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THE SUPREME COURT AND THE NATURAL LAW
DAVID C. BAYNE, S.J.

In this day when the natural law is so much talked of and so often endorsed and yet so rarely understood, every reader is searching vainly for its true essence and nature. Yet if the natural law has any weakness, and it has, that weakness is that everything about it cannot be said all at once. It is a philosophy of life, of law, of conduct and of living, not a phrase, nor a simple theory, nor a theorem that can be pulled out and applied to a problem for an automatic solution.

As with the natural law itself, this essay cannot say everything at once. But that does not mean that it should not say something. In the light of all these difficulties with the natural law, however, there is one thing that should be made clear from the outset: what this essay is not trying to say, or do. By doing this, the reader will not turn away, again dissatisfied with the natural law, having come seeking, and departed untaught.

This essay will not: (1) Lay the philosophical foundations of the natural law, will not elucidate the fundamental Thomistic and Suarezian concepts of the natural law. They should be studied, but not here. Such a study is nothing other than a compendium of philosophy, an ordered study of metaphysics, epistemology, psychology especially, natural theology and above all ethics, all rolled into one treatise and denominated "natural law." (2) Make the natural law live for the reader by applying it detail-by-detail to a given moral or legal problem, beginning from the facts and tracing the reasoning through from the most ultimate principles of the natural law, on down through the more proximate, to the final solution. That is also for a separate article, and a valuable one. (3) Analyze the natural law philosophy of the Supreme Court, case-by-case, justice-by-justice, Court-by-Court.

1 Aquinas, Summa Theologica, translated by Anton C. Pegis 2, 743 (1945).
3 For an excellent short treatment, see Rommen, The Natural Law (1948).
4 For an example, see Obering, The Philosophy of Law of James Wilson.

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That is a study for the future. (4) Determine what the Court really meant (and equally important, what it should mean) when it used the words "natural law." That, too, is a necessary study, but not for here.

What then will this essay attempt? It will be a survey, of a necessity due to space a superficial one, of the tradition of natural law thinking in the history of the Supreme Court of the United States, from its earliest inception up to the present Court. What purpose will such a general survey serve? It will show that natural law reasoning, of some kind at least, has had a place in our American judicial tradition. It might, further and more important, excite some interest, and even prompt a study of the other phases of the natural law which are not going to be treated here, and yet which are so necessary in this world of ours, slipping as it is on the shifting sands of relativism, pragmatism and legal realism.

Over two decades before the beginning of the Supreme Court of the United States, in the year 1764, James Otis expressed the fact that all laws and government have "an everlasting foundation in the unchangeable will of God, the Author of nature, whose laws never vary," and that "there can be no prescriptions old enough to supersede the law of nature and the grant of Almighty God, who has given to all men a natural right to be free."3

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

In July of 1776, the thirteen United States spoke of "the laws of nature and of nature's God" in the Declaration of Independence, and went on to say:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

These words indicate the mind of our first fathers and "formulate a general political philosophy—a philosophy upon which the case of the colonies could solidly rest."7

But it is not the place here to trace the historical development of the natural law itself, nor does it devolve on this essay to consider the early American tradition of the natural law in all its broader relations to government and political science. We are concerned with the tradition of natural law principles in the judiciary of the United States.

The Age of Marshall

There is one prominent figure in these earliest days before Marshall actually ascended the bench who looms higher than the others, both as a justice and as an exponent of the natural law. He is Justice James Wilson. The work of Wilson was voluminous, exactingly accurate and very trustworthy. Perhaps not another justice in the history of the Court could be compared with him as a throughgoing, and correct, natural law philosopher. His work and his philosophy have been most comprehensively treated elsewhere. His enunciations complete the picture of the age of Marshall of which he could be called a member.

Wilson left the bench in 1798 and closed the century and the early part of the period. After Wilson, and for the next thirty-five years, the American legal scene was dominated by a trio of great American jurists, Marshall, Kent and Story. Thus, one commentator refers to

... the very important part played by the natural-law theory in the legal writings and the court decisions of the times. In the opinions of men like Marshall, Kent and Story, as well as in their formal treatises, the influence of natural-law ideas is apparent.

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

FLETCHER V. PECK (1810)

"During the 1810 term of the Court an important case was decided. In fact, it ranks as one of the foremost constitutional pronouncements

9 Wright, American Interpretations of Natural Law, 20 American Political Science Review (1926).
10 Note 4 supra.
11 "His (Wilson's) conviction that jurisprudence is a science subordinated to ethics, and that government, in the exercise of its powers, is subject to the moral law, meets us on every page of his writings, and is enshrined in the one great judicial decision connected with his name—the case of Chisholm, Executor v. Georgia (2 Dall. 419)." Note 4 supra, at 19.
13 Note 10 supra, at 535.
14 6 Cranch (U. S.) 87 (1810).
of Chief Justice Marshall.\(^\text{15}\) This case was *Fletcher v. Peck*. It was the first case involving impairment of the obligation of contracts, and had tremendous and immediate economic implications. It was regarded by some as another skirmish in the Hamilton-Jefferson struggle. The facts of the case and the numerous involved circumstances make its history fascinating. For our purposes, however, *Fletcher v. Peck* is important as a towering monument to the use of the natural law, a case which carries in its wake hundreds of other cases\(^\text{16}\) which rely on it wholly or in part for authority. The case is of special value to our study as a companion case to *Ogden v. Saunders*\(^\text{17}\) which comes at the latter end of Marshall’s life on the bench.

