Constitutional Law (Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet, Pamela S. Karlan eds., Aspen Publishers, 6th ed. 2009) ---- (These introductory materials try to "bridge the gap" between what you have learned in Constitutional I about individual rights and how they related to the Fourteenth Amendment.)

A REVIEW OF THE INCORPORATION CONTROVERSY AND THE DEBATE OVER SUBSTANTIVE DUE PROCESS

Long before the Civil War produced the Fourteenth Amendment, Americans began to talk about "rights." When the American colonists finally decided to declare their independence from Great Britain, they assigned a young man from Virginia to write up a declaratory document that would "make the case" for the Americans in declaring their independence. Although most of his Declaration consisted of a list of grievances against the King of England, seeking to demonstrate that the King was not meeting his obligation to give the colonists the protection of the laws of England–especially its fundamental law–Thomas Jefferson summed up the political philosophy underlying the colonists' declaration in the following language:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the Pursuit of Happiness–That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the people to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence, par. 2.

What is the relationship between this statement in the Declaration of Independence and the system of "rights" guaranteed by the federal Constitution? Which idea is more central to the Constitution–the notion that people are "endowed," by their Creator, with "certain unalienable Rights," or the concept that government's "just Powers" are derived from "the Consent of the Governed"? Do you perceive any tension between these two classic American ideas?

I. Structure and "Rights"--It is interesting that your casebook authors observe that one prominent modern idea is that historically "the concept of 'higher law,' protecting 'natural rights,' and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt." This idea comes from Thomas C. Grey's, *Do We Have an Unwritten Constitution*?, 27 Stan. L. Rev. 703, 715-716 (1975), **Casebook at p. 715.** ***See*** Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987). Professor Grey concludes that just as "it came to be accepted that the judiciary had the power to enforce the commands of the written Constitution when these conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well." (*Id*.) A number of modern scholars thus conclude that constitutional text should be construed in favor of the best moral arguments as to rights—some even arguing for the use of unwritten natural rights.

What many would find most surprising is how close we came to adopting a federal Constitution that included virtually no provisions drafted as "constitutional guarantees of individual rights." The Constitution that was proposed for ratification in 1787 did not include a Bill of Rights, and this became perhaps the strongest political source of objection. But notice that in The Federalist, James Madison "posed the question: 'Is a Bill of Rights essential to liberty?' He answered that the 'Confederation has no Bill of Rights.' The basic idea was the simple one that if you have granted limited powers, you have accomplished the same thing as if you had included a bill of rights." Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 Wake Forest L. Rev. 101, 105 (2001) [hereinafter *Inalienable Rights*], *citing* The Federalist No. 38 (James Madison), *reprinted in* The Federalist Papers: Alexander Hamilton, James Madison, and John Jay 182, 187 (Garry Wills ed., 1982). Those who drafted, and advocated ratification of, the federal Constitution, believed that a grant of limited, enumerated powers "raised an inference against government power and in favor of liberty." *Id.*

(1) Why did the Constitution's framers think that its enumerated powers scheme raised an inference against power and in favor of liberty? *(2) Most educated modern Americans–including law students–associate the system of enumerated powers not with individual rights, but with federalism, the division of power between the nation and the states: what does assuring a federal government of limited powers have to do with securing rights?*

As to (1) above, according to James Wilson–who was a member of the committee that drafted the final constitution, and who has been characterized (accurately, I think) as the second most influential member of the constitutional convention in Philadelphia (after only James Madison)–whereas under the state constitutions "everything which is not reserved is given," under the proposed federal Constitution "the reverse of the proposition prevails, and everything which is not given, is reserved." (*Id.* at 106, *quoting* James Wilson's Speech in the State House Yard (Oct. 6, 1787, *in* 2 The Documentary History of the Ratification of the Constitution 388 (Merrill Jensen ed., 1976) [hereinafter cited as Documentary History, p. 3] .)

Thus Nathaniel Gorham of Massachusetts explained that "a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had unlimited powers." (*Id.*, *citing* 1 Documentary History, *supra* p. 3, at 335 (Sept. 27, 1787).) Gorham's statement was consistent with the understanding of those who had drafted the state constitutions between 1776 and 1787. Those who drafted the earliest state constitutions "assumed that government had all power except for specific prohibitions contained in a bill of rights." Donald S. Lutz, Popular Consent and Popular Control 60 (1980). Well into the Nineteenth Century "the states were thought to be sovereign and could only be restrained by express constitutional provisions." David E. Bernstain, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 Geo. L.J. 1, 32 (2003). *These state governments, then, were thought to be governments of "general"–sometimes even called "plenary"--legislative powers. Under a system of "general legislative powers," how would you go about securing "rights"? Could your approach be different under a government of "enumerated legislative powers"? If you held the political theory that legislatures like the states "hold all power except for the specific prohibitions contained in a bill of rights," what would be the logical legal conclusion if someone asserted that the "general legislature" had enacted a law that invaded someone's inalienable natural right? In that setting, would someone's assertion of a right—and the argument that it had been violated by an act of legislation--be a moral claim rather than an arguably valid legal claim?*

As to the second question raised at p. 2 above--*what does assuring a federal government of limited powers have to do with securing rights?* – it is important to realize that near the end of the Philadelphia Convention, a member proposed appointing a committee to draft a bill of rights. One of the representatives from Connecticut, Roger Sherman, used a single example of a provision proposed for a bill of rights–freedom of the press. He contended that such a proposal was simply

"unnecessary" because "[t]he power of Congress does not extend to the Press." 2 James Madison, Debates in the Federal Convention of 1787, at 565 (G. Hunt & J. Scott eds. 1987). If one examines art. I, section 8, the section that contains the powers granted to Congress, Sherman is definitely right that the Constitution does not grant a power to regulate the press. If the federal government was to be a government of "general legislative powers," as we learned above, the power of Congress to regulate the press would have been presumed–inasmuch as the power to legislate would include the authority to regulate anything the legislature deemed to be in the general public interest. *What text in the Constitution assures that this was <u>not</u> to be a government of "general legislative powers"?* **[See U.S. Const. art. I, Section 1.** ("All legislative Powers **herein granted** shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives"); **art. I, Section 8, clauses 1 & 18** ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence . . . . ; To make all Laws **which shall be necessary and proper for carrying into Execution the foregoing Powers**, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.")**]** Notice that an implication of article I is that the only powers given to Congress are those "herein granted."

