130 Years of Substantive Due Process (1810–1937): The Premature Demise of Natural Law Jurisprudence and the Liberty of Contract—How the Lochner Era Could Have Survived the New Deal

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Natural Law is an essential element of America's Constitutional-based legal system. Many of the Founding Fathers, most notably James Wilson, vigorously championed the necessity of preserving Natural Law doctrines. In many ways, Natural Law provides a moral foundation to the Constitution and a justification for the basic human rights it was created to respect. Some of the many natural rights inherent within Natural Law are expressed through the basic protections listed in the Bill of Rights, including the First Amendment right to freely practice one's religion without government intrusion, and the Fifth Amendment guarantee to life, liberty, and property with due process under the law.

Natural Law has been relied upon in a host of United States Supreme Court case opinions. Decisions in the early Court were more directly forthright when referencing Natural Law to justify the moral basis for certain rulings. Chief Justice Marshall's majority opinion in Fletcher v. Peck (1810) points to how certain portions of the Constitution, such as the "contract clause" in Article I, Section 10, can be interpreted as providing the textual equivalent of Natural Law principles. My Article draws a connection from Justice Marshall's Natural Law jurisprudence and reliance on the contract clause to the Natural Law respecting decisions rendered during the Lochner Era. My Article seeks to establish a more robust understanding of the Constitutional justifications for the Lochner Court's application of the "liberty to contract" and "substantive due process" to strike down state laws infringing upon corporate privileges. The Court's use of Natural Law here may have extended the deregulatory period had the majority coalition relied upon the contract clause and Justice Marshall's opinion in Fletcher.

I. INTRODUCTION

Natural Law has always existed as a separate legal system from positive law. Where positive law is grounded in human-made law that

embodies a host of rules governing individual conduct during a specific place and time, natural law is tethered to an invisible set of rights and privileges that an individual is afforded on the basis of one's immutable existence.[1] Natural Law is not constrained to notions of human law, but rather is grounded in "higher law," guaranteeing a set of universal rights provided to man by his Creator.[2] Legal theorist, David Adams, defines Natural Law as a bundle of "principles and standards not simply made up by humans but rather part of an objective moral order, present in the universe and accessible to human reason."[3] Natural Law is often referenced as a philosophical theory that defines someone as an autonomous being who possesses a set of freedoms inherent to their existence.[4] Human existence is equated as occupying a perfect state of nature.[5] The invisible, ever-present freedoms that an individual possesses derive from their Creator, bestowed from birth.[6] Such freedoms can never be infringed upon by another man, group, or governmental entity.[7] These inherent freedoms, deemed sacred and non-transferable, are commonly referred to as natural rights.[8]

Natural Law as a theory has existed long before the American founding, serving to inspire many of the Constitutional Framers to appeal to higher notions of morality, human equality, and God-granted rights.[9] The most direct appeals to Natural Law derive from the immortal words of the Declaration of Independence, where Thomas Jefferson expresses mankind's possession of "self-evident truths" that point toward human equality and the endowment of "unalienable rights" granted by our "Creator."[10] These encompass, among many other tacit natural rights, "life, liberty, and the pursuit of happiness."[11] While Natural Law is commonly interpreted as an abstract philosophical theory or purely legal theory, it has been resorted to by many lawmakers and American judges throughout history as a form of higher law that evokes a combination of law and morality.

Over time, Natural Law has taken on a form of judicial interpretation, known as Natural Law jurisprudence, where judges are generally faced with

1. *See* Christopher Wolfe, *Understanding Natural Law*, 12 GOOD SOC'Y 38, 38–39 (2003).
2. *Id.* at 39.
3. DAVID M. ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW 19 (2d ed. 1996).
4. *See* A. John Simmons, *Locke's State of Nature*, 17 POL. THEORY 449, 456 (1989).
5. *Id.* at 451–52.
6. *Id.* at 456.
7. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT § 63 (1689).
8. Simmons, *supra* note 4.
9. *See* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269 (2021).
10. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
11. *See id.*; *see generally* ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter ed., Signet Classics 2003).