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

To the credit of Georgia, the populace was indignant. A new legislature went in. Action was immediate. The original grant was rescinded by a second act of the legislature. The old grant was even burned on the statehouse steps. Meanwhile, speculators were not deterred in the least. The land was passing from hand to hand. In short, the Rescinding Act of the legislature was ignored on all sides.

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

The suit was begun in the Circuit Court for the District of Massachusetts, on diversity of citizenship, in an action of covenant brought by Fletcher against Peck. It was averred that the covenant had been breached since the Rescinding Act had rendered the conveyance of Peck, as well as of Peck’s grantors, void. The Circuit Court held that

\(^{15}\) Haines, *The Role of the Supreme Court in American Government and Politics 1789–1835*, p. 309.

\(^{16}\) Some of the more outstanding and clearly traceable cases are: Satterlee *v.* Matthewson, 2 Pet. (U.S.) 378 (1819); Poindexter *v.* Greenhow, 114 U.S. 270 (1884); *Legal Tender Cases*, 12 Wall. (U.S.) 457 (1870); *Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1896).

\(^{17}\) 12 Wheat. (U.S.) 213 (1827).
the second act of the Georgia legislature had not impaired the title. The Supreme Court affirmed and made legal history.

Chief Justice Marshall wrote the majority opinion and moved immediately to the heart of the case. Even though Georgia could be considered above and beyond submission to judicial tribunals for the purpose of adjudication concerning the titles of the land passed by the first act (and Marshall did not think the state should be so considered), nevertheless there was still remaining the moral law to which it was bound to subject itself. Thus he begins:

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.\footnote{Note 14 supra, at 133.}

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

Marshall next proceeds to suppose that the matter had been brought before a court of equity (which was contrarily supposed above). What would a court have done, if without a court the unsupported precepts of justice had bound the legislature? Note well what Marshall says. This is a perfect instance of the transit, implicit and veiled as it is, from clearly natural law terminology to a terminology and phraseology that gradually becomes a part of the Court's tradition, becomes hallowed by constant usage until a sanctity grows up around a phrase which might lead one to place the reason for the sanctity and the force of its binding power in the phrase itself rather than in the natural law. So Marshall supposes that a bill had been brought to set aside the conveyance by the first act of the legislature. That court would have been bound by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable considera-
Logically enough, Marshall holds a court of equity to the same principles of justice to which he held the legislature when hypothetically it adjudged its own case outside the court.

Marshall gives us further explanation of his reasoning:

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

There is latent here a possible thrust at the "might-makes-right" philosophy. It would seem, however, that he is merely reiterating his former statement, that Georgia had taken the matter into her own hands and had really no higher approval of her action than her own word, which, in the light of the Eternal Law of God, will avail little if the act done is in fact immoral.

The final word in the case is a very fit denouement to our study since it clearly states the basis for the decision.

It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? The state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States.

We can well see from this how a later Court would be able to rely on *Fletcher v. Peck* and these words of Marshall rather than be forced to go beyond the precedents or the Constitution itself, since Marshall here put some onus for the decision on the Constitution. This latter attempt, however, appears to be "mere camouflage, designed to ... sanction constitutional principle about to be announced." Haines has said:

But it is apparent, not only from the opinion itself, but also from Marshall's political ideas and faith, that the argument predicated on general principles and on implied limitations on legislative powers was the primary and fundamental part of his opinion and that the reasoning founded on the constitutional inhibition was secondary.

Associate Justice Johnson wrote a dissent in part. It could better be called a distinction, since he concurred with the other justices that a state could not revoke its original grant. In the one point that he wanted

made, Johnson is even more outspoken in his reliance on principles higher than the Constitution than even Marshall himself. So he says:

I do not hesitate to declare, that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.24

Not only is Justice Johnson going to the first precepts25 of the natural law in seeking the foundation for his decision, but he is indicating clearly the right of a people against arbitrary action by government. Such a doctrine is completely repugnant to the positivist and totalitarian.

**TERRETT v. TAYLOR (1815)26**

In the latter years of the Age of Marshall, the same adherence to the fundamental principles of equity and justice as characterized by the great chief justice was evident, and “the temper of the associate justices was still substantially that of Marshall.”27

There can be no doubt that Justice Joseph Story was closer to Marshall than any other man and more fit to carry on the tradition of natural law thinking that had characterized the Supreme Court since its inception.

*Terrett v. Taylor*, added to our series of outstanding natural law decisions just five years after *Fletcher v. Peck*, was fully fitted to take its place in the tradition.

