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THE NATURAL LAW ORIGINS OF PRIVATE AND PUBLIC LAW

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ABSTRACT

This article attempts to counter the widespread skepticism that surrounds any appeal to natural law principles, starting with Roman law at one end and the appeal to general law under Swift v. Tyson *on the other. It steers a systematic middle course between moral absolutism, which treats all relationships as fixed and immutable, and modern realist positions that insist the infinite variety of legal approaches to most legal problems proves that there is no solid core to either natural law or general law. The natural law positions set out the basic relationships for marriage and family, for alluvion and avulsion of rivers and streams, for the formation of agreements, and for the transfer of various forms of property under the private law. But at that point, these rules may be modified as needed to create strong Pareto improvements by the introduction of various formalities that improve the security of transactions or, more substantively, which overcome key holdout issues that can arise, for example in the upper airspace on the one side or with caves on the other.*

These principles can carry over to public law as well. Systems of taxation have to be structured (with flat taxes) as the best way to avoid theft

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*from one group to another, and also for eminent domain powers when the public must be compensated, unless under the police power they are designed to prevent wrongful conduct from the party regulated, as under the common law of nuisance, which is not subject to infinite variation. Similarly on procedural matters, the two Roman principles of "hear the other side" (*audi alterem partem*) in cases before a neutral judge and "no one shall be a judge in his own cause" (*nemo judex in causa sua*) have to apply universally whereas other fact finding devices, for example juries, are subject to wider variations. These principles were tested in the* Insular Cases *where this norm held in check any American impulse to dictate legal practices and norms to conquered groups. This rule that explains why the Supreme Court was correct in refusing to hear the case intended to compel American Samoa to force federal citizenship on indigenous peoples who refused to have it. These basic natural law principles, most notably the rule that no one should profit from his own wrong explains, contrary to today's understandings, why the common principle of birthright citizenship applies only to the offspring of legal aliens, but not illegal ones.*

In dealing with the transition between Swift *and* Erie Railroad v. Tompkins*, the key insight is that* Swift *was correct insofar as it used a set of general (i.e., neutral) principles to decide disputes that took place across state lines, but not for those that took place solely within a given state. Thus, using general principles for negotiable instruments and boundary disputes eliminates local favoritism and gravitates to the best of common practices. But there is no reason to use these common principles for complex private disputes (rules for mortgages or local antitrust laws) where the general law (as expanded before* Erie*) often slights local interests, such that the key decision in* Clearfield Trust v. United States *reestablishing general common law for negotiable interests and* Hinderlider v. La Plata River & Cherry Creek Ditch Co. *with respect to boundary disputes, pushed the law back in its correct direction.*

It is only by patiently working through all of these ancient and modern, private and public law cases, the conceptual unity of our basic legal system can be defended.

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INTRODUCTION: THE MODERN RISE OF GENERAL AND NATURAL LAW

In recent years, there has been an increased interest in the role of natural law thinking in the interpretation of constitutional and legal doctrines. A combination of legal and constitutional historians, as well as legal philosophers, do most of this work. None of these scholars have any systematic training in the operation of natural law thinking as it developed in Roman law and carries through to modern times. That tradition is a complex one as the Roman law sources are a rich but neglected trove of information containing the first systematic effort to develop these principles. Lawyers crafted a system of natural law that was internally consistent and far in advance of anything that had come before it in the ancient world. The end of Rome was not the end of Roman law. Its influences coursed through medieval times, first in Europe with the advent of the law merchant, and then in the English common law, which in turn had a profound influence on American legal thinking at least through the Second World War and beyond it. That influence was not confined to the topics with which it originated, but carried on to major issues of constitutional law, federalism, civil procedure, and international law. In all these areas, natural law themes emerge in unlikely places where they inform—or should inform—our views of historical development.

One notable effort to address these issues is a recent paper "General Law and the Fourteenth Amendment," [1] written by Professors William Baude, Jud Campbell, and Stephen Sachs (BCS). They make the sensible claim that the correct way to interpret Section One of the Fourteenth Amendment, including its much mooted "Privileges or Immunities Clause," is through the lens of the "general law." [2] As they point out, the phrase "general law" during the nineteenth century was a commonplace conception that did not tie any basic legal rule to the particular laws of any given state within

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[1] William Baude, Jud Campbell, Stephen E. Sachs, *General Law and the Fourteenth Amendment*, STAN. L. REV. (forthcoming) [https://perma.cc/6X32-XZ28].

[2] *See id.* at 3. *See* U.S. CONST. amend. XIV, § 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 State 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.").

the United States. Instead, it relied on conceptions that were not only universal among the states of the United States, but also among all the civilized nations of the world. In theory, that law contains durable, indeed immutable, principles that speak to all people at all times in all places.

Their motivation for examining that unique system of general law was to articulate a uniform understanding of the key provisions of the Fourteenth Amendment independent of the vagaries of different state laws, which (especially in the aftermath of slavery) may differ on various points. In their paper, they announce this thesis but only refer to a few of the many materials that are relevant to the inquiry. This article is not an examination of their paper which is only a jumping off point into a larger examination of the natural law tradition, a worldview not subject to any spatial or temporal limitations. Indeed, the reference to the "general law" is part of the overall requirement is critical for yet another one of the great cases of American law, *Swift v. Tyson*.[3] In *Swift*, Justice Joseph Story relied on that approach to explain why state law—relating to the use of negotiable instruments—was displaced in a wide number of cases by the principles of general law. Indeed, as will become clear, the use of common law general principles ties in closely with the general use of natural law principles in the interpretation of the Privileges or Immunities Clause, because neither inquiry is tightly tied to the particular rules in any given jurisdiction.

To make matters worse, there is an obvious limitation on the use of natural law principles to define and understand the role of the word "citizens." That term does not have any meaning in the state of nature, where there are no states to which individuals can give loyalty or from which individuals can demand protection. To overcome that shortfall, jurists had to meld the natural law with the law of nations. This transformation was accomplished as follows:

> There certainly exists a natural law of nations, since the obligations of the law of nature are no less binding on states, on men united in political society, than on individuals. The moderns are generally agreed in restricting the appellation of

[3] 41 U.S. 1 (1842).

> "the law of nations" to that system of right and justice which ought to prevail between nations or sovereign states.[4]

These words and others like them shaped the overall content of international law—as part of American law. *The Paquete Habana*, a case that arose out of the capture by American steamships as they plied their regular fishing trade along the Cuban coast, exemplifies this phenomenon.[5] Their capture was contested on the grounds that customary international law, by long usage, had exempted such ships from capture. Justice Horace Gray gave full weight to that custom after an exhaustive review of legal authorities both domestic and foreign, writing an opinion that *rejected* the claim of the American privateers. He wrote:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.
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> Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for

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[4] EMER DE VATTEL, THE LAW OF NATIONS, Preface 1; 7 (Béla Kapossy & Richard Whatmore eds., 2008) [https://perma.cc/269J-BNQV].

[5] 175 U.S. 677 (1900).

> the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton's International Law, (8th ed.) § 15.[6]

The reference to "civilized nations" was an essential part of Gray's historical account, as was the unity of judgment in these cases. It is hard to imagine today that anyone would write that "the Empire of Japan" was "the last State admitted into the rank of civilized nations."[7] But there was method to this assertion, because Japan too adopted the general exemption from capture.

The Privileges or Immunities Clause was nowhere in evidence. Nonetheless, it was just this appeal to general law—in an opinion that had no reason to refer to *Swift v. Tyson*—that set out the basic framework. And as in the case of international customs that were part of our law, the challenge of finding the applicable general principles was hard work. Yet for this task, there remains the trusty starting point of *Corfield v. Coryell*, which reads:

> The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such

[6] *Id.* at 700–01.
[7] *Id.* at 700.

> restraints as the government may justly prescribe for the general good of the whole.[8]

This account is not ideal, for it does not distinguish between the special rights of citizens and those of all people, including aliens. Nor does it gives any constructive hint that property rights must be set off against general rules dealing with the police power—see the last sentence without going into much detail about how the police power—which is nowhere mentioned in the text of the Constitution but nonetheless becomes an essential part of our constitutional structure.[9] As a single data point, the case holds that an out-of-state fisherman does not have rights to catch oysters from New Jersey waters, but it leaves open crucial questions about the right to marry, to pursue certain trades, and to escape zoning laws.[10] And there is not the slightest hint that any of the modern commentaries look to any international sources in order to discover the relevance of the distinction of citizens and aliens (non-citizens) in the basic law. It is therefore useful to return to the original historical sources with far greater depth than is done in the standard inquiries on this topic, [11] in order to develop a somewhat more secure base for understanding how to interpret such key provisions of the Privileges or Immunities Clause in relationship to the rest of the Fourteenth Amendment and to the general law doctrine of *Swift v. Tyson*.

To be sure, *Swift* did not raise a whisper of constitutional complications. But those elements were injected into the mix by Justice Brandeis in *Erie Railroad v. Tompkins* to explain why *Swift* had

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[8] 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

[9] The first case that explicitly references the police power is *Brown v. Maryland*, 25 U.S. 419 (1827). "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States." *Id.* at 443. Note that this reference covers state jurisdictions and not the later usage where it refers to the limitations on the individual constitutional guarantees.

[10] *See* Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment,* 1 N.Y.U. J.L. & LIBERTY 334 (2005); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 1095 (2005).

[11] For some standard references, see DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 342–51 (1985); Philip A. Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1388 (1992); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT (2020).

to be overruled.[12] It is worthwhile examining these two references to general law in tandem, which in turn also crops up in connection with other clauses of the Constitution. Is there a general (or natural) law of "private property" that is needed to make sense of the Takings Clause ("Nor shall private property be taken for public use, without compensation.")? The same questions must be asked of the Contracts Clause ("no state shall pass any. . . Law impairing the obligation of Contracts.").[13] The Constitution contains no dictionary of its key terms, so the ordinary usage of the terms is the first step, but rarely the last word, in constitutional interpretation. Yet by the same token it is important in some context to respect—on some key matters—the variations that are found in local law. The question, then, is how best to sort out the two halves of this ambitious program.

In working through these issues, this article is by no means meant as a commentary on the BCS article. It focuses on the abundant legislative history that, given that the extended debate over the language of the Fourteenth Amendment points in many directions at the same time. Instead, this article moves in the exact opposite direction by reading key constitutional and statutory texts as part of the general and natural law tradition which make little or no use of these materials in setting out the basic framework. In the Roman law tradition, it was the opinion of the great jurists—Papinian, Gaius, Paul, Modestinus, and Ulpian—whose opinions carried the greatest weight, which, as noted above, was much the way in which the evolution of international law, and through it, much of American constitutional law, took place. The point of the article is to trace the influence of natural law thinking on the overall structure of the legal system.

Accordingly, I divide the article into several parts. Part II deals with the overwrought claims of both the defenders and critics of the natural law. The former assume that these rules are immutable and unchangeable. The latter that they are so formless as to be wholly useless. Both are incorrect. The natural law principles forged the initial set of entitlements subject to those variations that generate systematic gains in the sense of Pareto improvements. These improvements operated through the use of formalities to improve the security of transactions or modifications of the initial natural law

[12] 304 U.S. 64, 80 (1938).

[13] U.S. CONST. art. I, § 10, cl. 2.

entitlements in ways that eliminate holdout and blockade problems that impair the overall efficiency of the system.

Part III then offers an alternative account of the relationship between natural and local law. Part IV next examines how these principles look in a wide range of contexts in private law, including family law, conveyancing, overflights, caves, animal law, doctrines of accession, confusion, and specification that follow rigorous principles. Part V continues the inquiry by showing how once states are formed, the natural law principles deal with matters of taxation, eminent domain, and the rules of conquest, especially as seen by development of the highly controversial rules dealing with the treatment of acquired countries that started with the *Insular Cases*, decided between 1901 and 1922 in the aftermath of the U.S. acquisitions of the Philippines, Puerto Rico, and Guam under the Treaty of Paris that concluded the Spanish-American War in 1898.

Part VI then completes the picture by looking at the fate of the rule of *Swift v. Tyson*. Its endorsement of the general law has been attacked both by scholars and, most notably, Justice Brandeis in *Erie v. Tompkins*, where he boldly claimed that there was no federal common law. This was only to be qualified in the cases where it most mattered—boundary disputes between neighboring states and transactions with negotiable instruments in the years that immediately followed. Part VII briefly summarizes and recapitulates the main points of the article.

Throughout this inquiry, the key thread is that natural law principles pop up in the oddest of places where, contrary to modern expectations, they serve a unifying intellectual function.

I. THE OVERLY ENTHUSIASTIC FRIENDS AND THE UNDULY HARSH CRITICS OF NATURAL LAW

To begin this inquiry, it is critical to note that as a matter of first principle the key to solving this problem lies in understanding what is meant by the terms "general" and "natural" law by looking at the discrete contexts in which they arise. One possible meaning of the term "general law" treats it in a morally neutral fashion as any law of widespread application, whether good or bad. Thus, a law that requires all citizens to surrender their homes to public officials without compensation has the broad sweep of a general law. But in historical context, the term "general law" carries an exclusively

positive connotation, whose substantive commands are fit their subject by promoting human flourishing. Here, its meaning verges on natural law. That approach leads to a nifty segue into modern welfare theory, where the evidence of human well-being can never be evaluated from the point of view of a single person, but only by showing that the law or regulation benefits the populace at large. Thus no purported rule that works to the exclusive benefit of one person counts as a general law; nor, more critically, does any "general" law that works only for the benefit of a subgroup as a form of class legislation. This is a universally disapproved practice, where invidious distinctions by race comes at the top of the standard list.[14] For example, BCS make multiple references in their article to the protean concept of natural law, which contains a normative framework. Thus they write that "[g]eneral law was central to older conceptions of rights" and that "[t]he most elemental general law rights were thought of as retained natural rights, which Justice Trimble described as 'principles of natural, universal law.'"[15]

This same approach was articulated emphatically by Blackstone at the dawn of the Founding Period in these terms:

> This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over the globe in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or intermediately, from this original.[16]

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[14] *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND FALL OF LOCHNER POLICE POWERS JURISPRUDENCE (1995) (casting the concerns of Lochner v. New York, 198 U.S. 45 (1905)); Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997). Yet even here there are ambiguities. Thus, Saunders compares Pace v. Alabama, 106 U.S. 583, 585 (1883), which held that there was no form of class legislation when the state imposed heavier penalties on interracial couples living together "in adultery or fornication" than interracial couples who engaged in the same conduct. That line was decisively rejected in Loving v. Virginia, 388 U.S. 1 (1967) which struck down anti-miscegenation laws that penalized both members of the couple equally. Note that this is a weaker theory than one that rests on the liberty of two people to marry, where the argument in *Pace* about equal burdens has no weight because the dual restrictions no longer cancel out.

[15] Baude et al., *supra* note 1, at 11 (citing Ogden v. Saunders, 25 U.S. 213, 319 (1827) (opinion of Trimble, J.)).

[16] 1 WILLIAM BLACKSTONE COMMENTARIES BK 2. *41.

That sentiment has worked itself into modern philosophical writing. Leo Strauss stressed just this point:

> By natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always.... Natural right is that right which has everywhere the same power and does not owe its validity to human enactment.... Natural right thus understood delineates the minimum conditions of political life ....[17]

A. The Friends

In light of this extensive pedigree, it was no surprise that this dominant philosophical framework worked itself into the general law of England and thereafter into the Fourteenth Amendment. BCS complain that these rights "lacked specificity,"[18] which then gives rise to the obvious question of how such malleable rules can anchor a general system of positive law. Yet in the next breath, they correctly note that the rules of natural law are operable in relationship to disputes between private individuals—"a punch in the nose was a violation of natural rights"[19]—and that they have powerful influence on the public law, given that the Due Process Clauses of both the Fifth and Fourteenth Amendments operate on the federal and state governments, respectively. The choice of their example carries more weight than they attribute to it. Indeed, their more general claim is flatly wrong historically, for the principles of natural law are much more precise than they acknowledge. But at the same time, they do not cover the entire universe. Thus, the central problem of political theory is to figure out rules and institutions needed to control the use of force, of which a punch in the nose is but a paradigmatic example.[20] And it points to the general conclusion that the level of

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[17] Leo Strauss, *On Natural Law*, in STUDIES IN PLATONIC POLITICAL PHILOSOPHY 137, 140 (1983).

[18] Baude et al., *supra* note 1, at 11.

[19] *Id.*

[20] For the full-blown theory of how "he hit me" leads to a comprehensive theory of tort liability, see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL. STUD. 151

variation in the substantive commands of a natural law system are much lower than even modern defenders (or at least sympathizers) of the classical law conceptions generally suppose.

The question then arises as to how infuse the needed content into the natural law. Most discussions of natural law reference its supposedly nonutilitarian foundations. Adrian Vermeule makes the standard move when he defends his view of classical tradition, which he talks about in terms that are explicitly "nonutilitarian" and "nonindividualist." [21] This makes him an uneasy ally of Ronald Dworkin, chiefly expressed in Dworkin's book *Law's Empire*.[22] Yet at the same time he notes that with the exception of "intrinsic evils," his theory of common good "does not, by itself, prescribe any particular institutions or rules," [23] nor do any "[l]ibertarian conceptions of property rights and economic rights" stand in the way of the state "enforcing duties of community and solidarity in the use and distribution of resources."[24] So the proper question is, what's the use of a theory that neither mandates nor precludes any result other than some ill-conceived form of legislative dominance? At one point Vermeule refers to the (justly famous) passage in Ulpian, which reads: *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* ("3. The maxims of law are these: to live honesty, to hurt no one, to give every one his due").[25] Vermeule leaves it at that. At no point does he pursue any Latin text to see whether or not these principles can be made operational—and if so, how. To get at the root of this question, it is critical to pair this maxim with another Roman phrase—*damnum absque injuria*—harm without legal injury, which in its simplest cases ties this maxim to the use and application of force or the creation of dangerous conditions, so that striking another or setting traps generates liability while competing for customers or

(1973), and in connection with earlier systems of English and Roman law, Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 BOST. U. L. REV. 72 (1992), which contains an extensive explication of this principle in Roman law as well.

[21] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 1 (2022). For two highly critical reviews see, William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto,* 136 HARV. L. REV 861 (2023); Brian Leiter, *Politics by Other Means: The Jurisprudence of 'Common Good Constitutionalism*, 90 U. CHI. L. REV. 1685 (2023).

[22] RONALD DWORKIN, LAW'S EMPIRE (1986).

[23] VERMEULE, *supra* note 21.

[24] *Id.* at 42.