In the Articles of Confederation there was a provision (later quoted by Justice Marshall in *McCulloch v. Maryland*) that stated the principle of "reserved power." Article II provided that each state "retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States." 1 Documentary History, *supra* p. 3, at 86. *If you were an opponent to the ratification of the Constitution–they were called Anti-Federalists–why would you think it significant that the proposed Constitution did not include Article II or its equivalent? Is there a provision in the Constitution now that is the rough equivalent of Article II of the Articles of Confederation?*

II. Inalienable Rights: is there an Inalienable Rights Clause in the Constitution?

Many modern Americans would also be surprised to learn that the state constitution declarations of rights were often stated in hortatory terms, or as general statements of principle, which reflected the lack of an intention that they be legally enforceable. For example, in the 1776 the Virginia Bill of Rights, adopted in June of 1776 (just prior to the Declaration of Independence), it provided:

Section 1. That all man are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and obtaining happiness and safety.

Sec. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Sec. 3. That government is, *or ought to be*, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against that danger of maladministration; and that, when the government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Sec. 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

Sec. 5 That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

Sec. 6 . . . .

Sec. 7 That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

Sec. 8 . . .

Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Sec. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly

> described and supported by evidence, are grevious and oppressive, and ought not be be granted.
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> Sec. 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.
>
> Sec. 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic government.
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> Sec.'s 13-16 omitted.

7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America, Va. Const., Bill of Rights at 3813-14 (Francis N. Thorpe ed. 1909) [hereinafter cited as State Constitutions].

This is why, in debating whether the proposed Constitution should be ratified, Alexander Hamilton referred to "those aphorisms" in the state constitutions' bills of rights that "would sound much better in a treatise of ethics than in a constitution of government." Alexander Hamilton, The Federalist No. 84, at 578-79 (Jacob Cooke ed., 1961). A modern authority on state constitutional law describes constitutional provisions, such as the "inherent rights" provision in section 1, in the following language:

> [T]he insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people's representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power.

G. Alan Tarr, Understanding State Constitutions 77-78 (1998).

The result was that Jefferson's language from the Declaration of Independence showed up in the state constitutions–there most definitely were Inalienable Rights Clauses–but in provisions that almost certainly had a different purpose than analogous provisions would have today. The Virginia provision, Section 1, for example, read:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and

> liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

7 State Constitutions, *supra* p. 5, Va. Const., Bill of Rights § 1, at 3813. Section 1's reference to "inherent rights" almost certainly referred to the same sorts of rights that Jefferson called "inalienable" in the Declaration of Independence. This did mean that, in moral theory, they could not legitimately be transferred, or "given up." The big question is whether this quality automatically made them legally enforceable.

Even rights deemed to be "inalienable" (non-transferable) were conceived by most thoughtful Americans to be "qualifiable" in the public interest, and many Americans believed that the best way to secure these rights was by means of popular control of government.

> While some formulations of the concept of inalienable rights suggested that they were entirely beyond the control of the community, the more standard view was that even the inalienable rights were subject to regulation for the general good of the community, so that they were qualified (rather than absolute) rights, even though not subject to alienation. Thoughtful Americans would largely have concurred in Blackstone's view that civil liberty "is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick." [William Blackstone, 1 Commentaries on the Laws of England 121 (Chi. 1979 reprint of 1765-69 ed.]
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> When individual liberty is thus linked to, and limited by, the good of society as a whole, it becomes clear how the framers of these constitutions reconciled natural rights with the doctrine of popular sovereignty. As the "supreme authority and ultimate judicature," [Gordon Wood, The Creation of the American Republic 1776-1787, at 382 (1969)] the people would be the best judges of the public good by which the natural rights would be qualified. . . .
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> While the qualified nature of the individual rights guarantees was often presumed, various provisions of the founding era conveyed the idea by express language. Most often, however, the qualified nature of the individual rights enumerated in the state declarations of rights is suggested by the drafters' reliance on language of obligation and of statement of principle–language that itself suggests something other than a hard legal rule–rather than the language of direct command and prohibition.
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> The declarations' individual rights provisions were framed in terms of "ought" or "ought not" rather than "shall" or "shall not," or occasionally as statements of political ideals. These formulations were clearly not inadvertant. As Palmer points out, the declarations were drafted by sophisticated draftsmen, and the

> frames of government consistently used the language of direct command and prohibition. This wording very probably reflects in part the idea of restating the fundamental principles, which inherently bind government, as opposed to promulgating new sovereign commands. In a sense, this language conveys their greater importance; but in another sense, it also reflects the recognition of the drafters that such principles are to be honored rather than enforced. The language of the declarations conveys the idea that the enumerated liberties were "serious principles by which government was to abide," [Robert C. Palmer, *Liberties as Constitutional Provisions*, 1776-1791, in Constitution and Rights in the Early American Republic 65, 75 (1987)] but were nevertheless subject in general to qualification as essential for the public good.

Thomas B. McAffee, Inherent Rights, the Written Constitution, and Popular Sovereignty 23-24 (2000) [hereinafter cited as Inherent Rights] .

There is one other reason that the key to understanding the state constitution declarations of rights is arguably not the doctrine of inalienable rights. That is that, in the minds of members of the founding generation, the "inalienable right" that was most crucial was the right of "the people," as a collective whole, to make decisions about how they were to be governed. Section 3 of the Virginia Bill of Rights provides:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

7 State Constitutions, Va. Const., Bill of Rights § 3, at 3813.

Consider the implications of § 3 as you read about a speech that James Wilson gave at the Pennsylvania Ratifying Convention:

> At the Pennsylvania Ratifying Convention, Wilson began a speech in defense of the Constitution by focusing on the Preamble's declaration that the Constitution was established by "We, the People of the United States." Wilson continued: "What is the necessary consequence? Those who ordain and establish have the power, if they think proper, to repeal and annul." According to Wilson, this power to reject as well as to ordain was implicit in the people's sovereignty understood in the classic sense: "In all governments, whatever is their form, however they may be constituted, there must be a power established from which

> there is no appeal and which is therefore called absolute, supreme, and uncontrollable." Whereas in Great Britain this power resided in Parliament, Wilson contended that in the United States it resided in the people.

McAffee, Inherent Rights, *supra* p. 4, at 126, *citing* 2 The Documentary History *supra* p. 3, at 383, 348, 361-62.

A question: in light of what you have just read, when the federal Constitution's Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," do you think it was referring to ***(1) unspecified limits on granted government power in favor of unnamed rights–rights to be "discovered" and "applied" by constitutional interpreters?*** *Or was it referring to* ***(2) the reservation (or retaining) of all not granted by the enumerated powers scheme–by analogy to Article II of the Articles of Confederation?*** [Recall that Article II provided that each state "retains every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States." 1 Documentary History, *supra* p. 3, at 86.]