*Terrett v. Taylor* involved circumstances very similar to those of *Fletcher v. Peck*. In the lower court, the Circuit Court for the District of Columbia, Taylor and others, members of the vestry of the Protestant Episcopal Church of Alexandria in the District of Columbia, filed their bill in chancery against Terrett and others, overseers of the poor for the county. They prayed that the defendants be perpetually enjoined from claiming the land of the church under the act of the state of Virginia (where the land was situate before the separation of the District of Columbia), which provided that, at the revolution, all the property acquired by the Episcopal Churches became the property of the state (due, ostensibly, to the loss of its character as the established church), and that their title be quieted. The plaintiffs were granted their prayer in the Circuit Court and the defendants sued out a writ of

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24 Note 14 supra, at 143.
25 Ibid.
26 9 Cranch (U.S.) 43 (1815).
error. It is under these facts that the case came to Justice Story and the Supreme Court of the United States.

The Supreme Court affirmed and agreed that the land belonged to the Protestant Episcopal Church.

The court consisted of Marshall, Chief Justice, Washington, Livingston, Duvall and Story. No dissent was voiced and Justice Story wrote the majority opinion. Thus again we have the weight of both Marshall and Story behind an expression of natural law reasoning.

Justice Story begins his reasoning with these words:

The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown, to seize or assume it; ... unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted.²⁸

Story has referred his decision to a law, but it is not the law of any temporal ruler or body of law. He explicitly denies the power to both. This title to the lands was protected by a law superior to the crown, and if the crown were to act in contravention of that law it was doing so only because it could not be resisted. In short, if the crown so acted, it based its action on force—on might alone—and was acting against the Eternal Law of God, to which the crown is subject in all things. As he continues, Story is more explicit in stating the foundation of his decision:

... the division of an empire creates no forfeiture of previously vested rights of property. And this principle is ... consonant with the common sense of mankind and the maxims of eternal justice.²⁹

In Story's conclusion he summarizes his stand:

... we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.³⁰

OGDEN v. SAUNDERS (1827)³¹

Marshall and Story, in 1827, joined forces in one of the most important cases which came to the Supreme Court during this period, Ogden v. Saunders. Coming as it does as the finale to the period, it has the added value for us in rounding out the Age of Marshall.

But Ogden v. Saunders was chosen for a greater purpose. It is able, above all, to take us deep into the minds and philosophy of Marshall.

²⁸ Note 26 supra, at 49, 50.
²⁹ Note 26 supra, at 50.
³⁰ Note 26 supra, at 52.
³¹ 12 Wheat. (U.S.) 213 (1827).
and men who thought with him. "It is only in the occasional case that takes us back to fundamentals that Marshall's... philosophy of law... shows itself. For this, the most illuminating document is the dissenting opinion in *Ogden v. Saunders*,...". It is this same dissent that is later embodied in the Constitution by amendment.

The facts of *Ogden v. Saunders*, in so far as they appertain to the analysis of the obligation of contracts and to this study, are brief. It was an action of assumpsit brought in the District Court of Louisiana by Saunders against Ogden on certain bills of exchange drawn on Ogden, accepted by him and protested for nonpayment. The defendant raised as a defense a certificate of discharge under an act of the state legislature for the relief of insolvent debtors. The court rendered a judgment for the plaintiff and the cause was brought by writ of error before the Supreme Court of the United States. The single question for consideration was whether the act of the state legislature was consistent with the Constitution of the United States. The act in question was a bankruptcy law, providing for the relief of insolvent debtors by discharging their persons and future property from liability for their debts.

Marshall maintained that this act of the legislature could not be resorted to as a bar to the action of assumpsit. The majority felt otherwise. In Marshall's dissent concurred Justices Duvall and Story. Marshall said:

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

Marshall has laid down the general principles from the aspect of the individual. But this is but the introduction. In the same paragraph Marshall indicated another general principle. This viewed the situation from the social aspect. Thus he says: "... they may be controlled," by society. Here Marshall is indicating that all contracts have a twofold aspect, individual and social; that man can never totally prescind from the thought of the common good. Throughout this and the other cases, therefore, the precept of social justice must be recognized as well, and a


33 "The Chief Justice, dissenting in Ogden v. Saunders, defended a doctrine favoring the protection of vested rights, which, though not accepted by his Associates, was later to be included in the broad scope given by interpretation of the phrase due process of law as included in the Fifth and Fourteenth Amendments." Note 15 supra, at 651.

34 Note 31 supra, at 345.
proper balance between the individual and the common good be achieved. These are very general considerations running through this introductory word of Marshall.

Marshall then begins to elaborate his philosophy of the law of contract. He begins his analysis by a discussion of the argument of the adversaries:

... this argument ... assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs.... That though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.85

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

So far back as human research carries us, we find the judicial power... applying these remedies, on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. ... we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces.86

Implicit in his whole treatment is the essential equality of the persons contracting, the independence of their respective human persons, the dignity of man as juridically and morally free to follow his ends, with the only provision that he act rightfully. Here Marshall is recognizing that man exists for the prosecution of his own personal ends, that man must be protected in the natural means to these ends, among which is the right to contract. It is true that he does not argue here from the metaphysical concept of the human person, but his constant reference to an obligation that pre-exists, which only is enforced, not made, by human law leads us to all the notions that would be expressed in such an approach.