[25] *Id.* at 30 (citing J. INST. 1.1).

blocking views does not.[26] So it is indeed odd to think that his Common Good Constitutionalism is somehow based on the Roman conception of *Ius Gentium*—the law of all peoples—without once referring to any of its laws.

Unfortunately, with both Dworkin and Vermeule, two negatives do not make a positive. It is hard to make operational any implicit alternative system that must rise out of the ashes of these two failed approaches. Indeed, as best I can tell, all these discussions about natural law that exhibit a philosophical flair are so abstract that they never once address any of the rules that historically form part of the natural law lexicon.

B. The Foes

It is just that amorphous quality of the defense of natural law that give opponents a field day for asserting that the supposed theories of natural law are the peculiar inclinations of given authors. For example, the famous Scandinavian legal realist, Alf Ross, notes that: "Like a harlot, natural law is at the disposal of everyone. There is no ideology that cannot be defended by invoking the law of nature."[27] Elsewhere, he takes it upon himself to trace at great length the origins and evolution of the theory.[28] At a later point, he engages in extensive logic chopping in order to show that Ulpian's maxim is quite meaningless. After all, how does one know what it is to live honestly, or what it is to hurt someone, or to give everyone his due? Ross then has a field day in showing that even though these ideas sound "splendid," they are "devoid of meaning" because they presuppose that we know the baselines need to make the needed calculations.[29] And the notion of hurt is "hard," for it might even be read to include the insistence of a creditor that a debt be claimed. And then for good measure he uses the same dismissive attitude toward Immanuel Kant for the temerity of writing when he says that "[a] course of action is lawful if the liberty to pursue it is compatible with the liberty of every

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[26] Richard A. Epstein, *The Harm Principle – And How It Grew*, 45 U. TORONTO L. J. 359 (1995).

[27] ALF ROSS, ON LAW AND JUSTICE 338 (Jakob v. H. Holtermann ed., Uta Bindreiter trans., 2019) (1953), *cited in* Leiter, *supra* note 21, at 1702.

[28] *Id.* at 345–57.

[29] *Id.* at 376–77.

other person under a general rule."[30] Here Ross is half right because there are conditions of parity, making it necessary to decide which of the positions of parity is the best to choose. But to do that it is necessary to figure out which of these initial positions yields a higher overall output. Sometimes that choice is hard to make, but on the essential questions that is not the case. As regards landowners one position of parity is that no one can build on his land. Another is that every owner can do what he pleases with his land, attention to the condition of his neighbor. The third, and correct position, is that the opportunities to build are allowed, but constrained by the law of nuisance, which is not—as will be apparent later—an empty concept.

Ross then compounds his error by his implicit assumption that all of these proposed rules should be regarded as absolutes, such that a single counterexample shows their emptiness. But as will be shown at great length later, the objection disappears if these maxims are regarded as general *presumptions* that can, and indeed must, be further refined. At this point, it should be clear that the key benefit of these statements, one and all, is to set the journey off in the right direction by ruling out some truly destructive baselines whose consistent application could have disastrous results—outcomes that even the crudest form of consequentialism necessarily condemns. Thus, it is worth noting that if these maxims were all useless, we might as well embrace their opposite. Version two of Justinian's *Institutes* would now read: "The maxims of law are these; to be dishonest when possible, to hurt anyone anytime; and never to render others what is due."[31] Kant's improvement now counsels that "any action is lawful whether or not the liberty to pursue it is compatible with the liberty of others." Even if the initial constraint on dealing with the liberty of others does not set out the ideal initial set of rights, it does rule out positions where one person can dominate others. The test of whether all this works lies in the detailed examination of the rules that pass under the banner of natural law, starting with Gaius and Justinian and working forward, where that initial promise can be redeemed.

The same skeptical attitude is exhibited in the sustained "belligerent" remarks of political theorist Judith Shklar. In her book *Legalism*, she seeks at every moment to land knock out blows against

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[30] *Id.* at 249.

[31] For the original text, see J. INST. 1.1.3.

natural law theory, with criticisms such as "One of the delights of those who do not happen to be partial to natural law theory is to sit back and observe the diversity and incompatibility among the various schools of natural law, each one insisting upon its own preferences as the only truly universally valid ones." [32] And she elaborates these failures in detail, noting how the full range of conservative and revolutionary ideologies all appeal to some ghost of natural law. She then derides Jacques Maritain for insisting that "there is a human nature that is the same in all men and that this nature is 'ontological structure' that forms the basis of all law."

Yet Shklar is utterly indifferent to evolutionary theory. She never asks how it is that the pressures of scarcity shape the emergence of self-interest, which addresses not only how individuals behave, but the interactive relationships brought to the fore in W.D Hamilton's key work (published the same year) on inclusive fitness.[33] Hamilton holds that any individual actor takes into account his or her genetic connection to other individuals in order to maximize the success of the family line over generations and hence not individual welfare per se. The basic theory gives an explanation as to why interdependent utilities are powerful forces within families, which explains the basis of much cooperation that takes places in these settings wholly apart from, and indeed prior to market exchanges. [34] Yet in dealing in "arm's length" business transactions with strangers, the model of individual self-interest gives lots of insight into the exchange so long as it is remembered that the (re)distribution of wealth within the family takes place along these very different principles, including vast expenditures on children without any intention to exact a return benefit later on.

But Shklar remains fixed, without once making any effort here to examine either the biological determinants of behavior or the actual rules that have long been treated as part of the natural law under any

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[32] JUDITH N. SHKLAR, LEGALISM 68 (1964), *cited in* Leiter, *supra* note 21, at 1702. The definition of legalism from Shklar, who is no lawyer, but a historian of ideas, reads: "It is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." *Id.*, at 1. I have never heard that definition, either before or after this book; and there are all sorts of imperfect duties of benevolence that are in no way required by law.

[33] W. D. Hamilton, *The Genetical Evolution of Social Behaviour*, 7 J. Theoret. Biology 1 (1964).

[34] For my explanation, see Richard A. Epstein, *Happiness and Revealed Preferences in Evolutionary Perspective*, 13 VER. L. REV. 559 (2009).

of the classical legal systems starting with Roman law. Instead, there is a feint and parry: Harvard's jacket blurb for the book insists that "instead of regarding law as a discrete entity resting upon a rigid system of definitions, legal theorists should treat it, along with morals and politics, as part of an all-inclusive social continuum."[35] There is no doubt that any system of legal rules must be understood in the context of the social conventions and sanctions that help to clarify and undergird it. Thus a common law rule that calls for the use of the contract at will—allowing people to fire for good reason, bad reason, or no reason at all[36]—only works because it is situated within a strong social norms that limit bizarre firings in practice, at least most of the time. But that common-sense proposition should not deter us from undertaking the hard work of looking at those legal propositions to determine whether they make any sense in ways that span both time and space. So the grand critics of natural law are vulnerable to the charge of ripping down some stylized opponent, without erecting a viable alternative to these long standing rules.

II. THE RELATIONSHIP BETWEEN NATURAL AND LOCAL LAW

I take exactly the opposite view, insisting that the universality of the system is possible only because of powerful common features of the world—gravity and force for physical actions, and scarcity and the self-interest as the determinants of action for both human beings and all other creatures.[37] On this point, it is important to stress that a strong set of core principles is able to generate a complete system. The failure to understand the point undermines H.L.A. Hart's discussion in *The Concept of Law* of "The Minimum Content of Natural Law,[38] which self-consciously follows the general lines of argument in Thomas Hobbes's *Leviathan* and David Hume's *Treatise on Human Nature* (Book III) by outlining some minimum content of natural law that guarantees basic human survival but little else. But the rules that Hart identifies cannot be cabined into that narrow scope. As I argued in my article "The Not So Minimum Content of

[35] Harvard Press Blurb [https://perma.cc/W5CH-A3T7].

[36] Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

[37] This was the central theme of Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J. LAW & PUB. POLICY 711 (1989), and followed up in Richard A. Epstein, *The Necessity of Convergence in Private Law*, 92 S. CAL. L. REV. 751 (2019) [hereinafter *Convergence*].

[38] H. L. A. HART, THE CONCEPT OF LAW 189195 (1961).

Natural Law," the generative principles that speak of bodily security, the acquisition of property, and the protection of voluntary exchange can, and indeed must, be expanded to secure not just bare survival but a full account of human flourishing. [39] Hart put the question thusly: "The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other."[40] But the flaw in this position is:

> That the function of any legal order is not just to *minimise* the risks to survival, but to *maximise* some overall measure of social happiness or welfare, and that this result is brought about in a perfectly 'natural' way by recognizing that Hart's minimum conditions are in fact far more expansive and complete than he knew.[41]

To understand how the basic natural system works, it is important to stress that it follows a mathematical-like technique of using successive approximations to reach the right result in any given case. This methodology is captured by the standard pleading rules—before the unwise truncation of pleadings into two stages only in the Federal Rules of Civil Procedure—that started with a prima face case, and then allowed for defenses, replies, rejoinders and so on until there was a joinder of issue.[42] At each state, some new material can be introduced, so long as it is consistent with all that has gone before. The procedural incidents of the older formulary systems and the English forms of action may be no longer salient, but their embedded linguistic methodology is as good today as it has ever

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[39] Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OX. J.L. STUD. 219 (2005). That work contains a more detailed analysis of the tort question of causation, *id.* at 243–50, and a short analysis of the gains from successive rounds of contracting. *Id.* at 250–52.

[40] HART, *supra* note 38, at 189.

[41] Epstein, *supra* note 39, at 22.

[42] I wrote about this system in Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973). For further application see also, Epstein, *supra* note 39, at 233–43 (2005), on defeasibility. The earliest statement of this system can be found in the Institutes of Gaius. G. INST. 4.124–29 (introduction the *replicatio* and the *duplicatio*). The scheme can be extended indefinitely. For the classic English discussion, *see* Ralph Sutton, PERSONAL ACTIONS AT COMMON LAW (1929). For its systematic application in tort law, as is evident from the title, see Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

been. Failure to understand how the system works is one of the reasons why H.L.A. Hart failed in his famous, but misguided essay, *Ascriptions Responsibility and Rights*.[43] Hart sought to put too much substantive content into these definitions, leaving no room for making the necessary normative judgments in dealing with complex fact patterns.[44]

Accordingly, the process begins with certain kinds of bedrock propositions—individual autonomy, first possession for the acquisition of specific forms of property (namely, land, chattels, and animals), freedom of contract because of the gains from trade, and the prohibition against the use of force and fraud. Thereafter, it makes further elaborations of the overall system. These elaborations do not take place at random, but only in accordance with an overriding principle that any alteration of the initial set of natural law entitlements is allowable only if it creates a Pareto improvement, so that at the very least no one is worse off than before, and at least one person is made better off. Indeed, with respect to the kinds of general laws involved here, there is often an additional requirement of pro-rata gains among the participants—sometimes called a nondiscrimination rule—so the gains are shared in equal proportion against these entitlements.[45] There is no substantive limitation on the kinds of improvements that can be made. Some of these are procedural and involve the use of formalities to improve the security of transactions or to eliminate bias in their application. Others involve the use of affirmative defenses to narrow down presumptions that are too strong to survive without exceptions and further qualifications. Still others involve transitions from legal regime to another, usually to avoid some serious holdout problem that a revised system of rights can respond to.[46] And finally, at the

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[43] 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, N.S. 171 (1948–1949). Hart himself acknowledged the force of the criticisms offered by P.T. Geach, *Ascriptivism*, 69 PHILOSOPHICAL REV. 221, 221–25 (1960), and George Pitcher, *Hart on Action and Responsibility*, 69 PHILOSOPHICAL REV 226, 226–35 (1960), and thus refused to include it in a volume of his collected essays. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *Preface* (1968).

[44] For the criticism, see Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. at 559–60 (in connection with the definition of contracts); Epstein, *Minimum Content*, at 232–33.

[45] On this requirement, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993).

[46] *See* Richard A. Epstein, *The Plasticity of Property Legal Transitions Between Property Rights Regimes for Different Resources*, in THE CHANGING ROLE OF PROPERTY LAW: RIGHTS, VALUES AND CONCEPTS 1 (Ernst Nordtveit, ed. 2022).

constitutional level of protections, the principle calls for just compensation when private property is taken for public use, unless there is some police power justification. In all of these situations, the shifts are made in accordance with the general principles of natural law, and they do not rely in any way on the legislative history in some particular jurisdiction that might be relevant on some key questions, but not on these.

Understanding how this system of natural justice (often in defense of natural liberty) works is key to the entire enterprise.[47] The full explication of these relationships leads to just the aggressive position taken frequently by the natural lawyers (who themselves do not deploy the consequentialist apparatus needed to justify their position). The analytical approach taken here does not "freeze" the law into its initial position, given its capacity for orderly growth in the manner just stated. But equally important, it is not so permissive to allow for the deconstruction of the basic rules through endless ad hoc changes sought by the political powers of the moment, by the use of such tactics as putting words like "taking," "causation," or "possession," or "nuisance" in quotation marks and thus to hint at some supposed ambiguity, a chronic weakness that the intellectual positions of Ross, Shklar, Dworkin, Vermeule, and Leiter invite.

To start the analysis, it is best to go back to its earliest articulation which is found in the opening paragraph of Gaius's *Institutes*, which reads as follows:

> I. Concerning Civil and Natural Law: Book I, ¶ 1: Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for its self is peculiar to it, and is called *ius civile* (civil) as being the special law of that *ciuitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples

[47] Often associated with ADAM SMITH, THE WEALTH OF NATIONS (1776), "'Natural liberty' meant the removal of government restraints so that free people could live their lives and manage their property according to individual preference as long as nobody else was injured through force or fraud." Perry Gresham, *"Natural Liberty,"* FEE (1981), [https://perma.cc/E6RR-CX76]. Note the conspicuous absence of monopoly from this list.

> alike, and is called *ius gentium* (law of nations, or of the world) as being the law observed by all mankind.[48]

Several observations are critical about this passage, with its deep lawyerly precision. The first is that Gaius expresses no hesitation about the binding force and universality of natural law. That state of affairs cannot be the result of legislation or decrees promulgated within any given state, for these rules all are articulated prior to and independent of any individual state. Yet notwithstanding the murkiness of its origin, its authority is unrivalled and is binding both within states and across states, and for all time, just as its more modern exponents claim. There is one systematic account of the phrase "natural reason" which suggests a close kinship with physical laws of nature, holding uniformly at all times in all places. Under this vision, the test of natural law is its durability over time in one jurisdiction and its widespread usage at any given time across different nations. Of course, the physical laws of nature always hold, while the social version of natural law involves precepts that are all too often broken. The best way to understand this insight, then, is to make explicit the relationship between social utility (best measured by the Paretian standards) and the natural law rules. Those relationships that have such overwhelming social benefits are turned into (presumptive) natural law rules because any other starting point leads to complete social disintegration.

These rules are, however, just the jumping off points for the legal system. At this juncture the questions mentioned above—the use of formalities, the need for substantive elaboration and regime changes—all become critical. Thus, a close reading of Gaius (and the derived passage from Justinian) makes it clear that many of these issues are issues that are largely matter of local or national law,

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[48] G. INST. 1.1. The Latin, partly restored from Justinian's *Institutes*, reads:

> Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: Nam quod quisque populus ipse sibi iusconstituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur.

J. INST. 1.1. This text from 530 A.D. is clearly derived from Gaius, which was written about 360 years earlier.

especially those that deal with formalities. His basic set-up runs as follows. He first draws the distinction between that property which is *res commune*, that is common to all people and property that is *res nullius*, that is owned by no one, but which can be brought into private ownership by someone taking it into possession. In the earlier books in Gaius, the question of rights in one's person in such personal relations as family and marriage are also discussed, and I bracket that discussion the one on private property, because these two relationship stand apart from the commons. It is not possible in this rapid tour of the entire area to deal with each and every one of the rules that are described by the Romans and their successors as the rules of natural law or as rules that are governed by natural reason. But it is important to note that all of these have lasted, and are capable of expansion because they strike themes that continue to resonate today. These lists are not perfect, but they are as far from arbitrary as anyone can imagine.

III. THE APPLICATIONS OF NATURAL LAW IN PRIVATE DISPUTES

A. Common Property

It is all too commonplace to begin the discussion of property law with private property, without being aware that it has always operated side by side with common property regimes. It is thus instructive that Justinian's discussion of common property rights sets the intellectual table for generations to come:

> 1. By the law of nature these things are common to mankind---the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitationes, monuments, and buildings which are not, like the sea, subject only to the law of nations.[49]

It should be apparent from this brief exposition that there are two forms of common property at work here. The second includes public buildings and fortifications that are the same kinds of things that can be owned by private persons. Their public nature then, as is the case

[49] J. INST. 2.1.1.

today, does not allow all people access to them, but allows the state, as with most owners forms of private property—subject to fiduciary duties—to exclude or to allow admission on limited conditions, which will vary mightily for fortifications on the one hand and public theaters on the other, so that it is a deadly offense to try to partition the walls that surround the city.[50] But the greater theoretical interest comes with the first portion of the dichotomy having to do with the air, the sea, and the beach. Why are these placed in a special category so that access is open to all?[51]

The basics of this choice govern every property rights system throughout the world, for they all must contend with two separate risks that impede the ideal use of both natural and intellectual resources. The first of these is the question of *externalities* where the activities that take place on one form of property operate to the detriment of activities on others. That risk always arises in connection with the public property, which is why there has always been a law of public nuisance to counter these threats. But it is the second type of risk that in this context is far greater, namely the risk of *holdout* that can destroy the utility of the resource. The best example is that of a river or lake, where the value of the total asset depends on its going concern value. Ultimately, this assertion amounts to nothing more than the correct proposition that the preservation of water in a river or lake is presumptively far more valuable for everyone than the value of that water if one person or several people dam up the river or divert its water into a barrel. In the latter scenario, all the natural uses of the water for transportation, recreation, fishing, and supporting the productive activities on miles of riparian lands, are all lost. In most of these cases, we are dealing with resources that are long and skinny, which is a physical imperative (in social systems as in all living beings)[52] to establish communication and transportation on a uniform grid, where the risk of severance is dominant.[53] At that point what sensibly emerges is the

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[50] G. INST. 2.8.

[51] *See* Richard A. Epstein, *On the Optimal Mix of Common and Private Property*, 11 SOC. PHIL. & POL. (No. 2) 17 (1994) for a more extensive account.

[52] *See* Richard A. Epstein, *Property Rights and Governance Strategies: How Best To Deal With Land, Water, Intellectual Property and Spectrum*, 14 COLO. TECH. L. J. 181, 184–85 (2016) (discussing the analogy between the physical organization of the human body and larger social structures).