Advocates of **position (1),** conceive of the Ninth Amendment as being, in effect, the federal Constitution's Inalienable Rights Clause – analogous to Virginia's "inherent rights" clause, but legally enforceable. On this view, when it says that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," the "others" is a way to refer to additional, unnamed rights. "Justice Goldberg found, based on 'the language and history of the Ninth Amendment,' that 'the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965). And, after all, if it is appropriate to conceive of the people as having "retained" some additional rights, beyond those *enumerated* "in the Constitution," why not the rights that, according to social contract political theory, are those that the people may not morally and legitimately "give up" (or "alienate"–hence are "unalienable")? For strong advocacy on behalf just this sort of view of the Ninth Amendment, you could look at Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004); Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed (1997) (title inspired by Lincoln's statement in the Gettysburg Address); Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights (1995).

This is not the time nor place to attempt to do complete justice to the arguments that can be made on behalf of **position (1), p. 9.** Article II of the Articles of Confederation–the provision that stated that each state "retains every Power, Jurisdiction and right, which is not . . . delegated to the United States–contains two concepts that reappear in the Ninth Amendment. States are said to "retain" every "right" not delegated to the United States. *Can you think of any reason why Article II of the Articles of Confederation refers to each "state" retaining every power, jurisdiction, and right not expressly granted, while our Tenth Amendment says that "[t]he powers not delegated . . . are reserved to the states respectively, or to the people"?* [Think in terms of a new emphasis on popular sovereignty at a national level – it is "We the People" who establish the Constitution, who therefore "delegate" and "reserve."]

In support of this more restricted interpretation, see Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S.I.U. L.J. 267 (1992). For published works that support position (1): Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 Temple L. Rev. 61 (1996); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907 (1993); Leslie Friedman Goldstein, In Defense of the Text: Democracy and Constitutional Theory (1991); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215 (1990).

Supporters of the Supreme Court perceiving itself as authorized to impose natural rights as an inherent limit on government power often presume that under such an approach we would be governed by natural law and natural rights. In turn, natural law/natural rights advocates are inclined to see advocates of positivist theories of law as contending for the view that "might makes right." (If I've got the power to "make the law," even if it's so-called fundamental law, then that should automatically mean that I have the power to enforce the law as written–even if it's an "unjust" law.) But the question is not whether someone can "impose" an "unjust law," but whether there are good reasons to feel confident that courts – or any official "interpreter" – are most likely to have the capacity to determine what laws are "just:"

> [I]t is too easy to forget that establishing natural law-based adjudication, which permits judges to invoke moral values to override acts of government, does not establish natural law as our fundamental law. After all, the decisions will still be made by fallible humans. If judicial decisions are binding and final, and hence become the law within our constitutional order–which is the conventional view and the one natural law constitutionalists typically suppose–then it is the judges' determination of the meaning and application of natural law that will actually take

> effect as law rather than the natural law itself. As Professor Soper observes, in these circumstances "the system remains positivist in the most significant sense, with the judges simply serving as the sovereign in place of the legislature." [Philip Soper, *Some Natural Confusions About Natural Law*, 90 Mich. L. Rev. 2393, 2413 (1992).] This is why natural law theory can never be a complete legal or constitutional theory.

Thomas B. McAffee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. Cal. Interdisc. J. 501, 515 (1995).

THE PRIVILEGES OR IMMUNIITES CLAUSE AND THE INCORPORATION CONTROVERSY, pp. 724-741

Many modern Americans simply do not know that through the majority of American history the basic rights found in the federal Bill of Rights limited *only* the actions taken by the national government. This was itself a litigated issue, but fairly early in the nation's history, in **Barron v. Mayor and City of Baltimore, 7 Pet. (32 U.S.) 243 (1833), p. 734,** perhaps the most nationalistic judge to ever sit on the Supreme Court, Chief Justice Marshall, ruled that the Bill of Rights did not limit the powers of the states. Even though *Barron* was somewhat controversial – because many wanted the same limitations (or rights) to apply as limits on state governments as well – it was almost certainly correctly decided. (More on that below). Perhaps those who lived in states with less attractive or meaningful state constitutional Declarations of Rights were especially anxious to contend that some of the *federal* rights could also serve to limit state power. For an excellent review, summary, and defense of the Court's holding in *Barron*, see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 140-45(1998). Amar observes that critics of the decision came to be known as "Barron Contrarians," because they were so insistent that it was wrongly decided.

If you turn to the Bill of Rights – it's at pp. li-liii, at the front of your casebook – you may notice that the First Amendment begins with the word "Congress," and goes on to state the laws that Congress is not empowered to enact. Its clauses protect freedom of religion, freedom of speech and press, and the right to assemble and petition government. If the First Amendment were all we had to go on, there would not be any doubt about the application of its provisions as limits on state government – clearly, they would have no application to limiting the states. Notice, however, that amendments two through eight are not similarly restricted to stating limitations on the powers of Congress, or even the national government. This was the consequence of a change proposed by Roger Sherman in the first Congress – the one that sent the proposed amendments to the states for

their ratification. As initially drafted and submitted by Representative James Madison, most of the proposed amendments were to be added to article I, Section 9. Please turn to pp. xlvi-xlvii of the casebook.

There is a good reason for Madison's decision. Article I, Section 9 of the Constitution stated the small handful of limits on the powers of Congress in the original Constitution, including the Bill of Attainder Clause (that prohibited legislative criminal trials) and the Ex Post Facto Law Clause (that prohibited criminalizing behavior retroactively). Madison also proposed that a particular amendment be inserted in article I, section 10, between clauses 1 and 2: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Cf.* the First Amendment on free religion and press, and the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . "). Madison's proposed amendment to supply limits on state power was not adopted by Congress. *Does the decision of Congress to vote down Madison's proposed limits on state power – that was to be added to article I, section 10–suggest whether the Supreme Court correctly decided Barrown v. Baltimore?*

Consider this defense of *Barron*:

Marshall looked to the balance of the text of the Constitution and found that the division of federal and state limitations in Article I, Sections 9 and 10 reflected that the framers carefully separated limitations imposed on state government from those imposed on the newly-created national government. Marshall concluded that the framers of the Bill of Rights would have followed this pattern and stated limits on state power expressly and in separate provisions. Even in the setting of this "whole text" argument from the internal context of the Constitution, however, Justice Marshall turned back to the general historical background. To Marshall the historical background made it clear that had "[C]ongress engaged in the extraordinary occupation of improving the constitutions of the states, . . . they would have declared this purpose in plain and intelligible language."

Reviewing the history of the ratification of the Constitution, including the demand in various state conventions for a bill of rights to secure the people's rights against potential encroachments by the general government, Marshall concluded that there was no contextual basis for finding that the amendments were in any way aimed at controlling the local governments of the states. It is widely agreed that "[i]n terms of the original understanding, *Barron* was almost certainly correctly decided." As a nationalist, however, Justice Marshall could undoubtedly have seized upon the apparent ambiguity created by the omission of a clear referent from the Fifth Amendment text to expand the power of the federal government to offer added protections to individuals against state oppression. By itself, the text would not have prevented it. . . .