a complex set of legal questions grounded in notions of "good" vs. "evil."[12] To properly render decisions, judges either must go beyond the confines of the Constitution to evoke fundamental concepts of morality or derive such moral concepts that are expressly stated or inferred by the written text of the Constitution.[13] Natural Law was more commonly debated among the Framers as a theoretical subject during the Constitutional Convention and debates on ratification, and while it does not directly appear in the text of the Constitution, it has provided the foundation for a host of clauses and amendments contained in the document.[14]

The focus of this Article will be on the United States ("U.S.") Supreme Court's interpretation of Natural Law and natural rights in prominent cases that examined state authority in relation to individual rights. Readers will be introduced to a comparative analysis of Natural Law jurisprudence spanning a 100-year period from the Marshall Court through the Lochner Era (1837–1937), analyzing key cases where Justices derived components of Natural Law existing beyond the confines of the text of the Constitution when rendering decisions. This Article will explore cases where Justices based their decisions strictly on the text of the Bill of Rights' protections that appeal to or imply notions of natural rights. The central argument is that the Contract Clause of the Constitution, as provided by the Framers in Article I, Section 10, Clause I, could have been utilized as a bedrock for Natural Law jurisprudence beyond the temporal limits of the Lochner Era. Had the conservative Justices of the Fuller Court (1888–1910) referenced and relied upon the Contract Clause as a critical focal point for preserving the contractual liberties of the New York bakeshop, the Court's application of Natural Law Jurisprudence would likely not have been eclipsed by the New Deal.[15]

As this Article will explain, the Contract Clause would have further preserved the Constitutional sanctity of contractual rights as codified in the U.S. Constitution, rather than as abstract rights that exist within legal philosophies or extensions of substantive due process. Proper infusion of the Contract Clause in the landmark *Lochner v. New York*[16] decision would have extended the Supreme Court's application of Natural Law beyond its historical demise in 1937. Supreme Court Justices of the latter half of the Twentieth Century may likely have portrayed better respect for the contractual obligations of litigants against intrusive state labor laws like the

12. *See generally* William P. Stemberg, *Natural Law in American Jurisprudence*, 13 NOTRE DAME L. REV. 89 (1938).

13. *Id.*

14. Robert S. Barker, *Natural Law and the United States Constitution*, 66 REV. METAPHYSICS 105, 109–14 (2012).

15. *See The Fuller Court, 1888–1910*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-courts/fuller-court-1888-1910/ (last visited Apr. 18, 2024).

16. Lochner v. New York, 198 U.S. 45 (1905).

New York Bakeshop Act of 1895 or Washington State's "Minimum Wages for Women" law of 1913. This Article will reveal the significance of Natural Law Jurisprudence, underscore how states are legally prohibited from unencumbering such agreements through regulation and explore the importance of Natural Law for modern day through the lens of the Contract Clause's protection of natural rights.

This Article will show that over time, the Court has consistently relied on tenets of Natural Law inferred from the Constitution when rendering decisions to safeguard an individual's "liberty of contract" apart from state or federal intrusion, while upholding individual rights against governmental regulation by means of substantive due process. It will demonstrate how Chief Justice Marshall's invoking of the Contract Clause[17] to safeguard the "vested rights" of property owners in the case of *Fletcher v. Peck*[18] provided the textual justification for later Courts to apply Natural Law jurisprudence when striking down laws restrictive to private ownership, contractual rights, and the liberties inherent within the free market during the Lochner Era.[19] Sectionally, this Article examines a host of Natural Law theories, addresses the Founders' views of Natural Law, assesses the differing perceptions of Natural Law among present-day legal scholars, engages in a historical analysis of notable cases where the U.S. Supreme Court has rendered decisions based on Natural Law principles, and concludes with arguments for how the Lochner Era may have been prolonged.

II. UNDERSTANDING NATURAL LAW THEORY

In its purest sense, Natural Law theory places human existence as separate from and uncontrolled by existing political structures or governmental institutions.[20] English philosopher John Locke viewed humanity's original existence as one that occupied a perfect state of nature, predating the influences of developed societies.[21] This paved the way for the conception of Locke's social contract theory, where over time, individuals possessed only freedoms in relation to their natural existence.[22] The concept of basic "rights" came only with the establishment of civil societies that were formed to oversee contractual relationships between individuals.[23] Such contracts guarantee rights and obligations between the