[53] *See* Richard A. Epstein, *Property Rights: Long and Skinny*, 14 INT'L J. OF THE COMMONS 567, 574 (2020).

historical maxim "*aqua currit et debet currere ut currere solebat*." "Water runs and ought to run as it was accustomed to run."[54] The maxim prevents anyone by unilateral action from altering that natural flow, which prevents wasteful forms of rent seeking. It does not take a detailed empirical study to realize that allowing the first occupier to take all the water leads to a massive dissipation of public wealth, which is why the new baseline says that everyone has access to the water even though no person is able to divert it to his or her own private use—an initial configuration that is true of every modern water riparian system today.

The creation of this system tends to work tolerably well when the demands of the various users are relatively low, and thus compatible with each other. But, as a well-nigh universal rule, as the intensity of use increases, the uncoordinated actions of hundreds of individuals can lead to a dissipation of the common pool resources. Transportation becomes chaotic. Pollution hampers the use of water for drinking, fishing, and recreation, so that there is some imperative necessity, and thus a clear Pareto improvement, for some system both to manage the resource is necessary, and in a state of nature no one is a position to supply those services. So at this point the transition to a social system where the government takes over the control of these common systems is the only viable means to prevent these resources from destruction by some combination of human and natural sources. Rivers must be dredged and filled in order to preserve navigation and to protect natural resources. Rules of the road must be established on the water (starboard-to-starboard) in order to prevent crashes, and so on. At this juncture, the state, as by default, becomes in charge of these facilities. However, it cannot do so as an absolute owner that holds the power to put all the water into a barrel, but as a trustee whose duties parallel those of private trustees and are thus subject to the same duties of care and loyalty as any private trustee.[55] Accordingly, it is often necessary to allow private citizens, as citizens or taxpayers, to sue the public agencies

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[54] AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (1st ed., Oxford University Press 2009), https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-228.

[55] *See* Robert G. Natelson, *The Constitution and the Public Trust,* 52 BUFF. L. REV. 1077, 1086 (2004), for the lockstep parallel between the two notions. *See also* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987).

for any breach of trust.[56] For similar reason, beaches are long and skinny, and are far more valuable for movement of people and carts than they were for cultivation. So these are also treated as part of the commons, meaning they cannot be walled off for private use. But, as the law of nations recognizes, there are certain limited private uses that increase the value of the beaches some without hampering its utility to others, such as fastening boats to the shore to load and unload cargo, and in times of storms to construct temporary huts on the beach to keep out of the weather when using the beach for transportation is likely to be at a low ebb.[57] The articulation of the various subrules takes a good deal of effort, but the basic underlying natural law structure makes Justinian's rule the baseline against which all other changes are measured.

B. Private Rights and Private Property

The other half of the commons/private divide also exhibits the same close conformity to basic natural law relationships on key matters of marriage, property, and contract subject to formalities that vary from place to place.

1. Marriage

Marriage is a constant for reproduction across societies, as duly noted in Justinian's *Institutes*:

> The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the earth, the air, or the water. Hence comes the union of the male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other

[56] *See* Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11, 18 (1970) ("[S]uch cases [are] based upon the individual's status as a taxpayer [whose] right to sue does not depend on any injury to his property and [who] should not be forced to rely solely upon the efforts of public law officers for the protection of public rights.").

[57] *See* J. INST. 2.1.4–5.

> animals besides men are considered as having knowledge of this law.[58]

These functions are invariant across species and places for without reproduction all species fail. Hence there must be ways to ensure that these vital relationships last. In human beings, the transformative nature of the occasion calls for the acceptance of various formalities, so as to let the parties know that their relationship has been sealed, and for the rest of the world to know who is married to whom, and to know whose remains unmarried, in order to guide their behavior accordingly. But the forms of validation differ across cultures. The Roman used, a variety of rituals to signify the change in status—*confarreation*—ceremony with a kind of cake.[59] *Coemption* takes place by emancipation—a kind of fictitious sale.[60] As in all systems, there are a set of corrective devices that protect parties to the relationship with the passage of time, even the initial ceremonial requirements are not met. In Roman law this task was done through the process of *usucaption*—literally capturing by use—after cohabitation for a period of one year.[61] In other countries the ceremonies will often differ—think of an exchange of rings, or the signing of some official marriage document. And all these systems will also provide backstop protection with the passage of time when the requisite formalities are not fully observed, including common law marriages. The basic legal regime is needed to ensure procreation. The various formalities are the province of local law but the general endorsement of marriage is the province of the natural law.

These rules also have powerful consequences for the children born of these marriages. The genetic connection does a great deal to ensure that the parents will take enormous steps to protect their offspring, so before the creation of the state it is perfectly natural to speak of how "natural love and affection" assign the care of all

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[58] J. INST. 1.2. The point is still valid. *See* Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J. L. & PUB. POL'Y 711, 718–26 (1989) (Stressing how self-interest works different with strangers than it does within families, where the principle of inclusive fitness creates natural bonding). *See also* Hamilton, *supra* note 33, at 1.

[59] G. INST. 1.112.

[60] *Id.* §§ 113, 119.

[61] *Id.* § 111.

children to their parents. That rule remains in effect everywhere, even if it is subject to exceptions in those cases where the parents have engaged in abuse (beating up children) or neglect (not feeding them) when state intervention can take over whenever the natural bonds have failed. But this breakdown is sometimes no easy matter to determine, given that the state administered schemes of childcare are also subject to favoritism, lack of resources, or general confusion, which impede the state's adoptive function. And of course, in those cases where the parents are unable or unwilling to care for their children, some system of orphanages or adoption must be put into place. Such systems often differ in material ways, and given the multiple centripetal forces, nothing about natural law theory dictates how or which these warring systems should be administered. What remains is the imperfect but critical restraint of seeking to minimize the errors of excessive state intervention on the one side, and excessive public indifference on the other, which remedial questions fall in the domain of practical, not natural, law.

2. Occupation (First Possession)

The central proposition about the occupation of land is that its value would be wholly dissipated if the rules that work for water (always with some difficulty) were carried over to land. If land was perpetually open to all comers, the efforts of those who would clear the rocks and till the soil would be frustrated if others could enter at will and undo their work or gather for themselves the produce of their labor. No one should be allowed to reap where they have not sown, quite literally for crops that are the outgrowth of the agricultural revolution. Again, this basic choice is not a close question, as becomes evident by asking the simple question, what happens if the rules of land were applied to water or those for water were applied to land. So as per our central promise, the indisputable efficiency advantages of the natural law decision on the first possession rule makes perfectly good sense, but, as we shall see, only as a first approximation.

Accordingly, the basic proposition of the general rule for the acquisition of chattels and animals was stated by Gaius as follows:

> (66) Property which becomes ours by delivery can be acquired by us not only by natural law but also by occupancy, and

> hence we become the owners of the same because it previously belonged to no one else; and in this class are included all animals which are taken on land, or in the water, or in the air.[62]

This passage needs some contextual clarification. The initial phrase concerning taking ownership of property by delivery stems from the distinctive organization of Gaius's *Institutes*. When he wrote at the height of the classical period, the problem of delivery, which was governed in large measure by Roman rules of formal conveyances—e.g., mancipation (or formal transfer) for special goods, and simple deliveries for others—came first because they were distinctive to Roman law. The "natural" mode of acquisition by occupation thus came afterwards, given its less distinguished pedigree. By Justinian's time, these formalities were simplified so that the order of exposition reverted to the more logical order where original acquisition, which precedes in time the delivery of goods (and land) already acquired, came first.[63] But the acquisitions that private parties in this context were in accordance with the dictates of natural law. The critical move here is that the text explicitly recognizes the difference between things held in common that were not subject to private acquisition and things that were in fact unowned in the state of nature, and thus capable of being acquired by occupancy (the simple act of taking possession of the thing or animal). Land was not on Gaius's list because all titles to real estate were derived from royal authority or the authority of the Roman people, neither of which could exist in a state of nature.[64] In part, the same principle applied to feudal lands in England which were also understood to have resulted from an elaborate system of grants, both assignment and subinfeudation, initiated by William the Conqueror after his successful invasion of England.

But for those objects covered by the rule, the theory of occupancy used by this legal system differs radically from one postulated by the

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[62] *Id.* at 2.66.

[63] *See* J. INST. 2.1.11–12 for the parallel passages, covered in greater detail.

[64] G. INST. 2.7.

unduly influential Lockean theory.[65] First, the initial position was different because Locke presupposed that all things were given to mankind in common by God, so that it was imperative to find a way to take things from the public sphere into private ownership. In turn, this led to his erratic embrace of the labor theory of value which he applied one way to apples and similar objects—initial occupation is sufficient to protect title[66]—but quite another way to land. His labor theory of value was said to require cultivation to perfect title, which prejudiced various native tribes that never engaged in agriculture but nonetheless occupied territories.[67]

Yet in his famous chapter five, "Of Property," including most obviously land, Locke does not once use the correct term, "occupation," even though the wrong word, "labour," appears some fifty-seven times in that chapter.[68] Nor does Locke accurately state the relationship between the commons and private property, for he assumes that it includes whatever tangible resources (such as accords or grass) count as part of the commons. The Romans classified these resources as *res nullius* that could be reduced to private possession without worrying about any conflicting ownership claims by others. Nonetheless, by pointing to the intractable holdout problem that would arise if all persons on the earth were treated in some original position as part owners of all the earth's resources, he does give the right explanation as to why these objects can be removed.[69] We should all die before these titles were unscrambled. The inability to disentangle claims would prevent any form of privatization. But this clashes with the so-called Lockean proviso, under which a man "can have a right to what [his labour] is once joined to, at least where there is enough, and as good, left in common for others."[70] That condition is always unattainable given scarcity, so long as each person chooses the best of the options available to him.

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[65] JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Project Gutenberg ed.) (1690) [https://perma.cc/PW4W-2KX2]. *See* Richard A. Epstein, *The Basic Structure of Intellectual Property Law*, *in* OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 25 (Rochelle C. Dreyfuss & Justine Pila eds., 2018) for further discussion. *See also* Epstein, *Convergence*, *supra* note 37, at 758–60.

[66] LOCKE, *supra* note 65, ch.5, § 28.

[67] *Id.* § 32.

[68] The count was taken off the Project Gutenberg rendition of the Book, *supra* note 65.

[69] *See* LOCKE, *supra* note 65, ch.5, § 28.

[70] *Id.* § 27.

Note that the refusal to find any special form of common property in, for example, water in river or lakes, gives no guidance on the proper way to allocate common resources.[71] Instead, Locke applies the same proviso to both: "No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst; and the case of land and water, where there is enough of both, is perfectly the same." This is a stunning conclusion since every known system of water rights differs drastically from the relatively uniform systems of property rights in land. In the riparian system in use in England at the time, the basic position held that water rights were "usufructuary", such each riparian had a pro rata share of the whole flow that remained constant *regardless* of the time that he came to the river.[72] So constituted, the system was not subject to the objection that it is impossible to leave "as much again and as good" in a world of scarce resources.[73] And it also allowed for the amount removed from the river by each riparian to fluctuate with the amount of water that was within it, which could not be done if there was a system of absolute priorities. But the overall system of water rights is sensitive again to the design of rivers. Large American rivers are capable of supporting mills, and hence the so-called system of reasonable use allows for these to be established, but only under principles that make it hard to decide who is entitled to construct a mill on what portion of the river.[74] There are efforts to try to preserve parity among individuals upstream or downstream, so again some administrative system is needed to determine the location and optimal design of the system, which highlights the limitation of the common law baselines.[75] The situation differs further with the rivers

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[71] *See id.* §§ 33, 42.

[72] For a simple account see *Riparian Right,* BRITANNICA, [https://perma.cc/Z4AW-QVAD]. The term usufructuary is a matter of convenience to express a limited interest in the use and the fruits. The term technically was an inalienable life estate in possession that entitled the holder of that interest to the use and fruits of the land, but not to the trees or land itself.

[73] LOCKE, *supra* note 65, ch.5, § 28.

[74] *See,* for a general statement, Evans v. Meriweather, 4 Ill. 492 (1842). *See also* Red River Roller Mills v. Wright, 15 N.W. 167, 169 (1883) (pollution and refuse).

[75] *See, e.g.*, Dumont v. Kellogg, 29 Mich. 420, 423 (1874) ("It is a fair participation and a reasonable use by each that the law seeks to protect."). The asymmetries create difficulties for imposing sharp limitations on any use by the upper riparian which "would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream." *Id.*

of the Mountain West where riparian lands are often in the poorest position (think of gorges) to take advantage of the adjacent water that is of far greater use for irrigation if taken away from the river under an elaborate prior appropriation system which was justified as a form of "imperative necessity."[76] Again we have a massive social improvement in circumstances but it is not one in which any scheme of explicit compensation paid by multiple appropriators to multiple riparians can ease the transition between two different systems. The huge overall gains, and the absence of any effort to steer preferences to particular parties is what makes the system durable.

3. Animals and Slaves

The rules with respect to animals (and in earlier times, slaves) were also invariant in substance but not in terms of formalities. Sticking to Roman law, the Latin maxim, *partus sequitur ventrem*—or the "offspring follows the womb," often called "increase"—is similarly universal in all countries for any animal whose offspring belongs to the owner of the mother.[77] No other rule could possibly work as well anywhere, for all offspring needs care, nourishment, protection, and instruction from the mother. Hence, in these cases, it is wholly counterproductive to allow the normal doctrine of acquisition by occupation (first possession) to apply.[78] The separation of the offspring from the parent is likely to lead to the offspring's death, so that rule is universal because there is no place and no time where it does not make sense. It is these invariant features, and not the exotic and Humean theories of some mystical psychological bond—the imagination—between the person who takes the thing and the owner, for that supposed bond could be formed by any interloper as well as the owner of female that gave birth.[79] Properly understood, this universal rule that meets Gaius's exact specification in Book I, ¶ 1, even though the origins of the rule—which must have had different instantiations in different cultures—is fixed in all. The natural reason works.

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[76] *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

[77] *See* Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 366 (1954).

[78] *See, e.g.*, G. INST. 2.66.

[79] DAVID HUME, A TREATISE OF HUMAN NATURE 327 n.75 (David Fate Norton & Mary J. Norton eds., 2000) (1739).

The same rule also works for the related rule for the offspring of slaves. Thus, in Gaius Book I ¶ 89, it is a matter of natural law that a child whose mother was a slave when her offspring was conceived, nonetheless gives birth to a free child in accordance with natural law if the child is born after the slave had been set free by manumission.[80] There is an obvious uneasiness here, because Justinian wrote: "Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free."[81] At this point the widespread social institution cannot be ignored by legal writers, but requires that the rules governing it be subject to explication, with all moral qualms and objections put to one side. Deeper conflict, which lasts to this day, involves the tension between natural law provisions and the absolute power of the emperor, expressed in the Roman maxim, as announced in Justinian, "*Sed et quod principi placuit legis habet vigorem*,"[82] which literally translated means "that which is pleasing unto the prince has the force of law." Typically the maxim is strategically mistranslated to dull its power. Thus, the eminent Roman Law scholar Francis de Zulueta renders it thusly: "That which seems good to the emperor has also the force of law"[83]—in order to spur the prince to act in accordance with the principles of natural law.

4. Qualifications of the First Possession Rule

The first possession rule answers the simple question of which person should claim a *res nullius* (a thing owned by no one) from the state of nature. But in situations where chronic instability controls, land so acquired can be taken by force by another, and then again. So the Roman maxim is *not* first in time is highest in right. It is, more precisely, *prior in tempore, potior in jure*—"prior in time is higher in right"—such that all titles are relative, which thus gives the law a rule of decision applicable when the first possessor is out of the picture for some reason—death without heir, adverse possession. This more precise rule makes it always possible to use temporal sequencing to determine priorities. This position transferred into English law, and is used everywhere else, because any other rule leads to the massive

[80] G. INST. 1.89.
[81] J. INST. 1.2.2.
[82] *Id.* ¶ 6.
[83] The translation is by Francis de Zulueta (Vol 1).

instability of possession and a massive free-for-all unless the defense of the *ius tertiae*—your claim against me cannot be barred, because some third party has a higher claim of title—is roundly rejected. The only person who can raise that contention is that third person with a superior title—period. Again, I am aware of no legal system that deviates from this principle.

The possession of property also has both a spatial dimension. The general principle in Latin but dating from the Middle Ages, reads: "*Cuius ad coelum et ad inferos*," or whoever owns the soil, owns from the heavens to hell (the center of the earth). The maxim is also a strict necessity as a first approximation because people necessarily live in three dimensions, requiring them to dig beneath the ground and rise above the surface in order to discharge their ordinary functions of life. Any legal system that did not start from this three-dimensional position could not make any system of property in land work. But, as in all cases, this rule is only a presumption which leaves open the question of how it can be rebutted, to which the general answer is whenever the use values to the property owner are zero or close to zero, and the *blockade or holdout* potential is enormous. The right to exclude gives way because in these select contexts it will dissipate huge amounts of social wealth through pointless bargaining.

Here are some examples. Until the rise of the airplane and radio transmission, there was no need to incur the additional cost of imposing height limitations on surface owners who operated under the *ad coelum* rule. But now advances in technology have created multiple holdout risks. Thus, airplane overflight would be impossible if each landowner could blockade trespassing airplanes from crossing his or her airspace.[84] The transaction costs of many airlines trying to transact with many landowners to create a highway in the sky is an exercise in futility. Forced exchanges are needed to recalibrate property rights. Hence the universally imposed forced exchange everywhere so that the upper airspace is removed from the control of the groundowners and thereafter put in control of the state—(again, who else is a candidate?)—which can use its powers to organize a traffic grid in the sky above a certain level (such as 500 feet

[84] *See* United States v. Causby, 328 U.S. 256, 260 (1946) ("The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.").

above the ground or 250 feet over any structure thereon, to keep the new rule simple).[85] The upper airspace is now made fit for public use and the ground owners have all received ample compensation *in-kind* from their access to a transportation grid for of goods and services, so that no cash compensation is required. There is an important and principled exception for low-flying planes that interfere with a variety of ground uses, and in these cases the disproportionate impact on select surface owners justifies the payment of cash compensation. This basic formula is an entry way into the U.S. Takings Clause, but similar arrangements necessarily apply elsewhere for the enormity of the overall gains makes it imperative that every legal system everywhere adopt the rules for its aviation traffic.

The second major exception is for electromagnetic transmission over private property. The same calculus of costs and benefits applies, so no one can block transmission activity in the absence of showing that some actual physical harm takes place, including disruption of communication systems, agitation of animals, or vibration harm to structures.[86] At this point, it is necessary to address the question of how to best tailor monetary and injunctive relief—again a universal problem, given the two kinds of error—which is applicable everywhere.