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. . . . Marshall's treatment led him to the fairly compelling conclusion that Article I, Sections 9 and 10 provided a pattern that would have been followed had the framers intended these provisions to apply to the states. By contrast, William Crosskey contended that the substance of the amendments, speaking to things which were deemed "inherently evil," belied an attribution to the framers of an intent "to create sole and exclusive.state powers to do the things forbidden." To Crosskey it was not central that the pervasive clamor for a bill of rights was stated in terms of the fears relating to the extent of the powers granted to the government created by the Constitution, or that the demand for a bill of rights was frequently couched in terms of the need to provide security for the rights of the people *and the states*. [*E.g.,* 2 The Documentary History, *supra* p. 3, at 210, 211 (complaining that "the liberties of the states and the people are not secured by a bill or *Declaration of Rights*").] It hardly mattered that the Federalists defended the omission of a bill of rights by the argument that the Constitution granted only limited power to affect the basic interests of the people and thus secured their rights as a reservation from the powers granted the new government. The crucial thing was the "plain text" of the amendments.

Turning to the legislative history, Crosskey might have found powerful confirming evidence of Justice Marshall's general contextual analysis. Thus, Madison's original resolution for a bill of rights, which he proposed to insert into relevant sections of the Constitution, called for virtually all of the provisions now found in the first nine amendments to be included in Article I, Section 9, as limitations against the national government. Virtually all of these amendments had been proposed by various state ratifying conventions and were, in turn, drawn from leading state declarations of rights. In addition, Madison made his own original contribution by proposing to insert into Article I, Section 10, prohibitions on state violations of "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." . . . . .

In his speech, Madison forthrightly explained that he desired to "extend" the protection offered to some crucial rights by providing for their protection even as against state governments, arguing that "it is proper that every government should be disarmed of powers which trench upon those particular rights." It is quite clear historically that Madison held a special concern about the potential for abuses against individual and minority rights by majoritarian state legislatures; and he was forthcoming here that these proposals grew out of his own concerns, for which he argued, rather than from the history leading to the balance of the proposed amendments. It is equally clear that these proposals were as controversial as they were novel. On August 17, 1789, Thomas Tudor Tucker moved to strike them because they were "an interference with the Constitution of the several States," adding that many thought the states were interfered with too much already. Although his motion was rejected, the Senate refused to agree to what had become, ironically, the fourteenth proposed amendment, and Madison's attempt to add the limits imposed on the states failed. [Crosskey even acknowledges that "*if* the amendments had been made as Madison proposed them, the Supreme Court's decision in Barron v. Baltimore would have been correct." Crosskey at 1067.]

Keeping the plain meaning of the text at the forefront, what was significant to Professor Crosskey was not that Madison followed precisely the pattern of Article I, Sections 9 and 10 in

setting forth generally worded limitations on the national government and specific limitations on the states, but that these provisions were eventually placed at the end of the Constitution and the specific limitations on the states eliminated. Nor was it significant that there is no evidence that the decision to move the amendments to the end of the document was viewed by any one as having any substantive significance as to the meaning or purpose of any of the specific provisions. Finally, for Crosskey the Senate's rejection of the few proposed restrictions on the states that Madison ventured to offer is significant only because that decision destroyed "the sole surviving basis in the amendments, as they then existed, for inferring an intended application of their various literally general prohibitions, to the nation only." In short, rather than following the natural inferences suggested by the relevant texts and their drafting history, we are to presume that members of the first Congress paid scrupulous attention to the nuances of textual change and would have scurried to avoid the implications of the plain meaning rule had they so intended.

For those with minds disposed to read constitutional text in a relevant context, including the evidence from legislative history that sheds a confirming light, the interpretation found in *Barron v. Mayor of Baltimore* appears to be virtually indisputable. And if the interpreter is left with any doubts after reading Justice Marshall's persuasive explication of the Bill of Rights in its historical setting, the legislative history provides overwhelming evidence that his approach was well-founded. Only a mind organized like Crosskey's, wielding a textual presumption that blinds one to powerful cues supplied by the historical context, could find the extrinsic evidence insufficient to resolve the contextual ambiguity presented by the wording of the Bill of Rights. [As Henry Hart once observed in another connection, "Professor Crosskey is a devotee of that technique of interpretation which reaches its apogee of persuasiveness in the triumphant question, 'If that's what they meant, why didn't they say so?'" Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 Harv. L. Rev. 1456, 1462 (1954) (book review).] To adopt a favorite quotation from Justice Oliver Wendell Holmes, Jr., Crosskey is thus like the proverbial court that said to the legislature: "We see what you are driving at, but you have not said it [sufficiently clearly to overcome what we take to be the plain meaning], and therefore we shall go on as before." Modern constitutional textualists who reject the obligation to read the text according to its meaning in its original context wind up saying much the same thing.

Thomas B. McAffee, *Reed Dickerson's Originalism–What it Contributes to Contemporary Constitutional Debate*, 16 S. Ill. L.J. 617, 635-37, 651-58 (1992).

Questions Raised by Barron.

1. Are we bound by original meaning? As we have noted, *Barron* was a controversial decision even in the Nineteenth century. *Why might perspectives about the applicability of the Bill of Rights to the states have varied from 1789 to 1833? Does Justice Marshall seem like a justice who would be unsympathetic to a claim of federal power? Whatever the original intentions, would a Court be justified in construing the Constitution to expand the power of the federal government to offer added protections to individuals against potential state oppression?*

2. Plain Meaning? For the argument that a "plain meaning" reading is required and shows that *Barron* was incorrectly decided, see William W. Crosskey, Politics and the Constitution in the History of the United States 1049-82 (1953). For a critique of this view, see McAffee, *Reed Dickerson's Originalism, supra* p. 12, at 651-657(excerpted above). My own view is that the historically intended meaning of the Bill of Rights was that it would serve to limit only the powers of the national government. *See* Douglas W. Kmiec & Stephen B. Presser, The American Constitutional Order: History, Cases, and Philosophy 725 (1998) (finding "little doubt" that "the Court is correct on this point, as a glance at any of the better histories of the period will confirm").

