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COURTS OF GENERAL JURISDICTION: JUDICIAL POWER EXTENDING TO CASES ARISING UNDER THE “LAWS OF NATURE AND OF NATURE’S GOD”

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In every legal system, there must be an ultimate criterion for the legitimacy of law. Thus, in a real sense a god must exist in every legal system. The god will take the form of a spiritual entity or the state. If the state does not recognize a standard of right and wrong higher than itself, higher than the will of the people, and higher than any other human standard, then the state itself will become, in a sense, the ultimate god.¹

Is it possible to determine the legitimacy of civil law without reference to its source? Or does civil law have no source? Is it merely a utilitarian instrument wherein the means and the ends are determined by the interest groups in a polity who have assumed civil power? In

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1. Charles E. Rice, *The Problem of Unjust Laws*, 26 CATH. LAW. 278, 278-79 (1981).

the formative stage of the Western legal tradition, the legitimacy of positive law² was determined by its conformity with natural law.³ Though competing schools of legitimization subsequently ascended, today the entire Western legal tradition is under a frontal assault. Critics⁴ who concede law's religious roots (while assuming the irrelevance of the same) deny the validity of all subsequent attempts to justify the Western legal order.⁵ The dilemma those critics face, however, is how to justify an alternate system from within a paradigm where God does not exist, where reference to a "higher law" is unthinkable, and all other systems are merely power struggles. That is, how do you answer the ultimate question, "Why is it right or wrong to do X?," without an evaluation of what is "good" supplied by an evaluator which is superior to a mere human declaration?⁶

2. Positive law is "[l]aw actually and specifically enacted or adopted by proper authority for the government of an organized jural society." BLACK'S LAW DICTIONARY 1162 (6th ed. 1990).

3. HAROLD E. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 12 (1983).

4. "Critics" refers to adherents of the Critical Legal Studies movement, which holds that law is an instrument of social, economic, and political domination, both in the sense of furthering the concrete interests of the dominators *and* in that of legitimating the existing legal order." MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 1 n.1 (1987) (quoting from the invitation to the first annual Conference on Critical Legal Studies in 1977). See also Heather MacDonald, *Law School Humbug*, WALL ST. J., Nov. 8, 1995, at A23.

5. See, e.g., the views of perhaps the "father" of Critical Legal Studies:

What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy [from politics] and generality in law survive the demise of the religious beliefs that presided over their birth?

ROBERTO M. UNGER, LAW IN MODERN SOCIETY 83 (1976).

6. In his review of Unger's *Knowledge and Politics*, in which Unger despairingly ends his book, "Speak God," professor Arthur Leff of Yale Law School, speaking as the devil, advances the quandary facing the critics:

You were trapped in what, to save time, I might call a Godel problem: how to validate the premises of a system from within itself. "Good," "right" and words like that are evaluations. For evaluations you need an evaluator. Either what the evaluator says is good is good, or you must find some superior place to stand to evaluate the evaluator. But there is no such place in the world to stand [under an atheistic presupposition].

Legally, the United States has one standard by which law is ultimately legitimized. The first organic positive law rests the legality of the United States as an independent nation upon the "Laws of Nature and of Nature's God."⁷ If the legitimacy of our nation as a

Or to put it another way, one more congenial, I think, to both of us, by dispensing with God we did more than just free ourselves of some intellectual anachronism. We also dispensed with the only intellectually respectable answer to the ultimate [question] "Why is it right to do X?" It was not so very long ago that most people (and I, too) could and did answer: "It is right to do X because God says so." That answer was at least intelligible, the only one that did not depend upon mere sublunary assertion

There are Professor Unger, not very many possibilities. In fact, there are, I think, just two. The first is that mankind is a species that doesn't *mean* anything at all, except to itself. There is no evaluator out there. . . . You are what you are, and will become what you will become, and the goodness or badness of that being and becoming is for you, and you alone, to define and declare. . . .

The second possibility is that God exists, and still cares. My own opinion is that the Hand that holds you over my fiery pit doesn't abhor you, but has forgotten completely that It has anything in It. But God may still care, and, if that is so, you have but one epistemological problem, to learn the will of God. If there is no God, everything is permitted; if there is a God, it's even more terrifying, because then some things are not permitted, and men have got to find out which are which. Since He has the right and power to evaluate you, but no duty to do so, you are bravely right: you must pray.

But while you try to live as best as you can until His revelation, perhaps you will accept some practical advice from me. Look around you at your species, throughout time and all over the world, and see what men seem to be like. [Advice given because Unger equated "good" with human nature.] Okay? Now take this hint from what you have seen: If He exists, Me too.

Arthur A. Leff, *Book Review*, 29 STAN. L. REV. 879, 887-89 (1977) (reviewing ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* (1975)).

7. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Hereinafter, I will interchangeably employ the term "natural law" with "laws of nature." I acknowledge that variant definitions have been attached to "natural law" but choose, for reasons explained below, to utilize Blackstone's definition. I also acknowledge that Blackstone did not equate perfectly "natural law" with "laws of nature":

[U]ndoubtedly the revealed law is (humanly speaking) of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the

civil polity turns upon her conformity with natural law, how much more must the law that daily governs the people's civil conduct be consistent with the same? May a civil judge recognize natural law as a rule of decision, that is, as the law governing the outcome of a civil dispute before him when faced with positive law to the contrary?

Section I of this article illustrates how from antiquity to a relatively short time ago positive law was not considered "law" apart from its conformity with the laws of nature. After establishing the historicity of the principle that positive law receives its legitimacy from its conformity with natural law, Section II will present a small, but significant portion of the modern, though presently dormant, debate on the subject of whether judges can resort to natural law. As will be shown in subsequent sections, the role of the judge vis-à-vis natural law has been in contention for centuries. Section III examines the nature of judicial power under divine law. Section IV explores a few important cases in which courts in England, Colonial America and the states, respectively, tested the validity of positive law with the laws of nature. Section V argues that federal courts, by virtue of the language that grants them limited jurisdiction in Article III, are prevented from looking to natural law as a rule of decision. Nonetheless, it is contended that principles of the laws of nature are relevant in interpreting the constitutional text. Section VI discusses that courts of general jurisdiction, such as most state courts and federal courts exercising diversity of citizenship jurisdiction, may look to natural law as a rule even when positive law is contrary. In conclusion, justice requires some judges to look to the laws of nature.

I. THE LAWS OF NATURE AND OF NATURE'S GOD

The legal term "laws of nature," though not historically uniform as to source, content and semantic range, did retain some consistent precepts over the centuries. In *Antigone*, the Greek philosopher

former, both would have equal authority: but, till then, they can never be put in any competition together.

1 WILLIAM BLACKSTONE, COMMENTARIES *42. In other words, the Creator's will can never be understood in the absence of divine revelation.

Sophocles refers to the timeless nature of laws that are “not for now or for yesterday, they are alive forever; and no one knows when they were shown to us first.”⁸ Aristotle acknowledged that these laws were also universal when he distinguished between the written and general law, the latter being “those unwritten principles which are supposed to be acknowledged everywhere.”⁹ Likewise, he stated that “one part of what is politically just is natural, and the other part legal [positive]. What is natural has the same validity everywhere alike, independent of it seeming so or not.”¹⁰ Aristotle also observed humanity’s common knowledge of natural law, stating that “there is in nature a common principle of the just and unjust that all people in some way divine, even if they have no association or commerce with each other.”¹¹

This supposition of a fixed and universally known law subsequently lost its currency under Greek political faith, but the principle was restored by Cicero during the Roman empire.¹² Besides recognizing its universality, Cicero discerned that natural law bound legislatures everywhere on the earth.¹³ Consequently, it was futile to root justice in mere precedent,¹⁴ nor “as the Epicureans claim[ed,

8. SOPHOCLES, *ANTIGONE* 39 (Richard E. Braun trans., 1973).

9. ARISTOTLE, *RHETORIC*, in *THE BASIC WORKS OF ARISTOTLE* 1359 (Richard McKeon ed., 1941).

10. ARISTOTLE, *NICOMACHEAN ETHICS*, bk. V, at 133 (Terence Irwin trans., 1985).

11. ARISTOTLE, *ON RHETORIC*, bk. I, ch. 13, at 102 (George A. Kennedy trans., 1991).

12. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 *HARV. L. REV.* 149, 157 (1928).

13. Cicero recognized the divine character of “lawmaking”:

It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from or abrogated. Indeed by neither the Senate nor the people can we be released from this law; Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through time.

LACTANTIUS, *DIVINE INSTITUTES* 8 (Alexander Roberts & James Donaldson trans., 1871).

14. Cicero rejected precedent as a legitimizing principle:

[T]he most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice

based upon] mere utility, for ‘that which is established on account of utility may for utility’s sake be overturned.’”¹⁵ Consequently, Cicero recognized that even the word “law” had a transcendent quality: “those who formulated wicked and unjust statutes for nations . . . put into effect anything but ‘laws.’ It may thus be clear that in every definition of the term ‘law’ there inheres the idea and principle of choosing what is just and true.”¹⁶ Predating Blackstone’s observations by about 1800 years, Cicero declared that “many pernicious and harmful measures are constantly enacted among peoples which do not deserve the name law.”¹⁷ Such an enactment “not only ought not to be regarded as law, it ought not to be called law.”¹⁸ Hence, it was the Roman practice to incorporate in statutes a savings clause akin to judicial review that said in effect that it was “no purpose of the enactment to abrogate what was sacrosanct or jus.”¹⁹

The concept of superintending laws observable in nature was described and appealed to by the Apostle Paul in the New Testament²⁰ and developed during the Middle Ages.²¹ As early as the eleventh

would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace.

CICERO, LAWS, THE GREAT LEGAL PHILOSOPHERS 48 (Clarence Morris ed., 1959).

15. CICERO, DE LEGIBUS I, 10, 28.

16. *Id.* at 51.

17. CICERO, DE LEGIBUS II, 5, 13.

18. *Id.*

19. Corwin, *supra* note 12, at 159.

20. See, e.g., *Romans* 1:32 (Paul declares that all men “know God’s decree.”) and *Romans* 2:14-15 (Paul sees conclusive evidence that all men know God’s law, even those without the written revelation: “Gentiles who have not the [Mosaic] law do by nature what the law requires . . .”). Furthermore, in *1 Corinthians* 11:14-15a, Paul asks, rhetorically, does not “nature itself teach you that if a man wears his hair long, it is a disgrace to him, whereas if a woman has long hair, it is her glory?” (New American Bible). All Scripture is taken from the Revised Standard Version, Catholic Edition, unless otherwise stated.

21. Corwin cites “John of Salisbury, the first systematic writer on politics in the Middle Ages . . . [who stated that] ‘there are certain precepts of the law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken.’” Corwin, *supra* note 12, at 164 (quoting DICKINSON, THE STATESMAN’S BOOK OF JOHN OF SALISBURY 33 (1927)).

century, the shorter phrase “law of nature” was part of the Church’s theology and canon law.²² The first instance of the longer phrase “law of nature or God” being used was in the early 1300s in a debate between rival monastic orders.²³

During the Colonial American era, Edmund Burke, a late eighteenth century British Parliamentarian, stated that “the people of the [American] colonies are descendants of Englishmen. . . . The colonists emigrated from [England] They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles.”²⁴ These principles were stated by, among others, John Locke and Sir William Blackstone, two of the most cited European writers from the 1760s until 1805.²⁵

Another factor that contributed to the survival of natural law was the identification of the higher law with Scripture As remarked by his translator, John [of Salisbury] was not confronted with the difficulty . . . “of identifying any specific rules or precepts as belonging to this law.” He had them “in the form of clear cut scripture texts” and in the maxims of the Roman law.

Id.

No surface discussion of this subject could fail to acknowledge the contributions of St. Thomas Aquinas. With respect to legitimacy of positive law vis-à-vis natural law, Aquinas argued that “every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” THOMAS AQUINAS, *THE SUMMA THEOLOGICA*, Part I-II, Q. 95, art. 2 (Fathers of the English Dominican Province trans., 1941).

22. GARY T. AMOS, *DEFENDING THE DECLARATION* 41 (1989).

23. RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 21 n.43 (1979).

24. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 120 n.2 (5th ed. 1905) (quoting 2 EDMUND BURKE’S *WORKS*, 38-45 (7th ed. 1881)).

25. In his comprehensive study of citations in political writings by Americans published during the founding era, Lutz found that “Montesquieu is almost without peer . . . except for Blackstone”:

Blackstone is the second most prominent secular writer during the founding era. He is cited well over two and a half times as often as Locke. Whereas Locke’s pattern is toward relative prominence early during the founding era, falling off after the 1770s, Blackstone’s pattern is that of increasing frequency of citation after the 1770s to achieve prominence late in the founding era

.....
The prominence of Blackstone would come as a surprise to many, and he is the prime candidate for the writer most likely to be left out in any list of influential European thinkers. . . . A trenchant reference to Blackstone could quickly end an

Locke made a conceptual distinction and mirror association between the two methods by which the Creator's will has been communicated: "that Law which God has set to the actions of Men, whether promulgated to them by the light of Nature, or the voice of Revelation."²⁶ He recognized that civil authority under the law of nature commenced with God's covenant with Noah: "upon this is grounded that great law of nature, *Whoso sheddeth man's blood, by man shall his blood be shed.*"²⁷ Locke echoed Cicero concerning the binding nature of natural law over legislators²⁸ and concluded that positive law is not binding upon the people apart from its consistency with the laws of nature.²⁹

argument. Such a respected writer deserves a much closer look by those studying American political thought.

Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 THE AMERICAN POLITICAL SCIENCE REVIEW 189, 193, 195-96 (1984).

26. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 352 (Peter H. Nidditch ed., 1975) (1689).

27. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 11-12 (C.B. MacPherson ed., 1980) (1690) (emphasis added) (quoting *Genesis* 9:6 wherein by God's covenant with Noah, man is given civil authority to punish murder and, by implication, as the greater includes the lesser, all lesser crimes).

28. For Locke, the laws of nature were an "eternal rule to all men, *legislators* as well as others. The *rules* that they make for other men's actions, must as well as their own and other men's actions, be conformable to the law of nature . . . no human sanction can be good, or valid against it." *Id.* at 71.

29. Locke described the law of nature as

the decree of the divine will discernible by the light of nature Less correctly termed by some people the dictate of reason, since reason does not so much establish and pronounce this law of nature as search for it and discover it as a law enacted by a superior power and implanted in our hearts. Neither is reason so much the maker of that law as its interpreter, unless, violating the dignity of the supreme legislator, we wish to make reason responsible for that received law which it merely investigates; nor indeed can reason give us laws, since it is only a faculty of our mind and part of us

[P]ositive civil laws are not binding by their own nature or force or in any other way than in virtue of the law of nature Thus, without this law, the rulers can perhaps by force and with the aid of arms compel the multitude to obedience, but put them under an obligation they cannot.

Blackstone discussed extensively the “law of nature” in his *Commentaries*³⁰ and concluded, as did Locke, that no human law should be permitted to contradict the law of God revealed in nature and in Scripture.³¹ Eleven years later, the Declaration of Independence reflected the dual sources of legitimizing law: the law posited in nature as ascertained by reason (“laws of nature”), and the revealed law in Sacred Scripture (“laws of nature’s God”).

Though Aristotle and Blackstone would not agree as to the source and content of the laws of nature, a common thread runs from

JOHN LOCKE, *ESSAYS ON THE LAW OF NATURE* (W. von Leyden ed., 1954) (ca. 1660) *reprinted in* GEORGE C. CHRISTIE, *JURISPRUDENCE* 218, 221 (1973).

30. Just before the War for Independence, Burke stated, “I hear that they have sold nearly as many Blackstone’s *Commentaries* in America as in England.” 1 STORY, *supra* note 24, at 154 n.1.

31. Blackstone described the Judeo-Christian model for natural law as follows:

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. . . . [A] state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct.

This will of his maker is called the law of nature.

.....

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 all 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 immediately, from this original.

.....

This [“corrupt” human reason that has arisen from the effect of original sin] has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers[e] manners, to discover and enforce it’s [sic] law by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature. . . .

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. . . . [H]uman laws are only declaratory of, and act in subordination to, [the laws of nature]. . . .

1 BLACKSTONE, *COMMENTARIES* *39, 41-42. Alexander Hamilton quoted Blackstone’s definition in part concerning the source of the law of nature. See 1 *PAPERS OF ALEXANDER HAMILTON* 87 (Harold C. Syrett & Jacob E. Cooke ed., 1961).

antiquity: the legislative organs of civil government can legitimately posit law based only on the preexisting law and its principles. Any enactments to the contrary are not law. During America's founding period, the predominantly recognized canon for the nature of things could be found in Sacred Scripture, which was in itself a publishing of the law of the created order.

II. THE DEBATE OVER THE NATURE OF JUDICIAL POWER

As early as 1798, objections were made to the United States Supreme Court basing its rule of decision upon natural law. In that year, the Court reviewed an act of the Connecticut legislature that had set aside a probate court decree with respect to a will contest.³² Before the Court considered the constitutional issue raised by the plaintiff, Justice Chase declared that he could not "subscribe to the *omnipotence* of a *State Legislature*," even if its exercise of power is not restrained by its own constitution.³³ He announced that "[a]n ACT of the Legislature contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of legislative authority."³⁴

Justice Iredell, although concurring in the judgment, did not ground his opinion upon first principles. He conceded that "some speculative jurists have held, that a legislative act against natural justice must, in itself, be void;" yet he did not believe that "under such a government, *any* Court of Justice would possess a power to declare

32. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

33. *Id.* at 387-88.

34. *Id.* at 388. A few examples were then listed:

A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *Judge in his own cause*; or a law that takes *property* from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Id. (emphasis added).

it so.”³⁵ In reaching this conclusion, Justice Iredell indulged a common assumption that “natural justice [is] regulated by no fixed standard” as evidenced by the fact that “the ablest and the purest men have differed upon the subject.”³⁶

Disagreement concerning any question, however, does not necessarily evidence a lack of objective truth. The premise for Justice Iredell’s position -- that the “ablest and the purest” have differed upon the content of natural law -- presupposes a fixed standard by which ability and purity of the “ablest and purest” could be legitimately judged and to which his reader would subscribe. Any disagreement concerning the standard by which ability and purity is determined destroys his premise and, thus, his position opposing judicial recognition of natural law. Natural justice, no less than all human judgments that some state of things or mode of conduct is “right,” “good,” or ought to be adhered to, assumes the existence of objectivity. Even pragmatic arguments presuppose the objective “good” of whatever ends are achieved by particular means. Consequently, opposing judicial reliance upon natural justice on the grounds of a present state of disagreement on its content precludes all value judgments.

With Justice Iredell off the Court and Justice Chase remaining, the Court met no resistance when it resorted to unwritten fundamental law early in the nineteenth century. In *Fletcher v. Peck*,³⁷ Justice Marshall relied upon some combination of the Constitution’s Contract Clause and “general principles which are common to our free institutions,”³⁸ to void the Georgia legislature’s revocation of a land grant. Justice Johnson, though concurring in the judgment, disagreed with Justice Marshall’s reading of the Contract Clause and rested his judgment solely upon “a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”³⁹

As with Justice Iredell, rejected Supreme Court nominee Judge Robert Bork is critical of the judicial reliance upon natural law. He

35. *Id.* at 398 (Iredell, J., concurring) (emphasis added).

36. *Id.* at 399.

37. 10 U.S. (6 Cranch) 87 (1810).

38. *Id.* at 139.

39. *Id.* at 143.

claims that the Supreme Court's recognition of "fundamental values" not in the constitutional text is unjustified because "there is no principled way to prefer any claimed human value to any other."⁴⁰ Judge Bork states that "[t]here may be a natural law, but we are not agreed upon what it is, and there is no such law that gives definite answers to a judge trying to decide a case."⁴¹

Judge Bork's contention, like Justice Iredell's, that the mere existence of disagreement over the content of fundamental law renders it off limits to the judiciary, is, again, an internally inconsistent argument.⁴² According to Judge Bork, a judge is to be "neutral . . . in the *definition* and the *derivation* of principles,"⁴³ as distinguished from merely neutral in the *application* of principle. This assumes that a judge, looking at the constitutional text with its history, can employ presuppositional neutrality when deriving its principles. The ramifications of this view were not lost upon the special interest groups and senators who opposed Judge Bork. They knew intuitively that Judge Bork, like all human beings, was not, and could never be, neutral in deriving and defining principles from a written text and its history.

Justice Thomas, by contrast, suggested that natural law was vitally linked to adjudication,⁴⁴ provoking the same Senators who opposed

40. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

41. Robert H. Bork, *The Struggle Over the Role of the Court*, NAT'L REV., Sept. 17, 1982, at 1138.

42. Consider Arkes' rejoinder:

I would be obliged to record my own, emphatic "disagreement" with *this* proposition [that disagreement over the source and content of natural law means judges cannot employ it], and by its own terms, by its own logic, that disagreement would be quite sufficient to establish the falsity of the proposition. No argument has become more familiar in "explaining" the futility of natural law, and yet it seems to have slipped past the common understanding that this proposition stands in the class of what philosophers describe as "self-refuting" propositions.

HADLEY ARKES, *BEYOND THE CONSTITUTION* 14 (1990).

43. Bork, *supra* note 40, at 7.

44. Thomas found that resort to higher law was indispensable to constitutional interpretation:

Bork to be fearful of him. Legal academics were equally concerned. Professor Laurence Tribe of Harvard Law School claimed that Clarence Thomas “is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation.”⁴⁵ Provost Geoffrey Stone of the University of Chicago Law School stated that Thomas’ work is “further outside the mainstream of constitutional interpretation” than that of rejected nominee Robert Bork.⁴⁶

Some senators, like Howell Heflin of Alabama, however, saw a “confirmation conversion”⁴⁷ when Justice Thomas told the Senate Judiciary Committee that “I don’t see a role for the use of natural law in *constitutional* adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory.”⁴⁸ Though some may read Justice Thomas’ statement with cynicism, perhaps his comments reflected an understanding of the limited role of the federal judge in adjudicating federal questions.

Ironically, few would suggest that Judge Bork and Justice Thomas would have differed significantly in result in constitutional cases.⁴⁹ Does legal positivism and natural law jurisprudence converge in some respect with Bork and Thomas, or is there less of a

[W]ithout recourse to higher law, we abandon our best defense of judicial review – a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.

Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63-64 (1989); see also Clarence Thomas, *Toward a “Plain Reading” of the Constitution – The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983 (1987).

45. Laurence H. Tribe, *Natural Law and the Nominee*, N.Y. TIMES, July 15, 1991, at A15.

46. Clarence Page, *Is Clarence Thomas in Imminent Danger of Getting Borked?*, CHI. TRIB., July 10, 1991, at 11.

47. Neil A. Lewis, *Thomas Undergoes Tough Questioning on Past Remarks*, N.Y. TIMES, Sept. 12, 1991, at A1.

48. David Margolick, *Sizing Up the Talk of “Natural Law”*: Many Ideologies Discover a Precept, N.Y. TIMES, Sept. 12, 1991, at A22 (emphasis added).

49. Why else would the same interest groups and roughly the same senators support and oppose each nominee?

jurisprudential conjunction than a sharing of common presuppositions that necessarily affect their construction of the Constitution? Thomas' comments at his confirmation hearings were less likely an expedient "conversion" than perhaps an implicit recognition of the distinct jurisdictional footwear worn by federal judges. Judge Bork's writings upon the use of natural law by judges were likely discussed in the context of adjudicating federal question cases without considering the different jurisdictions under which federal judges sit.⁵⁰ Common moral and jurisdictional presuppositions bring a correspondence among jurists with respect to constitutional interpretation, notwithstanding the differences judges may hold regarding the use of natural law.

The debate over the use of natural law by American judges began during the nation's founding era and is not likely to end anytime soon, save a moral and jurisdictional consensus birthed from above. Nonetheless, "speculative jurists" have explicitly resorted to it for centuries when positive law would produce unjust results. The origins of this assumed power cannot be ascertained apart from looking at the nature of judicial power under the "laws of nature's God."

III. THE NATURE OF JUDICIAL POWER

President Coolidge stated that "[m]en do not make laws. They do but discover them."⁵¹ As his namesake John Calvin aptly stated, the judge's court is a "sacred asylum."⁵² In Blackstone's description of the common law doctrine of *stare decisis* the sacred nature of law and, thus, by implication, the nature of judicial power is recognized.⁵³

50. I expect his views would remain constant in any event.

51. CALVIN COOLIDGE, *HAVE FAITH IN MASSACHUSETTS* 4 (1919).

52. 3 JOHN CALVIN, *COMMENTARIES ON THE FOUR LAST BOOKS OF MOSES* 136 (William B. Eerdmans Co. 1950).

53. Because of the fixed nature of law, Blackstone's criteria for departing from precedents permits greater deviance from what is considered appropriate today:

[A judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the Divine law. But even in such cases, the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the

Moses described the nature of judicial power *before* the *Torah*, “written with the finger of God,”⁵⁴ was revealed on Mount Sinai. Moses described the nature of his judicial responsibility: “the people come to me to *inquire of God*. When they have a dispute, they come to me and I decide between a man and his neighbor, and I *make them know* the statutes of God and His decisions.”⁵⁵ This passage reveals three important concepts about the nature of judicial power. First, that Moses “ma[de] them know the statutes of God” before His law was positively revealed indicates that judicial power or, more particularly, judicial reasoning, is *a priori*. It assumes the *transcendental*⁶⁶ nature of law and, therefore, that law exists apart from legislation or that declared in judicial decrees. It also requires the judge to presuppose the law’s preexistence and inquire into the rule of civil conduct.

Second, that Moses “ma[de] them know the statutes of God and His decisions” illustrates that judicial power is *declarative*. Judges declare the law and, by necessity, interpret it for the disputants so as to resolve their conflict. Judicial power, being in the nature of inquiry and declaration, is suggested further by, and is consistent with, the Hebrew “*palil*,” translated “judges” in the *lex talionis*.⁵⁷ The denotation of its root “*palal*” means to “intervene” or “interpose.”⁵⁸ Not only is the judge interposed between disputants, but the judge

former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.

1 BLACKSTONE, COMMENTARIES *69-70.

54. *Deuteronomy* 9:10.

55. *Exodus* 18:15-16 (emphasis added).

56. See, e.g., Justice Holmes’ description, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1929) (Holmes, J., dissenting), of Justice Story’s construction of the phrase “laws of the several states” (in the Rules of Decision Act - a provision adopted in the Federal Judiciary Act of 1789 [now 28 U.S.C. § 1652]) in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). In *Black & White*, Justice Holmes stated that Story’s holding, that decisions of courts are “only evidence of what the laws are, and are not, of themselves, laws,” rested upon the assumption that there is a “transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute.” *Id.* at 533.

57. *Exodus* 21:23.

58. FRANCIS BROWN ET AL., *THE NEW HEBREW AND ENGLISH LEXICON* 813 (1978) (emphasis added).

intervenes between the parties and the lawmaker to determine the law and declare it to the parties.