A similar set of issues arises in connection with activities that take place below the ground. Here the major advantage of the *ad inferos* rule is its linkage of the surface to the subsurface in ways that allow for their uniform and coherent development. The world could not function if the ownership of the surface did not prevent other individuals from taking over the possession subsurface land in a way that would undermine the surface and allow that person to attempt to mine minerals. It would call support for the surface into question. There are, of course, good reasons why the ownership of mines and the surface may well be placed in different hands, but if so, this is better done through contractual arrangements whereby the joint value can be maximized by agreement. These agreements may well

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[85] *See* Neiswonger v. Goodyear Tire and Rubber Co., 35 F.2d 761, 762–63 (N.D. Ohio 1929) (treating airplane overflights within 500 feet of the ground, in violation of air traffic rules established by the Department of Commerce, as trespasses).

[86] *See* Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 390 (Colo. 2001); Gehrts v. Batteen, 620 N.W.2d 775 (S.D. 2001).

be of great importance if the optimal size of a plot of land for surface use is smaller than it is for mining, at which point the agreements could coordinate the arrangement between the original parties, and allow for the transfer of either surface or subsurface interest by consent—which was the kind of arrangement that was at issue in *Pennsylvania Coal Co. v. Mahon*.[87]

But this system has counterexamples, of which the most famous concerns the ownership of caves with only a single entryway located on one person's land but some portion of the remainder located under the land of another. Now the use of the *ad inferos* rule creates the ideal holdout situation. The cave's value in use to the surface owner who has no access to the cave is zero. The value of the use of the cave to the person who controls the single entryway is very large indeed as the holdout problem disappears. In the famous case of *Edwards v. Sims*,[88] the Kentucky court held that "that there can be little differentiation so far as the matter now before us is concerned, between caves and mines." [89] That statement ignores the vast differences in total output under the two rules, because it fails to address the massive holdout problem that arises in trying to figure out what compensation, if any, was owed for the prior use of the cave by the wrong party. This situation, in turn, makes condemnation a valuable option to the government because the two divided interests could be taken far less than the whole. The idea here is to think of how a single owner would resolve the matter and then impose that solution to minimize overall costs.[90] The dissent therefore got it right when it noted that single ownership would maximize resources. But it did so for the wrong reason. It stressed in poetic terms and at undue length the inordinate effort that the owners of the cave mouth had used to develop the cave into a commercial property. But that is just another application of Locke's misguided labor theory of value in this novel context. The occupation rule renders the cave owner's level

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[87] 260 U.S. 393 (1922). The case involved a forced transfer of support rights reserved the coal company to the surface owners. The correct solution requires *the surface owners* as a group (not the government) to pay for what they have obtained. References to regulations that "go too far" are utterly beside the point. *Id.* at 415. These are property transfers not regulations. Matters of degree go to the level of compensation owed after the taking established by looking at the set of deeds and government transfers.

[88] 24 S.W.2d 619 (Ky. 1929).

[89] *Id.* at 620.

[90] *See* Richard A. Epstein, *Holdouts ,Externalities, and the Single Owner: One More Tribute to Ronald Coase*, 36 J. LAW & ECON. 553, 563–67 (1993) for further discussion.

of effort utterly irrelevant. Instead, it points to the sensible observation that assigning the cave rights to the person who owns the opening does not compromise the support rights for the service in ways that would be sure to happen if mining were allowed. Hence this is a unique case in which overcoming the holdout problem creates no externality to the owner of the surface. The clear Pareto improvement explains Prosser was right, in his intuitive way, in saying that the case was a classic illustration of "dog-in-manger-law"—a colloquial way of talking about holdout.[91]

This same proposition—that holdouts are not allowed when use value is zero or low—is operative in connection with the well-nigh universal distinction, again dating back to Roman law, between alluvion and avulsion.[92] The former is a gradual, often imperceptible addition or removal of soil from a riparian. In cases where the water recedes, a small strip of land, often only inches wide, emerges. The discussion of alluvion in both Roman sources takes place right after the discussion of the occupation rule, and operates an exception to it. These lands are not a grant from the state, so if the rule of initial occupation applied, some stranger (as in the subsurface case) could swoop in to claim that strip, thereby cutting off the riparian from the water. The boundaries and duration of that claim would be uncertain, as would its scope. Worse still if the waters receded still further, yet another interloper could claim the same right with the newly emergent sliver, even though either or both could disappear in short order with further undulations of the water. Hence, the rule that the riparians retained their rights thereby obviating the entire problem at its root by making sure that the riparian never loses contact with the water. The rule here has such powerful advantages that its application is again universal.

Alluvion represents the polar opposite. It is where natural forces divert the river into a new channel at substantial distance from the original river. It makes no sense whatsoever to have the old riparian extend its holding far and wide to the new riverbed, so that rule has always been that the old riverbed becomes surface land and is divided down its thread between (where appropriate) its two riparian owners, another simple rule. The new river course is then

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[91] WILLIAM L. PROSSER, LAW OF TORTS §13 (5th ed. 1984).

[92] *See* G. INST. 2.70–72 (discussing alluvion); J. INST. 2.1.20–24 (discussing alluvion and avulsion).

subject to the same rules on riparian rights, so that those along the river stand in the same relationship to the river as did the original riparians.

These rules have extensive application is well shown by the Supreme Court's decision in *Nebraska v. Iowa*,[93] which was decided under the general rule of *Swift v. Tyson*. The opinion begins with a recitation of the settled rules on alluvion and avulsion with ample citation to the classical sources[94] only to apply them to this somewhat novel context. The muddy Missouri undulates across a broader space that most traditional rivers, but it never quite leaves its riverbeds so that these movements do not alter the boundary between the two states, for if it did, then the location of sovereign would be hard indeed to determine.[95] Hence the rules that are used between parties are carried over to a boundary dispute between states. But their use further extended, without missing a beat, to supply a well-established neutral way to decide boundary disputes between nations so that neither side could appeal to one's own domestic law. The approach was followed in the earlier Rio Bravo dispute between the United States and Mexico.[96] But at one point near Omaha the Missouri breaks through at the neck of an ox-bow, thereby making a new channel. This discontinuity falls under the rules of avulsion, which are then applied to this case so that the governance of the land, which was originally in Iowa, remains aligned along the center line of the old channel.[97]

C. Accession, Confusion, and Specification

These three related doctrines all ask the same difficult question: how to apportion rights to a new product that is created by some combination of the labor and materials from two or more persons.[98]

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[93] 143 U.S. 359 (1892).

[94] *See id.* at 361–62 (discussing first Blackstone and Angel on watercourses, followed by a discussion of foreign sources).

[95] *See id.* at 369–70 ("Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States.").

[96] *See id.* at 361–62.

[97] *Id.* at 370.

[98] *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 117–19 (1995) for my longer exposition. *See also* J. INST. 2.25–34 (discussing parallel rules).

These cases break down into three classes, where the deep difficulties are in the middle category. At one end are the cases in which the mixture, compound or structure is created by the joint consent of both parties, at which point their contractual allocation controls, just as it does in other joint ventures. At the other extreme lie cases where the one party consciously takes and uses the property known to be owned by another for his own purposes, without consent, and thus stands in relation to the new product as a thief. He not only has to return what has been taken, but often he must also surrender, without cost, the value of any labor that he added to improve the particular product. Here the only question is how to best impose the penalty—deny recovery for costs spent on improvement, face criminal penalties, or some other sanction. But in the middle lie the hard cases where the creation of the new mixture, compound, or thing takes place by innocent mistake, as when a sculptor uses a slab of marble owned by another thinking that it is was his, perhaps because his servant had taken it in for safekeeping from the owner.

The correct resolution of these cases lies in making sure that the party who gets to keep the thing (as often happens) is not allowed to wipe out the interest of the other party. In these examples, we see the early emergence of a just compensation principle that is used to protect the party who does not gain the ultimate possession of the new thing. In Gaius's initial example, he writes that if A builds something by mistake on the land of B, the structure goes with the land: "Moreover, any building erected on our land by another, even though the latter may have erected it in his own name, is ours by Natural Law, for the reason that the surface is part of the soil."[99]

Analytically, that last phrase is somewhat suspect because it does not give a clear explanation as to why, conversely, the land does not go with the structure. In Roman times, the likely answer was that the transfer of land required a formal conveyance by mancipation, which was lacking here, so that the owner of the land prevails, subject to this caveat:

> (76) But if we bring an action against him to recover the land or the building, and we refuse to pay him the expenses he has incurred in constructing the building or in sowing the crop,

[99] G. INST. 2.73.

> we can be barred by an exception on the ground of fraud, that is to say, if he was a possessor in good faith.[100]

Note that the rule gives an affirmative defense so that the property can be recovered only if the expenses are covered. The details of how that is done are not specified, which means that some disputes can follow the value of labor and goods expended when these expenses all inured to the benefit of the other side. There are also cases where the owner regains the property, so the defense will not work. At this point, the resourceful Roman lawyer created an "equitable action" to recover the necessary funds from the owner who has regained possession.[101] Within the architecture, the small questions can be resolved incrementally once the basic framework is established. In more modern times, land may be more fungible (as a building plot) so that the unique value might well lie in the distinctive structure constructed on the land, at which point it may make sense to reverse the rule such that the owner of the building has to pay to acquire title to the land to make sure that the property is put in the hands of the party with the highest subjective value. This same basic approach applies to the puzzle, given in Justinian, when a person makes a work partly with his own materials and partly with those of another: the basic rule provides that the work goes to the person who made it, with offsets to the other.[102]

The basic Instinct throughout Is that where the law can locate subjective value in one party, and only market values for fungible goods in the other, the correct solution assigns the object to the party who has that subjective value. With paintings and similar objects, a puzzle arose about whether the picture should go with the canvas or the opposite direction. Gaius is stumped as to why the canvas accedes to the painting when in a similar case it is held that the writings (even for letters written in gold)[103] accede to the canvas. The best explanation for that result is that for the writings, there is no subjective value either way, so that the basic thing stays with its owner when it is hard to find a consistent advantage on the question of valuation. But with the painting, it is now easy. Many paintings

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[100] *Id.* § 76.
[101] *Id.* at 2.78.
[102] J. INST. 2.1.25.
[103] G. INST. 2.78.

are quite inferior, so the explanation for the uniform rule relies not on market value but on the variation in subjective value, possessed in abundance in the picture when the canvas is fungible. Justinian then notes that this rule also applies to purple thread that is always valuable,[104] but has no subjective value so that the party whose value is less ends up with the combined thing.

In many cases, of course, no element subjective value comes into play. Thus in *Wetherbee v. Green*,[105] Wetherbee had mistakenly cut timber from the Green's land which he then fashioned into hoops. The value of these hoops, with labor added, was $800, far in excess of the value of the original timber. In principle, the correct answer should not allow either the owner of the uncut timber or the finished hoops to usurp the value belonging to the other. So the solution maximizes the value of the joint enterprise, which in this instance should assign the hoops to their maker for two reasons. First, when there are no subjective values in play, it is usually wiser to give the thing to the party who has made the greater contribution so as to reduce the costs of the valuation and any possible error. Second, the maker of the hoops has better access to the market for their further sale, and is in a better position to enter into the marketplace. Cooley, J., eventually reached what was an easy conclusion but only after taking a detour:

> As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the mean time, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity.[106]

This last diversion into "identity" seemed to suggest that the original owner should keep the wheels since nothing new is added, even when the functional explanations cut clearly in the other direction. The lesson is that the logic behind the natural law analysis is again utilitarian. First, find the right owner of the object, then give

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[104] J. INST. 2.1.26.
[105] 22 Mich. 311 (1871).
[106] *Id.* at 315.

the appropriate set off by cash. If the cash is not available, then allow the second party to impose a lien of a fixed value on the asset that can be discharged either at or before its final disposition to a third party. It is critical in all the above cases that the two parties *not* be made partners in the new asset, because it is always unwise to create fiduciary duties between strangers—especially when the lien can be dissolved upon payment of a fixed sum, while the division of partnership assets is often a laborious task.

Alas, this rule was not uniformly followed. In at least one case, the Roman solution championed by Justinian held that when possible, a vessel made of brass, silver, or gold must be reduced to its original materials. But why? Reduction to initial ingredients destroys value of the labor already invested to make the new product, so the rule invites the party who put in the labor to bargain around this default, with uncertain results at best. The rule that preserves the value of the improvement works best, and it does so in all times and circumstances, just as a good set of natural law principles should apply.

Finally, there is at least one situation in which coownership is superior to the use of a lien. When two parties contribute labor and materials to make a single uniform product like wine that can be easily divided without loss of value, then coownership works. It is easy for each party to break the joint ownership at any time, so there is no need to engage in figuring out the monetary value that should be attached to any lien that is imposed on the property. That principle carries over without missing a beat to modern eminent domain law when such division of uniform assets allows each party to achieve its end without having to make any valuation at all. After all, the key requirement is to make sure that the division does not result in an implicit wealth transfer from one side to the other, which can be done under a nondiscrimination rule when the valuation questions are thorny. Once again, all of these solutions make as much sense today as in earlier times, consistent with natural law principles.

IV. NATURAL RIGHTS THEORY IN THE PUBLIC SPHERE

A. Taxation

The detailed review of natural law in private law, above, ended with a discussion of how the just compensation formula works whenever interests in property from two or more people are brought

together by some innocent mistake. Its formulas seek to maximize output and to prevent the covert redistribution of wealth. Those considerations are paramount when we move to the public sphere, where natural law principles are converted into a system that seeks to allow for the essential functions of government without compromising the private rights that are normally protected. Here the basic challenge is to explain how the general prohibition against theft in a state of nature carries over to civil society, such that taxation is not just a glorified scheme that takes from many As, the outsiders, and gives to many Bs who control the levers of political power. The basic plan is not to deny that these rights are taken, but to show that the set of services and benefits provided to each citizen is worth (to the extent that these matters can be estimated) more than the taxes paid to secure them, so that the admitted loss of property receives full and fair compensation.

The basic setup is easy to state. Take it as a given that all individuals wish to have certain goods that they cannot acquire through deals in voluntary markets because of the high transaction costs that prevent such coordination. Therefore, suppose that each person in society could contribute $X to a common fund that would supply appropriate public goods (e.g. nonexcludable goods like police services, traffic controls, courts, all broadly conceived) worth twice that much as their individual contributions. Few people would object to being coerced, along with all others, into a scheme that left them better off than in their prior position. It is easily grasped that if these contributions were optional, the scheme could break down if enough people would be tempted to sit back enjoying the benefits of the superior social order while letting the naïve others pay the bill.[107] Hence, a well-designed system of coerced transactions creates close to a Pareto improvement with a roughly even distribution of surplus, though one can never be sure about everyone's exact share in a world with in-kind benefits. With the basic flat tax for general public expenditures, it is impossible to tell with great confidence the optimal level of taxation relative to total output. But rigorously enforcing that tax nondiscrimination rule helps control political abuse and prevents systematic wealth shifting, even though the ideal

[107] The now obligatory citation for the point is MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965).

rate of tax is unknown and perhaps unknowable.[108] It is that scrupulously-protected return benefit that creates the overall gain, and thus strengthens the case for this benefit theory of taxation, which has long been the favorite of classical liberals from Aristotle, to Locke, to Hayek, and most recently myself. In essence, the winning formula taxes everyone, and then uses government to supply compensation to all equal or greater than the level of the tax imposed. Hence these taxes cannot be dismissed on supposed libertarian grounds as a form of "theft," where that return benefit is missing.

In stark opposition to the benefit theory is the so-called "ability to pay approach" that insists that the key objective of any tax system is to transfer wealth from individuals with a lesser marginal utility of wealth to those with a greater marginal utility of wealth, so long as any potential gains are not destroyed by a combination of high administrative costs and reduced incentives for innovation and production.[109] The theory imposes these income or wealth taxes even if the state were not needed to supply any public goods at all. Yet to a classical liberal in the natural law tradition, this conscious program sounds like a scheme of well-organized theft because there is no return to *anyone in any form of any benefit* from the program, so that the use of the government intermediary only magnifies the losses from the refusal to supply any just compensation to the parties taxed. The imbalances replace a well-known and enforceable flat tax rule with a mass of discretionary choices that pose no limits on what the state can do either by progressive taxation or direct regulation. The levels of discretion have been justified by Saul Levmore as follows:

> [M]ost taxes and rent control schemes are not compensable takings because they are the products of political exchanges; taxpayers and landlords are left to protect themselves in the political arena. In contrast, individuals who are subjected to "spot zoning" are often politically unprotected, because they are burdened in a way that makes it unlikely that they can

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[108] *See* Richard A. Epstein, *Can Anyone Beat the Flat Tax?*, SOC. PHIL. & POL. SUMMER 2002 at 140. For a more recent defense of the closely allied benefit theory, see Charles Delmotte, *Predistribution Against Rent-Seeking: The Benefit Principle's Alternative to Redistributive Taxation,* SOC. PHIL. & POL. SUMMER 2022 at 188.

[109] For a summary, *see* Daniel Hemel, *Does the Tax Code Favor Robots?*, 16 OHIO ST. TECH. L.J. 219, 225-37 (2020) discussing the seminal article in the field, J. A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971).

> find political allies, and takings law will often protect them from majoritarian exploitation.[110]

His article rightly presupposes that the same analytical framework applies to both taxation and regulation, and thus requires an institutional response that runs as follows. The political design question throughout is not to pick those individuals who are not, or who may not, be able to protect themselves in the political process (spot zoning cases are hard to predict, for example). Rather, in line with the private law analogues, it is to set up a stable political process that allows for the achievement of a set of outcomes at the lowest possible cost. The state retains no discretion in setting different rate classes for different persons on the pure flat tax, at which point the only collective deliberation that remains is over the choice of unitary rate, which is far more bounded. Hence, the ability to pay tax theory suffers from this political instability because it places no effective constraints on who receives the benefits reaped by this tax system. And so the benefit theory of taxation dominates because it takes private property for public uses with payment in kind just compensation.