The Incorporation Controversy

To understand and appreciate the *Slaughter-House Cases*, it is useful to have some notion of the content of the so-called "black codes" that generated the Civil Rights Act of 1866, and eventually the Fourteenth Amendment. I once had a colleague, Professor Patrick J. Kelley, who drafted a handout to underscore the connection between these highly discriminatory black codes and the Fourteenth Amendment:

The Black Codes, Civil Rights Act of 1866, and the Fourteenth Amendment

> On September 22, 1862, Lincoln announced his intention to free the slaves in all states or parts of states that were in rebellion against the United States as of January 1, 1863. True to his warning, President Lincoln issued the final Emancipation Proclamation on January 1, 1863. That Proclomation listed those states and parts of states then in rebellion, and declared that:
>
> > ". . . by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion . . . and as a fit and necessary war measure for suppressing said rebellion . . . [I] do order and declare that all persons held as slaves within said designated states and parts of states are, and henceforward shall be, free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons."

On February 1, 1865, while the Civil War was still raging, Congress passed the Thirteenth Amendment and sent it to the States for ratification. That amendment reads as follows:

> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.
> Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

The Thirteenth Amendment was thereafter ratified and declared to be part of the Constitution on December 18, 1865.

In the meantime, Lee surrendered to Grant at Appomattox on April 9, 1865; President Lincoln was shot at Ford's Theatre on April 14, 1865, and Andrew Johnson, the former democrat from Tennessee, became President of the United States. At the time the war ended, there were an estimated four million black slaves in the rebel states. Under Johnson's reconstruction program, newly-reconstituted legislatures in the rebel states soon turned their attention to legislation defining the legal status of these freed slaves. These "Black Codes" were passed late in 1865 and early in 1866. The Black Codes in general are summarized as follows by Richard Bardolph in his book: The Civil Rights Record: Black Americans and the Law, 1849-1870 36-37 (Tomas Y. Crowell Co., 1970, reprinted by permission):

> ". . . [t]he codes did concede to the blacks some rights and privileges which they had hitherto not possessed. Marriages were at least legalized, and the ex-slaves could now normally testify in court, and sue and be sued. But by far the greater bulk of the legislation was restrictive and strongly reminiscent of the old pre-war slave codes. Marriages of apprentices required the 'master's' (the terminology is significant) approval; marriage between blacks and whites was absolutely forbidden; and some of the codes forbade Negroes to 'intrude upon' meetings, including religious gatherings, of whites, or upon coaches and carriages reserved for whites. Masters were authorized to punish their laborers and apprentices with the lash for misconduct, indolence, or insolence. Some codes specifically provided that penal sections of the pre-war slave codes were now re-enacted. Most prescribed severer punishments for blacks than for whites for the same offenses, and offenses by blacks against whites were considered far graver than the same injury committed by whites against blacks.
>
> Dependent Negro children were forced by the codes into compulsory apprenticeships, often until they reached the age of twenty-one. Labor contracts were stringently defined by law, and some states went so far as to ordain that the working day was to begin at dawn and end at a specified hour in the evening. Negroes leaving their employment were subject to severe punishment as 'deserters,' and whites who sought to entice a 'servant' into leaving his employment were also liable to heavy fines or imprisonment. In no case were blacks to be permitted to receive instruction in the same schools with whites. They were all but totally excluded from any employment except that of farm laborers and household menials, and servants were forbidden to leave their

masters' premises without written permission, to possess liquor or firearms, and, in some states, to own land or live in cities.

They were required by law to furnish proof of steady employment in the form of a legally executed contract or be subject to arrest as vagrants. Even those who were employed could, if caught idling in the streets, be apprehended–and subjected to a heavy fine, which, of course, they had no means to pay. They could then be bound over a white person, normally the highest bidder (preference to be given to the blacks' former owners) who might come forward to pay the court for the right to bind them to service."

These Black Codes infuriated both the moderate and the radical Republicans in the North, for the codes seemed to indicate an intention to reduce the former slaves to a legal status scarcely better than slavery. Congress, convening in January of 1866, quickly passed a Civil Rights Bill to strike down these codes. The first and most important section of that Bill reads as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The Bill passed the Senate on February 2, 1866 and the House on March 13, 1866. President Johnson vetoed the Bill on March 27, 1866, arguing among other things that Congress lacked constitutional authority to enact such a law. Two-thirds majorities in both the Senate and the House overrode Johnson's veto, and the Bill became law on April 9, 1866.

Many congressional supporters of the Civil Rights Act of 1866 were troubled by the lack of constitutional authorization for the Act. Therefore on June 16, 1866, Congress passed the Fourteenth Amendment. Section 1 of the Fourteenth Amendment was clearly intended, at the very least, to place the protection in Section 1 of the Civil Rights Act of 1866 in the Constitution. It reads as follows:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or 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.

For a useful overview of the history leading to the Privileges or Immunities Clause, and its relationship to the 1866 Civil Rights Act, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

Congressman John Bingham of Ohio drafted the language that became the Fourteenth Amendment. In an early version, his draft read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (art. 4, sec. 2), and to all persons in the several states equal protection in the rights of life, liberty, and property (5^{th} amendment).

When Senator Howard of Michigan presented the final draft of the Fourteenth Amendment to the Senate, he stated that, among other things, the privileges or immunities clause in the proposed amendment incorporated "the personal rights guaranteed and secured by the first eight amendments of the Constitution." Cong. Globe at 2765.

Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873), p. 721

Since section 1 prohibits a state from making or enforcing "any law which shall abridge the privileges or immunities of citizens of *the United States,*" the Court concluded that it is clear that the privileges or immunities clause was limited to securing rights that owed their existence to *national* citizenship. The Court then said that the Privileges or Immunities Clause thus guarantees the right to travel that the Court had inferred in *Crandall v. Nevada*, the right to have access to seaports, the right to protection on the high seas or within the jurisdiction of a foreign government, and the right "to peaceably assemble and petition for redress of grievances," and so forth.

But Justice Miller's "reliance on the first sentence of section 1 is rebutted by the legislative history: The clause was added to the amendment during floor debate and did not influence its drafting at all. *See* Raoul Berger, Government by Judiciary 434 (1977)." Thomas B. McAffee, *Constitutional Interpretation–The Uses and Limitations of Original Intent*, 12 U. Dayton L. Rev. 275, 285 n. 67

(1986). Moreover, given that Bingham "purposely drafted the privileges or immunities clause to link it to article IV," *id.* at 285, and that an article IV case, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), "was relied on in defense of the Civil Rights Act and the fourteenth amendment," *id.*, the evidence is all but overwhelming that the Privileges or Immunities Clause "was probably the clause from which the framers of the Fourteenth Amendment expected most." John Hart Ely, Democracy and Distrust 22 (1980).