Third, that the people "c[ame] to" Moses as judge of their civil disputes and he judged "between a man and his neighbor," shows that judicial power is *responsive* by nature. Judges respond to parties who appear before the court and do no more than adjudicate between them. Cases are not an incidental means whereby judges can arbitrarily "make" law for those not before the court. Nonetheless, the weight and merit of a judge's opinion of the law may deserve compelling adherence *ad infinitum*. This role is consistent with the view described among academics⁵⁹ of federal judicial power as the second Marshall approach (M-2) to constitutional adjudication, drawn from Chief Justice Marshall's opinion in *Marbury v. Madison*.⁶⁰ Under M-2, judges disregard laws repugnant to the Constitution and do no more. This view stops short of the contemporary view of judicial supremacy, which holds the Supreme Court to be the ultimate expositor of the Constitution.

Finally, the use of the Hebrew "*Elohim*," for civil office holders and judges, suggests that the civil ruler or judge is subrogated to fulfill a divine function. Two passages from the *Torah* read "judges" for the Hebrew "*Elohim*,"⁶¹ which is almost without exception translated "God" elsewhere in the Old Testament. Likewise, upon seeing Samuel, the last judge to reign in Israel, the witch of Endor proclaimed, "I see a god [*elohim*] coming up out of the earth."⁶² Furthermore, civil "rulers" are referred to as "gods,"⁶³ an employment accepted by Christ.⁶⁴ When the sons of Heth characterized Abraham as a civil ruler by calling him a "mighty [*elohim*] prince," by implication they also referred to him as an agent of God.⁶⁵ The New

59. See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 10-11 (2d ed. 1989).

60. 5 U.S. (1 Cranch) 137 (1803).

61. *Exodus* 21:6; 22:8-9 (New International).

62. *I Samuel* 28:13.

63. *Psalms* 82:1, 6.

64. *John* 10:35.

65. *Genesis* 23:6.

Testament affirms this agency principle where civil “rulers” are described as “ministers” of God.⁶⁶

This principle of divine participation in judging through men is evident when Moses charged the judges to “not be partial in judgment; you shall hear the small and the great alike. You shall not be afraid of the face of man, *for the judgment is God’s.*”⁶⁷ Likewise, a description of divine subrogation is apparent when King Jehoshaphat of Israel charged his newly appointed judges: “Consider what you do, for you judge not for man but for the Lord; he is with you in giving judgment....[T]ake heed what you do, for there is no perversion of justice with the Lord, or partiality, or taking bribes.”⁶⁸

Though under contemporary practice in federal court a pleader’s request for relief is termed a “demand for judgment,”⁶⁹ it is still common to see the implicit recognition of the divine function in judging in a “prayer for relief.” As Calvin observed, the nature of judging requires the judge to see his role as a sacred duty. Erroneous pronouncements respecting the law misrepresent the will of the Creator of law.

In summary, the nature of judicial power requires the judge to: assume the law’s preexistence and inquire into its content; respond to and adjudicate only between disputants; and declare and interpret the law for the parties who have come before the court. If the law is accurately discerned and applied without bias toward a party, justice is served.

66. *Romans* 13:3, 4 (New International).

67. *Deuteronomy* 1:17 (emphasis added).

68. *2 Chronicles* 19:6-7.

69. FED. R. CIV. P. 8(a).

IV. NATURAL LAW IN ENGLISH, COLONIAL, AND STATE COURTS

A. *English Courts*⁷⁰

The common law of England was once considered a reflection of the laws of nature and only an act of Parliament could codify it.⁷¹ In 1608, *Calvin's Case*⁷² held that persons born in Scotland after the accession of James I to the throne of England in 1603 were not aliens, but were capable of inheriting land in England. This case is noteworthy, not because the court disregarded an act of Parliament,⁷³ but for its acknowledgment that the laws of nature were part of the

70. For scholarly treatment of the history of adjudication on this subject in England, see, e.g., CHARLES H. MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* (1910); Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

71. Notwithstanding the common law's shortcomings, for a time it was esteemed as divine:

The Common Law is pictured [during the fourteenth century] invested with a halo of dignity, peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. [The Common Law's] authority is above, rather than below that of Acts of Parliament or royal ordinances, which owe their fleeting existence to the caprice of the King or to the pleasure of councillors, which have a merely material sanction and may be repealed at any moment.

JOHN N. FIGGIS, *THE THEORY OF THE DIVINE RIGHT OF KINGS* 228, 230 (2d ed. 1914). Acts of Parliament were subject to, not the equivalent of, the law:

The properly Medieval and never completely obsolete theory declared that every act of the Sovereign which broke the bounds drawn by Natural Law was formally null and void. As null and void therefore every judge and every other magistrate who had to apply the law was to treat, not only every unlawful executive act, but every lawful statute, even though it were published by Pope or Emperor.

OTTO FRIEDRICH VON GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* 84 (Frederic W. Maitland trans., 1958).

72. 77 Eng. Rep. 377 (K.B. 1608).

73. It was argued, however, that "Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute [25 Ed. 3. cap. 22], the King may protect and pardon him." *Id.* at 393.

common law. This understanding led the court to its conclusion regarding alienage and inheritance rights.

In *Calvin's Case*, Robert Calvin brought a complaint alleging that certain individuals had "disseised him of his [inherited] freehold" and requested from the court that he be "reseized with the chattels within it were taken."⁷⁴ The defendants argued that they need not answer the complaint because the plaintiff was born an alien (in Scotland) and, therefore, disabled from invoking the benefits and privileges of the laws of England that allowed such an action. Coke, as Chief Justice of the Court of Common Pleas, was one of twelve judges who argued successfully before the court that the plaintiff was not an alien and consequently ought to be answered. Part of the judge's arguments reasoned that the law of nature is immutable and part of the laws of England, and had been inscribed upon the heart of man before the positive law of nature was reported by Moses.⁷⁵

74. *Id.* at 378.

75. *Id.* at 382. The arguments look back to creation as the origin of the laws of nature:

[F]irst that the ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England: thirdly, that the law of nature was before any judicial or municipal law: fourthly, that the law of nature is immutable.

Id. at 391-92.

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna* [eternal law], the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world. The Apostle [Paul] in the second chapter to the Romans saith, *Cum enim gentes quae legem non habent naturaliter ea quae legissunt faciunt* [While the nations who do not have the law, naturally are doing the things of the law]. . . . And the Apostle [Paul] saith *Omnis anima potestatibus sublimioribus subdita sit* [Let Every person be subject to the authorities]. And these be the words of the Great Divine, *Hoc Deus in Sacris Scripturis jubet, hoc lex naturae dictari, ut quilibet subditus obeiat superio* [This God in sacred scripture commands, this the law of nature dictates, or order that anyone who is a subject might yield obedience to the superior].

Later that year, the English bench reported *The Case of the College of Physicians*, often considered the seminal decision in which a court disregarded a parliamentary act. In *Bonham's Case*,⁷⁶ as this case is commonly known, Dr. Thomas Bonham had been imprisoned for practicing medicine without a license from the Royal College of Physicians. Because he had received his medical degree from the University of Cambridge, he asserted that the College had no jurisdiction over him. Dr. Bonham brought an action for false imprisonment against the leading members of the College. The College rested upon letters patent that had incorporated it with powers to fine and imprison practitioners in London who were not admitted by it. One-half of the fine was to go to the King and the other half to the College. Two acts of Parliament confirmed the patent.

Chief Justice Coke held that the College did not possess the powers it claimed over unlicensed physicians. Because the statute permitted the College to keep one-half of the fines imposed, it effectively made the College a judge to its own case. Such was against the common law, and any acts of Parliament repugnant to the same were controlled by it and to be adjudged void.⁷⁷

In 1616, Coke was suspended from his office and ordered to "correct" his *Reports*. King James I demanded an explanation of Coke's holding in *Bonham's Case* that the common law controlled

Gary T. Amos, *A Limited National Congress: The Law of Nature and Constitutional Limitations*, 7 J. CHRIST. JURIS. 99, 107 (1988) (quoting Coke in Calvin's Case and translating the Latin). The relevance of the law of nature to the resolution of the case was as follows: (1) obedience by the subject to his sovereign is due by the law of nature; (2) protection from the King was a reciprocal obligation under the law of nature; (3) the law of nature was immutable and parcel of England's law and as well as that of every other nation; (4) England and Scotland were united by birthright in obedience to the sovereign under the law of nature; (5) Calvin, who was born under one ligeance to one king (James I) cannot, therefore, be an alien born.

76. 77 Eng. Rep. 638 (K.B. 1610).

77. Coke rested upon precedent:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.

Id. at 652. Coke also uses the word "repugnant" to mean "contrary to common law." *Id.*

acts of Parliament. Coke repeated the statement made in his opinion with the preface: "The words of my report do not import any new opinion, but only a relation of such authorities of law, as had been adjudged and resolved in ancient and former times" ⁷⁸

In *Day v. Savage*,⁷⁹ Matthew Day brought an action for trespass against John Savage for the unlawful exaction of certain wharf dues (a bag of nutmegs) on behalf of the City of London. Day argued that under city custom dating back from time immemorial, all freemen were discharged from the payment of wharfage on their goods. The city asserted that there was no such custom and relied upon another custom confirmed by an act of Parliament during the reign of Richard II. This custom and statute authorized the mayor and alderman to certify to the court through the mouth of the city recorder the content of city customs. Day objected that such a statute was "against the law and common reason"⁸⁰ and, therefore, the issue ought to be judged by a jury. Chief Justice Hobart held that the statute did not intend to confirm such a custom, and that "even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself."⁸¹

Twelve years after the Glorious Revolution, the City of London sued Mr. Wood in the Mayor's Court under a city by-law for his refusing the office of sheriff. The by-law provided that a fine could be exacted in any city court of record. It was argued, *inter alia*, that the by-law enabled the city to be judge in its own case. In reversing the judgment below in *City of London v. Wood*,⁸² Chief Justice Holt

78. 2 THE WORKS OF FRANCIS BACON 506 (Basil Montagu ed., 1803). Coke cited the following precedents: *Thomas Tregor's Case*, Y.B. Pasch., 8 Edw. III, pl. 26 (1334); *Cessavit* 42, 2 Brownl. 265 (1359); *Annuitie* 41, Y.B. Pasch., 27 Hen. VI (1448); *Strowd's Case*, 1 And. 45 (1575). To the extent the precedents relied upon were valid for the proposition stated, *Bonham's Case* is not, contrary to its popular characterization, the original English case wherein an act of Parliament was trumped by the common law. Such a review, however, is beyond the scope of this article. For further reading, on the precedents cited by Coke and others that could be cited on this subject, see MCLWAIN, *supra* note 70, and Plucknett, *supra* note 70.

79. 80 Eng. Rep. 235 (K.B. 1614).

80. *Id.*

81. *Id.* at 237.

82. 88 Eng. Rep. 1592 (1701).

commented approvingly upon Coke's celebrated holding in *Bonham's Case* that any act of Parliament that would allow a man to judge his own cause is void.⁸³ The principle was not limited to voiding statutes permitting one to judge his own cause. Chief Justice Holt went further to state the general principle that statutes cannot do wrong, that is, they cannot make lawful that which is inherently unlawful.⁸⁴

The *Bonham's Case* principle was affirmed, though carefully circumscribed, only fifty-three years before Blackstone wrote his *Commentaries*.⁸⁵ Though the principle was not categorically denied until 1871,⁸⁶ Blackstone expressed the prevailing view of Parliamentary supremacy in 1765: "I know it is generally laid down more largely; that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . that [can] control it."⁸⁷ Such a

83. He held as follows:

And what my Lord Coke says in *Dr. Bonham's case* . . . is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party . . .

Id. at 1602.

84. Chief Justice Holt went further:

[A]n act of Parliament can do not wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to a state of nature; but it cannot make one that lives under a Government Judge and party. An Act of Parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B. but it may make the wife of A. to be the wife of B. and dissolve her marriage with A.

Id.

85. In *Duchess of Hamilton's Case*, 88 Eng. Rep. 651, 653 (1712), the principle expressed in *Day v. Savage*, that "an Act of Parliament may be void from its first creation, as an Act against natural equity," was acknowledged but such was limited to a "very clear case, and Judges will strain hard rather than interpret an Act void *ab initio*." *Id.*

86. See *Lee v. Bude & Torrington Junction Ry. Co.*, L.R. 6 C.P. 576, 582 (1871).

87. 1 BLACKSTONE, COMMENTARIES *91. His full comment follows:

statement is obviously incompatible with his earlier comment concerning the legitimacy of human law turning upon its conformity with the law of nature.⁸⁸

It also is significant that in Blackstone's eighth edition of his *Commentaries*, published in 1778, there is a note in the margin of a copy, alleged to be in Blackstone's own hand, that makes the latter part of the second sentence of the quotation above read: "I know of no power *in the ordinary forms of the Constitution that is vested with authority* to control it."⁸⁹ The ninth and all later editions have this modification. Josiah Quincy suggested that Blackstone had changed his opinion with respect to judicial review, as a consequence of American precedents.⁹⁰ Even Brent Bozell, who was extremely skeptical of the presidential attention paid to *Bonham's Case*, conceded that "[t]he change was evidently made to allow for the right of revolution."⁹¹

[T]he examples usually alleged in support of this sense of the rule do none of them prove that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which should be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hac* disregard it. Thus, if an act of Parliament gives a man power to try all causes that arise within his manor at Dale; yet if a cause should arise in which he himself is a party, the act is construed not to extend to that, because it would be unreasonable that any man should determine his own quarrel. But if we could conceive it possible for the Parliament to enact that he should try as well as his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

Id.