17. U.S. CONST. art. I, § 10.
18. Fletcher v. Peck, 10 U.S. 87 (1810).
19. *See id*.
20. Mark Murphy, *The Natural Law Tradition in Ethics*, STANFORD ENCYC. PHIL., Summer 2019, https://plato.stanford.edu/archives/sum2019/entries/natural-law-ethics/.
21. Simmons, *supra* note 4, at 450.
22. *See id*.
23. *See* Joshua Foa Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. POL. 985, 986–87 (1996).

parties involved, differing from the self-evident freedoms that lie at the basis of Natural Rights.[24] Some have interpreted social contract theory differently, viewing a contract as something that imposes a series of restrictions on individual Natural Rights when citizens obey government.[25] Locke's famous work, *Second Treatise on Civil Government*,[26] provided a strong foundation for the basis of Natural Law in an established society and spoke to the scope of individual rights that are safeguarded by notions of higher law which coexists within a system of human governance.

In chapter eight of the *Treatise*, Locke opined that under Natural Law, no person can be wrongfully deprived or put out of his estate, nor can he be subject to the will of another without his prior consent.[27] Man-made governments are creatures of the people, who are naturally free and voluntarily choose to establish social contracts by consenting to being governed under a structure of ratified laws and rules.[28] Governmental structures are formed to introduce order, stability, and structure into a free society, with the intent to orchestrate the natural space of existence that man occupies—what Locke refers to as a "perfect state of nature."[29] To this end, Locke recognizes the necessity of having civil government to rectify the potential inconsistencies of the state of nature by preventing men from engaging in favoritism, corruption, and impartiality toward their friends or allies when executing the laws of nature against offenders.[30] Civil government also serves as a necessary buffer against those seeking to execute extreme forms of vengeance toward others who have committed a wrong or offense, which may lead to disorder and chaos in place of ordered stability.[31]

This state of nature sees humans as free to engage with one another with an unlimited possession of liberty and equality, governed not by a man-made state, but by one's own desires to survive and the pursuit for individual fulfillment and purpose.[32] Locke understood humans as rational actors who co-exist to pursue certain basic needs toward mutual gain and self-preservation.[33] Governments were originally formed to serve as neutral arbitrators between individuals engaged in conflict over scarce resources, operating under man-made laws that punish wrongful conduct.[34] Much of these laws were established as a safeguard to preserving a person's Natural

24. *See id.*
25. *See* THOMAS HOBBES, LEVIATHAN (1651).
26. LOCKE, *supra* note 7.
27. *Id.* at ch. VIII.
28. *Id.*
29. *Id.* § 87.
30. *See id.* § 128.
31. *Id.*
32. *See id.* § 131.
33. *See id.* § 87.
34. *See id.* § 94.

Rights from harm.[35] When imperfect beings exist in a perfect state of nature, irrational and violent tendencies often take hold, leading one to violate norms of Natural Law by theft, murder, or other harms to one's person.

Locke's view of man existing in a perfect state of nature is not without its own constraints, being governed through the "law of nature," which restrains individuals from committing harm to another's life, liberty, health, or personal property.[36] Upholding the laws of nature estops such natural rights from intrusion by another.[37] If such rights were ever harmed, Locke argues that it is within the right of that person to take action by punishing the transgressor of the law.[38] This retribution against lawless misconduct is permitted under the notion of "perfect freedom," where human beings could act as they please in protecting their property.[39] This perfect freedom underscores Locke's understanding of universal equality, where everyone is born to possess the "same advantages of nature."[40] Thus, a victim is at liberty to hold law-breakers accountable for their misdeeds in order to preserve the peace by upholding "natural justice."[41]

Natural Law theory assumes that human beings are born with an inherent sense of "right" and "wrong" and posits that individuals exercise notions of Natural Law by choosing to make perceivably good ("right") decisions.[42] Natural Law is incapable of being plainly taught, instead, it is inferred through the ongoing discovery of reason and the pursuit of rational-decision-making.[43] The earliest iterations of Natural Law in Western civilization can be traced to the works of preeminent Greek philosophers Plato and Aristotle.[44] Where Plato did not devise a distinct theory on Natural Law, many of his theories drew from concepts of Natural Law.[45] Compare this to Aristotle, who established a clear distinction between law and nature and is considered by many to be the father of Natural Law and progenitor of natural justice. Similar to Natural Law, natural justice is universally applicable, morally positive, and unchanging in the principles it portrays.[46] Building on this, the famous Roman statesman, Marcus Tullius Cicero, believed that Natural Law could be harnessed as a force of good to reinforce the moral foundations of society, while positive law should