B. Eminent Domain

This key concern with stable governance carries over from a system of taxation to its close cousin: the government specifically targeting the wealth of a single or small group of individuals for special treatment. Here again, it is critical to identify the two extremes that are subject to abuse. At the one end is the view that no individual can be made to pay taxes without his or her (individual) consent, which operates as a death knell for all systems of coercive takings, even those that supply compensation so that the government coercion works to the advantage of both the property owner and society at large. The risk of holdout for key lands needed for railroads, bridges, fortifications, and the like is so great as to doom all such adventures once a small fraction of individuals refuse to deal. Yet allowing the state to take any form of wealth upon a vote of the simple majority risks confiscation at a massive level against the

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[110] Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1345 (1991). For my recent response, see Richard A. Epstein, *Levmore on Simple Rules*, 10 TEX. A & M. L. REV. 649 (2023).

isolated individuals in society. So the middle ground is to allow the state to take that property so long as it pays long just compensation when it thereafter puts to that property to public use. Many obstacles lurk along the way, but the one constant requirement is that all individuals receive "full and perfect compensation" for their taken property.[111] That requirement imposes an effective safeguard even if it does not, regrettably, compensate for consequential damages, which include lost profits that the owner could have obtained if his previous use had been allowed to continue. The basic right here is also hedged in by the simple precaution that the taking must be tied to some public use or purpose and not be a simple transfer from A to B,[112] where the political risk of government abuse is greatest. At this point the formula becomes, "nor shall private property be taken for public use without just compensation," which is the text of the Fifth Amendment to the United States Constitution. But since this is a natural law exercise, it is important to look quickly at the status of the matter in the jurisdictions—and they are few—that lack a clause of this sort, for here the practice is to imply one given the natural equity of the basic requirement.

One key case that illustrates this development is *Gardner v. Village of Newburgh*,[113] which arose out of a prosaic dispute in which the applicable statute made no provision to compensate the owner of a spring from which water was to be taken for the benefit of the community at large. That same law had provided compensation be paid to other property owners whose water rights had been abridged. The New York Constitution contained no explicit protection against any diversion of this water, but Chancellor James Kent, who was quite partial to Roman and Civil Law, found that the basic structure of state common law was so clear that such compensation was necessarily required:

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[111] *See* Monongahela v. United States, 148 U.S. 312, 326 (1893) ("There can, in view of the combination of those two words [just and compensation], be no doubt that the compensation must be a full and prefect equivalent for the property taken. . . .").

[112] *See* Calder v. Bull, 3 U.S. 386, 388 (1798) (condemning such purely redistributive laws as contrary to "reason and justice.").

[113] 2 Johns. Ch. 162 (N.Y. 1816). *Gardner* was the "most prominent" of these cases, but by no means the only one. See, James W. Ely, *The Oxymoron Reconsidered: Myth and Reality In the Origins of Substantive Due Process*, 16 CONSTITUTIONAL COMMENTARY 315, 334 (1999).

> The owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water course is a private nuisance; . . . A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *Magna Charta*, and which the legislature has incorporated into an act declaratory of the rights of the citizens of this state.[114]

Thereafter, his opinion becomes inexorable. It cites Grotius, Pufendorf, and Bynkershoeck[115] for the proposition that "it is a clear principle of natural equity, that the individual, whose property is thus sacrificed, must be indemnified." He then quotes the familiar passage from Blackstone that makes the same basic point, [116] and he notes that the proposition is incorporated in the Fifth Amendment to the United States Constitution. At this point there is a perfect continuity of public and private law that drives the natural law foundations, such that it is easy for Kent to then conclude:

> I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the act in question, to violate or interfere with this great and sacred principle of private right.[117]

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[114] *Gardner*, 2 Johns. Ch. at 164, 166.

[115] *Id.* at 166.

[116] The sense and practice of the *English* government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? "Not," says Blackstone, "by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained." BLACKSTONE, *supra* note 16, at *139. Note that this formulation appears to allow for the recovery of consequential damages.

[117] *Gardner*, 2 Johns. Ch. at 168.

Kent exhibits no lack of confidence in using these natural law principles to drive his case home. Private property includes vested water rights, and there are no complications that might allow the Village to justify its actions on some alternative police power ground. So Chancellor Kent never has to reach the question of its scope. But once that issue is raised, the clues for its proper resolution are contained in the opinion when Kent refers to the rules of private nuisance that are, in his view, well-settled. The diversion of water from a river is a classic illustration of the taking of water from a public body, as noted earlier,[118] and it is just that conception of a nuisance that defines the proper scope of the police power in the cases where the government is *justified* to restrict private rights, by stopping those kinds of emissions with some combination of injunctive and damage relief to minimize the two kinds of error in cases of this sort. The natural law foundations for this version of the takings law explains its great durability, as I have defended at length in my *Takings* book.[119]

The same logic was at work in connection with the contracts clause. The key case was *West River Bridge Co v. Dix* (1849)[120], where the question was whether the government which had previously granted a franchise to build a bridge was in position to revoke that charter upon payment of just compensation. The case did not cite *Gardner*, but did allude to the same principles of natural that animated the earlier decision:

> Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the

[118] *Id.* at **Error! Bookmark not defined.**.

[119] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (discussing the police power at ch. 8 (Ends) & ch. 9 (Means)).

[120] 47 U.S. 507 (1848).

> preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain.[121]

The opinion of Justice Daniel did not miss a beat. The rule that matter ono taking for just compensation made it clear that with takings for public use, the just compensation clause had to read into a text that did not contain, when the clause on takings did contain those words. But the two extremes were not tenable. If the charter could never be revoked, there would be unacceptable rigidity. If it could simply be seized there would be tyranny. The middle position that derived from natural law principles thus dominated the classical period.

It is important to note how the modern synthesis of takings law rips this coherent scheme to shreds, starting with its new take on water law. The key case in this deterioration is *United States v. Willow River*,[122] which asks the simple question of whether the government may build a dam on a navigable river so that it backed up to destroy the head of the plaintiff's power facility located on a nonnavigable river. Justice Robert Jackson begins his analysis by rejecting the earlier decision of Justice Mahlon Pitney in *United States v. Cress*[123] that had applied the usual private law rules in the tradition of Kent to the dispute. But after his long disquisition on the precarious state of private rights, Justice Jackson notes that in private disputes the doctrine recognizes a "equality of right" between riparian owners.[124] Accordingly, in his view, *Cress* erred by assuming that it "measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the

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[121] *Id.* at 523.
[122] 324 U.S. 499 (1945).
[123] 243 U.S. 316 (1917).
[124] *Willow River*, 324 U.S. at 504–05.

rights of riparian owners against each other," [125] but that the "dominant public interest in navigation"[126] meant that the rights that any riparian enjoyed against any private party did not run against the government and its "paramount" navigation easement:

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.[127]

Modernly, any connection between public and private rights is necessarily broken, so that the federal government can control a navigable water under the Commerce Clause to wipe out all private rights in a way that is not imaginable under *Gardner*. Indeed, at this point, the takings doctrine is in effect a dead letter unless the government wishes to revive it legislatively. Hence it follows that the government may wall off, as approved in *United States v. Rands*[128] a private landowner's access to a river from a riparian without paying compensation for its actions:

> The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.[129]

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[125] *Id.* at 506.
[126] *Id.* at 507.
[127] *Id.* at 510.
[128] 389 U.S. 121 (1967).
[129] *Id.* at 123.

This imperialist view that separates public from private rights, moreover, is not confined to water, but migrates over to land. Perhaps the most important modern case on regulatory takings is *Penn Central Transportation Co. v. City of New York*,[130] which arose after New York City's landmark designation ordinance prevented Penn Central from using its air rights over Grand Central Station, fully protected as such under New York law, to build Breuer Tower. Under *Gardner*, the state law account of property rights would dominate, as it would under the similarly categorical statement in *Armstrong v. United States* from Justice Hugo Black that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[131] In that case, the Court held that the United States could not dissolve a mechanic's valid lien for services rendered by a subcontractor from whom no valid lien waiver had been obtained, just by sailing its navy vessels into international waters, where Maine law did not apply. That action dissolved the lien, but in its stead Justice Hugo Black held for a five-to-four majority—the other four accepted a defense of sovereign immunity, itself a long tale—the former lienholder now became general creditor of the government. The key insight here, as in *Gardner*, is that the Takings Clause protects not only the fee simple absolute in possession, but every partial interest in real and personal property, including both liens and air rights. In stark contrast, Justice William Brennan in *Penn Central* repudiated Black's clear command in *Armstrong* by insisting that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[132] That self-imposed definition of helplessness led to a set of "ad hoc, factual inquiries" that require balancing various factors that almost never generate the per se rule.[133] Brennan's retreat from rules was not simple happenstance, given that he cites *Willow*

[130] 438 U.S. 104 (1978).
[131] 364 U.S. 40, 49 (1960).
[132] *Penn Central*, 438 U.S. at 124.
[133] *Id.*

River for the proposition "that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[134] The connection between private and public property, once broken, cannot be restored. A system of private property law, which depends for its effectiveness on the division of property into partial interests—leases, mortgages, life estates, future interests, mineral rights, air rights, and servitudes—to produce gains from trade will founder if the fragmentation of these interests for private gain can be coopted by state declarations that their losses don't count at all when the entire property is taken. Indeed, *Penn Central* never addresses the scenario where the air rights over a certain height are taken over bare land.

The intellectual situation does not get any better from the other side, where the notion of nuisance—which Kent did not put into quotation marks—is either disregarded or attenuated in modern case law. The key point is that the term nuisance necessarily has constitutional dimensions in structuring the police power under the takings law. The basic instinct here is that the rights of property against government action can be lost if, but only if, the individual property owner has done *something wrong* with his or her property, which is why the state does not have to compensate the robber when it takes his gun. In land use cases, the typical form of private wrong is a nuisance, even though occasional cases of trespass by a property owner may trigger a similar state response. At this point, the nuisance doctrine announced in *Gardner* necessarily comes into play, so that the state can no more redefine the term nuisance to reduce the level of private property protection any more than it can recast every spoken word as a form of defamation or threat (to the public order, of course) in order to eliminate all protections for freedom of speech. At this point, allowing any definitional ploy to work undermines the entire structure of property rights.

This issue became paramount in *Lucas v. South Carolina Coastal Council*,[135] where the government forbade a Palm Island property owner from reconstruction after South Carolina passed its Beachfront Management Act in 1988, which prohibited the

[134] *Id.* at 124–25.

[135] 505 U.S. 1003 (1992).

rebuilding of any structure previously there. The South Carolina court justified the restriction on the ground that the regulation was intended to prevent "'harmful or noxious uses' of property akin to public nuisances."[136] And thus the issue was joined on the question of whether reconstruction of that property could be limited this way. There was, in fact, at no point any systematic explication of the principles of nuisance and how they work.[137] Justice Scalia struck down the ordinance, but only after first equivocating that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[138] Scalia thereby dismissed the centuries-old distinction between restitution and tort, only to then revert back to conventional wisdom by citing key provisions of the Restatement of Torts, §§826–830 to restore some sense of order to the situation. So the question became whether building a single-family home is equivalent to casting odors, noise, and pollution onto the land of another, placing all the existing homes in South Carolina in danger of suffering from the same fate.

The common law definitions received a far more hostile treatment from the concurring and dissenting judges. Justice Anthony Kennedy gives away the game when he insists "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[139] He then goes one step further when he writes that "the Takings Clause does not require a *static* body of state property law; it protects private expectations to ensure private investment,"[140] again without saying how the a so-called dynamic common law is able to protect private expectations when it, presumptively, introduces a new level of uncertainty into the analysis. As I argued long ago in my article "The Static Conception of the Common Law"[141]:

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[136] *Id.* at 1003 (quoting Mugler v. Kansas, 123 U.S. 623 (1887)).

[137] For my efforts, see Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUDIES 49 (1979) (describing the classical system); Richard A Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J LAW & ECON. AND POLICY 282 (2022) (offering criticism of the extensions of public nuisance on such matters as lead and opioids).

[138] *Lucas*, 505 U.S. at 1024.

[139] *Id.* at 1035 (Kennedy, J., concurring).

[140] *Id.* at 1035 (emphasis added).

[141] For my earlier attack on this ploy, see Richard A. Epstein, *The Static Conception of Common Law*, 9 J. LEGAL STUD. 253 (1980).

> Cases too numerous to count make reference to the change in social conditions between the time that some common law rule is first announced and the time it is at last overthrown. The value of the rule is subject to constant depreciation; while fit for the social era in which it first appeared, with changed conditions, it must now give way to a reality. The law, it is said, must thus evolve with the human institutions it governs if it is to preserve its own legitimacy.[142]

Hence the real challenge is to identify those precise situations where changed conditions call for a change in the rules, which occurs when the advent of the airplane and telecommunications require modifications of the *ad coelum* rule to overcome intractable holdout and blockade problems so as to create a clear Pareto improvement. Nor does Justice Harry Blackmun in his dissent—which reads a lot like the Kennedy concurrence—offer any close analogy when he puts forward this deceptive quotation from Oliver Wendell Holmes, "[T]he legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances."[143] But he never mentions the kinds of variation on the theme to which he referred was to the "power, when deemed necessary for public safety, to prohibit blasting rocks with gunpowder without written consent, is among the powers given by [the Massachusetts statute]."[144] And that same principle was found in a companion place to allow for the ringing of bells and whistles to warn passersby of arriving trains.[145] How one should move from these cases to the ban on new home construction on a valuable beachfront lot is left, seemingly, to the reader's imagination.

1. Public Trust Doctrine

The laws of taxation and takings both deal with how the Constitution works when it imposes limitations on the ownership

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[142] *Id.* at 253–54.

[143] *Lucas*, 505 U.S. at 1060 (Blackmun, J., dissenting) (quoting Commonwealth v. Parks, 30 N.E. 174 (1892)).

[144] *Parks*, 30 N.E. at 174.

[145] Sawyer v. Davis, 136 Mass. 239, 239–40 (1884).

and use of private property. The converse problem arises when the government takes public resources, however acquired, and transfers them to private parties. One possible solution to that problem is to dismiss it from the get-go and insist that the government can distribute whatever it owns to whomever it wants, just as though it were a private party dispensing with its own resources. Hence, the government can dole out water rights that were held in common or lands acquired by treaty or conquest to its favorite parties, no questions asked. There is, to my knowledge, no one today who takes that position seriously, so the question then arises on how the issue should be best handled. Justice Holmes was of that view on the question of whom could hold public employment or speak in a public park,[146] which was then followed in *Davis v. Commonwealth of Massachusetts*. In Davis, Holmes, then sitting as a justice on the Massachusetts Supreme Judicial Court, held, "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[147] Accordingly, the government should be treated as an outright owner when it banned preaching of the gospel on the Boston Common, which had taken place "from time immemorial to a recent period, [i.e. 1885]."[148] *Davis* was overturned by name in *Hague v. C.I.O.*,[149] which denied that the government held property as if it were a private owner. Justice Butler wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[150]

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[146] *See* McAuliffe v. City of Bedford, 29 N.E. 517 (Mass. 1892); Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895).

[147] *Davis*, 39 N.E. at 113. *See* Davis v. Massachusetts, 167 U.S. 43, 47 (1897) for a reiteration of the same point by Justice White at the U.S. Supreme Court.

[148] *Davis*, 167 U.S. at 46.

[149] 307 U.S. 496 (1939).

[150] *Id*. at 515.

This transformation reflects the postulate of limited government holding public property *in trust* for its citizens, which properly limits its powers of management and disposition. The content given to the duty is intended to guard against abuse, and to deal with that situation where I have urged that the standard be the converse of the Takings Clause, namely, "nor shall public property be given to private use, without just compensation."[151] At this point, the correct move, as in nuisance cases, is to adhere to the analogies to private trust law which were followed without exception during the Founding Period. John Locke wrote that the social contract required "that the government had a fiduciary obligation to manage properly what had been entrusted to it,"[152] which includes the duties of loyalty, good faith and impartiality,[153] as identified by Professor Robert Natelson after exhaustive study. Elsewhere Natelson has written, "I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt. The fiduciary metaphor seems to rank just below 'liberty' and 'republicanism' as an element of the ideology of the day."[154]

Key to these duties is that public property cannot be given away to a private party, nor sold to it on terms that are so imbalanced as to make it tantamount to a gift. In most cases where there is no conflict of interest, the business judgment rule protects the trustee who acts in good faith where the valuations are credible. But in those cases where there is self-dealing so that the trustee finds its loyalty compromised, the court will examine the transaction to see if fair value is obtained. The rule is of longstanding application. Therefore in *Milhau v. Sharp*,[155] the public trust doctrine was applied to allow private parties to overturn a decision of the New York City Board of Alderman that authorized a private party to construct and operate a

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[151] U.S. CONST. AMEND. 5; *see also* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 428 (1987).

[152] Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause* 52, 53, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 53 (Gary Lawson et al. eds., 2010) (citing JOHN LOCKE, THE SECOND TREATISE OF Government § 136 (1690)).

[153] Natelson, *Legal Origins* at 57–60.

[154] Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1086 (2004).

[155] 15 Barb. 193, 206-207 (N.Y. Gen. Term 1853). This case and similar cases are cited and discussed in Schanzenbach & Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 586–87 (2018).

private railway along Broadway after it received the contract for a price below that of rival bids. The Court noted that the city corporation "is the depositary of a trust which it is bound to administer faithfully, honestly and justly. And no one will contend that the body of men, who for the time being, may be its duly authorized representatives, can legally dispose of its property of great value."[156]

The rule applies to all kinds of property, regardless of when and how it was acquired, and its application should be cut and dried in most cases. Nonetheless, in dealing with this doctrine under the general rule of *Swift v. Tyson*, Justice Field, in *Illinois Central Railroad Co. v. Illinois*,[157] stated the doctrine in correct terms, only to misapply it when allowing the state of Illinois to rescind on grounds of initial voidness its earlier grant the Illinois Central Railroad that had permitted it to erect facilities in Lake Michigan, while preserving the public right of navigation over the affected waters. The fiduciary duty does not require the government, any more than a private party, to retain property when it can be disposed of in ways that secure mutual benefits for itself as grantor and the individual transferee. It is of course permissible to set aside any prior grant within time if the deal is one-sided or has been obtained by fraud or duress. But it is quite another thing to declare it void ab initio so that such a demonstration need not be made at all. Yet, on this point, the Illinois state law has run both hot and cold. Its most exhaustive decision in *Paepcke v. Public Bldg. Comm'n of Chicago*[158] involved a public-to-public transfer of four acres of public trust land in Washington Park to create a public school. The Court examined the transaction in detail and concluded that on a balancing of factors that "diminution of the area of original use would be small compared to the entire area," [159] allowing the transfer to go through, even though it constituted a small deviation from the terms of the original state grant to the Commissioners.[160] The state grant had dictated that the

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[156] *Milhau*, 15 Barb. 212.

[157] 146 U.S. 387 (1892).

[158] N.E.2d 11 (Ill. 1970). *Paepcke* contained a long discourse about the then-recent article. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970), which called for a stricter use of the doctrine to protect environmental interests, but never related that discussion to this case.