88. Justice James Wilson, appointed by President Washington to the United States Supreme Court, in contrasting this passage with Blackstone's earlier statement that "no human laws should be suffered to contradict these [the law of nature, and the law of revelation]," observed that "[s]urely these positions are inconsistent and irreconcilable." 1 THE WORKS OF JAMES WILSON 328 (Robert G. McCloskey ed., 1967).

89. Plucknett, *supra* note 70, at 60 (emphasis added).

90. JOSIAH QUINCY, JR., REPORTS OF THE CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, 526 (1865).

91. L. BRENT BOZELL, THE WARREN REVOLUTION 136 (1966).

Judicial resort to the laws of nature as a rule of decision saw its zenith in England under Lord Coke and others of like mind. Though his jurisprudence was not to take root, it was to bear fruit with Coke's disciples in the New World. Coke's writings "were the most frequent legal title to be found among lawbooks in the hands of the colonists."⁹² For those who aspired to the bar in eighteenth-century colonial America, Coke's works were the cornerstone of their legal education.⁹³

B. Colonial Courts

In *Giddings v. Browne*,⁹⁴ Justice Symonds of Boston became the first judge across the Atlantic to invalidate an act of a legislature. In this case, a town levied a tax, the proceeds of which were to provide a house for Mr. Cobbet, a clergyman. Mr. Browne's refusal to contribute to the clergyman's house was the issue before the court. Justice Symonds disregarded the town enactment, and instead rested his judgment upon the principle that "[t]he fundamental law which God and nature has given to the people cannot be infringed The right of property is such a fundamental right."⁹⁵ This law prohibited the civil authority from taking property from one to give to another. It proscribed being compelled to pay what others do give.⁹⁶ In restricting the town legislature, Justice Symonds assumed the reader's agreement with the unlawfulness of royal or legislative power to take property from one man for the benefit of another.⁹⁷

92. A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 47, 122 (1965).

93. *Id.* at 129-30.

94. 2 *THE HUTCHINSON PAPERS* 1-25 (Prince Soc. ed., 1865).

95. Charles G. Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 *YALE L.J.* 617, 623-24 (1916).

96. Edward S. Corwin, *The "Higher Law II" Background of American Constitutional Law*, 42 *HARV. L. REV.* 149, 395 (1928) (quoting 2 *THE HUTCHINSON PAPERS*, *supra* note 94, at 1-25).

97. *Id.* "If noe kinge or Parliament can justly enact or cause that one man's estate, in whole or in part, may be taken from him and given to another without his owne consent, then surely the major part of a towne or other inferior powers cannot doe it." *Id.*

Strangely enough, others see legislative supremacy in the decision because the General Court of Massachusetts had directed its legislature to draft a code of law “agreeable to the word of God,” and until they did so magistrates were to proceed “as near to the law of God as they can.”⁹⁸ Magistrate Symonds is seen as serving the legislatively ordained “Massachusetts Theocracy.”⁹⁹ This trend demonstrates that both the courts and the legislature looked to the law of God for the rule of civil conduct. The Massachusetts General Court did reverse the decision on appeal.¹⁰⁰ This was no triumph of positivism, however, but merely an appellate court disagreeing with an inferior court over the content of the laws of nature applicable to the case.

*Waddill v. Chamberlayne*¹⁰¹ is instructive, not because a legislative act was disregarded, but for the natural justice hurdle that the defendant was compelled to address notwithstanding precedent in his favor. The defendant was alleged to have knowingly sold a terminally ill slave, and the trial court gave a verdict for the plaintiff. Counsel for defendant moved for an arrest of judgment on the grounds that no warranty had been given. He conceded that “natural Justice” may give a different result, but argued that the “[l]aws of Society and Civil Government are not founded upon strict Rules of natural justice. . . . [P]ublic Convenience oft requires that they sho’d be dispensed with”¹⁰² The defendant cited numerous favorable authorities stating that *caveat emptor* was the law of the land. In so doing, he distinguished those cases wherein a warranty was not required when the seller had no lawful title to the goods sold or when selling goods that were unlawful to sell at all.

The court’s rationale is not given in the report. Perhaps, the unlawfulness of chattel slavery under the laws of nature rendered the court’s decision consistent with the exceptional precedents. Or

98. BOZELL, *supra* note 91, at 139.

99. *Id.*

100. *Id.*

101. 2 VIRGINIA COLONIAL DECISIONS: THE REPORTS BY SIR JOHN RANDOLPH AND EDWARD BARRADALL OF DECISIONS OF THE GENERAL COURT OF VIRGINIA B45 (R. Barton ed., 1909).

102. *Id.* at B46, B49.

perhaps, actual knowledge of a concealed defect in property sold was tantamount to theft and not properly within the *caveat emptor* defense, notwithstanding numerous precedents to the contrary. For Virginian lawyers, "the purpose of the law was to facilitate the speedy and expeditious completion of business," but for the judges "some semblance should exist between the laws of God and those of man."¹⁰³ In any event, the judgment was given for the plaintiff.

Coke's authority was invoked frequently by James Otis in his attack upon the Writs of Assistance in *Paxton's Case*.¹⁰⁴ With these writs, royal customs officials were given sweeping powers to search for smuggled contraband. Otis successfully relied upon *Bonham's Case* for his argument against the validity of the Act of Parliament that granted these writs. John Adams summarized the argument, in part, as "an Act against natural *Equity* is void: and if an Act of Parliament should be made . . . it would be void. The Executive Courts must pass such Acts into disuse."¹⁰⁵ With the result in this case John Adams declared "the child Independence was born."¹⁰⁶

Adams used Otis' argument before the Governor and Council of Massachusetts when he argued that the courts should remain open and use unstamped paper, notwithstanding the Stamp Act.¹⁰⁷ A Virginia county court declared the Act void. The report of the latter case states that "[t]he judges were unanimously of the opinion that the law did not bind, affect, or concern the inhabitants of Virginia, 'inasmuch as they conceived the said act to be unconstitutional.'"¹⁰⁸ As late as 1776, Chief Justice William Cushing of Massachusetts, who was one of President Washington's first appointees to the Supreme Court, was

103. A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810, 106-07 (1981).

104. QUINCY, *supra* note 90, at 51, 401.

105. *Id.* at 474.

106. 10 THE WORKS OF JOHN ADAMS 248 (Charles F. Adams ed., 1850).

107. Governor Hutchinson wrote with respect to the Stamp Act: "The prevailing reason at this time is, that the Act of Parliament is against Magna Charta, and the natural Rights of Englishmen, and therefore, according to Lord Coke, null and void." *Id.* at app. 527. See also *id.* at 441, 445.

108. 5 JOHN B. McMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES 394-95 (1920).

congratulated by Adams for telling a jury of the nullity of the acts of Parliament.¹⁰⁹

In *Robin v. Hardaway*,¹¹⁰ several persons of Indian descent brought actions in trespass, assault and battery against persons who held them in slavery, to try their titles to freedom. The defendants rested their title on a 1682 Virginia statute that had repealed a former law making Indians and others free. George Mason, counsel for the plaintiffs, argued that the statute was "originally void in itself, because it was contrary to natural right."¹¹¹ He cited *Bonham's Case*, *Calvin's Case* and *Day v. Savage* for the proposition that legislative acts contrary to the law of God are void.¹¹² Even the defense recognized the legitimate basis of the plaintiff's arguments when they quoted Puffendorf to prove that slavery was legitimate under the laws of nature.¹¹³ As an apparent alternate argument, the defense cited Blackstone to counter Coke's argument that legislative acts contrary to natural rights are void.¹¹⁴ The court did not pass on these arguments, however, as they found that the statute had been repealed in 1705.

When the Declaration of Independence transformed colonies into states, Coke's jurisprudential seed had clearly taken root and the courts of the several states continued to look carefully at statutes to ensure that fundamental liberties were not usurped, regardless of

109. *Id.* at 395.

110. 1 Jeff. Rep. 109 (Va. 1772), reprinted in VIRGINIA REPORTS, ANNOTATED: JEFFERSON AND WYTHE 1730-1799, at 58 (1903).

111. *Id.* at 113.

112. George Mason contended that

all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict His laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice.

Id. at 114.

113. *Id.* at 118.

114. *Id.*

whether such rights were posited in the recently enacted state constitutions.

C. State Courts

The orthodox legal view of natural law limits upon American legislatures is that "there is no case in which the courts have held an act invalid or refused to enforce a law regarded as contrary to natural law, except when such a law was in conflict with an express constitutional provision."¹¹⁵ Conversely stated, in the three decades after the adoption of the Constitution, "there is no case during this period in which the courts have upheld an act contrary to natural law on the ground that the law was not in conflict with any constitutional provision."¹¹⁶

In *Rutgers v. Waddington*,¹¹⁷ the plaintiff brought a trespass action under a statute against a British citizen who had occupied her property during the British occupation in the Revolutionary War. Alexander Hamilton, representing the defendant, asserted two defenses. His primary argument was that holding his client liable would violate the law of nations: "The enemy having a right to the use of the Plaintiffs property & having exercised their right through the Defendant & for valuable consideration he cannot be made answerable to another without violating the law of Universal society."¹¹⁸

The court characterized Hamilton's defense, in part, as an argument that the court should resort to "first principles" and that "statutes against law and reason are void."¹¹⁹ The court relied solely upon Hamilton's principle argument and held that the "amiable precepts of the law of nature, are as obligatory on nations in their mutual intercourse, as they are on individuals in their conduct toward

115. CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 75 (1930).

116. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1167 (1987).

117. This is an unreported decision of the New York City Mayor's Court from 1784, reprinted in JULIUS GOEBEL, JR., *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 393-419 (1964).

118. *Id.* at 373.

119. *Id.* at 395.

each other.”¹²⁰ It also found that the “*primary* law of nations . . . is no other than the *law of nature*, so far as it is applicable to them.”¹²¹ Instead of voiding the clear and unambiguous language of the trespass statute, the court cited Blackstone and construed it so as not to offend the law of nations. The judges felt bound to conclude that “such a consequence was not foreseen by the Legislature” and to “disregard it in that point *only*, where it would operate unseasonably.”¹²²

Trevett v. Weeden,¹²³ decided by the Superior Court of the Judicature of the City of Newport, Rhode Island, is an early case that shows the vigor of Coke’s jurisprudence. This case involved an Act of the Rhode Island Legislature that imposed penalties on all who refused to take the state’s paper money at its face value, the introduction of which was designed to inflate the value of currency to aid debtors. The Act gave power to certain justices to try offenders summarily without a jury trial, from which there would be no appeal. This was an attempt to avoid the circumvention of the unpopular statute via jury nullification. At this time, Rhode Island had no written constitution beyond its 1663 colonial charter from King Charles II.

Defense counsel James Varnum’s “argument is replete with references to natural law, suggesting ‘that there are certain general principles that are equally binding in all governments.’”¹²⁴ Varnum appealed to “the law of nature, the laws of God, ‘common right’ and ‘reason,’ and ‘unalienable rights’”¹²⁵ in arguing that the Act is “unconstitutional and void.”¹²⁶ Varnum quoted often from Coke, arguing that the Act was “repugnant and impossible” for the judges could not exercise jurisdiction “without any jury . . . according to the law of the land.”¹²⁷ The judges were exhorted to exercise their

120. *Id.* at 400.

121. *Id.* at 404.

122. GOEBEL, *supra* note 117, at 417.

123. Sherry, *supra* note 116, at 1135 n.37 (citing JAMES M. VARNUM, THE CASE, TREVETT V. WEEDEN: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER’S MEAT, IN MARKET, AT PAR WITH SPECIE (1787)). No official report of the case was made, save the pamphlet by defense counsel James Mitchell Varnum.

124. *Id.* at 1141.

125. *Id.*

126. *Id.*

127. Plucknett, *supra* note 70, at 66.

inherent powers over legislation as reported in the reports of Hobart, Plowden, and Coke -- with the theoretical support of Vattel.¹²⁸

The contemporary newspapers reported the case and from their account three judges declared the act unconstitutional, one doubted the court's jurisdiction, and the Chief Justice expressed no opinion save that in his judgment. While the court record indicated that judgment was given solely on the jurisdictional question, a majority had indeed declared the act void. This strategy was insightful for the judges were summoned to appear before the legislature to "assign the reasons and grounds of their judgment in adjudging an act of this Assembly unconstitutional and therefore void."¹²⁹ Judge Howell, the judges' appointed spokesman, appeared before the legislature. He came under the seemingly pretentious assumption that the judges had been summoned to "assist in matters of legislation" and "to act as legal counselors for the State . . . in framing new or repealing former laws."¹³⁰ He spoke "upwards from six hours," expounding "a variety of conclusive arguments [proving that the legislation] was unconstitutional, had not the force of law, and could not be executed."¹³¹

The obvious reason for the summons was to disclose the court's reasoning in *Trevett*. Perhaps wisely, Judge Howell asserted that "[w]hatever might have been the opinion of the judges, they spoke by their records, which admitted of no addition or diminution. [The individual judges] might have been influenced respectively by different reasons [for which] were accountable only to God and their own conscience."¹³² The legislature discharged them with the caveat that "no satisfactory reasons have been rendered by them for their judgment."¹³³ This strategy of the judges, though truthful as far as it went, sidestepped criminal charges and cost all but the chief justice their jobs upon the expiration of their terms.

128. *Id.*

129. 10 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATION IN NEW ENGLAND 218 (John R. Bartlett ed., 1865).

