century treatises were organized around the police power even though these words appear nowhere in the Constitution.70

In the end, as I have argued elsewhere,71 the only coherent account of the police power is one that tracks the standard catalogue of classical liberal justifications for regulation—the control of force (including nuisances), fraud, and monopoly, and the protection of vulnerable classes such as infants and the insane.72 Statutes that are intended to block competition and new entry are not included under the police power. Explicating those categories was the major task of the last half of the nineteenth century, and the model therein developed was effectively rejected by the far more expansive accounts of the police power that came to dominate in the twentieth century.73 Yet ironically, closer attention to Hamburger’s incremental style of thought would, I have long urged, produce a better balance between individual rights and state powers of regulation. No matter how one thinks about the issue, it is clear that no form of close textualism can answer questions about the scope and limits of the police power, standing alone, or in relationship to the police power.

**Conclusion**


72 Id. at 107-125.

Philip Hamburger took his history of the principles of judicial duty up to the time of the adoption of the United States Constitution, but no further. In so doing, he gives us powerful evidence about the force behind the natural law movement and the powerful tensions that stand in the path of its uniform application. It is not possible to understand ongoing debates after the adoption of the Constitution, without reference to the earlier materials that form the core of Hamburger's book.

Yet at the same time, these natural law principles did not resolve all, or even most of the debates that arose once the Constitution was up and running. The explanation for that is not because these principles had somehow outlived their usefulness. Quite the opposite, as I have tried to show, the strong consequentialist explanations that can be offered for the central principles offer powerful confirmation of their intellectual coherence and practical viability. But context matters, and the two decisive shifts in American constitutionalism taken together raised challenges that the judges of earlier generations could not foresee.

A written constitution leaves much less to the imagination than an unwritten one, which is free to evolve in more or less Burkean fashion. And our written Constitution in particular was not a document that sought to establish—in line with conventional social contract theory—a compact between the individual and the state. Rather it sought to create a compact between states and the federal government, which respected not only the relative powers of the two respective sovereigns, but also the rights of ordinary individuals against, albeit in differing degrees, both federal and state government. That enterprise was one of incredible daring. The issues that were raised, and the cases that were decided could not help but deviate from a prior path in some cases, even if they did not do so in others. Hamburger's *Law and Judicial Duty* helps get us to the pearly gates, but in and of itself it cannot secure us entry into the kingdom of heaven.