Marshall is forced by the consequences of his words to admit that God, as the Author of nature, so created the human person that man of his own will and disposition and natural inclination tended first to enter society, then to own his own and finally, and fully as naturally, to dispose of his own in the attainment of his ends by means of contract. Consequent on this contract, and flowing from the nature of man as

85 Note 31 supra, at 344. 86 Note 31 supra, at 344, 345.
made by God, man must be held obliged to fulfill his part of the bargain. As soon as Marshall goes beyond the positive law enactments of society for his sanction for contracts he is faced with these considerations. It is God's Eternal Law in the nature of man that is the ultimate font of obligation.

He continues, this time excluding the possibility of "might-makes-right."

The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle, that the injured party may be the weakest. In society, the wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and if society acquire the power of coercion, that power will be applied, without previously enacting that his contract is obligatory.37

The added note of sanction and obedience to just authority is introduced here. Again, as he did so often previously, Marshall condemns brute force as the norm of morality.

Next Marshall treats of the natural law right to property and the consensual aspect of contract:

... that obligation... is conferred by the act of the parties. This results from the right which every man retains, to acquire property, to dispose of that property. These rights are not given by society, but are brought into it.88

In this statement we see the derivation of the right to contract from the right to private property. Here, too, is the indication that the proximate cause of the binding force of the contractual obligation is the consent of the parties. Consent must always be present. It is only by consent that the juridically and morally independent persons can signify their intent to so contract and to call into force the binding power that is theirs to exert as human persons. Marshall continues:

... we must suppose, that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. When we turn to those treatises, we find them to concur in the declaration, that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose, that the framers of our Constitution took the same view of the subject, and the language they have used confirm this opinion.39

Transition

There has been a tendency among some of the modern commentators on the work of the Supreme Court to minimize the influence of the

37 Note 31 supra, at 345, 346.
38 Note 31 supra, at 346.
39 Note 31 supra, at 353, 354.
natural law during the transitional years from the close of the age of Marshall in 1835 to the outstanding pronouncements of Field, Harlan, and Brewer beginning in 1870. These thirty-five years were not as expressive of natural law reasoning as those preceding or following, but it would seem that another evaluation is the correct one. From 1830 until the Civil War the Court hardly needed to do more than apply the canons of constitutionalism already laid down.

There is sufficient evidence that the tradition of the Court had not been lost and the continuity of natural law reasoning had been maintained. Chief Justice Taney and Justice Daniel were outstanding in this period.

**HARRIS V. HARDEMAN (1852)**

*Harris v. Hardeman* involved a judgment of a court rendered without service of process on the defendant or his appearance before the court. Harris instituted in the Circuit Court of the United States for the Southern District of Mississippi an action on a promissory note against Hardeman, and on a writ sued out in that action, the marshall made a return in these words: "Executed on the defendant Hardeman, by leaving a true copy at his residence." On this return, at the next term of the court, a judgment by default was taken against the defendant Hardeman for the amount of the note, and an execution was issued upon which a forthcoming bond was given. The defendant in error moved the Circuit Court to quash this forthcoming bond, executed by the defendant to the plaintiff, and to set aside the judgment on which the bond was founded, upon the grounds that the forthcoming bond was taken in execution of a judgment entered by default, when in truth there had been no service of original or mesne process on him to warrant such a judgment.

The Circuit Court of Mississippi quashed the proceedings and set aside the judgment by default. The Supreme Court affirmed, and Justice Daniel delivered the opinion of the court, saying:


42 Thus we hear in 1848, just thirteen years after Marshall: "But into all contracts...there enter conditions which arise, not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, or nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all..." Justice Daniel in *West River Bridge Co. v. Dix*, 6 How. (U.S.) 532 (1848). For an excellent case at the other end of this period, in 1867, see *Cummings v. Missouri*, 4 Wall. (U.S.) 277 (1866).

43 14 How. (U.S.) 333 (1852).
We have refused to sustain an action here upon a judgment... where... no personal summons or actual notice was given... In such cases we have considered... the judgment having no force in personam. This principle is not considered as growing out of anything peculiar to proceedings by attachment, but is founded on more enlarged and general principles.44

Here we find Justice Daniel going beyond and behind the ordinary positive law prescriptions concerning notice and appearance, and appeals to principles of "natural justice," which is to say, principles of the natural law.

Mr. Justice Daniel concludes his opinion in unmistakable language: "This doctrine does not depend merely upon adjudged cases; it has a better foundation; it rests upon a principle of natural justice."45

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

Field, Harlan and Brewer: The Late Nineteenth Century

As the country settled down after the years of turmoil ending with the Civil War, there appeared a more marked return to the traditional line of reasoning that had characterized the Court from the beginning. This period produced the second great trio of American natural law jurists: Field, Harlan and Brewer. These men were eminently worthy to carry on the tradition of Marshall, Kent and Story, of Taney and Daniel, and were responsible in the main for a further entrenchment of natural law principles in the philosophy of the federal judiciary.