130. BOZELL, *supra* note 91, at 188.

131. *Id.*

132. *Id.*

133. Plucknett, *supra* note 70, at 67.

In *Ham v. M'Claws*,¹³⁴ British settlers in Honduras had emigrated to South Carolina with their slaves to escape a famine. They left with knowledge of a state statute that prohibited the importation of slaves under pain of forfeiture. It contained, however, an exception for the slaves of transients or travelers passing through the state or settlers who did not sell their slaves within one year. During their two-month journey, the state legislature passed a succeeding statute prohibiting the importation of slaves under pain of forfeiture and a fine of one hundred pounds. It excepted only the slaves of United States citizens who were within its territorial limits when the Act passed.

Upon their arrival, the slaves were seized by a revenue officer and an information was filed on the ground that they had become forfeited, having been imported contrary to the previously passed statute. The prosecution argued that the slaves were not brought into the state under the sole exception, that it was the intention of the legislature to "shut the door effectually against the importation of slaves, under any pretext whatever, by foreigners, or from foreign countries [N]o other construction could be given [the statute]."¹³⁵ In light of the former statute which had passed only about nineteen months earlier than the latter Act, the legislative intent would certainly seem to comport with the prosecution's contentions.

Counsel for the defendants argued that it would be "contrary to common right" to give the Act such a construction. They cited *Bonham's Case* to argue that the court's decision should turn upon "common right and reason" and "natural equity" which are "paramount to all statutes."¹³⁶ The court held that "[i]t is clear that

134. 1 S.C.L. (1 Bay) 93 (1789).

135. *Id.* at 95.

136. Counsel argued that

[i]t was . . . the duty of the court . . . to square its decision with the rules of common right and justice. For there were certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made *against* those principles, they are null and void. For instance, statutes made against common right and reason, are void. [*Bonham's Case* cited]. So statutes made against natural equity are void; and so also are statutes made against *Magna Charta*.

statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles."¹³⁷ Nonetheless, the court interpreted the law to exempt slaves in transit at the time of the enactment though such a construction was conceded by it to be "contrary to the letter of the act."¹³⁸

*Bowman v. Middleton*¹³⁹ noted the validity of a private 1712 South Carolina statute that had settled a boundary dispute and inheritance rights by transferring property from one owner to another. The defendant had agreed to purchase some land from the plaintiff who had inherited the land from the beneficiary of the 1712 statute. Later, the defendant refused to close the agreement on the grounds that the plaintiffs did not have good title and that the land therefore belonged to the heirs of the original owner. The plaintiffs asserted that the 1712 statute had conferred title upon them. The court held for the defendant and stated that the Act "was against common right, as well as against *magna charta*, to take away the freehold of one man and vest it in another That the act was, therefore, *ipso facto* void."¹⁴⁰ Though eighty-four years had elapsed since the statute was passed, "no length of time could give it validity, being originally founded on erroneous principles."¹⁴¹

Under the Virginia Act of 1788, debts owed to British citizens could be discharged with the payment of paper money into a loan office. In *Page v. Pendleton*,¹⁴² Chancellor George Wythe announced that under the Act of 1788 the Virginia legislature could not unilaterally discharge debts owed to British citizens because "the right to money due to an enemy cannot be confiscated."¹⁴³ In a footnote, Wythe explained that the issue turned upon the law of nature.¹⁴⁴ He

Id. at 96.

137. *Id.* at 98.

138. *Id.* at 97.

139. 1 S.C.L. (1 Bay) 252 (1792).

140. *Id.* at 254.

141. *Id.* at 254-55.

142. 1 GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY 211 (B.B. Minor ed., 1852).

143. *Id.* at 212.

144. Wythe did not rest upon a provision in the Virginia Constitution:

likened the effect of the statute to privateering,¹⁴⁵ which he characterized as nothing more than “piracy licensed imperially.”¹⁴⁶ Quoting Sophocles, Wythe added another informative footnote showing the prevailing view that the common law mirrored the laws of nature and could not be nullified by man because man did not decree them.¹⁴⁷ He also evidenced that he understood the true nature of an oath when he stated that he was constrained to nullify the effect of the statute because he had “sworn in obedience to legislative injunction, an oath, which no human power can dispense, that he will do equal right to all manner of people.”¹⁴⁸

Finally, the principles held by John Locke were recognized in *Billings v. Hall*.¹⁴⁹ In this case, the Supreme Court of California disregarded “an act for the protection of actual settlers, and to quiet

If this seem contrary to what is called authority, as perhaps it may seem to some men, the publisher of the opinion will be against the authority, when, in a question depending, like the present, on the *law of nature*, the authority is against reason, which is affirmed to be the case here.

Id. at 212 n.(b) (emphasis added).

145. Noah Webster defined “privateer” as “[a] ship or vessel of war owned and equipped by a private man or by individuals, at their own expense, to seize or plunder the ships of an enemy in war. Such as ship must be licensed or commissioned by government, or it is a pirate.” NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (facsimile 1st ed. 1828). This edition was not printed with page numbers.

146. 1 WYTHE, *supra* note 142, at 212 n.(b).

147. The common law was deemed to be equivalent to the laws of nature:

The position in the sixth article of our bill of rights, namely, that men are not bound by laws to which they have not assented, is not true of unwritten or common law, that is, of the law of nature, called common law, because it is common to all mankind. The prohibitions to kill or wound our fellow man, to defame them, to invade their property, the praecepts to deal faithfully, to make reparations for injury, and others, are perceived intuitively to harmonize with our innate notions of rectitude, so that every man, not under the temptations of revenge, lust or avarice solicited by opportunity, feels obligated to obey those prohibitions and praecepts, more forcibly than if the duties were capable of demonstration. . . . They are laws which men, who did not ordain them, have not power to abrogate.

Id. at 214 n.(e).

148. *Id.* at 218.

149. 7 Cal. 1 (1857).

land-titles of this state.”¹⁵⁰ The Act provided that any owner that successfully ejected an occupant owed the value of his improvements as a condition of recovery. Hall, who had been ejected from his adverse possession of Billing’s land, prevailed under the Act at the trial level on a directed verdict. On appeal, the Court reversed, finding the law’s imposition of payment of improvements, without recovery of rent, “repugnant to the plainest principles of morality and justice, and . . . violative of the spirit and letter of our Constitution.”¹⁵¹ The letter of the state Constitution to which he referred was the common declaration that all men have “certain inalienable rights, amongst which are those of enjoying and defending life and liberty, acquiring possession, protecting property, and pursuing and obtaining safety and happiness.”¹⁵² The dissent observed that the majority’s opinion “seems to be predicated on the grounds, that the act is void, because it is in violation of natural justice.”¹⁵³ The letter of the state constitution could not have been violated because the article relied upon was a “mere reiteration of a truism which is as old as constitutional government” and had never been construed as a limitation upon the legislative power.¹⁵⁴

150. *Id.* at 3.

151. *Id.* at 10. Quoting Locke, the Court affirmed that “the law of nature stands as an eternal rule to all,” *id.* at 12, and declared that the “principles of natural justice” trump the utilitarian policy interests of the government:

The policy of most of the States has been to encourage settlement in good faith upon vacant lands as a means of developing agricultural interests, and the wisdom of that policy has manifested itself in rapid growth of the West and Southwest.

However desirable such a policy may be, and however necessary to the interest of this State, it ought not to be encouraged or maintained when founded in wrong and injustice to her citizens. It is a law as immutable as those of nature, that States and nations, like individuals, are bound to obey the principles of natural justice in all their dealings with their subjects and others, and while a seeming temporary prosperity may follow the infractions of this rule, the day of retribution must come as certainly as effect follows cause.

Id. at 15.

152. *Id.* at 6.

153. *Id.* at 19.

154. 7 Cal. at 19.

Though never without controversy, state courts continued the colonial tradition of judicial review assumed from the jurisprudence of Sir Edward Coke. State courts have left a legacy of being the protector of inalienable rights by looking beyond the declarations of legislatures and constitutional conventions to law rooted deep in the created order as recognized in our common law heritage and the law of nations.¹⁵⁵

V. NATURAL LAW AND COURTS OF LIMITED JURISDICTION

Justice Stevens stated in *O'Melveny & Myers v. F.D.I.C.* that "federal courts, . . . 'unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.'"¹⁵⁶ Although he characterized federal judicial power as "lawmaking power," his point, nonetheless, is sound: federal judicial power is limited relative to those powers vested within state courts. Federal judges can exercise only the powers delegated to them within the Constitution. In recognizing the flawed nature of man and his tendency to abuse and accrete power, the governed may preclude some of the polity's judges from recognizing the laws of nature as a

155. For additional cases, see *Symsbury Case*, 1 Kirby 444 (Conn. Super. Ct. 1785); *Turner v. Turner's Ex*, 8 Va. (4 Call.) 234 (1792); *Kamper v. Hawkins*, 1 Va. Cas. 20 (1793); *Zylstra v. Corporation of Charleston*, 1 S.C.L. (1 Bay) 382 (1794); *Derby v. Blake* (1799) (reported in a newspaper article that was later published at 226 Mass. 618 (1917)); *Jones v. Commonwealth*, 5 Va. (1 Call.) 555 (1799); *Turpin v. Locket*, 10 Va. (6 Call.) 113 (1804); *Currie's Adm'rs v. Mutual Assurance Soc'y*, 14 Va. (4 Hen. & M.) 315 (1809); *Dupuy v. Wickwire*, 1 D. Chipman 237 (Vt. 1814); *Holden v. James*, 11 Mass. 396 (1814); *Portland Bank v. Apthorp*, 12 Mass. 252 (1815); *Dartmouth College v. Woodward*, 1 N.H. 111 (1817); *Foster v. Essex Bank*, 16 Mass. 245 (1819); *Goshen v. Stonington*, 4 Conn. 209 (1822); *Commonwealth v. Worcester*, 20 Mass. (3 Pick.) 462 (1826); *Coates v. Mayor of New York*, 7 Cow. 584 (N.Y. Sup. Ct. 1827); *Bank of the State v. Cooper*, 10 Tenn. (2 Yerg.) 599 (1831); *Ex parte Dorsey*, 7 Port. 293 (Ala. 1838); *Regents v. Williams*, 9 G. & J. 365 (Md. 1838); *Holmes v. Holmes*, 12 Barb. 137 (N.Y. App. Div. 1851); *White v. White*, 5 Barb. 474 (N.Y. App. Div. 1849); *William v. Robinson*, 60 Mass. (6 Cush.) 330 (1850); *Benson v. Mayor of New York*, 10 Barb. 223 (N.Y. Sup. Ct. 1850); *Wynehamer v. State of N.Y.*, 13 N.Y. 378 (1856); *Walker v. Cincinatti*, 21 Ohio St. 14 (1873); *State v. Moores*, 55 Neb. 480, 76 N.W. 175 (1898); *Mirick v. Sims*, 79 Ohio St. 174 (1908).

156. 114 S. Ct. 2048, 2056 (1994) (Stevens, J., concurring) (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981)).

rule of decision, just as the Framers; in recognizing human nature,¹⁵⁷ they separated and enumerated power in and among all three branches of the federal government and thereby limited its abuse. The judicial power of the federal courts “extend[s] to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made.”¹⁵⁸ The foregoing extension of judicial power is typically referred to as “federal-question” jurisdiction.

Though a case may encompass a variety of issues, the words “arising under this Constitution” in Article III qualifies the type of case, or that portion of a case, to which the federal court may extend its jurisdiction. The inclusion of the qualifying word “this” in contrast to “the” precludes federal judges from recognizing a fundamental law other than the one posited in the written document under which they assume power to judge. Moreover, limiting the federal judicial power to cases *arising under* a federal rule precludes resort to extra-textual rules as well. Noah Webster’s first dictionary defined “arising” in part as “originating or proceeding.”¹⁵⁹ He defined “under” in part as “[i]n a state of pupilage or subjection to” or “[i]n subordination to” as illustrated by the phrase, “*Under* God, this is our only safety.”¹⁶⁰ Hence, a case that “arises under” a federal rule is a case in which the Constitution, statutes or treaties govern the rights asserted from the commencement of the suit.¹⁶¹

157. See, e.g., James Madison’s familiar statement:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

158. U.S. CONST. art. III, § 2 (emphasis added).

159. WEBSTER, *supra* note 145.

160. *Id.*

161. The word “arising” then justifies the “face-of-the-complaint rule” recognized in *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), though alluded to as early as *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 824 (1824) (“The right of the

A single word can change history. Had the Article III text granted federal courts jurisdiction to hear cases that arise “out of” a federal rule such power would have been quite broad. The legal phrase “arising out of” is commonly used in insurance contracts and workers’ compensation statutes where liability for insurers and employers “arises out” of the occurrence of certain events. As the Missouri Supreme Court observed, “[t]he words ‘arising out of,’ . . . are ordinarily understood to mean ‘originating from’ or ‘having its origin in,’ ‘growing out of’ or ‘flowing from.’”¹⁶² Arising “‘out of’ points to the cause or source.”¹⁶³ Extending federal court power to cases that “arise out of” a federal rule, therefore, would require only that a single issue in a case be governed by a federal rule. Under this scheme, the adjudication of federal issues governing the rights of the parties would not be necessary for a federal court to retain jurisdiction.

Chief Justice John Marshall held a similar view with respect to cases that arise “under” federal rules. In *Osborn v. Bank of the United States*,¹⁶⁴ Marshall held that federal-question jurisdiction exists if federal law “forms *an* ingredient of the original cause . . . [even though] other questions of fact or of law may be involved in it”¹⁶⁵ and where “the title or right set up by the party, *may* be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction.”¹⁶⁶

The text of the Constitution requires a significant qualification of Marshall’s view. Article III does not give federal judges power to decide a case under federal-question jurisdiction if federal law is only an ingredient of the cause of action that *may* be subject to a federal rule. If a federal judge can take cognizance of a case only because the controversy is subject to a rule found in the Constitution, statutes or treaties, once jurisdiction is assumed, the judge cannot look elsewhere

plaintiff to sue cannot depend upon the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend upon the state of things when the action is brought.”)