At the center of all of this is a commitment to a fairly traditional outlook about the nature of our federal system:

> [Thus,] up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection. [Was] it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? . . . . [W]as it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

Yet it is clear that Congressman Bingham associated the two guarantees, inasmuch as he referred explicitly to art. IV in his original draft. It is important to realize that Justice Miller may have had difficulty understanding what Congressman Bingham and others were trying to do because he was so deeply committed to an "orthodox" understanding of article IV. The provision in article IV, sometimes referred to as the Comity Clause, was designed to assure that the states showed proper respect for the rights and privileges of citizens in other states. If I lived in Southern Illinois, and owned property in St. Louis Missouri, the provision would guarantee to me that I would not have my property taxed at a different rate than a citizen of Missouri *merely because I was a citizen of Illinois.* Notice, though, that article IV (1) does not say that Missouri can't (a) limit property ownership to U.S. citizens; (b) require you to be an adult to own property in Missouri; (c) discriminate as to the property rights of married women; or (2) close its courts altogether to property rights claims, so long as it doesn't close its courts' doors only to citizens of Illinois simply to foreclose Illinois claims.

Be aware, however, that 1866 Republicans defended the Civil Rights Act by advocating a somewhat unorthodox reading of article IV. Just as United States citizenship served to protect non-residents even under the orthodox reading of article IV, so the citizenship of emancipated slaves was viewed as providing a bulwark against the wholesale discrimination reflected in the Black Codes. Republicans admitted that the States generally could define the privileges and

immunities to be enjoyed by their citizens, but they also contended that Article IV prohibited the States from treating one class of citizens–namely, the newly-freed blacks–as though they were not citizens at all.

Be aware that, in pre-1866 terms, the republican argument to support the Civil Rights Act was based on dubious constitutional theory that was probably rooted in anti-slavery constitutional thought. Citizenship protected outsiders under the Comity Clause to preserve the nation as a single economic unit and to prevent economic warfare between the States. Instead, whatever rights "you grant or establish. . . to your own citizens," would, in the Court's own words, become "the measure of the rights of citizens of other States within your jurisdiction." (727) The Court insisted that if the provision were read as transferring "the security and protection of all the civil rights which we have mentioned," to the federal government–the implication would be a general power in Congress to regulate in a plenary way all the rights and obligations held by all citizens.

Another possibility, though: when section 1 is limited to forbidding any state from enacting legislation "which shall <u>abridge</u> the privileges or immunities of citizens of the United States," it may not be transferring plenary control over these rights to Congress–Congress still perhaps may not enact general legislation prescribing when people can marry or when they can divorce, or adopt a child, etc., because such general legislation is still left to the states--but Congress may prohibit states from "discriminating against" an entire class of citizens (such as the freedmen) as to their basic rights. On this interpretation, to "abridge" is to "discriminate against."

As *Barron v. Baltimore* indicated, the assumption was that states would adequately protect the rights of their own citizens. You need to be aware, however, that the Republicans' arguments for the Civil Rights Act of 1866 reflected dissatisfaction with that original view. Proponents of the unorthodox theory, moreover, never attempted to explain how they would draw the line between prohibited treatment of a group as "non-citizens" and the myriad of distinctions which all laws draw between various classes of citizens in allocating burdens and benefits in a complex society.

One reason we have to believe that the real source of the prohibition on laws that discriminated against the freedmen was the "Privileges or Immunities Clause" is Section 2 of the Fourteenth Amendment–which rather clearly seems to permit states constitutionally to deny "the right to vote" to "male inhabitants of such state" over twenty-one years old–and it even makes allowance for cases in which that

right is "in any way abridged." This was a compromise provision in that it reduces apportionment in Congress to states that deny the right to vote to African Americans as a gesture to those who wanted to constitutionally guarantee the right to vote. During the debates over the 1866 Civil Rights Act, republican supporters of the law were insistent that it would only affect "civil rights" and would have no impact at all on "political" rights, like the right to vote. The way that reassurance found its way into the text of the Fourteenth Amendment is with the phrase "Privileges or Immunities," which refers to the pre-political rights (to sign contracts, to own property) that people bring with them to the social contract; this also reflected that basically all citizens had these basic civil rights, while the right to vote and the right to serve on juries or in militias, were often limited, for example to just men, or, in some settings, to property owners.

This remains true even though these republicans consistently acknowledged that States have broad regulatory powers called the police powers. Republican proponents of the Fourteenth Amendment and Civil Rights Bill may have been thinking centrally of cases such as the use of racial discrimination as a justification for imposing burdens in which it is arguably fairly clear-cut how to divide the line between acceptable and unacceptable grounds for drawing legislative distinctions.

Notice how eloquently Justice Field articulates this unorthodox understanding of "privileges or immunities." (pp. 728-29) This raises the question whether the Court saw too much potential mischief that could result from reading the provision as requiring that laws not *unfairly* or *unreasonably* discriminate as to basic rights. Did the Court choose its reading to avoid what it took to be unseemly results?

Notes & Questions

1. ***The Meaning of the 14th Amendment.*** I confess to buying into the view that in *Slaughter-House* the Supreme Court "effectively banished from the Constitution" the Privileges or Immunities Clause. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1414 (1992). *Accord,* Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 n. 327 (2000) (concluding that Court "basically read the [Privileges or Immunities Clause]–the central clause of Section 1!–out of the Amendment"; concluding that "no serious modern scholar–left, right, or center–thinks this a plausible reading of the Amendment"); Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 89 (1997) (describing the majority opinion as "one of the

most outrageous actions of our Supreme Court"). For my own attempt to defend the view that the case just got it wrong, see McAffee, *Constitutional Interpretation*, *supra* p. 18, 12 U. Dayton L. Rev. 275 (1986).

2. Privileges and immunities of national citizenship. Although the Court was not being asked in *Slaughter-House Cases* to address the issue of "incorporation" of the Bill of Rights, I confess that I buy the theory that the opinion in *Slaughter-House* cases was deliberately written to construe the Privileges or Immunities Clause in a restricted and narrow way. Justice Miller's focus on legal rights uniquely secured for national citizens was designed to shift the amendment's center to the equal protection and due process clauses.

3. The Citizenship Clause. The notion that the first sentence of section 1 could have played a far more constructive role is defended in Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution (1989). My own view is that equal citizenship is indeed what the Fourteenth Amendment is about, but the Privileges or Immunities Clause was designed to secure equal citizenship by prohibiting the making or enforcing any law that "abridged" the privileges or immunities of citizens.

I have been persuaded that the framers of the Fourteenth Amendment did intend to protect all the Privileges or Immunities of American citizenship, including the individual rights guarantees of the federal Bill of Rights. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 181-231 (1998). *See* pp. 483-84 n. 4. It may even be that the attempt to prevent "discrimination against" classes of citizens means, as a practical matter, that state laws must honor federal rights guarantees–including provisions of the federal Bill of Rights–or be seen as "abridg[ing]" Privileges or Immunities of citizenship. We have wound up with a process of "selective" incorporation, that has been justified as an application of the Due Process Clause.