BUTCHER'S UNION CO. V. CRESCENT CITY CO. (1883)46

Of this great trio, there seems no doubt that the foremost is Justice Field. He was a highly creative man, and the nature of his intellect impelled him on all occasions to go directly to fundamental and universal

44 Ibid., at 340.
45 Ibid., at 341.
46 111 U.S. 746 (1883).
principles. Such a philosophy of law led him to oppose sharply any governmental action that appeared arbitrary,\textsuperscript{47} and evoked his remarkably pertinent pronouncement that the Fourteenth Amendment was meant:

\ldots to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer but only recognizes.\textsuperscript{48}

"The classic presentation of the theory of implied limitations" on arbitrary acts of government "is that of Justice Field in Butcher's Union Co. v. Crescent City Co., where he amplified his notions" on the natural law basis for such limitations and gave posterity an excellent ruling case on the point.\textsuperscript{49}

The Butcher's Union case, like Fletcher v. Peck, carries in its wake a long line of cases which depend on it for authority and has been, moreover, very influential in the development of the constitutional notion of freedom of contract.\textsuperscript{50}

Just ten years earlier Justice Field had been with the minority on the very same question in the Slaughter House Cases.\textsuperscript{51} Now his holding is vindicated and the decision in the Slaughter House Cases overruled.

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

The Supreme Court by Justice Miller reversed; there was no dissent.

It is the concurring opinion of Justice Field that is of main interest to our discussion. Field begins this discussion with an analysis of the fundamental principles of his decision.

\textsuperscript{47} Ex Parte Wall, 107 U.S. 265 (1882).
\textsuperscript{48} See the dissent in the Slaughter House Cases, 16 Wall. (U.S.) 36, 105 (1872).
\textsuperscript{50} For a full treatment of the influence of this case in the growth of the constitutional notion of liberty of contract see Anthony, Attitude of the Supreme Court Toward Liberty of Contract, 6 Tex. L. Rev. 265 (1928); Pound, Liberty of Contract, 18 Yale L. J. 454 (1909).
\textsuperscript{51} Note 48 supra.
As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all [governmental] action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: ‘We hold these truths to be self-evident’—that is so plain that their truth is recognized upon their mere statement—‘that all men are endowed’—not by edicts of emperors, or decrees of Parliament, or Acts of Congress, but ‘by their Creator with certain unalienable rights’—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime—‘and that among these are life, liberty, and the pursuit of happiness, and to secure these’—not grant them but secure them—‘governments are instituted among men, deriving their just powers from the consent of the governed.’

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

The basic nature of these first principles is also evident from Field’s reference to them as “assumed to exist,” and “so plain that their truth is recognized upon their mere statement. . . .”

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

Field errs in his statement: “…except in punishment of crime,” because there are some rights which are inalienable even in punishment of crime. We have no reason to suppose Field was ignorant of them; he merely made the general statement and failed to distinguish such rights as the freedom of conscience, of faith, and the like.
Throughout this article we have stressed man's right and duty to self-perfection. Field has this in mind as he continues:

The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them... is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.\(^5\)

Man has the right to follow any vocation not inconsistent with the rights of others which will permit him to provide the necessities of life for himself and his dependents. This includes the right of full development of each man's faculties.

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

In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just, and impartial laws... I cannot believe that what is termed in the Declaration of Independence a God-given and an inalienable right can be thus ruthlessly taken from the citizen...\(^5\)

And with that, Field declares the act creating the monopoly void. Field here indicates his appreciation of the dignity and freedom of the human person. This person is free and unrestrained, except by just laws. There is the proper balance between this independence of man as an individual entity and his dependence on the law of the Creator as a dependent and created being.

**MONONGAHELA NAVIGATION CO. V. UNITED STATES (1893)**\(^6\)

In every respect David Josiah Brewer was as powerful an advocate of natural law principles as any man of his age. A suitable reflection of this philosophy and of this period is the Monongahela Navigation case.

The Monongahela Navigation Company had, under the authority of the state of Pennsylvania, expended large sums of money in improving the Monongahela River by means of locks and dams. Considerable additional commerce on the Monongahela River was made possible by these improvements. After the effort on the part of the United States

\(^5\) Note 46 supra, at 757.
\(^6\) Note 46 supra, at 757, 758.  
\(^5\) 148 U.S. 312 (1893).
to purchase this lock and dam had failed, proceedings of condemnation were instituted in the Circuit Court of the United States for the Western District of Pennsylvania. The case was appealed not on the matter of condemnation, but of compensation due. Mr. Justice Brewer delivered the opinion of the court reversing and remanding the case. There were no dissents.

Brewer proceeds to discuss the twin rights (1) of the state to take private property for public use and (2) the citizen to demand just compensation. He says in the words of the Supreme Court of New Jersey:

... this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.57

Here Brewer has reference to the principles of commutative justice: each must give to each his due.

As further substantiation, Justice Brewer cites Chancellor Kent speaking for the Supreme Court of New York. In that pronouncement Kent, having noted that there was no provision in the Constitution of New York on the subject, concluded that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation should be made to a person deprived of his property for the common use. Thereupon Brewer adds in his own words that “in this there is a natural equity which commends it to everyone.”58

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

The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the ‘just compensation’ it ought to pay therefore, or how much benefit it has conferred on the citizen by thus taking his property without his consent, or to extinguish any part of such ‘compensation’ by prospective conjectural advantage, or in any manner to interfere... cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.59

57 Ibid., at 324, 325.
58 Ibid., at 325.
59 Ibid., at 327, 328.
The opinion of the court in the *Monongahela Navigation* case presents an example of the transition from the earlier and avowedly natural law cases to the later disavowedly, though truly natural law decisions. We have heard the numerous references to the principles of “absolute and eternal justice” of Mr. Justice Brewer. Now we hear him make his nexus by stating that there is no need to rely on these principles in themselves; that actually the Constitution of the United States is capable itself of providing sufficient authority for the decision handed down in the *Monongahela Navigation* case.