162. *Schmidt v. Utilities Ins. Co.*, 182 S.W.2d 181, 184 (Mo. 1944).

163. *Hopkins v. Michigan Sugar Co.*, 150 N.W. 325, 326 (Mich. 1915) (quoting *Fitzgerald v. Clarke & Son*, 2 K.B. 796 (1908)).

164. 22 U.S. (9 Wheat.) 738 (1824).

165. *Id.* at 823 (emphasis added).

166. *Id.* at 822 (emphasis added).

for a rule to determine the rights of the parties¹⁶⁷ or else the case ceases at that point to “arise under” federal law and the federal judge’s jurisdiction of the case is forfeited. Federal judges *must* apply the law that the Framers of the Constitution and Congress have already posited, or else hold the case in abeyance until a court with proper jurisdiction can adjudicate the non-cognizable issues. *Osborn* remains the accepted view, but cannot be justified from the text.

An analogous, though not perfect example of this reading of federal-question jurisdiction is present in the Supreme Court’s construction of Section 25 of the Judiciary Act in *Murdock v. City of Memphis*.¹⁶⁸ In *Murdock*, the federal-question statute, which contains the identical “arising under” language, was construed to mean that the Supreme Court was restricted in its jurisdiction to questions of federal law and that decisions of a state’s highest court are final on questions of state law. This holding was based upon the Court’s reading of legislative intent that the principal reason for granting appellate jurisdiction over state court decisions under Section 25 was to “correct[] . . . errors relating solely to Federal law.”¹⁶⁹ It was not argued that questions that could be determined by the laws of nature were exclusively state law questions. Rather, it is contended that federal-question jurisdiction under the Constitution ought to be the same as the Court’s construction of the federal-question statute in *Murdock* due to the identical “arising under” language.¹⁷⁰

167. This is precisely what Justice Chase did in *Fletcher v. Peck*. Though the constitutional issue of whether Connecticut had passed an ex-post facto law granted the Court jurisdiction to adjudicate the case, Justice Chase rested his decision, in part, upon natural law.

168. 87 U.S. 590 (1874).

169. *Id.* at 630.

170. The Court’s analysis is appropriate to federal-question jurisdiction under Article III:

There may be some plausibility in the argument that [federal] rights cannot be protected in all cases unless the Supreme Court has final control of the whole case. But the experience of eighty-five years of the administration of the law under the opposite theory would seem to be a satisfactory answer to the argument. . . . [B]y the very terms of this statute, when the Supreme Court is of opinion that the question of Federal law is of such relative importance to the whole case that it should control the final judgment, that court is authorized to render such judgment

The Supreme Court cannot necessarily speak the law of a case even when a state court of last resort below relies upon state *and* federal law for its rule of decision. The well-established rule is that “where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Supreme Court’s] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”¹⁷¹

Another similar, though not complete reading of Article III is found within the prudentially based abstention doctrine recognized first in *Railroad Commission v. Pullman Co.*¹⁷² To avoid an unnecessary constitutional ruling, the Supreme Court remanded this case to the federal district court with directions to retain the action pending a determination of certain state law matters in state court. Under the *Pullman* abstention doctrine, federal courts should abstain from adjudicating a case where there is substantial uncertainty as to the meaning of state law and where there is a reasonable possibility that clarification of the state law might preclude the need for a federal constitutional ruling.¹⁷³ This doctrine should properly be based in the constitutional text. Abstention is constitutionally required whenever adjudication of a state law issue would govern the rights of the parties. It is not constitutionally required merely when the state law issue is merely in need of clarification or when resolution of the state law matter *might* obviate the need for a constitutional decision.

If a provision within the constitutional text is challenged as being repugnant to natural law, administrative law illustrates the nature of courts of limited jurisdiction, such as federal courts. Administrative tribunals receive delegated authority to adjudge certain controversies by virtue of the same statutes that govern the duties and rights of parties that come before them. Administrative law judges cannot

and enforce it by its own process. It cannot, therefore, be maintained that it is in any case necessary for the security of the rights claimed under the Constitution, laws, or treaties of the United States that the Supreme Court should examine and decide other questions not of a Federal character.

Id. at 632-33.

171. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

172. 312 U.S. 496 (1941).

173. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.2 691 (2d ed. 1994).

entertain questions as to the facial constitutionality of the statute providing the administrative regulation or remedy since “[a]n administrative body does not have authority to determine the constitutionality of the law it administers.”¹⁷⁴ Whenever the statute or administrative rule ceases to govern the rights asserted by the parties, the jurisdiction of the administrative law judge ceases to exist until the constitutional question can be resolved.¹⁷⁵

Likewise, the federal constitution gives the federal courts power to hear cases that are governed by federal constitutional rules. Because the Constitution grants adjudicatory power to federal courts whenever the lawfulness of a constitutional provision is challenged in federal court, the party raising the challenge is effectively and concurrently objecting to the authority of the court to adjudicate the issue. A judge whose power is derived from the Constitution cannot look beyond the legal instrument that gives him authority to adjudicate and sit in judgment upon the same. To allow him to hear such a question is like permitting a party to judge its own case.

An historical example of the foregoing limitation of power being recognized occurred when the lawfulness of the Fugitive Slave Act, which executed the Fugitive Slave Clause of the Constitution,¹⁷⁶ was

174. *Bare v. Gorton*, 526 P.2d 379, 381 (Wash. 1974).

175. *See, e.g., Moore v. City of Cleveland*, 431 U.S. 494, 497 n.5 (1977) (a zoning board of review lacks competence to resolve whether a zoning ordinance is unconstitutionally invalid on its face); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures”); *Mathews v. Diaz*, 426 U.S. 67 (1976) (the constitutionality of a provision of the Social Security Act is beyond the competence of the Secretary of Health, Education and Welfare to decide); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (the constitutionality of a statutory requirement is “beyond [the Secretary of Health, Education and Welfare’s] jurisdiction to determine”); and *California Comm’n v. United States*, 355 U.S. 534, 539 (1957) (a constitutional issue is “one that the Commission can hardly be expected to entertain”). Those who claim that bifurcating a case between state and federal courts would create logistical nightmares need to consider the foregoing cases and many others of their kind where bifurcation is present. The facial unconstitutionality of the statute that an administrative tribunal adjudicates remedies under is one of several exceptions to the principle that a party must exhaust administrative procedures before an Article III judge can review the case. *See* BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 8.37 (2d ed. 1984).

176. The infamous clause reads:

challenged. The Clause and the Act were challenged by Senator William Henry Seward as being contrary to a higher law. Orestes Brownson, a Catholic scholar, correctly pointed out the jurisdictional problem for the Senator. A public official who holds his power under the authority of the Constitution cannot, while holding such power, appeal to a higher law against the authority by which he assumes office. To do so is to deny the very authority by which such an official sits.¹⁷⁷

Article III of the Constitution does not, however, assume that federal judges can apply the written law to the facts in a perfunctory fashion. Human beings without exception, including federal judges, are not presuppositionally neutral. A person's assumptions directly affect the interpretation of all facts. Moreover, presuppositions determine what we consider to be facts. A federal judge cannot avoid interpreting words and phrases in light of these biases. Even the so-called positivist Judge Bork saw the significance of this inevitability.¹⁷⁸

No person held to Service or Labour in one State, under the Laws Thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2.

177. Brownson's astute exhortation was as follows:

[T]here is a higher law than the Constitution. The law of God is supreme, and overrides all human enactments, and every human enactment incompatible with it is null and void from the beginning, and cannot be obeyed with a good conscience, for "we must obey God rather than men." This is the great truth statesmen and lawyers are extremely prone to overlook, which the temporal authority not seldom practically denies, and on which the Church never fails to insist But the concession of the fact of a higher law than the Constitution does not of itself justify the appeal to it against the Constitution, either by Mr. Seward or the opponents of the Fugitive Slave Law. Mr. Seward had no right, *while holding his seat in the Senate under the Constitution, to appeal to the higher law against the Constitution, because that was to deny the very authority by which he held his seat.*

Russell Kirk, *In Memoriam -- A Lecture on Natural Law*, POL'Y REV. 77, 81 (Summer 1994) (emphasis added).

178. Judge Bork clearly saw the nexus between assumptions and interpretation:

[T]he various clauses of the Constitution and the Bill of Rights can be established, in their meaning, only by attaching them to the properties of a moral argument. And

Interpreting the Constitution in a supposedly amoral context leads to words like "liberty" being given a lawless definition incapable of general application in all other legal contexts: the freedom "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁷⁹

In what context then should the Constitution be interpreted? The legal context recognized implicitly by the Constitution itself: the Declaration of Independence and the legal principles it recognizes for the legality of the United States as a civil polity.¹⁸⁰ The language in the Preamble, "[w]e the people of the United States" and "for the United States of America," assumes that the nation had been already

when we do that, we find ourselves tracing these clauses back to the structure of moral understanding that must lie behind the text of the Constitution. The Constitution in some of its most important provisions, is quite general, not to be taken in full literalness, and therefore dangerous in the hands of those who do not interpret such provisions in light of the principles that underlie and animate them.

Id.

Gary Jacobsohn draws similar conclusions:

[J]udicial appeals to "higher law" are not justifiable when they lead to a distinction between written and unwritten constitutions, but they are justifiable as they help explicate and illuminate the written words of the Constitution itself. From this perspective the positivists are correct in their insistence upon the exclusive authority of the written document, but fundamentally misguided in their understanding of the nature of this document, since . . . the written words do not preclude a natural rights content.

GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 75 (1986).

179. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

180. *See Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). In his concurring opinion, Justice Thomas wrote:

There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.).

Id. at 2119 (Thomas, J., concurring).

formed.¹⁸¹ This assumption is clear in what the Constitution itself states as one of its established purposes: “in Order to form a more perfect Union.”¹⁸² A union must already exist, albeit in an imperfect state, in order to make it “more” perfect. The Subscription Clause of the Constitution recognizes that the nation commenced with the Declaration of Independence: “Done in Convention . . . in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth.”¹⁸³ Counting back from 1787, the year the Constitution was signed, the Declaration of Independence was subscribed to in the twelfth year, 1776. The foregoing references show the legal continuity between the two documents.

One might be tempted to conclude that the Subscription Clause points to the independence event alone. The Declaration of Independence, however, along with the justificatory principles stated therein, was written and consented to by the people to put the event of national independence into legal effect. The legitimacy of the declaration was not merely because the people said so. The document itself recognized the law, the “laws of nature and of nature’s God,” under which separation from Great Britain could be justified. The legal context then for the Constitution was “the laws of nature and of nature’s God” under which this nation’s birth received its legitimacy and is the context in which words susceptible of natural law content should be interpreted.

Federal judges also may not find refuge in the Ninth Amendment¹⁸⁴ to test the validity of positive law with natural law. This Amendment is not a means of incorporating natural law as a rule

181. U.S. CONST. pmb1.

182. *Id.*

183. U.S. CONST. art. VII.

184. The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

of decision,¹⁸⁵ though the Amendment was used in the strategy to defeat Judge Bork during his confirmation hearings.¹⁸⁶

The Federalists, who were opposed to an inclusion of a Bill of Rights, argued that it was impossible and, therefore, unwise to amend a perfect enumeration of restrictions upon the federal government. They were fearful of the possible implication that every power not restricted in the Bill of Rights from the federal government will be construed as a power left to the same. The Federalists argued that the enumeration of powers alone would provide a greater protection against the usurpation of inalienable rights.¹⁸⁷ Though the Bill of

185. See *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991) ("We agree with the district court that the ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law.").

186. The report of the Senate Judiciary Committee on Judge Bork's nomination wrote:

Judge Bork has also disregarded the text of the Ninth Amendment In Judge Bork's view, while there are alternative explanations for the Amendment, "if it ultimately turns out that no plausible interpretation can be given, the only recourse for a judge is to refrain from inventing meanings and ignore the provision, as was the practice until recently."

This suggested disregard for the Amendment is consistent with Judge Bork's general recommendation about a judge's role "when his studies leave him unpersuaded that he understands the core of what the Framers intended" with respect to a particular constitutional provision: "[The judge] must treat [the provision] as nonexistent, since, in terms of expression of the framers' will, it is nonexistent. . . . When the meaning of a provision . . . is unknown, the judge has in effect nothing more than a water blot on the document before him. He cannot read it; any meaning he assigns to it is no more than judicial invention of a constitutional prohibition; and his proper course is to ignore it."

Nomination of Robert H. Bork to be an Associate Justice of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 10-11 (1987) (quoting Robert H. Bork, *Interpretation of the Constitution*, 1984 Justice Lester W. Roth Lecture, University of Southern California, at 11-12 (October 25, 1984)) (alterations in original) (citations omitted).

187. James Madison argued:

If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government? Has not the honorable gentleman himself admitted that an imperfect enumeration is dangerous? . . . Does it follow from the omission of . . . restrictions, that they can exercise powers not delegated? The reverse of the proposition holds. The delegation alone warrants the exercise of any power.