IV. Fundamental Rights Analysis

Substantive Due Process: Rise, Decline, Revival.

Notice that in the Field dissent in *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873), at pp. 728-29, he specifically linked the Privileges or Immunities of citizenship with "the natural and inalienable rights which belong to all citizens." Eventually, again under the rubric of the Due Process Clause, the Court came to recognize the idea that certain rights are so "fundamental" that they should be

secured. Notwithstanding the emphasis there has been historically on the concept of a written Constitution, the origins of modern fundamental rights doctrine, and the emergence of substantive due process, seems to be a product of "unwritten constitutionalism." As early as 1798, five years before *Marbury* was even decided, Justice Chase suggested that courts could "invalidate legislation "although its authority should not be expressly restrained by the Constitution." (Casebook, p. 74.)

> Justice Chase asserted:
> The people of the United States erected their constitutions or forms of government , to establish justice, to promote the general welfare, to secure the blessings of libertyand to protedt their persons and proeprty from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.

There is little question that Justice Chase's comments are, at most, dictum in favor of reading the Constitution as lending itself to natural rights-based adjudication. He specifically stated that the "sole inquiry was whether the action of the Connecticut legislature offended the *ex post facto* clause of the Federal Constitution,"[1] and his analysis concluded that the clause had no application to non-criminal, civil legislation.[2] Indeed, Justice Chase even acknowledged that state legislatures "retain all the powers of legislation, delegated to them by the state constitutions; which are not expressly taken away by the constitution of the United States."[3]

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[1]*Calder*, 3 U.S. (3 Dall.) at 386, 387.

[2]*See* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, 42-44 (1985). Although there has been controversy as to whether the prohibition of ex post facto laws should have been read to include retroactive civil as well as criminal laws, *id.* at 43-44, Corwin, Twilight, *supra* note 35, at 57, Chase contended that his narrower construction "was confirmed by other clauses of the Constitution, for if the term 'ex post facto' had included retroactive *civil* laws, it would have been unnecessary to forbid the states to impair contracts or the United States to take property without compensation." Currie, *supra*, at 42-43.

[3]3 U.S. (3 Dall.) at 399. Professor Currie characterizes this statement as "paraphrasing the tenth amendment." Currie, *supra* note 62, at 46. For Chase, though, a judge "must interpret the 'vital principles in our free republican government,' whether they are to be found in the words of the Constitution or not," and thus the document itself "is to be read not as words but as a sufficient foundation for this form of politics." William F. Harris II, The Interpretable Constitution 136-37 (1992). *See also* Grey, *Original Understanding*, *supra* note 17, at 148 (despite acknowledging

Nonetheless, despite acknowledging that state legislatures retain all "powers of legislation," it is clear that his approach to understanding what this means and implies was not "document-centered."[4] Indeed, Justice Chase "expressed his willingness in a proper case to prevent a legislature from intruding upon private contract or property rights, even if not 'expressly restrained by the Constitution.'"[5] So Chase winds up at nearly the opposite position from the then-standard view of the authority held by a legislature of general powers--the one formulated in a separate opinion written by Justice Iredell.

It is clear that Justice Iredell found the opinion setting forth the views of Justice Chase to be extremely troubling. Objecting to the views of "some speculative jurists" that the Court could invalidate a law "merely because it is, in their judgment, contrary to the principles of natural justice,"[6] Iredell still acknowledged that "[i]f any act of congress, or the legislature of a state, violates . . . constitutional provisions, it is unquestionably void."[7] Considering that "[t]he ideas of natural justice are regulated by no fixed standard," courts relying on such

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conventional understandings, Chase apparently concluded that "this plenary legislative power was not so plenary after all").

[4]W. Harris II, *supra* note 63, at 136 (concluding that for Justice Chase, "the power of an institution may be constrained, in the absence of express boundaries designated from within the document, on the basis of the constitution-maker['s]" purposes in creating the institution of the legislature).

[5]Laurence H. Tribe, 1 American Constitutional Law 1336-37 (2000), *quoting* Calder v. Bull, 3 U.S. (3 Dall.) 386, 386 (1798) (Chase, J., seriatim opinion). For Chase, in other words, it was clear that "the judiciary had at its disposal a supplemental unwritten constitution which would catch the cases of flagrant injustice that fell through the gaps of the written one." Grey, *Original Understanding*, *supra* note 17, at 147. *Accord,* Edward Keynes, Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process 21 (1996).

[6]*Id.* at 398-99. For the view that Iredell contradicted not only the predominant view of the period, but also stated a view in conflict with his own previously articulated views, see Stephen B. Presser, *Book Review*, 14 Const. Comment. 229, 233 (1997), *citing to*, Scott Douglas Gerber, To Secure These Rights: The Declaration of Independence and Constitutional Interpretation 111-12, 118-19 (1995). *But see* Thomas B. McAffee, *Does the Federal Constitution Incorporate the Declaration of Independence*?, 1 Nev. L.J. 138, 142 n.17 (2001) (defending view that Iredell maintained a generally consistent view of judicial power); *supra* notes 43-46 (citing works showing Iredell maintained a basic consistency on the scope of judicial power).

[7]Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.)

principles would be, in effect, asserting the right to strike down laws with which they disagreed.[8] The American response to the problem of potentially oppressive legislation was "to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries."[9] To posit a judicial power to invalidate laws on grounds of policy, which Iredell read Chase's opinion as confirming, was "not only undemocratic and contrary to the English legal tradition we had inherited; it was fundamentally inconsistent with the concept of a written constitution."[10]

The *Calder* case has been influential.[11] In 1828, the highest court in Maryland invalidated statutes, adopted in 1807 and 1812, seeking to abolish the institution of the regents of the University of Maryland.[12] Although the court relied centrally on the federal Constitution's contract impairment clause[13], it also boldly asserted:

> Independent of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least) the character and genius of our government, the causes from which they spring, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its

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[8]*Id* at 399.

[9]*Id.* at 398-99.

[10]Currie, *supra* note 62, at 47. *See also* Keynes, *supra* note 65, at 21 n. 89 ("In a remarkably contemporary criticism, Iredell stressed the abstract and subjective qualities of the concept").

[11]*See, e.g.*, Harrison, *supra* note 72, at 506 (observing that "[e]very nineteenth century lawyer's favorite example of an unconstitutional statute–albeit one that was thought unconstitutional for various different reasons–involved a law that, in Justice Miller's formulation in Davidson v. New Orleans, 96 U.S. 97 (1878), 'declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be in and is hereby vested in B. . . .'"); John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 Const. Comm. 337, 339 (1997) ("From its original use to encapsulate what was wrong with legislative interference with individual titles, the phrase 'taking from A and giving to B' became in the heyday of *laissez-faire* a powerful linguistic weapon against regulatory legislation").