35. *See id.* § 123–24.
36. *Id.* § 87.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* § 4.
41. *Id.* § 87.
42. *Id.* at ch. IX.
43. Wolfe, *supra* note 1, at 38.
44. *Id.* at 39.
45. *See* Tony Burns, *Aristotle and Natural Law*, 19 HIST. POL. THOUGHT 142 (1998).
46. *Id.*

accommodate the immediate safety and security of citizens in harmony with principles of nature.[47] Considered to be the earliest legal philosopher, Cicero based his view of Natural Law on the school of Stoicism, inheriting a Pantheistic view of Natural Law as proper or right reason (*recta ratio)* that is aligned with both nature and God.[48] Cicero expanded on this area of understanding by incorporating a humanistic element into Natural Law theory, arguing that when man chooses to abide by Natural Law, "he is obeying not only a natural and divine rule but also a rule that he gives himself as a fully rational and autonomous legislator."[49]

Cicero upheld Natural Law as a means to appeal to a higher order, enabling one to form metaphysical choices grounded in ethical principles of right versus wrong and moral versus immoral.[50] While he viewed both Natural Law and positive law as a means for governing human nature, Natural Law was understood as an unwritten code of laws grounded in divine principles that are universally applicable, everlasting in nature, and pre-existent to the state.[51] By contrast, positive law was viewed purely as a creature of the state and rested upon a set of man-made norms, restraints on wrongful misconduct, and customs of governance.[52] Cicero's theories of Natural Law are contained in his two essays, *De Re Publica* and *De Legibus*.[53]

Following Cicero, the work of St. Thomas Aquinas evokes an understanding of self-evident and primary principles of practical reasoning, organizing Natural Law into three general precepts.[54] The first advocates for human life as an essential good that must be preserved, while harm to life must be avoided.[55] The second favors the marriage of man and woman, and the necessity for educating their children, while avoiding anything which opposes this.[56] The third advances knowledge (primarily the truth about God), practical reasonableness, and the pursuit of a sociable lifestyle, while simultaneously offending others practical unreasonableness.[57] Aquinas attributes the first precept as universally applicable to all living creatures, while confining the third precept as applicable to all mankind.

47. *See* Paul Meany, *The Anciet Roman Cicero's Idea of Natural Law Has Much to Teach Us About the Evolution of Liberty*, LIBERTARIANISM.ORG (Aug. 31, 2018), https://www.libertarianism.org/columns/ciceros-natural-law-political-philosophy.

48. *See* Fernando H. Llano Alonso, *Cicero and Natural Law*, 98 ARCHIVES FOR PHIL. L. & SOC. PHIL. 157, 161 (2012).

49. *Id.* at 157.

50. *See id.* at 159.

51. *Id.*

52. *Id.* at 160.

53. *See* MARCUS TULLIUS CICERO, DE RE PUBLICA (Blackmore Dennett 2018); MARCUS TULLIUS CICERO, DE LEGIBUS (Univ. Press 1899).

54. *See* MARK DIMMOCK & ANDREW FISHER, ETHICS FOR A-LEVEL 65–75 (1st ed. 2017).

55. *Id.* at 67.

56. *Id.* at 68.

57. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 30–31 (1980).

Aquinas laid out the concept of divine prudential, that all of mankind's actions and deeds contribute to the good of the universe.[58] Unlike the teachings of Aristotle and the Stoics, Aquinas advances that the good of the universe is partially obtained through the good deeds of human-beings created in God's divine image.[59] As a prominent theologian, Aquinas perceived Natural Law to be inextricably connected with religion.[60] By this, Aquinas believed that Natural Law positively engages in "eternal law"—perceiving the world through intelligent design, with all things divinely created by God to satisfy and fulfill a specific purpose in an ordered, rational manner.[61]