But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to its affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses.60

The development of natural law reasoning and its insertion into the spirit and substance of the Constitution is not always as apparent as it is in this opinion of Justice Brewer. As time goes on it will be increasingly difficult to point to the underlying philosophy. The cliché and standard phrase will take over the onus of thinking and push the reasoning underlying the decision to the background.

CHICAGO, BURLINGTON AND QUINCY R.R. CO.

V. CHICAGO (1897)61

John Marshall Harlan was worthy of his name. Almost a century after his illustrious namesake he carried on the same tradition in his adherence to the basic principles of the natural law. He was a “militant justice,”62 and since he was “inclined to emphasize the theory of natural rights, he was readily disposed to adopt the doctrine of fundamental rights which the Justices of the Supreme Court were slowly developing in connection with the interpretation of the due process clause.”63

The Circuit Court of Cook County in Illinois handed down a judgment awarding the sum of $1.00 to the plaintiff in error, the Burlington Railroad. This sum was held to be the just compensation for the taking of a part of its right of way under eminent domain. The Supreme Court of Illinois affirmed and the case was brought on writ of error to the Supreme Court of the United States. The facts further indicate that

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60 Ibid., at 325. 61 166 U.S. 226 (1897).
63 Haines, the Revival of Natural Law Concepts 200 (1930).
there was no interference with the Burlington's right of way; that the only change was in the laying of the street where formerly there was merely gravel and cinders. The Supreme Court affirmed the state court.

Justice Brewer dissented in a part irrelevant to this discussion. Justice Harlan delivered the opinion of the Court.

Justice Harlan begins his discussion by remarking that the mere fact of notice and appearance does not in itself constitute "due process of law" and mean that all the requirements contained in that phrase have been satisfied. He goes on to point out that there are other requirements to be satisfied. "In determining what is due process of law regard must be had to substance, not to form." 64

The question then arises whether due process of law enjoined in the Fourteenth Amendment requires compensation to be made to the owner of private property divested of that property for the public good. This is the general question that occupies Harlan in this case. He treats it in view of the broad principles of natural equity.

The requirement that the property shall not be taken for public use without just compensation is but 'an affirmation of a great doctrine established by the common law for the protection of a private property. It is founded on natural equity, and is laid down as a principle of universal law. Indeed...almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 65

Harlan shows here the same respect for the primary precepts of the natural law of commutative justice and of private property. He recognizes the dignity of the person, the inviolability of the citizen, and at the same time acknowledges the authority of the duly authorized state in matters of the common good.

Justice Harlan concludes with a reiteration of the God-given and God-ordaining quality of the law behind the positive law. It is the idea again of the Eternal Law.

...it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution." 66

The First Half of the Twentieth Century

The period beginning at the turn of the century can best be characterized as one of wane in the use of natural law principles. This is prob-
ably due in the main to the coming to the bench of men of the stamp of Holmes. But it will be to commentators of fifty years hence to evaluate properly the period.

**LOCHNER V. NEW YORK (1905);**67 **ADAIR V. UNITED STATES (1908).**68 **AND COPPAGE V. KANSAS (1915).**69

The early years of this period, however, do not seem to presage this wane. In the first two decades we find those principles of government that have “an everlasting foundation in the unchangeable will of God, the Author of nature, whose laws never vary,” and the “law of nature” expressed “in a famous trilogy of decisions of the Supreme Court.”70 Speaking of these famous three cases, one commentator observes:

The protection of the inalienable right of liberty of contract was taken up vigorously by the state courts . . . the protection in the Supreme Court culminated in the decisions of **Lockner v. New York, Adair v. United States, and Coppage v. Kansas** and led to the affirmation of the dictum of Justice Harlan that “the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land.”71

Limitations of time and space make a detailed analysis of these opinions impossible. They, and other cases early in the century, carry our tradition up to the **Blaisdell** opinion in 1934.

**HOME BUILDING AND LOAN ASSN. V. BLAISDELL (1934).**72

The facts of the **Blaisdell** case center around the constitutionality of an act of the legislature of Minnesota granting special relief, through authorized judicial proceedings, with respect to foreclosures of mortgages during the declared emergency period. The Supreme Court of Minnesota declared the act to be an emergency measure consonant with the powers of the legislature and refused to render it void as unconstitutional. The case came on appeal from that court. The Supreme Court of the United States found that the state court had applied the general principles well, and that the act of the legislature did not violate the constitution.

The court consisted of Chief Justice Hughes, Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, and Cardozo. Chief Justice Charles Evans Hughes delivered the opinion of the court. Justices Van Devanter, McReynolds and Butler concurred in the dissent of Justice Sutherland.