[12]Regents of the Univ. of Md. v. Williams, 9 G.&J. 365, 31 Am. Dec. 72 (1838).

[13]U.S. Const. art. I, sect. 10 ("no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts"). *See* Williams, 9 G.&J. at 16.

> rightful authority. It is that principle which protects life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power.[14]

In reading a just compensation requirement into state constitutional law in 1851, the highest court of Georgia clarified that the legislative power "is limited expressly by the State Constitution, and necessarily, by the Federal Constitution," as well as "by certain great fundamental principles not embodied in either."[15] Otherwise, "there is no limitation but the opinion of the Legislature, as to what may be necessary and proper for the good of the State."[16] This all flows from a recognition of how central the right of private property truly has been in American society; after all, the "right of accumulating, holding and transmitting property, lies at the foundation of civil liberty."[17]

Over time, however, clear and explicit reliance on unwritten constitutionalism became more and more controversial. In 1851, in *Griffith v. The Commissioners of Crawford County*,[18] Chief Justice Hitchcock, of the Ohio Supreme Court, clarified in dissent that he was "not the advocate of legislative supremacy," but "would have every act tested by the constitution," and, if found to be in conflict, declared "void."[19] The majority of the court, relying on unwritten principles of law, had held that the legislature lacked constitutional power to authorize counties to vote in favor of a subscription of railroad stock. Justice Hitchcock responded:

> It is said that these laws are "void, for the reasons that they are in violation of the general, great and essential principles of liberty and free government, recognized and forever unalterably established by the bill of rights." It is said: "To determine the extent of the legislative authority, under our constitution, we are *not confined to the letter of the constitution*, but may properly look to its declared principles and objects; and a statute violating these, is as clearly void

[14]Williams, 9 G.&J. at 28.

[15]Parham v. Justice of the Inferior Ct. of Decatur County, 9 Ga. 341, 8 (1851).

[16]*Id.*

[17]*Id.*

[18]20 Ohio 609, 623 (1851) (Hitchcock, C.J., dissenting).

[19]*Id.*

> as one violating the letter of the constitution." This is not in accordance with the rule heretofore prescribed by the Courts of the country for their action, in deciding questions of constitutional law, although it may be in accordance with the dogmas of some modern theorists, who seem to have little regard for written constitutions, except as the same may comport with their ideas of right and justice.[20]

In 1874, just one year after reaching the justly-controversial conclusions adopted in *The Slaughter-House Cases*,[21] the Supreme Court employed reasoning analogous to *Calder* in justifying its decision imposing limits on the power of the city of Topeka, Kansas to tax.[22] The Court reasoned:

> 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 respected by all governments entitled to the name.[23]

With this as its starting point, the Court concluded that it held power to second guess Topeka as to whether it held a sufficient "public purpose" to justify its tax, or had, instead, imposed a tax that worked mainly to benefit private parties.[24]

Justice Clifford, dissenting, contended that the Court was exercising a dangerous power:

> State constitutions may undoubtedly restrict the power of the legislature to pass laws, and it is plain that any law passed in violation of such a prohibition is void, but the better opinion is that where the constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except

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[20] *Id.* at 13.

[21] 16 Wall. (83 U.S.) 36 (1873).

[22] Loan Ass'n v. Topeka, 87 U.S. 655 (1874).

[23] *Id.* at 663.

[24] *Id.* at 663-66.

> where the Constitution has imposed limits upon the legislative power the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in a particular case, for the reason that courts are not the guardians of the rights of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance.[25]

By the end of the century, the Supreme Court followed state courts that were "motivated by the same natural-rights jurisprudence that had driven the *Slaughterhouse* dissents."[26] In *Godcharles v. Wigeman*[27], the Supreme Court of Pennsylvania invalidated a statute that required manufacturing and mining corporations to pay their workers in cash rather than company-store orders. The court's opinion did not even cite a provision of the state's constitution, but simply concluded that the law was "utterly unconstitutional and void," given that the legislature had attempted to do "what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts."[28] The "worker may sell his labor for what he thinks best, whether money or goods," the opinion declared, "just as his employer may sell his iron or coal, and any or every law the proposes to prevent him from so doing is an infringement on his constitutional privileges."[29] The conclusion was so obvious to the court that it did not consider it essential to even consider why the state legislature might have thought it necessary to enact such a statute.[30]

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[25]*Id.* at 668 (Clifford, J., dissenting).

[26]Arthur F. McEvoy, *Freedom of Contract, Labor, and the Administrative State, in* The State and Freedom of Contract, 198, 212 (Harry N. Scheiber ed. 1998) [hereinafter cited as Freedom of Contract].

[27]6 A. Rep. 354, 113 Pa. 431, 437 (1886).

[28]6 A. Rep. at 356; 113 Pa. at 437. For a useful treatment of the case, see Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* Freedom of Contract, *supra* note 98, at 161, 166-67.

[29]6 A. Rep. at 356.

[30]McCurdy, *supra* note 101, at 166.

Nathan N. Frost, Rachel Beth Klein-Levine, and Thomas B. McAffee, *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 Utah L. Rev. 333, 346-354.

The debate over judicial enforcement of unenumerated fundamental rights continues to this day. A favorite accusation from almost every wing of the Court is to charge one's opponent with "Lochnerizing." Ironically, though, everyone seems to mean something different by this accusation. For some, it refers to "inventing new rights," such as "liberty of contract," that are found nowhere in the text of the Constitution. For some others, what was so wrong with *Lochner* was that it worked so as to help people who already had money and power. If the judge is helping out those who lack money and power–who represent a "discrete and insular" minority in our society, for example–then finding a right for which there is little support historically, is not a problem.

As to the text itself, Professor Grey has suggested an historical justification for looking beyond the text–it requires one to accept the reading of the Ninth Amendment that sees it as an unenumerated fundamental rights provision. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975). Others insist that if a given text will lend itself to enforcing a given set of fundamental rights, it really does not matter that, as a historical matter, this was not its originally intended meaning. And, of course, a number of proponents of what is sometimes called "originalism," are insistent that they be shown that those who

framed relevant language had specifically contemplated the case before the Court, and intended that it be applied in the way advocated by litigants seeking to expand constitutional rights. The only problem is that this form of "originalism" can too readily become a form of strict constructionism. One of our tasks even in making sense out of the Equal Protection Clause will be to confront the difficulties of determining what is required by a provision of fundamental law that appears to require equal citizenship without in any way defining what that means.

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