Adherence to Natural Law is the method by which human beings contribute to this eternal law—discovered by the pursuit of reason—while the embrace of good over evil was understood by Aquinas to be the fundamental concept undergirding Natural Law.[62] Regarding man-made law, Aquinas believed that only laws that are "just" should be followed, while arguing that unjust laws are those that should never be followed.[63] This understanding is enshrined in the famous Latin aphorism, "*lex iniusta non est lex*" ("an unjust law is no law at all"). In his seminal work, *Summa Theologica,* Aquinas establishes three primary criteria that must be satisfied for someone to be expected to adhere to a man-made law: (1) the law's purpose must be crafted for the common good, (2) the lawmaker must operate within his/her sphere of authority when crafting the law, and (3) the form and burden of the law must be equally applicable to all individuals.[64] He argues that disobeying the law is not considered "evil" when seeking to avoid government-imposed oppression.[65] This understanding provided much of the inspiration behind Dr. Martin Luther King's famous "Letter from Birmingham Jail," which justified his exercise of civil disobedience and refusal to abide by corrupt Jim Crow segregation laws, which were perceived as unjust.[66] In his letter, Dr. King channeled the teachings of Aquinas and Augustine to correlate with his nonviolent crusade against racial segregation and state-imposed inequality of black Americans, advancing the understanding that

> A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral

58. *Id.*
59. READINGS IN THE PHILOSOPHY OF LAW 70 (Keith C. Culver ed., 2d ed. 2007).
60. *Id.* at 16.
61. *Id.* at 28.
62. *Natural Law in Ethics,* INVESTOPEDIA, https://www.investopedia.com/terms/n/natural-law.asp (last updated Dec. 19, 2023).
63. *Id.*
64. THOMAS AQUINAS, SUMMA THEOLOGIAE, at I–II.96.4; *see also* Norman Kretzmann, *Lex Iniusta Non est Lex: Laws on Trial in Aquinas' Court of Conscience*, 33 AM. J. JURIS. 99, 116–17 (1988).
65. Kretzmann, *supra* note 64, at 117.
66. INVESTOPEDIA, *supra* note 62.

> law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.[67]

III. THE FOUNDING FATHERS' VIEW OF NATURAL LAW

Natural law and natural rights were of great symbolic importance to many of the Founding Fathers.[68] As touched upon earlier, the greatest example of Natural Law in America's founding can be seen throughout the text of the Declaration of Independence where Jefferson echoed Locke's "life, liberty, and property" with his unconditional embrace of "life, liberty, and the pursuit of happiness." Such natural rights were understood to as endowments to every American by their "Creator."[69] These stated rights are by no means exhaustive, as Jefferson and the rest of the Framers were very much aware of and proponents for other natural rights, vested to them by a higher being, by which no government can infringe upon.[70] Patrick Henry's infamous rallying cry for revolt against the British crown, "give me liberty, or give me death," is an example of how some of the Framers relied on a sense of urgency when seeking to protect their natural rights from infringement, such as through autocratically enforced colonial taxes.[71] This widely championed ultimatum personified how many of America's leaders were willing to give their lives to obtain liberty from the clutches of tyranny imposed by the unjust demands of the British Empire, even at the peril of total war.

The concepts of Natural Law expressed in the Declaration of Independence are not secular in composition. In contrast to the French human-centeric version of "Natural Law" excluding any embrace of "Divine revelation," America's embrace of Natural Law is God-centered, as inspired by the theistic, philosophical teachings of John Locke.[72] One of the foremost proponents of Natural Law doctrine was James Wilson, a prominent legal theorist and one of the six original Justices appointed by

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67. Martin Luther King, Jr., *The Negro Is Your Brother*, 212 ATL. MONTHLY 78, 80 (1963). *See also* Ellis Washington, *Hitler's Willing Executioners . . . Then and Now*, RENEW AM. (Oct. 22, 2015), https://www.renewamerica.com/columns/washington/15102 [https://perma.cc/6R3V-GT5P] (citing MLK's views on Natural Law adopted from the works of St. Augustine and St. Thomas Acquinas).

68. Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 268, 271 (1992).

69. Kenneth D. Stern, *John Locke and the Declaration of Independence*, 15 CLEV.-MARSHALL L. REV. 186, 187–89 (1966).

70. *See id.*

71. Patrick Henry, *Give Me Liberty, or Give Me Death!*, Lithograph, 1876, Library of Congress, https://www.loc.gov/resource/pga.08961/.