[159] Paepcke v. Public Bldg. Commission of Chicago, 263 N.E.2d at 19.

[160] *Id.* at 19.

transferred property "shall be held, managed and controlled by [the Commissioners] and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever."[161] At no point did the that case distinguish between lands that were once submerged, never submerged, or previously submerged—noting instead that all trust property should be treated in the same fashion.

That decision was followed by *Lake Michigan Federation v. U.S. Army Corps of Engineers*,[162] where the court set aside an agreement whereby public trust lands were transferred to Loyola University, allowing the construction of public and private facilities in ways that appeared to benefit both sides. The District Court was correct that the doctrine is a safeguard against abuse, but was wrong to find any abuse in that transaction, which had gone through exhaustive reviews and which on its terms gave substantial return benefits to the City.[163] Joseph Kearney and Thomas W. Merrill noted the promise of a wealth of benefits to the City in their book, *Lakefront*. Their book, however, badly overplayed its skepticism of judicial enforcement of the public trust doctrine when it insisted that the danger of such aggressive intervention was so great that it was best for the courts to stay their hands whenever the legislature had acted, all in order to avoid injecting a "wild card" into these debates.[164]

Their refusal to countenance any form of judicial review marks a regressive step in using the public trust doctrine as a barrier against state intrigue by reducing it to, at most, a clear statement rule with no constitutional bite. At this point, the risks of patronage politics become great, as were manifested in the lop-sided deal whereby the City of Chicago and its Park District turned over 19 prime acres (worth perhaps $200 million) in historic Jackson Park (a Frederick Law Olmsted masterpiece) to the Obama Foundation under a 99–year "use agreement"—which had previously been styled as a 99-year lease—for $10. [165] Throughout litigation challenging this arrangement, the courts made much to do about the distinction

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[161] Private Laws, 1869, vol. 1, p. 360.

[162] 742 F. Supp. 441 (N.D. Ill. 1990).

[163] For a detailed account of that deal see JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT, PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO 276 (2021).

[164] *Id.* at 297.

[165] For early decisions on this matter, see Protect Our Parks v. City of Chi., 385 F. Supp. 3d 662 (N.D. Ill. 2019) ("POP I").

between formerly and never submerged lands, as if there was a total prohibition on the alienation of the former and complete discretion to dispose of the latter, contrary to standard uniform duties of all trustees for all kinds of property.[166] To make matters worse, the key agreements in the transaction required the Foundation to fund the cost of construction and a maintenance endowment before being allowed to proceed.[167] But the Foundation insisted that the "receipt" of sufficient funds was enough, even though they were later diverted to other purposes, and that the needed endowment, which as of June 2021 required $470 million, was satisfied when one million dollars were placed into the trust, leaving the financial future of the project most uncertain. As lead counsel (along with Michael Rachlis), we have attacked these one-sided arrangements in court but as of yet have had no success stopping or slowing down the project. The last argument was held on October 24, 2023, and a decision awaits, with a possible petition to the Supreme Court in the offing.

C. Procedural Due Process

The last part of the well-known natural law synthesis involves questions of procedural due process, which in American constitutional law is captured by the Due Process Clauses of the Fifth and Fourteenth Amendments. The origin of these principles go back to Roman times, in two Latin maxims that continue to endure: *Audi alterem partem* (hear the other side) and *nemo iudex in causa sua* (no one should be a judge in his own clause). These notions are evident as well in Chapter 39 of Magna Carta, which reads:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[168]

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[166] Protect Our Parks, Inc. v. Chi. Park Dist., 971 F.3d 722, 730 (7th Cir. 2020).

[167] *See* Master Agreement of Section 12(h) (construction costs); Section 12(j) (endowment); Section 13(iv) (updating of both before closing).

[168] MAGNA CARTA (1215, repeated in charter of 1225) [https://perma.cc/RH9P-CXBL].

These procedural rights are also an essential component of Locke's general approach to natural law.[169] The point is raised yet ago in *Calder v. Bull*, which condemns in no uncertain terms a law that makes a man a judge in his own cause.[170] Within the English framework, these principles are often referred to as principles of "natural justice," which include both the Rule against Bias and The Right to a Hearing.[171]

It is important to see that these procedural safeguards are necessary to preserve the stability of the substantive system of property rights set out above. Thus, suppose that in an uncertain case ex ante the true probabilities of each side winning are 50 percent, which is achieved by the flip of a fair coin. That result will not do, however, given that the coin does not review evidence to see which side is correct. That evidence is intended to push the probabilities to one corner or the other. But now suppose that there is a judge who has a bias. If the evidence suggests that the case is more than 50 percent toward one side, then a verdict that goes in the opposite direction amounts to a taking of property from one side to another. Hence, any judge that uses an improper presumption that 50/50 cases are really 60/40 cases has in effect taken ten percent of the wealth from one party and given it to the other. The same distortion applies if a party is not allowed to be heard, for now that omission skews what should have been a 50/50 case into, say, a 60-40 case. It is for this reason that procedural and substantive due process have always been yoked together, even though the terms procedure and substance appear to refer to polar opposites, explaining John Ely's famous denunciation of substantive process: "We apparently need periodic reminding that 'substantive due process' is a contradiction in terms-sort of like 'green pastel redness.'"[172] But nonetheless, that doctrine persists because of this close connection, most noticeably in the famous rate cases. In *Chicago, Burlington & Quincy Railroad, Co v.*

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[169] *See* Locke, Second Treatise, ch. 2, ¶ 13 (dangers of being judge in one's own cause)

[170] Note that the clause appears just before the passage previously noted that condemns a taking from A to B.

[171] For a simple and clear exposition, see H.W.R. WADE, ADMINISTRATIVE LAW ch. 12 (1961).

[172] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980). For a more systematic defense of this position see the other Ely, James W. Ely, *The Oxymoron Reconsidered: Myth and Reality In the Origins of Substantive Due Process*, 16 CONSTITUTIONAL COMMENTARY 315 (1999).

Chicago[173] the conflation took place in the context of the Fourteenth Amendment when "without due process" was transformed into "without just compensation" and thus opened the path to huge developments dealing with confiscatory rate regulation. In this context, Justice John Marshall Harlan again appealed to principles of natural law to bridge the gap between fair procedures and fair outcomes:

> The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.[174]

Thus, the connection survives because the objective of both doctrines is the preservation of private property against government exploitation.[175]

D. Privileges and Immunities and the Rights of Citizens

The discussion of both takings and procedural due process, above, did not rely on the distinction between citizens and other aliens. The Privileges or Immunities Clause brings the distinction into central view. Structurally, it seems clear that citizens must have some rights separate from and greater than those given to ordinary persons and, following general international practice, that line seems to be drawn in two distinct ways. First, with respect to the person, all

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[173] 166 U.S. 226 (1897).

[174] *Id.* at 236.

[175] For further applications, see, e.g., Smyth v. Ames, 169 U.S. 466 (1898); Fed. Power Comm'n v. Hope Nat. Gas, 320 U.S. 591 (1944); Duquesne Power and Light v. Barasch, 488 U.S. 299 (1989).

persons are entitled to be free of arbitrary imprisonment and unequal treatment based on arbitrary grounds, or else the guarantees of due process and equal protection of the laws, both of which apply to all persons, are empty. But in accordance with uniform practice in the United States and elsewhere, only citizens of the United States have the right to own real property (though, noncitizens must still be able to rent and buy groceries) and to enter into the trade or occupation of their choice, subject only to police power limitations. Aliens have no such rights under the Constitution. Congress can of course confer additional rights on noncitizens, but it cannot arbitrarily remove the minimum set of protections they possess. The hierarchy is thus preserved in ways that are consistent with common practice.

Yet the question of citizenship also raises the question of just who is entitled to that preferred status. The Fourteenth Amendment makes clear that persons born in the United States and subject to its laws counts as citizens. It is commonly understood that the children of U.S. citizens (or at least one parent) born abroad are citizens as well. The words "subject to the jurisdiction thereof" is meant to rule out people who are in the diplomatic corps given that they serve as representatives of other countries and thus cannot be loyal to the United States. It is also agreed that the children of *legal* aliens in the United States become citizens because one of the ways to encourage such individuals who are invited to come to the United States is to give their children that citizenship status as of right. This issue arose in the 1898 case of *United States v. Wong Kim Ark*.[176] The litigant's parents were permanent aliens legally in the United States when their son was born. He was denied readmission to the United States after going abroad to China. The Supreme Court held, after an exhaustive examination of English and American authorities, that he was allowed to regain admission into this country on the ground that, being born here, he was a citizen. There were two exceptions to the rule. One had to do with the aforementioned issue of being a member of the diplomatic corps of another nation. The other exception was described by A.V. Dicey as follows:

> "*British subject" means any person who owes permanent allegiance to the Crown*. "Permanent" allegiance is used to distinguish the allegiance of a British subject from the allegiance of an

[176] 169 U.S. 649 (1898).

> alien who, because he is within the British dominions, owes "temporary" allegiance to the Crown. "*Natural-born British subject" means a British subject who has become a British subject at the moment of his birth. Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject*.[177]

It is thus clear that children born of persons temporarily within a given country retain the loyalties to their own country and do not have the permanent attachment as citizens. That also is a sensible textual inference from the key first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The person who stays in a hotel for a week is in no sense a resident of that state, which seems to put an end to the "tourist" trade for citizenship, even though this category is not listed specifically in the Fourteenth Amendment. And that these children are not citizens is consistent with the dual relationship of protection from the one side and loyalty from the other to another sovereign. Indeed, such implications are the norm in constitutional interpretation throughout the nineteenth century (and every other era), such as the huge jurisprudence over the proper scope of sovereign immunity, the police power, and the doctrine of unconstitutional conditions, all of which are read into a Constitution that makes no direct mention of them. [178]

At this point, it is fair to ask the question of whether *Wong Kim Ark* addresses what has become the most divisive issues of our time.[179] Does that exclusion also apply to children of *illegal* aliens (the statutory term) born in the United States? *Wong Kim Ark* does not mention the question of illegality, and its facts did not present that issue. But it is a far stretch to think that these children become citizens when the children of sojourners do not. Congress can of course reverse that presumption by statute, just as it did when in 1924 when it conferred citizenship on all members of Indian tribes who

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[177] *Id.* at 694 (italics in original).

[178] Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295 (2017).

[179] 169 U.S. 649 (1898).

requested it, but who otherwise were not at that time thought to be caught by Citizenship Clause of the Fourteenth Amendment.[180]

Indeed, as a matter of first principle it seems odd that the commission of an illegal act should be the pathway for citizenship for the child of that illegal alien given the principle that no one should profit from his own wrong—*ex turpi causa non oritur actio* (out of a wrong action no cause of action arises)—including that of the child to retain citizenship. There are the usual textual arguments on the point that are always to some degree inconclusive, and the regrettable tendency to insist that anyone who takes the position that illegal aliens are entitled to the benefits of birthright citizen.[181] To make the credible case in the opposite direction, it should be possible to find cases in which children of illegal aliens received citizenship before 1868. I am not aware of any such demonstration.

E. The *Insular* Cases

The implications of citizenship also necessarily arise in connection with individuals not born the United States, but who became subject to its control when their countries of birth were acquired by the United States. This generated the most instructive line of cases, the so-called "Insular Cases" that arose in the aftermath of the American acquisition of the Spanish territories of the Philippines, Puerto Rico and Guam under the Treaty of Paris that ended the Spanish-American War in December 1898. None of which raise the issues in *Wong Kim Ark*. One central question in these cases regarded the various local institutions operating under Spanish rule remaining intact after that "cession." After Puerto Rico passed the Foraker Act[182] the first two *Insular Cases* reached the Supreme Court.

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[180] The Indian Citizenship Act of 1924, 43 Stat. 253 (1924).

[181] The issue may yet come back into play politically. *See* Brian Bushard, *Trump Promises To End Automatic Citizenship For Children Of Undocumented Immigrants*, FORBES (May 30, 2023), [https://perma.cc/Z3W8-UFKK]. There are extensive public debates on the legislative history. For the initial sally, see Michael Anton, *Citizenship shouldn't be a birthright*, WASHINGTON POST (July 18, 2018) [https://perma.cc/Z6AC-2SUF]. For an attack on that position, see Daniel Drezner, *Michael Anton and the Terrible, Horrible, No Good, Very Racist Argument on Birthright Citizenship*, WASHINGTON POST (July 23, 2018) [https://perma.cc/M9B2-2TJU]. For a response, see Michael Anton, *Birthright Citizenship: A Response to My Critics*, CLAREMONT REVIEW OF BOOKS (Jul. 22, 2018) [https://perma.cc/5FCP-XHKZ].

[182] Pub. L. 56-191, officially known as the Organic Act of 1900.

In *De Lima v. Bidwell* (the federal collector of custom taxes in New York),[183] the Court held that once the "cession" of Puerto Rico to the United States was completed, it was no longer a foreign nation, but an American territory and thus could not be subject to taxes as if it were a foreign nation, giving Puerto Rico a preference that it still enjoys today.

The companion case of *Downes v. Bidwell*[184] addressed the far thornier question of the status of Puerto Rico once it became a territory. There, the plaintiffs claimed that the lesser tax imposed under the Foraker Act was unconstitutional because it violated the constitutional requirement of Article I, Section 8, Clause 1 that "all duties, imposts and excises shall be uniform throughout the United States," [185] and, in addition, the provision of Article I, Section 9, Clause 6 that prohibited national duties on vessels that traveled between states.[186] The case also asked the question of how the general territorial status of Puerto Rico influenced the overall analysis. *Downes*, which was written by Justice Henry Billings Brown, the author of *Plessy v. Ferguson*, [187] is notable for its use of the term "plenary" in connection with the power of the federal government over the territories:

> The power of Congress over the territories of the United States is general and plenary, arising from an incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the

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[183] 182 U.S. 1 (1901).

[184] 182 U.S. 244 (1901). The decision anticipated the arguments offered by three eminent Harvard professors. Christopher Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899). They all accepted the view that the transition from distinctive English institutions to Spanish colonies would be a mistake, so that Congress was free to take a different course. In *Downes,* Brown may well have been influenced by these articles, but he cited none of them.

[185] U.S. CONST. art. I, § 8, cl. 1: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

[186] U.S. CONST. art. I, § 9, cl. 6: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."

[187] 163 U.S. 537 (1896).

> United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired.[188]

There was also an influential concurrence by Chief Justice Edward White that took the view that Congress did not have to make a uniform judgment as to which newly acquired territory put its citizens on the road to American citizenship. Stating a theme common at the time, he concluded that "the determination of what particular provision of the Constitution is applicable [to any unincorporated territory] . . . involves an inquiry into the situation of the territory and its relations to the United States."[189] It therefore followed that the United States could by "incorporation" put Hawaiians on the path to citizenship, doing the same for either Puerto Rico or the Philippines, and it was his supplement to Brown's opinion that settled the distinction between those territories bound for statehood and those not. Chief Justice Melville Fuller offered an impassioned dissent that rejected the view that:

> Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.[190]

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[188] *Downes*, at 268, quoting Bradley, J., in Mormon Church v. United States, 136 U.S. 1, 42 (1889). Bradley's denunciation of the Mormon practice polygamy is strident to say the least. Thus Polygamy is "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world." *Id.* at 48. And the same attitude was all too evident in some of the Chinese Exclusion case decided at the same time. Ping v. United states, 130 U.S. 581 (1889): "that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization;" id at 596. Note that on the facts of the case Ping had left the United States in 1887, having secured a promise from the government that he would be allowed to return in 1889. But an intervening act purported to strip that right and was upheld on much the same grounds that led to Field's opinion in *Illinois Central*, supra at 157, such that when the right is revoked, "the last expression of the right must control," notwithstanding any treaty with a foreign nation or an agreement with the individual.

[189] *Downes*, 182 U.S. at 293.

[190] *Id.* at 372.

Justice Harlan rejected the notion that the United States could independently make this choice, insisting that it was dependent on "the authority of the people" for its force:[191]

> Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the People of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces — the people inhabiting them to enjoy only such rights as Congress chooses to accord to them — is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.[192]

Accordingly, he emphatically rejected the notion of "incorporation," or the view that the Congress could decide whether a given territory should move toward statehood. "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend."[193]

In the end, I think that the majority had the better view on the question. The constant fear of an unrestrained Congress with "plenary" powers doing whatever it will for whatever reason it wanted was overstated. Indeed, the stress on that notion was no small deal because it is meant to neutralize the language found in Justice Roger Taney's decision in *Dred Scott v. Sanford* using the asserted limitation on the power of Congress to control the activities in the territories as a reason to undo the Missouri compromise.[194]

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[191] *Id.* at 377.
[192] *Id.* at 380.
[193] *Id.* at 391.
[194] *Id.* at 250-51.

Brown then further insisted that there was nothing to fear from the extensive scope of congressional power. He does so by first noting rightly that "an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation, in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism," but then finds on the facts that there was "no justification" in the past history of the United States or of Great Britain since the revolution—with the sole exception of *Dred Scott*.[195] At this point, the reference to natural rights is key because it becomes the fulcrum of much of what he says:

> We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, *Minor v. Happersett* 88 U.S. 162 (1869) and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.[196]

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[195] *Id.* at 280.

[196] *Id.* at 282–83. The *Minor* case answered in the negative question of whether a woman, who was both a citizen of the United States and the state of Missouri does not thereby become a voter in Missouri, by rejecting the view that her right to vote is one of the privileges and immunities conferred by the Fourteenth Amendment on all persons.

Indeed, by the same logic the Guarantee Clause for a Republican form of government that bound the United States to the *states* was not part of the natural law tradition.[197] This theme was followed up in *Dorr v. United States*,[198] a case from the Philippines finding that the right to a jury trial was only a domestic, not a universal, guarantee.[199] The entire decision was not without a strong dissent that insisted that stronger constitutional protections were necessary to keep the nation in line with its original principles.[200]

The first ten of the *Insular Cases* were decided between 1901 and 1904, and thus there was an eighteen year gap between them and the last of the *Insular Cases: Balzac v. Porto Rico*,[201] decided after World War I when the earlier imperial age had passed. At this point, Chief Justice Taft had to answer a ticklish technical question of how to prosecute Balzac for an alleged libel of the colonial governor at the time, Arthur Yager. Balzac demanded the right to a trial by jury, which he claimed was his under both the Sixth and Seventh Amendments to the United States Constitution. Notably, such a jury trial right under the Puerto Rican code of criminal procedure was allowed only in cases of felonies, not misdemeanors. Taft concluded that the Puerto Rican code governed the case, and the Sixth Amendment was inapplicable, even though the defendant had opted to become a citizen of the United States,[202] because Puerto Rico had not been incorporated into the Union in the same fashion as

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[197] U.S. CONST. art. IV, § 4.