67 198 U.S. 45 (1905).
68 208 U.S. 161 (1908).
69 236 U.S. 1 (1915).
70 Note 9 supra, at 324.
71 Note 49 supra, at 646.
72 290 U.S. 398 (1934).
The Court’s first pronouncement was that the measure was definitely a relief one; that it was designed only for the drastic financial situation of the 1929 depression. It is significant, however, that in the reference to emergency, specifically war emergency, it remarked that “even the war power does not remove constitutional limitations safeguarding essential liberties.”

There is no denunciation by the Court of the principles of ownership, of the right of contract, of the sacredness of contract. This was simply an instance where the interests of the group, the common good, demanded some modification of the contract of mortgage. The unusual nature of the depression of 1929 rendered it the duty of the state in the interest of the general welfare to exercise its emergency power in relief from foreclosures. The Court gives an excellent presentation of its stand in the following statement:

But into all contracts, . . . there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.

Certainly the Court’s words concerning the common good in relation to the individual are in line with basic philosophy of the true state. The court understood that such impairment of the obligations of contracts must be only in emergency periods and cease with the end of the period.

Whatever we may say as to the advisability of regarding the instant set of facts as emergency, however we may feel as to the application of the general principles in this particular situation, we cannot fail to see that the Court in the Blaisdell case argued the matter well and gave proper consideration to the basic natural law principles involved.

The Court Today

With the advent of the Roosevelt Court it became increasingly difficult to ascertain, and hence predict, a pattern of Court thinking, to discern a clearly marked philosophy of law. This has continued to be true under the Truman Court, if not to an even more notable degree. What is true in regard to the law in general is a fortiori so in the matter of the natural law. There is, moreover, an added factor militating against a

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73 Ibid., at 426.
74 Ibid., at 435, 436.
supported by a reliable appraisal of the present Court. We are too close to the trees to see the woods.

Looking over the years from the *Blaisdell* case to the present, a view from the hilltop would seem to indicate that the Court has maintained its tradition of the natural law, *at least as it sees it*—albeit with growing difficulty and against greater odds. Thus, ten years after the *Blaisdell* case, in 1943, the Court can be heard to clearly say in *Buchalter v. New York*:

> The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as "the law of the land."  

Certainly the Court showed that it was mindful of its natural law tradition in the *Paloko* case, which figured prominently in *Adamson v. California*. But for the clearest indication of the attitude of the Court towards natural law philosophy we should look to this *Adamson* case, and its companion, the *Rochin* case.

### ADAMSON V. CALIFORNIA (1947)

Adamson was convicted of first degree murder by a jury. The Supreme Court of California affirmed, and the case was taken to the Supreme Court of the United States. The California Constitution permits comment to jury and court on the failure of the accused to take the stand. Adamson faced the choice of disclosure to the jury of prior robbery and burglary offenses (in impeachment) or the harmful inferences from uncontradicted evidence. Adamson chose not to testify.

The Court faced the question: Does the California law that permits comment on the failure to testify violate the Fourteenth Amendment?

In answering this question in the negative, however, the Court stirred up a sharp dispute over natural law and natural law principles and gave us a view of its philosophy and reasoning that makes *Adamson v. California* the chief and most outstanding norm of the present Court's stand on the natural law. Prior to the consideration of the direct question of the case, the Court debated at great length whether the rights (among others, against self-incrimination in the Fifth Amendment) contained in the Bill of Rights of the first eight amendments were embodied *in globo* in the Fourteenth Amendment.

The Court answered categorically that the Fourteenth Amendment

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77 *332 U.S. 46* (1947).
did "... not draw all the rights of the federal Bill of Rights under its protection."78 "Palko", it said, "held that such provisions of the Bill of Rights as were 'implicit in the concept of ordered liberty,' became secure from state interference..."79 And Palko had relied on Twining in which the court said that a right is essential to due process only when it is "... a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government."80

It was at this point that the dispute broke out and the Court split over the natural law. Justice Black wrote a strong dissent, joined by Justice Douglas, seeing in the case "... a decision which reaches far beyond the relatively narrow issues on which this case might have turned."81 This narrow issue of Justice Black was: Did the Fourteenth Amendment "... make the prohibition against the compelled testimony applicable to trials in state courts?"82 In answering in the negative the Court, says Justice Black,

... reasserts a constitutional theory spelled out in Twining v. New Jersey, that this court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'83

Justice Black then makes it very clear what he, and presumably Justice Douglas, think of the natural law, at least as they understand it.

But I would not reaffirm the Twining decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.84

Later he reiterates:

And I further contend that the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.85

There is good insight into Justice Black's fear of the natural law in his later words:

78 Ibid., at 53.
79 Ibid., at 54.
81 Ibid., at 106.
82 Note 77 supra, at 69.
83 Note 77 supra, at 68.
84 Note 77 supra, at 69.
85 Note 77 supra, at 70.
86 Note 77 supra, at 75.
Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course.87

This fear of entrusting the application of broad principles into the hands of weak men rather than spell out closely worded directives is merely the fear of all men of all times in placing the exercise of justice in the hands of their fallible fellow men. Justice Black sees it as one thing to interpret statutes according to standards enumerated specifically in the Bill of Rights, but “... to invalidate statutes because of application of ‘natural law’ deemed to be above and undefined by the Constitution is another.”88

Mr. Justice Murphy, with whom Justice Rutledge concurred, wrote a separate dissent. Both were in substantial agreement with the views of Mr. Justice Black, but they did not want to limit the guarantees of the Fourteenth Amendment to the Bill of Rights. “Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of lack of due process despite the absence of a specific provision in the Bill of Rights.”89 It might be asked whether Justices Murphy and Rutledge did not want black and white at the same time. They agree with Justice Black who would confine the interpretation of statutes to the standards of the Bill of Rights, but they see occasions where the norm must be “fundamental standards of procedure”—which sounds perilously close to the “fundamental liberty and justice” condemned so heartily by Justice Black.