72. *See id.*

President George Washington to the U.S. Supreme Court.[73] He was one of the signatories to the Declaration of Independence and played a major role in drafting the U.S. Constitution, having been the principal draftsman who oversaw the creation of America's executive branch of government.[74] The following quote by Wilson channels a profound understanding for how deeply intertwined the divinity of Christian religion and American law was during the time of the Framers:

> In compassion to the imperfection of our internal powers, our all-gracious Creator, Preserver, and Ruler has been pleased to discover and enforce his laws by a revelation given to us immediately and directly from Himself. This revelation is contained in the Holy Scriptures. The moral precepts delivered in the sacred oracles from a part of the law of nature, are of the same origin and of the same obligation, operating universally and perpetually. . . . The law of nature and the law of revelation are both Divine: they flow, though in different channels, from the same adorable source. It is indeed preposterous to separate them from each other. They object of both is to discover the will of God and both are necessary for the accomplishment of that end.[75]

By this, Wilson ultimately understood Natural Law and biblical revelation to be inseparable, sharing the mutual intent to discover God's intentions for humanity, while also propped up by the same set of moral precepts.[76] According to Wilson, a person's sense of reason and morality are all inextricably linked with God's divine revelation.[77] Wilson was most inspired by the teachings of the Sixteenth century English theologian Richard Hooker, who conveyed the understanding that adherence to Natural Law implies a sense of moral obligation.[78] Natural Law is grounded in both a divine superiority emphasized by the union of goodness and power, and the mutual consent between individuals to exist as equals in society.[79] Human law, by contrast, may at times not be sychonized with eternal law, which is derived from divine nature.[80] In addition to Wilson, many other Founding Fathers championed the immense importance of Natural Law in relation to America's Constitutional system of governance. Alexander Hamilton, whose perception of Natural Law was largely inspired by the work of William Blackstone, perceived Natural Law to be universally

73. Roberta Bayer, *Natural Law and Democracy: The Philosophy of James Wilson*, LAW & LIBERTY (Nov. 20, 2018), https://lawliberty.org/natural-law-and-democracy-the-philosophy-of-james-wilson/.

74. *Id.*

75. DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION & RELIGION 224 (2d ed. 1997) (quoting James Wilson's *Of the Law of Nature*).

76. *See id.*

77. *See id.*

78. Bayer, *supra* note 73.

79. *See* Justin Buckley Dyer, *Reason, Revelation, and the Law of Nature in James Wilson's Lectures on Law*, 9 AM. POL. THOUGHT 264, 269 (2020).

80. DIMMOCK & FISHER, *supra* note 54, at 66.

applicable in scope, "superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity if contrary to this."[81]

Samuel Adams, Founding Father and cousin to President John Adams, boldly professed that "the natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but only to have the law of nature for his rule."[82] Adams directly channeled the natural right to individual liberty within his rebellious declaration against the rulership of the British monarchy.[83] Not only was Adams known for being a revolutionary firebrand and impassioned spokesmen for the colonial resentment toward the British, he was also known for embracing a strong sense of equality among men.[84] He maintained a firm belief in one of the fundamental natural rights that man possesses—liberty—should never be disregarded in favor of tyrannical subjugation.[85] Adams once said that "[i]n the supposed state of nature, all men are equally bound by the laws of nature, or to speak more properly, the laws of the Creator."[86]

Samuel Adams's third cousin, John Quincy Adams, adopted a more universal approach to humanity's access to natural rights, when arguing that such rights are granted to every nation and people across the world.[87] Natural Law was not a uniquely English or American phenomenon, but transcended nation, citizenship, and lineage: "[t]he laws of nature, 'which, being coeval with mankind and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this.'"[88] This universal notion of natural rights was particularly important for justifying the colonists calls for equality in relation to British officials and soldiers stationed in the country. Natural Law reinforced colonial demands for the English to respect their basic civil liberties, provide exemption from burdensome taxes absent representation, and respect their property rights. Echoing John Quincy Adams's perception of Natural Law, Founding Father and former U.S. Senator Rufus King championed its

81. Alexander Hamilton, *The Farmer Refuted*, *reprinted in* THE PAPERS OF ALEXANDER HAMILTON: VOLUME XXVI 1802–1804 (Harold C. Syrett ed., 1962).

82. Samuel Adams, *The Rights Of The Colonists: The Report of The Committee of Correspondence to The Boston Town Meeting, November 20, 1772*, *reprinted in* 7 OLD SOUTH LEAFLETS 417, 419 (1906).