[198] 195 U.S. 138 (1904).

[199] The governance of the Philippines after the Spanish-American war took a decidedly different path. These Island were first put under military rule by a set of instructions from President William McKinley to Elihu Root, then Secretary of War, which placed the Islands under military rule until an ongoing insurrection was ended. Thereafter the Instructions to Root called upon the military to a civil commission charged with securing the popular democratic government guided by constitutional principles. Taft was the initial head of this commission when the Dorr dispute arose. Instructions of the President to the Philippine Commission, September 18, 1900, available at [https://perma.cc/NR2W-SQBG].

[200] 182 U.S. at 378 ("I cannot assent to the proposition, whether it be announced in express words or by implication, that the national government is a government of or by the states in union, and that the prohibitions and limitations of the Constitution are addressed only to the states."), Note that this is clearly wrong with respect to the Guaranty Clause, see infra at 197, which applies only to the states.

[201] 258 U.S. 298 (1922).

[202] *Id.* at 304.

Hawaii.[203] At this point, Taft opted for a system that in general did not impose American values on Puerto Rico:

> Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. Hence the care with which from the time when Mr. McKinley wrote his historic letter to Mr. Root [then Secretary of War] in April of 1900, Public Laws, Philippine Commission, pp. 6-9 — Act of July 1, 1902, c. 1369, 32 Stat. 691, 692, concerning the character of government to be set up for the Philippines by the Philippine Commission, until the Act of 1917, giving a new Organic Act to Porto Rico, the United States has been liberal in granting to the Islands acquired by the Treaty of Paris most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it.[204]

There is much good sense in Taft's view because the principles of natural law no more require the use of a jury than any other decision-making device. Akin to the questions of form for basic social institutions like deeds and contracts, it leaves to each nation the right to design its institutions in accord with its own traditions. In the same fashion, the right to a Republican form of government which is given to each state under the federal constitution is also a matter of institutional design,[205] as other safeguards for fundamental rights need not involve the same concern for indirect governance.

So it turns out that procedural due process along with certain fundamental liberties are, in fact, required everywhere, but other

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[203] *Id.* at 304–05.

[204] *Id.* at 310–11. Note there was no legislation on this instance because the extensive insurrection that started against the Spanish continued, and McKinley was intent on suppressing that insurrection before turning to the task of preparing the Philippines for independent statehood, which after many bumps in the road occurred in 1946 when the Japanese occupation ended. Taft was the head of the Commission charged with fast tracking the conversion from 1900 until 1904 when Theodore Roosevelt call him back to be Secretary of War.

[205] U.S. CONST. art. IV, § 4.

principles are not, including, of course, universal suffrage, which was not generally introduced into the United States until the ratification of the Nineteenth Amendment in 1920. The same was true with the Republican form of government:

> Notwithstanding its duty to "guarantee to every State in this Union a republican form of government," Art. IV, sec. 4, . . .Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois and Wisconsin, and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British crown colony than a republican State of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people.[206]

Once again, the logic here is that the fundamental substantive rights are protected under natural law theory, but that the various institutional arrangements that are used to secure these rights may vary from nation to nation and state to state, including territories that are not states. This pick-and-choose strategy in the *Insular Cases* followed the same path that had been adopted in the earlier case of *Hurtado v. California*[207] where the question before the Supreme Court was whether in the prosecution of felonies (which were not capital offenses), the Due Process Clause of the Fourteenth Amendment required that the case be brought by indictment or presentment before a grand jury. Such was required under the constitution in cases of capital or infamous crimes, under the Fifth Amendment in an explicit provision[208] which also contained a Due Process Clause identical to that found in the Fourteenth Amendment, which meant that the text, far from requiring the grand jury, led to the opposite conclusion. Nonetheless there were minimum conditions that

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[206] *Downes*, 182 U.S. at 279.
[207] 110 U.S. 516 (1884).
[208] U.S. Const. Amdt. IV.

referred back to the Magna Carta, [209] and the other cases that did set minimum conditions which again led back to the right to a fair process with rights that had to include the right to present a case before an impartial judgment.[210] And why the difference, because as was concluded in the *Insular Cases*, some states used one set of procedures and other did not. So in the endless discussion of the Magna Carta[211] there are all sorts of references to the right to be heard and to have an impartial judge. But it could certainly not, along the lines of the argument here to assume that it was impermissible for states to experiment with juries, since there is no way that this procedure could be part of the law of nations. So the same logic of the *Insular Cases* applies here. Indeed, just this same logic lay behind the famous 1937 decision in *Palko v. Connecticut*,[212] a case that held that protection against double jeopardy, as found in the Fifth Amendment, was not read into the Fourteenth Amendment and did not violate the "fundamental principles of liberty and justice."[213] It initiated a stage of selective incorporation, which followed the same pattern that was done in the *Insular Cases*.

In my view, those decisions were explicitly written to respect local autonomy, so they should not be denounced as colonialist, which is currently in vogue. Nonetheless it is all too common today to condemn these opinions as both colonialist and racist. No less an authority than Justice Neil Gorsuch framed the issue as follows:

> Because no party asks us to overrule the *Insular Cases* to resolve today's dispute, I join the Court's opinion. But the time has come to recognize that the *Insular Cases* rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.[214]

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[209] 110 U.S. at 519, 542.

[210] *Id.*

[211] *See*, Hurtado, which contains 31 reference to the document both by the majority and the dissent of Justice John Marshall Harlan, who would have included jury rights under the due process clause.

[212] 302 U.S. 319 (1937), overruled in *Benton v. Maryland*, 395 U.S. 784 (1969).

[213] 302 U.S. at 328. For the early history of the selective incorporation debate, see, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 STANFORD L. REV. 5 (1949).

[214] United States v. Vaello Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring). His dissent reviews the same Harvard articles, cited above at 183.

But this charge is overwrought to say the least, and the general support for his opinion largely rests on objecting to the use of certain terms, not on the substantive outcomes of particular cases. Here is one key example: the term "savages"—the source of much opprobrium—appears in this sentence: "There seems to be no middle ground between this position and the doctrine that, if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens." The term savages is thus not applied to the parties in any case before the Court, but is intended to make sure that all such persons are in a position that their children can become citizens, which is hardly a form of invidious discrimination. It was no doubt used because of the chaotic insurrection in the Philippines, which was first placed under military rule before being turned over to the Taft Commission. With those issues gone a generation later, the term does not appear in *Balzac*. Similarly the constant use of the term "alien" is just the correct usage to describe someone who is not a citizen and carries no racial overtones whatsoever. There is a regrettable tendency to use these forced readings to denounce natural law theory even though its universalism points to the opposite conclusion.

Nonetheless, this very attack on the *Insular Cases* bore fruit when the American Bar Association ("ABA"), followed by the New York State Bar Association, both held unanimously that the *Insular Cases* should be overruled in order to "restore the rights, liberties, and protections provided by the United States to the people of the territories," and further to reject the "territorial incorporation doctrine" as inconsistent with subsequent cases.[215] Behind the legal argument is a strong charge that the original cases "rest in racial views that have long been rejected." But the ABA also engages in trimming that gives the quoted words a more malicious intention. Thus, the ABA writes:

> Justice Henry Billings Brown, the author of *Plessy v. Ferguson's* doctrine of "separate but equal," wrote the judgment of the Court that American's newly acquired overseas territories

[215] ABA Resolution 404 (2022), [https://perma.cc/9JCJ-PHK3].

> were "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, making it impossible "according to Anglo-Saxon principles."[216]

But the full text tells a different story, starting with the first word "If":

> If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.[217]

The argument in *Downes* was to suspend the adoption of Anglo-American principles until they can be properly implemented after wartime conditions have been corrected. The selective quotation turns this passage upside down. The beat continues today with the recent Harvard Law Review Foreword by my colleague Professor Maggie Blackhawk:[218]

> Puerto Rico was offered neither the dignity of a civilized nation under the law of nations, nor the fundamental rights and privileges of civilized people. The Supreme Court held that, outside of those rights deemed "fundamental" by the courts, Congress had the power to decide piecemeal which aspects of the Constitution applied to "foreign" lands as the political branches exercised unlimited power to govern those lands. The Insular Cases and the doctrines they codified

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[216] ABA Report at 4. The New York Bar just announces its commitment to diversity, equity and inclusion without addressing any of the cases individually.

[217] *Downes*, at 286–87.

[218] Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023).

> continue to structure the colonial relationship between our island borderlands and the United States today.[219]

The first sentence is a serious misrepresentation of the position on the ground. There are three options for Puerto Rico. The first is keeping the current situation with its obvious limitations on political power. But all Puerto Ricans are citizens and get the added benefit of being exempt from most federal income, gift, estate, and excise taxes.[220] These benefits would be lost if Puerto Rico opted for independence, which would, in turn, give the citizens full self-governance, or statehood. Puerto Rico made its own choice, and its citizens have lost "neither the dignity of a civilized nation under the law of nations, nor the fundamental rights and privileges of civilized people." Indeed, Blackhawk's second sentence contradicts her first, as the natural law theories, which were correctly applied, did preserve those rights under the formulations of both *Downes* and *Balzac*.

One reason for her attack, and, more pointedly that of the ABA and the N.Y. State Bar Association was to stoke the fires in order to get the Supreme Court revisit and overturn the *Insular Cases* in connection with the current dispute over the status of the citizens of American Samoa, who voluntarily came to the United States by cession and consciously spurned birthright citizenship, which would have given them the right to vote in federal elections and to run for state or federal office outside American Samoa if the once-settled distinction between incorporated and unincorporated territories were abolished. This issue was extensively debated in *Fitisemanu v. United States*,[221] where a divided court rejected that the effort to overturn the *Insular Cases*, and for which the Supreme Court denied certiorari. But the key point here was that *all* the elected public officials of American Samoa lined up solidly *against* the plaintiffs using arguments that came straight out of *Downes* and *Balzac*:

> Notwithstanding these cultural imprints, the people of American Samoa have maintained a traditional and distinctive way of life: the fa'a Samoa. It is this amalgam of

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[219] *Id.* at 53.

[220] 48 U.S.C. § 734; 26 U.S.C. §§ 933, 2209, 4081–84.

[221] 1 F.4th 862, cert. denied, 143 S. Ct. 362 (2022).

> customs and practices that Intervenors argue would be threatened if birthright citizenship were imposed. For example, the social structure of American Samoa is organized around large, extended families called `aiga. These families are led by matai, holders of hereditary chieftain titles. The matai regulate the village life of their `aiga and are the only individuals permitted to serve in the upper house of the American Samoan legislature. Land ownership is predominantly communal, with more than 90% of American Samoan land belonging to the `aiga rather than to any one individual. According to one local official, "Cultural identity is the core basis of the Sāmoan people, and communally owned lands are the central foundation that will allow our cultural identity to survive in today's world." Line-Noue Memea Kruse, The Pacific Insular Case of American Sāmoa 2 (2018). There are also racial restrictions on land ownership requiring landowners to be at least 50% American Samoan. Am. Samoa Code Ann. § 37.0204(a)-(b). Intervenors worry that these and other traditional elements of the American Samoan culture could run afoul of constitutional protections should the plaintiffs in this case prevail.[222]

But among these concerns, there is not a word by the defenders of birthright citizenship as a matter of American constitutional law. Is it really proper for a tiny minority of American Samoans and their American allies to dictate to the archipelago how it should conduct its affairs? It has been suggested that "scholars, and increasingly federal judges, have lately recognized the opportunity to repurpose the [*Insular*] framework in order to protect indigenous culture from the imposition of federal scrutiny and oversight."[223] The quotation is wrong only in one particular. There is no need to "repurpose" anything. One just has to give a fair reading to the *Insular Cases* to realize that its attackers, not the justices who fashioned the doctrine, are today's true imperialists who only weaken their case by making false charges of racism against justices who were more sensitive to

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[222] *Id.* at 866. The defendants raised just these arguments in opposition to the petition for certiorari. Brief in Opposition, Fitisemanu, Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, at 12–14.

[223] *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1680 (2017) (quoted and defended in *Fitisemanu*, 1 F. 4th at 870).

that issue than they are. It is comforting to know, therefore, that the older natural law principles do far better than their progressive alternatives. And these principles shape the general law approach in *Swift*.

V. *SWIFT V. TYSON* AND THE GENERAL LAW

Historically, the Fourteenth Amendment was not the only public topic to generate references to natural law principles. The same kind of dialogue existed in connection with a simple question of whether, and when, there was any general system of "federal common law" that trumped the decisions of particular states. Much of this jurisprudential issue circles around Justice Story who used the great case of *Swift v. Tyson*[224] to allow the general law to displace state common law rules. To set that stage, *Swift* was on its facts yet another instance of the eternal legal triangle. There is an obvious fraud by one party—here the buyer of land, Tyson, who issued a bill of exchange to Keith & Norton to pay for land said to be of equal value. Keith & Norton's representations were false and fraudulent in every respect, such that if the bill were still in their hands, Tyson could refuse to pay Keith & Norton when it was presented for payment. But in the interim, the bill had been negotiated by Keith & Norton to Swift, the plaintiff, in order to discharge an antecedent debt (in contradiction to supplying some fresh value), and the question before the courts was whether the plaintiff, who was a holder in due course of a note he took without notice of the fraud, actual or constructive, could maintain the action against the party who issued the note, even if the original payee, Keith & Norton, could not. Justice Story held that no matter what the law New York might have said, general principles of common law, as adopted not only in the United States, but also in England, and indeed among all nations, all protected that third party to grease the wheels of commerce:

> The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord MANSFIELD in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia*

[224] 41 U.S. 1 (1842).

> *nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit*. [There will not be one law at Rome, another at Athens; one now and another afterward, but one law, eternal and immortal, shall bind all peoples together and for all time.][225]

Notwithstanding some marked similarities the general law referred to in connection with the Privileges or Immunities Clause of the Fourteenth Amendment, *Swift* did not raise a whisper of constitutional complications, until such was added into the mix by Justice Brandeis in *Erie v. Tompkins* in 1938 to explain why *Swift* had to be overruled.[226] But *Erie* raises this simple question— if the rule on negotiable interests was as clear as Story had insisted—and it was— then why assume that there is any choice-of-law question at all if New York law pushed in the same direction? Story did address this question after a fashion when he thought that there was some uncertainty whether New York, then a leading commercial state, had indeed followed this rule, even though it had been endorsed by Chancellor Kent both in judicial opinions and in his commentaries on Blackstone. [227] But Story was after larger game. Negotiable instruments are built for speed, which means that they are likely in the ordinary course of commerce to go across state borders. This happened here when the instrument in question, originating in Maine, was litigated in New York. He may well have feared that if even a single state deviated from the basic rule, the entire edifice could topple, which would have put all commerce at risk. The definition of a general law simply refers here to a doctrine that routinely applies across all states, wholly without regard to any constitutional principles. He then observes that common law which "the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law."[228] He then immediately asks whether "that the [thirty-fourth]

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[225] For the Latin, see OpenJurist, [https://perma.cc/EVN7-EQAH]. The translation includes a reference to 3 Kent Comm. 1, which matters since his New York decisions were examined in *Swift*. His judicial decisions were referenced three times, *Swift* at 7, 16, and his commentaries twice. *Swift*, 41 U.S. as 7, 17.

[226] 304 U.S. 64, 80 (1938).

[227] *Swift*, 41 U.S. at 16–17.

[228] *Id.* at 18.

section of the [J]udiciary [A]ct of 1789, ch. 20, furnishes a rule obligatory upon this Court to follow the decisions of the state tribunals in all cases to which they apply." That section provides:

> That the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply.[229]

He then neutralizes that section by noting that for the purposes of this section a common law rule does not constitute one of the laws (plural) of the state, so his scheme is able to unify the common law with all these subjects. In my view, he got the balance just right, and thereafter set the stage for the use of natural law principles to resolve many of these issues. But the problem remains the source of much controversy, which is collateral to the central issue here.[230] For these purposes, Section 34 is a sideshow. What is most critical is Story's account of the general law, which was thereafter subject to strong challenge by Justice Oliver Wendell Holmes in his dissenting opinion in *Black & White Taxicab v. Brown & Yellow Taxicab Co.*,[231] which is most famous for this extended passage:

> If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally

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[229] *Id.* at 18 (quoting the Judiciary Act of 1789).

[230] *See, e.g.*, William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Caleb A. Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921 (2013).

[231] 276 U.S. 518 (1928).

> but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[232]

In order to place this passage in context, it is necessary to understand the factual setting in which it arose. The case involved an antitrust dispute between two taxicab companies. The Black & White company had obtained an exclusive deal with Louisville & Nashville Railroad that allowed only its cabs to meet incoming trains at Bowling Green, Kentucky. The question was whether this exclusive arrangement was in the violation of (some) antitrust law, which Brown & Yellow claimed was the case under Kentucky law.[233] At a first approximation, Kentucky law should apply to this case because the transaction took place entirely within the Commonwealth, and was, at that time, not subject to federal regulation under the Commerce Clause. In order to take advantage of the general law provisions of *Swift v. Tyson*, however, Black & White reincorporated in Tennessee not just for the purpose of this lawsuit but with bona fides for all purposes. That transaction was therefore able to withstand charges that it was a "sham" solely for the purposes of this litigation, so that it was then proper to apply the general law, which in this case was thought to cut in the opposite direction. Justice Butler noted the conflict between the law of Kentucky, which was followed by the highest courts of Indiana and Mississippi, in favor of the more national view that rested on the strong presumption in favor of freedom of contract, which is always weaker in connection with antitrust matters. So why not follow local law given that this case is far removed from *Swift v. Tyson*, when in a case of divided opinion local preferences should control?

In his dissent, Holmes did not rely solely on this the famous quotation, but also referred to his 1910 dissent in *Kuhn v. Fairmont Coal Co.*,[234] where he excoriated the Court for relying on the general rule approach of *Swift v. Tyson* in a case that concerned the title of real estate, which he thought, rightly, should be decided by the laws of the state where the land was situate, for the same reason. Oddly enough on this point, Holmes followed *Swift* where Justice Story had

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[232] *Id.* at 533-34.

[233] *See* McConnell v. Pedigo, 92 Ky. 465 (1892).