Rights became a necessary addendum, the Ninth Amendment was added merely as a rule of construction to the first eight substantive amendments to preclude the implication so feared that “what is not included [in the Bill of Rights] is excluded [as a restriction].”¹⁸⁸

The federal judge, in declining to hear an issue in a case alleging violations of unwritten restrictions upon the federal government, does not deny rights reserved to the people, but leaves the matter to courts who can properly hear claims resting upon natural law. In so doing, the federal judge is not necessarily concluding that because the Bill of Rights is enumerated that they are the only restrictions upon the federal government. He is, rather, concluding that another judge within our system of federalism has the proper authority to entertain such questions. Federal courts sitting under federal-question jurisdiction do not violate the Ninth Amendment’s command in refusing to hear a claim based upon unwritten rights reserved to the people because a federal court is prevented from giving a false construction to the enumerated restrictions in the absence of authority to hear a case that would lead to such a false construction.

In sum, because of the limited nature of the jurisdiction of federal courts as determined by the text of Article III, federal courts are proscribed from adjudicating cases under non-federal rules. When sitting under federal-question jurisdiction, they must look to the laws of nature to explicate the words of the text which allow for such a construction.

J. ELLIOT, 3 THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 620 (Burt Franklin ed., 1968).

188. Scott Lumsden, *The Ninth Amendment in Light of the Declaration of Independence* 113 (1990) (unpublished M. Pub. Pol’y thesis, Regent University); *See also* *Charles v. Brown*, 495 F. Supp. 862 (N.D. Ala. 1980). This court reasoned that

the Ninth Amendment was added to the Bill of Rights to ensure that the *maxim expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution. . . . [T]he Ninth Amendment is merely a rule of construction.

Id. at 863-64.

VI. NATURAL LAW AND COURTS OF GENERAL JURISDICTION

When Alexander Hamilton was imploring the people of New York to ratify the Constitution, he argued that “[s]tate courts will be divested of no part of their primitive¹⁸⁹ jurisdiction.”¹⁹⁰ In the United States, judicial power can be classified as being divided between two types of courts: those of limited jurisdiction such as the federal courts and those of general jurisdiction. The latter are contained within the state court systems. A court whose jurisdiction is classed as “limited” or “general” is categorized relative to the other class since no court is without certain jurisdictional restrictions.¹⁹¹

The line of demarcation between the two kinds of courts is not always definite.¹⁹² State governments, nonetheless, are governments of plenary power and can be contrasted with the governments of enumerated powers such as the federal government. Hence, state constitutions are characterized by restrictions of power in contrast with enumerations thereof. Because state governments are governments of plenary power, state courts generally have authority to hear all cases in law or equity, unless limited by positive law.¹⁹³ This

189. Noah Webster defined “primitive,” in part, as “[o]riginal; primary; radical; not derived.” WEBSTER, *supra* note 145.

190. THE FEDERALIST NO. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

191. Fox v. Hoyt, 12 Conn. 491, 496 (1838). “If by a court of general jurisdiction, is meant one of unlimited powers, then we have none such in this state; nor do we know of any elsewhere.”

192. Tucker v. Harris, 13 Ga. 1, 7 (1853). “But what author has undertaken to mark with accuracy and precision the boundary between the two? Bacon has not, nor has Blackstone, nor any other elementary writer.”

193. See, e.g., MICH. CONST. art. VI, § 13: “The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs” *Id.* Mich. Comp. Laws § 600.601 (1986) states that:

Circuit courts have the power and jurisdiction (1) possessed by courts at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and (2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and (3) prescribed by rule of the supreme court.

distinction was recognized in *Harvey v. Tyler*¹⁹⁴ where the Supreme Court held that a court has general jurisdiction when a statute gives the authority to hear all cases “at common law or in [equity] . . . and all such other matters as by any particular statute.”¹⁹⁵ Courts of general jurisdiction can hear natural law-based challenges to the positive law because such courts possess plenary judicial power under the laws of nature as a branch of governments of plenary power, the only exceptions being those posited in constitutions and statutes.¹⁹⁶

194. 69 U.S. (2 Wall.) 328 (1864).

195. *Id.* at 341. Other criteria can be found to characterize courts of general jurisdiction, but such are irrelevant to the scope of this article.

196. As discussed above, the same inherent limitation upon administrative law judges to entertain challenges to the statute under which they adjudicate rights necessarily prohibits federal courts from hearing a natural law-based challenge to the federal Constitution. *See supra* text accompanying notes 172-75. Likewise, a state court cannot entertain a natural law-based objection to its respective state constitution because the state court’s power is derived from that same legal covenant. State judges, also, cannot entertain objections to the Constitution because of the oath that all federal and state judges have taken in accordance with the Article VI mandate to “support this Constitution.”

Such an oath required of judges does not, however, prevent jury nullification of a federal Constitutional provision if a jury was given instructions as to its historic right to judge the law as well as the facts. *See* 47 AM. JUR. 2d *Jury* § 223 (1995). “Generally speaking, the juror’s oath pledges the juror to do his or her duty, and is to the effect that the juror will well and truly try the issues joined, and render a true verdict according to the law and the evidence.” *Id.* “Trial jurors in a criminal case are not judicial officers, within a provision of the Constitution of the United States that the executive and judicial officers of the several states shall take an oath to support the Constitution.” *Id.* With respect to the historic right of juries to judge the law, *see, e.g.,* *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969). “In the early history of the American Colonies and for a time after the Revolution juries were nearly always recognized as having the power to judge both law and fact.” *Id.* at 1005. *See also* *Sparf v. United States*, 156 U.S. 51 (1895) (Gray, J., dissenting). Consider Chief Justice John Jay’s charge to the jury in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794):

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. . . . [W]e have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries the best judges of facts; it is, on the other hand, presumable, that the courts are the best judges of law. But still both objects are lawfully, within your power of decision.

Federal courts, however, do have power to act as courts of general jurisdiction under Article III when sitting under what is commonly referred to as “diversity” jurisdiction.¹⁹⁷ In this instance, the laws of the respective states and international law¹⁹⁸ forms the rule

Id. at 4.

This right was not limited to nullification of criminal verdicts. It extended to constitutional interpretation as illustrated by Justice Livingston’s jury instruction in a treason trial in 1808. After giving a detailed opinion why the United States District Attorney’s case could not satisfy the Constitution’s definition of treason, he said to the jury, “[t]he whole case, both law and fact, is now committed to you, in the fullest confidence, that you will do justice.” *United States v. Hoxie*, 26 F. Cas. 397, 403 (C.C.D. Vt. 1808) (No. 15,407). While the jury was bound to give “very respectful consideration to every proposition of law you may receive from the court,” it has a “right to take upon itself the decision of both law and fact.” *Id.* at 402 (emphasis added). Supreme Court Justice James Wilson stated in his 1790-91 Law Lectures that “[i]t is true, that, in matters of law, the jurors are entitled to the assistance of the judges; but it is also true, that, after they receive it, they have the right of judging for themselves.” 1 *WORKS OF WILSON* 74 (Lecture I) (Robert G. McCloskey ed., 1967). To this day, the Indiana and Maryland Constitutions preserve the right of the jury to judge both law and fact. *See* MD. CONST. art. XXIII and IND. CONST. art. I, § 19.

197. Article III of the Constitution states:

The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls; To all Cases of admiralty and maritime Jurisdiction; To Controversies to which the United States shall be a Party, To Controversies between two or more States; . . . between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States . . .

U.S. CONST. art. III, § 2, cl. 1.

198. Early Americans consulted Emmerich de Vattel more than anyone regarding the law of nations. Vattel wrote that “the *law of Nations* is originally no other than the *law of nature applied to Nations*.” EMMERICH DE VATTEL, *THE LAW OF NATIONS* lvi (J. Chitty ed., 1863). John Jay, first Chief Justice of the Supreme Court, instructed a grand jury: “It may be asked who made the laws of nations? The answer is *he* from whose *will* proceed all moral obligations, and which *will* is made known to us by reason or by revelation.” 3 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 480 (H. Johnston ed., 1891) (quoting Charge to the Grand Jury for the District of Virginia (May 22, 1793)). Supreme Court Justice James Wilson told a grand jury that “[t]he law of nations has its foundation in the principles of natural law, applied to states . . .” 2 *THE WORKS OF JAMES WILSON* 813 (Robert G. McCloskey ed., 1967) (quoting Charge to the Grand Jury for the District of Virginia 16 (May 23, 1791)).

Jurists during the founding era also held that positive law could not violate the law of nations. As Vattel stated, “this law is immutable and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from

of decision.¹⁹⁹ Here, federal courts can derive the rule of decision from natural law, notwithstanding a contrary positive rule because the identity of the parties in a legal dispute or the legal subject matter of the dispute (admiralty or maritime jurisdiction) gives the court power to hear a diversity jurisdiction case. This is distinct from federal-question jurisdiction where the rule governing the question prescribed gives the court jurisdiction.

The Supreme Court construed Section 34 of the Federal Judiciary Act of 1789 in *Swift v. Tyson*.²⁰⁰ Section 34 instructed federal judges when hearing diversity cases that the “laws of the several states . . . shall be regarded as rules of decision in [trials at common law], in the courts of the United States”²⁰¹ In *Swift*, Justice Story held that the “laws of the several states” could not possibly refer to the decisions of the highest state courts. With a characteristically Blackstonian understanding, he aptly observed that “[i]n the ordinary course of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves laws.”²⁰² He construed “laws” in Section 34 as “positive statutes of the state, and [somewhat inconsistently with his characterization of court decisions] the construction thereof adopted by the local tribunals.”²⁰³ Section 34, therefore, did not apply to the case at hand because a state statute did

the observance of it.” Vattel at lviii. Justice Iredell instructed a grand jury that “[e]ven the Legislature cannot rightfully controul [the law of nations], but if it passes any law on such subjects is bound by the dictates of moral duty to the rest of the world in no instance to transgress them.” Charge to the Grand Jury for the District of South Carolina (May 12, 1794), reprinted in *Gazette of the United States* (Philadelphia) (June 12-14, 1794) (alterations in original).

199. Though an early draft of Article III (in James Wilson’s handwriting) extended jurisdiction to cases “which may arise . . . on the Law of Nations,” the final version did not include such a reference. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587 (Max Farrand ed., 1911). Hamilton explained that the clauses concerning the law of nations were the diversity grants. THE FEDERALIST NO. 80, at 475-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

200. 41 U.S. (16 Pet.) 1 (1842).

201. 28 U.S.C. § 1652 (1994) (“trials at common law” amended to “civil actions” in 1940).

202. *Swift*, 41 U.S. at 18.

203. *Id.*

not touch upon the issue (the law of negotiable instruments) before the Court. Although Justice Story considered prior New York court decisions, he felt free to apply general commercial law which he defined as "not the law of a single country only, but of the commercial world."²⁰⁴

The rule declared in *Erie Railroad v. Tompkins*²⁰⁵ would effectively forbid federal courts from considering natural law as a rule of decision in diversity cases governed by common law rules.²⁰⁶ *Erie* overturned the Supreme Court's construction of Section 34 in *Swift*. The rationale for *Erie* rested upon policy preferences of the Court, legislative history, and the Constitution.²⁰⁷ Concerning legislative history,²⁰⁸ the opinion depended, in part upon research reported by professor Charles Warren,²⁰⁹ which was based primarily on a slip of paper found in the Senate archives containing the original version of Section 34, handwritten by Senator Ellsworth. On this paper, the word "laws" was substituted for "statute law . . . in force for the time being and their unwritten or common law now in use; whether by adoption from the common law of England, the ancient statutes of the same or otherwise."²¹⁰ Warren concluded that the portion struck was an unnecessary enumeration of different types of state laws and that the word "laws" was intended to encompass the same. The legislative

204. *Id.* at 19.

205. 304 U.S. 64 (1938).

206. The text of the Rules of Decision Act no longer refers to "trials at common law" but to "civil actions." If Justice Story's construction of "laws" is valid, the aforementioned substitution would effectively proscribe a federal judge from disregarding the statutes of a particular state in lieu of natural law.

207. This article will address the latter two considerations because policy judgments ought to have been beyond the Court's cognizance and are, therefore, beyond the scope of this article. With respect to the Court's policy judgments articulated in *Erie*, see John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087 (1992).

208. Any discussion of legislative history for the purpose of giving authoritative content to statutes is, as Justice Scalia has said, a "waste of research time and ink; it is a false and disruptive lesson in the law . . . the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

209. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

210. *Id.* at 86-87.

intent, according to Warren, must have been to include more than statutory law.

Compared to professor Warren's conclusions, the historical and textual, though non-legislative, research of professor Wilfred Ritz is compelling.²¹¹ Two arguments are especially persuasive. First, because case opinions of the original thirteen states were not readily assessable when the Judiciary Act was passed, Congress did not intend for federal courts to look to state court opinions to determine its respective law.²¹² Second, after analyzing word usage during the founding era, including those within legal documents, professor Ritz concluded that distinctions must be made when the term "states" is read in the Judiciary Act. As such, "United States" refers to a single sovereign entity; one of the nations of the world. "Several states" refers to political entities, otherwise known as the "states" collectively as a group, not as separate and distinct political entities. Finally, "respective states" refers to states as individual political entities, each different from the others. Congress, therefore, was not instructing federal courts to ascertain the laws of particular states, but general American law.²¹³

The "clear and compelling" constitutional objection to *Swift*, however, was more important than legislative history as the predominant factor in *Erie*. So much so that statutory construction

211. WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT – EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Wythe Holt & L.H. La Rue eds., 1990).

212. Professor Ritz found that

[n]o state in 1789 had either judges who wrote opinions or reporters who published opinions, or courts that could instruct other courts about what state law was. The highest courts of many states were composed of neither judges nor lawyers. Judges did not make law, with the collegial assistance of counsel, of jurors, and sometimes of members of the executive and legislative parts of the government, they engaged in a continual struggle to discover the law

In short, no state court in 1789 could have declared what the law of that state was [To have] required the national courts to look to the opinions of state courts to ascertain what state law was; this would have been unthinkable.