ROCHIN V. CALIFORNIA (1952)90

Rochin was convicted, without a jury, of possessing dope contrary to California law. The chief evidence adduced was two capsules of morphine extracted from accused invito by a stomach pump. The conviction was affirmed despite the finding that the officers were guilty of unlawfully entering defendant's room and of assaulting, battering, torturing and falsely imprisoning him. The Supreme Court of California denied Rochin's petition for a hearing. The Supreme Court of the United States granted certiorari and reversed the decision below.

The Court faced the question: What limitations does the due process clause of the Fourteenth Amendment impose on the conduct of criminal proceedings by the states?

87 Note 77 supra, at 90. 88 Note 77 supra, at 91. 89 Note 77 supra, at 124. 90 72 S. Ct. 105 (1952).
Mr. Justice Frankfurter wrote a very forceful opinion for the Court. He strongly averred the power of the states to define crime and administer criminal justice, and claimed for the federal authority under the due process clause only restrictions upon the manner in which the states may enforce their penal code.

Justice Frankfurter saw a grave duty of the Court in applying the due process clause and stated the norm of that application: Do the proceedings

...offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.91

Throughout the opinion the court expresses well the broad concepts of the norm of morality and the natural law imprinted in the heart of man.

Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'92

This identification of the natural law with the conscience of the people is about the best short definition of the natural law possible.

But this does not mean that "The vague contours of the Due Process Clause ... leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations ... deeply rooted in reason. ..."93

At this point Justice Frankfurter, realizing that he has been expounding natural law philosophy, remarks:

Due Process of law thus conceived is not to be derided as resort to a revival of 'natural law.' To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges .... to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism.... But these ... are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.94

The court thereupon applied these norms to the instant case and concluded that

91 Ibid., at 208.
92 Ibid., at 208.
93 Ibid., at 208.
94 Ibid., at 209.
...the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. It is conduct that shocks the conscience.95

At this point Mr. Justice Black renews his opposition to the Court's philosophy by a special concurrence in which he immediately refers to his dissent in the Adamson case.

Harking back to all he had said of the natural law philosophy in that case, Justice Black contends again "the nebulous standards stated by the majority," the "considerations deeply rooted in reason," "those canons of decency and fairness which express the notions of justice of English-speaking peoples," the "traditions and conscience of our people." In one word, Mr. Justice Black in 1952 feels exactly as he did about the natural law in 1947. So does Mr. Justice Douglas.

Woven in and around the Adamson and Rockin cases there are other opinions of the court which reveal its philosophy. Certainly the Jersey School Bus98 and the McCollum97 opinions are not exactly consonant with the natural law reasoning of the traditional expressions in Myers v. Nebraska98 and Pierce v. Society of Sisters.99 Above all is the dictum of Chief Justice Vinson in Dennis v. United States abhorrent to the natural law foundations of our nation:

Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.100

As Felix Morley put it in Barron's,

Our whole system of government is based on the assumption that there are certain absolute values, referred to in the Declaration of Independence as 'the Laws of Nature and of Nature's God.'... Our form of government is based upon abstract ideas; is founded on a belief in natural rights.101

Yet Justices Black and Douglas dissented in the Dennis case. So what is to be said of the present court and natural law? It might come down to this, that the problem is largely terminological. That if each justice were to write out his philosophy of life, his concept of the role of God

95 Ibid., at 209.
100 341 U.S. 494, 508 (1951).
101 Morley, Barron's p. 3 (June 18, 1951).
in our living and conduct, of the dignity of the human person, of his rights, of his duties, of his God-given heritage, that if all this could be written down, we might find a decent unanimity. It is to be doubted if many would side with Justice Holmes in treating man (and hence his nature which is his law) as a "baboon" or a "grain of sand."102

Yet we must not be deluded. At best there is great need of much study and education. At worst, there might be much of the materialism of Holmes in the words of Vinson, of Black and of Douglas.

The crying need of the whole world today is for the stability and security that comes from knowing where it is going and why, and that is just another way of saying that the world needs a guide to lead it and a goal to be led to. Certainly, as part of it, the law is no different from the world. The goal for all, world and law, is God. The guide, too, is the same for both, the directive norm of conduct that will surely lead to God, the only goal.

From the standpoint of man as a spiritual animal destined for heaven, and as a social and legal animal ordained to reach heaven by way of earth, there is one absolute norm of conduct that God intended for man as a guide through earth to heaven: the natural law.

102Holmes, 2 Holmes-Pollock Letters 252 (1941).