[234] 215 U.S. 349 (1910).

cautioned that these real estate cases are governed by Section 34, the Rules of Decision Act, such that "the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, . . ." are not part of the general law.[235] Note the last clause. Story's view is sound here because there is no reason why there has to be uniformity across jurisdictions when each state can act as it chooses on the relevant matters, without adversely affecting the style or preferences of any other state. It is has often been said that states are "laboratories" of democracy and on matters of this sort, a principle that seems to hold here, and there are no constitutional complications that undercut this judgment.[236]

It follows, therefore, that in this context *Swift* is at best a false beacon, wholly without the grander critique that challenges the very notion that there is some body of law to which a court could turn. But at this larger point, Holmes ignores the entire natural law tradition, including its many manifestations in international law discussed here. He thinks that he must do so because the Austinian tradition that regards law as the command of the sovereign backed by force requires a different result.[237] But so long as there are any judicial decisions that fall within the judicial power of Article III of the United States Constitution or indeed the judicial power of their states, judges have always had the power to create common law, if need be, out of whole cloth, so it hardly follows that they need to do so in a void. If there were a statute that directed judges in one state to follow the judicial decisions handed down in another, that command should of course be followed. But if there is dead silence on the subject, judges can look anywhere they choose to ground their decisions. Their pronouncements from the bench are law, whether they look to tea leaves, local practice, or the body of natural law decisions described

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[235] *Swift*, 41 U.S. at 18.

[236] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311. The case involved a situation where the state sought to restrict entry into the marketplace, which adds a constitutional dimension not applicable in the other cases, given the threat to competitive markets not found with the standard set of natural law rules.

[237] John Austin, The Province of Jurisprudence Determined (1932), whose "command theory" of law by a determinate sovereign is in obvious conflict with the emergence of customary international law.

as such by scholars and judges alike, which is just the process used in formulating international customs when there is no unique lawgiver. In Roman law as well, the judges did not create the basic law, which was done by the commentators on the subject, leaving it to the various praetors to elaborate the "perpetual edict" that counts as a gloss on the law.[238] That is what is done here. The sources to which the judges refer are general, neutral, and constantly and uniformly followed. In the years after *Swift*, there were always rules and principles that were treated as law of the sovereign states by courts from the Supreme Court on down, not because they were transcendental in some metaphysical sense, but because these judicial (and legislative bodies) chose, one and all, to incorporate them into their own legal systems. And kept to its proper interstate focus, *Swift* did a world of good before *Erie*, and, as will be shown, a world of good afterwards

Hence, the discussion now turns to *Erie*, which rejected the *Swift* model not only because it was deemed mysterious but also because somehow it did not fall within the judicial power, where it had been lodged from the beginning of the Republic. The case itself involved a serious question of what legal rule should apply when the plaintiff Tompkins was struck, it appeared, by an open door projecting from the train while he was walking at night by a path located beside the train track. He thus claimed the status of a licensee who should be protected against these activities by the train. The defendant railroad claimed that the plaintiff was a trespasser on the track under Pennsylvania law to whom the railroad was bound to avoid reckless misconduct, an issue that was not on the table here. As a tort law matter, the railroad was engaged in active conduct, so this is not a case of some latent defect in the premises that was known to the defendant but not the plaintiff. And the existence of the established path makes the licensee characterization far more credible than otherwise. So on this point, if the Pennsylvania rule was applied, it looks as though there is no evident difference.

But if there is such a difference, it is a close question of whether this case should be regarded as raising a local or national issue. Trains run in interstate commerce, and it has long been held that some balance is needed under the dormant commerce clause as to whether local conditions require some deviation from national rules

[238] *See* OTTO LENEL, DAS EDICTUM PERPETUUM (1907).

that allow the state to impose safety rules on the railroad. The two most instructive cases are *South Carolina v. Barnwell*,[239] which allowed the state to impose limitations on truck lengths given it curvy roads. The extra burden on interstate commerce was justified by the safety concerns raised by the unique topography. The situation was quite different in *Southern Pacific Co. v. Arizona*,[240] where there was no similar justification to require the company to reduce its train length within the state whose level landscape was the same as its neighbors. *Erie* falls somewhere in the middle. There is no reason for a different rule on this track than any other. Yet by the same token, the shift in liability rule does not impose quite the burden on the company comparable to that of reassembling each and every train on an interstate journey. So there is, at most, a modest interference for which there is no real justification. Thus under *Swift*, it is a borderline case in which I would opt for the interstate rule, in part because the case does not look like the usual trespass claim where someone is running across the tracks or seeking to board a moving car.

Justice Brandeis, however, was looking for larger game, and so he repeats the famous Holmes line that there isn't "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[241] Brandeis then continues with a constitutional argument that the bifurcation of law denied individuals the equal protection of the laws,[242] to which the answer is that the state courts are bound to follow the same general law as the federal courts. Forum shopping, which was so much the issue in *Brown & White*, falls away if *both* state and federal courts follow the correct general principles. But Brandeis then takes a bolder course of action:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts.[243]

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[239] 303 U.S 177 (1938).

[240] Southern Pacific v. Ariz. ex rel Sullivan, 325 U.S. 761 (1945).

[241] *Erie*, at 79.

[242] *Id.* at 75-76.

[243] *Id.* at 78.

It is no exaggeration to say that there has been a veritable outpouring of commentary on *Erie*, one of the most-cited and discussed cases in the legal literature that largely has bypassed popular attention for the simple reason that choice-of-law rules are not on the lips of the common man. But scholars have devoted much to its defense and attack, though not for the reasons dealing with the relationship between general and local law that I shall return to earlier. Instead, much of the discussion relates to the conception of what judges do under the constrained system of *Erie* that requires federal judges to devote their intellectual efforts not to finding the best solution to any particular problem, but solely to ascertaining the best estimation of the probable outcome under state law, even in those cases where there is only limited authority, much of it found in lower court decisions that may or may not be exactly on point. This theme was the source of evident exasperation to one of the great scholars of the day, Arthur Linton Corbin, who could bring himself to accept that federal judges had less discretion in understanding state law than state judges, who themselves were free to look at any collateral source that they care cared about in making their decisions.[244] He vented his frustrations in this famous passage:

> It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic both inductive and deductive."[245]

These criticisms have continued more or less unabated in the years that follow, and the stress is always placed on the interference that *Erie* places on the system of common law thinking that has long been part of the toolkit of judges. Thus, to give two recent illustrations of the same point, Professor Stephen Sachs has taken

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[244] *See* Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L. J. 762 (1941). Corbin had also written about this topic in anticipation of *Erie.* Arthur L. Corbin, *The Common Law of the United States*, 47 YALE L.J. 1351 (1937–38).

[245] *Id.* at 775.

after *Erie* that the effort to put law into separate state and federal boxes has these unfortunate consequences:

> *Erie* destroyed this part of American jurisprudence for surprisingly bad reasons. The Court held that the prior 150 years of case law were philosophically impossible: that there simply can be no law without a legislator; that just as statutory rules are made by legislatures, common-law rules are necessarily made by judges; that it is the judge's job to make them, whether or not the federal or state constitution vests in them that power; that, in short, the common law necessarily is whatever the judges say it is.[246]

From a very different perspective, Professor Todd Zywicki invokes the venerable name of Friedrich Hayek to reach the same conclusion: Brandeis had no notion of how the responsible judge behaves. He writes, quoting Hayek:

> Hayek argues that under the approach of the common law judge, the approach of the judge was not to carry out the will of some authority, but to determine "what private persons have 'legitimate' reasons to expect, where 'legitimate' refers to the kind of expectations on which generally his actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success." In short, to the extent that the common law can be said to have a purpose, that purpose is to serve as a tool for private individuals to pursue their individual goals successfully through a matching of expectations and carrying those plans through to success.[247]

The constant theme in all these excerpts deals with the issue of how judges should operate in a common law system. But for these

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[246] Stephen E. Sachs, *Life After* Erie, Lecture Delivered Nov. 1, 2023, on the occasion of his appointment as Antonin Scalia Professor of Law, 3 (2023). For his longer remarks, Stephen E. Sachs, *Finding Law*, 107 Calif. L. Rev. 527 (2019).

[247] The internal quotations are to F.A. HAYEK, 1 LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 127, 131 (Jeremy Shearmur ed., 2021)

purposes that is the wrong question. The attitudes that judges should take to their work arise in many contexts that are unrelated to the critical *Swift/Erie* debate. How much deference should be given on matters of constitutional law? Do technical fields like patents and copyrights require the same judge to suspect that all judges take the same approach on these issues, or, as is likely the case, some of these judges take a formalist approach and others are more purposive in their reading of statute? It is a task akin to herding cats to assume that everyone who works in a particular area will have the same linguistic or institutional approach to these grand questions. We get along as best we can when these agreements arise. Yet, sometimes there are deep conflicts that cannot be resolved short of bitter litigation. In other cases an inelegant compromise is struck that has an uncertain durability. Nothing about the *Swift/Erie* debates resolves those problems.

Similarly, the description given of the common law method is in fact a one-sided solution of a much more complex issue. The truth that emerges from these cases is that case law is far more stable than the description given to it by Corbin, Sachs, or Zywicki. To be sure, the dramatic cases show these signs—just think of the relationship of *Roe v. Wade* and the decision to overrule it by a six-three majority in *Dobbs v. Jackson Women's Health Organization*.[248] But most cases are not like that. Instead, the ground rules for litigation are set by the academic commentaries that are regularly cited as the source of law. At this point, adjudication is not over the question of whether to chuck the distinction between alluvion versus avulsion. Instead, it is how that distinction applies with the Muddy Missouri, an important but interstitial case. It is precisely because many important day-to-day disputes are of this sort that the law keeps its long-term integrity in the case of these incremental changes, which in many instances use the basic framework about avoiding holdout questions to drive home certain transformations. So, all these writers overstate the supposed search for the transformative nature of the common law, when many of the decisions confirm the traditional rules as they apply it in newer cases.

This entire critique is thus overwrought because it does not hone in on the one question that has to be answered about the *Swift/Erie* debate: how workable and serviceable is the line between general

[248] 597 U.S. 215 (2021).

and local law? So now the question is what rule performs better? In this regard it is useful yet again to return to *Nebraska v. Iowa*, where the border dispute between two states was decided by general common law principles derived from Justinian and applicable to all private, interstate, and international disputes in a perfectly sensible way. But post-*Erie*, how should the case be treated if there is no federal common law? The great advantage of that general law approach was that a neutral body of law with long-term acceptance governed the dispute in a way that was free of political intrigue. But the displacement of *Swift* with *Erie*, which removes the option of federal common law, negated that advantage.[249] Thus *International Paper Co. v. Ouellette*,[250] which allowed for disputes involving point sources that generated pollution in one state to be governed by the laws of the source state,[251] permits that now dominant state to jigger its rules, whether by statute or at common law, to be governed by its own law. The older rule of *Swift* blocked that risk and indeed was still available after Erie under its long-forgotten companion case decided the same day: *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[252] which carved out this exception to *Erie*: "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."[253] That passage undercuts the view that *Erie* has a constitutional foundation, for if it did then there could be no path for the law return to the (bad) old days of general law under *Swift*. But with this revival of natural law, nothing keeps evidence from the *ius gentium* out of the picture, which in this instance gives a much cleaner approach to the issue because of the application of the standard norms of nuisance law that point precisely in that direction. Once again, the older view does at least as well, if not better than, the new approach.

The same vision applies to the commercial cases that were swept into state law under *Erie*. *Clearfield Trust v. United States*[254] resembled

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[249] I discuss these relationships in detail in Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism about Today's Intellectual Nominalism*, 17 J. L. ECON. & POL'Y. 282, 295-297 (2022).

[250] 479 U.S. 481 (1987).

[251] *Id.* at 497.

[252] 304 U.S. 92 (1938).

[253] *Id.* at 110.

[254] 318 U.S. 363 (1943).

Swift because it involved a check for $24.20 payable to one Clair Barner for services that he had rendered to the Works Progress Administration. Barner never received the check, which had been intercepted by a third party who then forged his name on the check and then persuaded an employee of J.C. Penney to accept it for payment of merchandise and some cash. J.C. Penney then endorsed the check over to the Clearfield Trust, which then received money from the government, which it paid over to J.C. Penney. The trial court held that the dispute between the Trust and the government was a matter of state law, which it then resolved in favor of the Trust on the ground that the government had not given the Trust prompt notice of the forgery, assuming that this choice might have made any difference. Forged checks raise different issues from the bill of exchange issued in *Swift*, because in general the transfer is void such that third parties obtain no rights.

So how should this be resolved? If there is no federal common law, the state law determination should control. But here, Justice Douglas applied the general common law approach (on an issue that is a lot closer on the merits than that in *Swift*), and held that federal law governed such that *Erie* was inapplicable:

> We agree with the Circuit Court of Appeals that the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . The [government's] authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.
>
> In our choice of the applicable federal rule we have occasionally selected state law. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict

> of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of Swift v. Tyson, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions. [255]

At this point the court opted for this rule:

> If it is shown that the drawee [here the government learning of the forgery] did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. The fact that the drawee is the United States and the laches those of its employees are not material.

And so the worm turns. The sensible post-*Erie* result is that federal law applies to boundary disputes and to disputes over commercial paper. There is not a word here of how the skepticism of Holmes and Brandeis regarding that brooding omnipresence applies. To be sure, the rule in *Clearfield Trust* is far closer than *Swift* because the case would have come out the same way even if the state and federal results had been reversed. But for these purposes, the conclusion should be clear: too many decisions after *Swift* should have been treated as local issues. But for those which had a true interstate valence, the natural law approach dominated, and still continues to do so.

The story does not quite end here given the large number of cases that followed in the wake of *Erie*. But it is now possible to put them into perspective, given the dominant concern with strategic efforts to choose a favorable forum. Thus, the statute of limitations is always a serious problem because the choice could either allow the case to go forward or to stop it in its tracks. In *Guaranty Trust v. York*,[256] a

[255] *Clearfield Trust*, 318 U.S. at 366–68.

[256] 326 U.S. 99 (1945).

tortured Justice Felix Frankfurter, who, after praising Holmes and Brandeis, held that the statute was "substantive" for the purposes of *Erie* because it was outcome determinative. But the second does not follow from the first. And a far better way to deal with the question is to use the power of Congress to pass a borrowed statute of limitation to eliminate the obvious advantage. It is also key to take the same approach to the Full Faith and Credit Clause,[257] such that Congress can make it applicable to proceedings brought in federal court as well. The point is simply that there are limits as to what can be done through the manipulation of *Erie* and *Swift*, so that in many cases the best result by far is to attack the problem head on with legislation that just neutralizes the forum-shopping issues of the federal system. But that being said, to the extent that courts do play a role on this matter, the linkage between the privileges and immunities law and the general law remains tight. There should be no judicial skepticism about either.

VI. CONCLUSION

There are many common elements that link together the study of the natural origins of common and constitutional law on the one side with the study of the choice of law provisions covered in the transition from *Swift v. Tyson* to *Erie Railroad v. Tompkins*. Start with natural law. Here, it is necessary to steer between two extremes. In the first place, it is assumed that the legal rules are in some sense immutable, which is flatly inconsistent with the wide variety of practices observed over time and across cultures. On the other hand, there is the equally dangerous tendency to assume that the variety of observed systems means that the notions of natural law have no discerning meaning or logic at all. A closer look at the problem reveals the soundness of an intermediate solution. The basic human relationships from marriage to the acquisition of property in various kinds of resources have two components. The first is the basic relationships that bring people together—or keep them apart. These are, as a first approximation, highly constant across time and place for no other kinds of relationship give an initial starting point that allows everyone to be free of aggression from without or to engage in cooperative activities within or across families and firms. Scarcity

[257] U.S. CONST. art. IV, § 1.

means that no one can have all that he or she wants, so that self-interest (as represented by inclusive fitness) is the attitude that all individuals bring to their relationship with other people and natural resources. To curb the excesses of self-interest, it becomes necessary to use legal rules to channel these activities so that they become socially productive which is what natural law rules try to do. But there are always limitations on efforts to make these simple rules the entire story. So, there are two more moves that have to be adopted everywhere. The first is to introduce a set of formalities that allow people to make clear both to themselves and to the rest of the world that certain transactions involve use of a jury—to obtain these rights. The principles here are versatile enough to handle ratemaking cases on the one side and the adoption of fair procedures, as in the *Insular Cases*, in the other hand. The task here is always to find ways to organize the often-messy materials into a coherent whole, so as to impose a barrier against arbitrary actions by legislatures, officials, or judges, which is always what happens under the dominant ethos that denies the existence of any external principles.

The second approach is more substantive and requires that substantive changes in legal rights be done by government force when the potential gains are large but high transactions costs preclude any voluntary reorganization of rights. Thus, in the many cases where the use rights of property are tiny or nonexistent, the right to exclude creates an intolerable holdout problem so that a new regime is put into place without explicit compensation in order to free up rights which in their new configuration produce great value and in practice create no new losers. This strategy works whether one deals with overflight rights on the one side or caves one the other side. It explains why riparian rights attach under the rules of alluvion but not in cases of avulsion. And at the same time the theory also explains that in most cases where property is needed for public use, the rule that prevents takings for public use does require compensation and fair procedures that derive from the natural law provision, and these basic rules survive, as in the *Insular Cases*, even if some particular guarantees, like the right to jury trial do not. Overall, the system has an internal coherence that the many critics—and supporters—fail to appreciate in the grand efforts of overgeneralization on the one side, and of excessive cynicism on the other.

A similar tale can be told about the evolution of the general law standard in *Swift v. Tyson*. Justice Story had it right when he insisted that general common law principles dominate for key interstate transactions, even if they should not be applied to local transactions like real estate mortgages or local antitrust litigation. In some instances, the national imperative is justified both on the grounds of its superior content and the need for uniformity, as was the case with the bills of exchange itself. In these cases, it is critical to get the right rule. But in other situations, as in *Clearfield Trust*, the ultimate choice on the merits is difficult, at which point the need for uniformity to deal with mass transactions becomes decisive on its own, thus displacing the variations that are found necessarily under state law. Therefore an issue—procedural variation, which is of no consequence under natural law theory—becomes critical in dealing with these cross-border situations.

The use of general law principles is equally vital in dealing with boundary disputes at all levels under the rules of alluvion and avulsion. And here the critical advantage of the natural law approach is that it uses a neutral body of rules fashioned and applied over centuries as the key tool of analysis. A need for uniformity is needed here lest different laws of adjacent states point in opposite directions. And these rules have to have a solid substantive core in order to gain legitimacy in all jurisdictions. The natural law approach does just this, which is why it should be allowed to function today for reasons that are as valid now as at the time they were formed.

Putting the whole system together, therefore, makes it clear that in substantive and cross-border disputes the natural tradition works when understood from the ground up. Both the orthodox critics and the orthodox defenders of the natural law have to raise their game by starting with how the system works in practice before resorting to abstract declarations that do more to mislead than to inform.