Id. at 51.

213. *Id.* at 80-86.

alone would not have warranted a departure from precedent.²¹⁴ The Court's conclusion was that just as Congress has no authority to declare by legislation the substantive rules of the common law, federal courts have no constitutional power to do the same through its opinions.²¹⁵ The foregoing syllogism is not necessarily valid, however, because congressional jurisdiction and that of the federal courts are not coextensive. Congress has *limited* authority under Article I to codify *certain* rules of the common law through the plenary authority to regulate interstate commerce. Through this power, Congress could have touched the law of negotiable instruments issue in *Swift*,²¹⁶ at least insofar as negotiable instruments are articles of interstate commerce. Federal courts, however, have jurisdiction to adjudicate disputes touching all areas of law between parties of diverse jurisdictions.

Furthermore, judicial power extends by its nature and under the Constitution to cases in which only the parties are bound by a court's opinion and order.²¹⁷ To conclude that state law has been displaced

214. Justice Brandeis held that "if only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938).

215. *Id.* at 78.

216. See Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100 (1951).

217. BLACK'S LAW DICTIONARY 215 (6th ed. 1990) defines "case," in part, as "[a] judicial proceeding for the determination of a controversy *between* parties" (emphasis added). When Congress passed the Sedition Act of 1798, the Virginia legislature passed a resolution charging that the Act was unconstitutional and included a provision introduced by James Madison. This provision rejected the argument that "the judicial authority is to be regarded as the sole expositor of the Constitution in the last resort" and reasoned that:

dangerous powers, not delegated, may not only be usurped and executed by other departments, but . . . the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution; . . . consequently, . . . the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations . . . by the judiciary, as well as by the executive, or the legislative.

THE VIRGINIA REPORT OF 1799 196 (J.W. Randolph ed., 1850).

For a persuasive argument that Chief Justice John Marshall consistently understood judicial power to extend only to particular cases, see David E. Engdahl, *John Marshall's*

when federal judges disregard state court decisions assumes that the written opinions²¹⁸ of judges are positive laws *per se*.²¹⁹ Stare decisis²²⁰ does not require courts to follow error, as if reliable injustice

"Jeffersonian" Concept of Judicial Review, 42 *Duke L.J.* 279 (1992); Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 *SUFFOLK U. L. REV.* 85 (1991). See also the views of Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt with respect to the binding quality of Supreme Court opinions. Jefferson, for example, wrote that

[t]he judges, believing the [sedition] law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its coordinate branches should be checks on each other.

8 THE WRITINGS OF THOMAS JEFFERSON 311 (Ford ed., 1897) (quoting Letter to Abigail Adams (Sept. 11, 1804)).

President Lincoln shared similar sentiments with respect to the infamous *Dred Scott v. Sandford*, 60 U.S. 393 (1857) decision:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 9 (James D. Richardson ed., 1897).

218. The use of the word "opinion" to describe a court's written rationale for its decision indicates the evidentiary nature of the court's holding as to law.

219. Justice Story rejected this assumption in *Swift*: "[T]he decisions of local tribunals . . . cannot furnish positive rules, or conclusive authority, by which our judgments are to be bound up and governed." *Swift*, 41 U.S. at 19.

220. Stare decisis is defined as the "[d]octrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle,

is better than uncertainty.²²¹ Such is not the historical view of the doctrine.²²² When the common law is understood as the “application of the dictates of natural justice, and of cultivated reason, to particular cases,”²²³ adherence to precedent ought to be steadfastly followed. Perceived as a policy to secure inalienable rights, such as the “great landmarks of property,”²²⁴ stare decisis must be embraced. A misinformed understanding of the doctrine, however, is a convenient tool to cement preferred modern precedents that were themselves departures from established precedents. Properly understood, federal common law, therefore, should have developed under *Swift* only in the sense that an ever increasing body of law was discovered and declared by federal judges and was useful as precedential authority to the extent that prior decisions accurately reflected the law.

and apply it to all future cases.” BLACK’S LAW DICTIONARY 1406 (6th ed. 1990) (citation omitted).

221. Adherence to precedents can breed cynicism when judges disingenuously avoid prior precedents though implausible factual distinctions while claiming faithfulness to the doctrine of stare decisis. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976).

222. Blackstone held that

it is an established rule to abide by former precedents [The judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm as has been erroneously determined.

1 BLACKSTONE, COMMENTARIES *69-70.

Consider also James Kent:

I wish not to be understood to press too strongly the doctrine of stare decisis It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law

JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 444 (1st ed. 1826).

223. KENT, *supra* note 222, at 439.

224. *Id.* at 443.

Federal courts sitting under federal-question jurisdiction can hear other nonfederal-question claims involving the same operative facts. This power is referred to as pendant²²⁵ or ancillary²²⁶ jurisdiction, and is now codified as supplemental jurisdiction.²²⁷ The constitutional basis for such jurisdiction arises out of the Article III extension of jurisdiction to “cases” or “controversies,” which “refers to a single set of facts.”²²⁸ Even so, these additional nonfederal-question claims are distinct and the parties asserting them are not dependent for their rights in these claims upon a construction of the Constitution or federal law. Though the same transaction or occurrence is present, such claims are distinct in that the parties depend upon state or international law. Consequently, when the federal judge sitting under federal-question jurisdiction also hears supplemental claims he, in effect, sits as a court of general jurisdiction and can therefore entertain questions answered by natural law.

Some may argue that *Tarble's Case*²²⁹ and its descendants prohibit a court of general jurisdiction from restraining federal officials from enforcing statutes in violation of the laws of nature. In *Tarble's*, the Supreme Court reversed a Wisconsin Supreme Court decision that permitted the issuance of a writ of habeas corpus to federal army officers. The Court reasoned that, under the Supremacy Clause, the federal government must be paramount in any conflict arising between the two governments until resolution in federal court.²³⁰

This analysis fails under basic logic flowing from the constitutional structure of the federal government. Had Congress chosen not to

225. Pendent jurisdiction is jurisdiction over “claims contained in the plaintiff’s complaint for which there are not independent bases for federal court jurisdiction.” CHEMERINSKY, *supra* note 173, at 314.

226. Ancillary jurisdiction is jurisdiction over “claims that are asserted after the filing of the original complaint that do not independently meet the requirements for federal court jurisdiction.” *Id.*

227. 28 U.S.C. §1367 (Supp. V 1993).

228. CHEMERINSKY, *supra* note 171, at 312.

229. 80 U.S. 397 (1872).

230. Thirty-nine years earlier, a Virginia state court released the editor of the Richmond Whig from federal confinement upon a habeas corpus petition. He had been cited for contempt for disobeying a subpoena with respect to a grand jury investigation of an assassination attempt upon President Jackson. *Ex parte Pleasants*, 19 Fed. Cas. 864 (No. 11225) (C.C.D.C. 1833).

create inferior federal courts to the Supreme Court, the writ of habeas corpus could not have issued from any court to federal officials because the Supreme Court is vested generally with only appellate jurisdiction over habeas corpus petitions.²³¹ To foreclose state courts from issuing such writs in the absence of inferior federal courts would effectively nullify Article I, Section 9. That section provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”²³² In addition, the creation of inferior federal courts does not confer jurisdiction upon them to order the writ. Federal habeas jurisdiction is a creature of federal law²³³ and without the latter only state courts could issue the writ.²³⁴

Moreover, nothing in the Constitution reserves habeas jurisdiction exclusively to federal courts.²³⁵ The Constitution explicitly expects state court review of federal conduct. The Supremacy Clause of Article VI, Section 2 is addressed to state judges and demands not that state courts be bound by all federal laws, but only those that are constitutional. As Justice Marshall held in *Marbury*, “that in declaring what shall be the Supreme law of the land . . . only [laws] which shall be made in pursuance of the constitution [shall bind the Courts].”²³⁶ Professor Richard Arnold states that “it follows that state courts are not only permitted, but obligated, to examine the validity of federal authority asserted in cases before them.”²³⁷ Consequently, it is clear that the Constitution presumed that state courts would have original jurisdiction in habeas corpus and other cases reviewing federal power under the Constitution or federal statutes.

231. This is true unless the case affected “Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party.” U.S. CONST. art. III, § 2, cl. 1.

232. U.S. CONST. art. I, § 9, cl. 2.

233. 28 U.S.C § 2241.

234. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

235. Nor did the Judiciary Act of 1789 reserve habeas jurisdiction exclusively to the federal courts.

236. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (emphasis added). The supreme law of the land is “not the laws of the United States, generally, but those only which shall be made in pursuance of the Constitution.” *Id.*

237. Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1402 (1964).

In *McClung v. Silliman*,²³⁸ a case much earlier than *Tarble's*, a state court's power to issue a writ of mandamus against a federal officer was upheld at the trial level, even though the writ was denied on the merits. When the case reached the Supreme Court the judgment was affirmed on the ground that a federal officer "can only be controlled by the power that created him."²³⁹ It followed from this premise that state courts lack jurisdiction to "resort[] to the extraordinary and unprecedented mode of trying such questions on a motion for a mandamus."²⁴⁰ The Court pointed with approval to "ordinary mode[s] of obtaining justice"²⁴¹ against federal officials. The power of state courts, however, to issue against federal officials the common law relief of replevin, which differs in form only from certain injunctions, has been unquestioned since *Slocum v. Mayberry*.²⁴² Likewise, *Stanley v. Schwalby*²⁴³ assumed state court power over an action for ejectment, which is similar in form to particular injunctions.

The *McClung* court also claimed that because lower level federal courts had been denied by statute the power to issue a writ of mandamus, it was unthinkable that state courts could retain such a remedy against federal officials.²⁴⁴ This analysis falls apart for similar reasons. It does not follow that since inferior federal courts had been forbidden by statute from issuing a writ of mandamus that state courts were necessarily disabled to do the same to federal officials. The writ of mandamus is an ancient equitable power that compels the performance of a mandatory ministerial duty. Since the Supreme Court has generally only appellate jurisdiction under Article III, and since inferior federal courts were discretionary congressional creations, how could any particular writ that existed in courts of equity in

238. 19 U.S. (6 Wheat.) 598 (1821).

239. *Id.* at 605. The power that created both federal and state officials is the sovereignty of the people: "In the United States, the case is altogether different [from Great Britain]. The people, not the government, possess the absolute sovereignty." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 569 (Jonathan Elliot ed., 1866).

240. *McClung*, 19 U.S. at 605.

241. *Id.*

242. 15 U.S. (2 Wheat.) 1 (1817).

243. 162 U.S. 255 (1896).

244. *McClung* was ignored completely in *Northern Pac. Ry. v. N.D. ex rel. Langer*, 250 U.S. 135, 151-52 (1919).

England be constitutionally proscribed to state courts insofar that it touched federal officials? If state courts cannot mandamus a federal official, no court would have the power in the absence of inferior federal courts.

Though the Supreme Court is a court of enumerated powers, the writ of habeas corpus is not explicitly granted within Article III. Yet, its explicit protection from statutory encroachment within Article I presumes that the writ was part and parcel of the judicial power. On what basis can only one extraordinary remedy be deemed part of the judicial power and not the other historic extraordinary writs? If a court of enumerated power need not have the express authority to issue extraordinary writs, why should a court of general jurisdiction?

Whether state courts would be allowed to mandamus federal officials today is an unsettled matter. As professor Arnold characterizes the issue, “[m]any cases assume its availability; some explicitly declare it; but most express rulings on the point deny it [N]o Supreme Court case squarely deals with the point.”²⁴⁵ It is not argued that a court ought to be able to mandamus a federal *or* state official to perform a civil duty under the laws of nature. Without positive recognition of the people’s *consent* to such laws, a civil official cannot be ordered to enforce such laws without violating the nature of a lawful civil polity. In other words, a court of general jurisdiction can restrain unlawful statutory abrogations of the laws of nature but may not compel affirmative duties under the same.

Assuming the constitutional validity of the rationale in *McClung*, left unanswered is whether an injunction would fall under the remedial characterization of “extraordinary and unprecedented.” There are instances of state courts issuing injunctions against federal officers²⁴⁶ but the Supreme Court has never announced an opinion directly on the matter. Under the paradigm presented, the most any court of general jurisdiction can and need do with respect to positive encroachments upon the laws of nature is to enjoin the enforcement of positive law. Since the nature of judicial power extends only to cases, any

245. Arnold, *supra* note 237, at 1397.

246. *McNally v. Jackson*, 7 F.2d 373 (E.D. La. 1925); *Lewis Publishing Co. v. Wyman*, 152 Fed. 200 (C.C.E.D. Mo. 1907).

declaration of a statute being void would be binding only in a particular case. Although expansive as to the current recognized test for statutory validity, such an outlook is quite restrained compared to the reflexive homage paid to appellate precedents by all branches and levels of government in our two-tiered system of federalism, regardless of how far such precedents have deviated from the constitutional text.

In sum, neither federal statutes nor case decisions prevent state and, in limited instances, federal courts from looking beyond statutes to the laws of nature as a rule of decision.

CONCLUSION

In conclusion, man has recognized since time immemorial that law needs to be legitimate in order to be binding, and that a measuring rod of legitimacy objectively exists. The yearning for such justification will never escape man's civil life.²⁴⁷ Justice requires that lawyers once again be able to ask a court with the proper jurisdiction to test the lawfulness of enactments vis-à-vis the laws of nature and of nature's God.

247. Unger identifies an irony of modern secular society: "the sense of being surrounded by injustice without knowing where justice lies." ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 175 (1976).