83. *Id.*

84. Pauline Maier, *Coming to Terms with Samuel Adams*, 81 AM. HIST. REV. 12, 13, 32 (1976).

85. *See id.* at 32–33.

86. BARTON, *supra* note 75 (quoting Samuel Adams).

87. *See id.*

88. *Id.* at 224–25 (quoting Alexander Hamilton).

universal significance.[89] He denoted Natural Law as an unparalleled set of privileges that transcend time, continents, and human controls.[90]

Noah Webster, one of America's more obscure Founding Fathers, was noteworthy for pursuing life as a member of the Connecticut House of Representatives and for his remarkable contributions to the English language.[91] Regarded as the "Father of Scholarship and Education," Webster was celebrated for having provided a generational guidebook on spelling and reading to young children.[92] In the U.S., his name has been used synonymous with the "dictionary."[93] Webster breathed support into Natural Law, deriving its roots from Biblical divinity, while regarding its worth above man-made positive law. He argued that:

> [The] "Law of nature" is a rule of conduct arising out of the natural relations of human beings established by the Creator and existing prior to any positive precept [human law]. . . . [T]hese . . . have been established by the Creator and are, with a peculiar felicity of expression, denominated in Scripture, "ordinances of heaven."[94]

Like other Founders, Webster afforded great precedence to the Judeo-Christian elements of Natural Law and its time-honored reverence, conceived in time before any man-made law of antiquity.[95] Among the many cited political theorists like Montesquieu, Locke, and Blackstone, the Founders took great inspiration from Christian theology, having directly quoted the Bible in 34 percent of their political writings during the Founding Era.[96] Biblical inspirations undergirded the Founders' understanding and championing of Natural Law principles and served to influence their thinking on legal morality more than any other known source.[97] What is clear is that most of the Founders were religious-centered men who took great care to undergird the founding principles of America's Constitutional Republic with the universal moral principles that govern Natural Law, inspired by biblical precedent.

89. *See id.* at 225.
90. *Id.*
91. Raven I. McDavid, *Noah Webster*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Noah-Webster-American-lexicographer (last visited Mar. 30, 2024).
92. *Id.*
93. *See generally About Us: Noah Webster and America's First Dictionary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/about-us/americas-first-dictionary (last visited Mar. 30, 2024).
94. BARTON, *supra* note 75, at 225 (quoting Noah Webster).
95. *See id.*
96. *Id.* at 225–26.
97. *See id.*

IV. NATURAL LAW JURISPRUDENCE FROM MARSHALL TO THE LOCHNER ERA

Many of the earliest decisions rendered by the U.S. Supreme Court were grounded in opinions based on Natural Law arguments. One of the most notable examples was the *Chisolm v. Georgia*[98] opinion of 1798, a case rendered early in the Court's history during the Jay Court, before the established use of judicial review and in absence of judicial precedent. The 4–1 decision ruled in favor of plaintiff Alexander Chisolm, a South Carolina citizen who sued the state of Georgia to satisfy payments that were made by merchant Robert Farquhar to supply the state with goods during the Revolutionary War.[99] Georgia state officials ultimately refused to appear in Court, citing its sovereign immunity as protection from it being compelled to appear in suits filed by citizens of other states.[100] Chief Justice Jay's opinion for the majority relied on Article III, Section 2 as a means to nullify Georgia's sovereign immunity and enable the federal courts to wield broad authority to hear disputes between private citizens and states.[101] Justice Wilson's opinion was more centered in Natural Law reasoning, believing that "the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damage."[102] Wilson also quoted William Blackstone's commentaries, which reference Natural Law and its use for justifying the fulfillment of contractual obligations that individuals, as well as states, are bound to obligate.[103] The case would later be overruled by the passage of the Eleventh Amendment in 1795, which only permitted a citizen of one state to sue another state by its consent.[104]

Later that term, the Court evoked a Natural Law interpretation of state and federal constitutions in the case of *Vanhorne's Lessee v. Dorrance*,[105] involving a territorial dispute between Connecticut and Pennsylvania over Indian land annexed by Pennsylvania. The Court ruled in favor of Pennsylvania's occupation of the land within the bounds of its charter, with the majority arguing that "the right of trial by Jury is a fundamental law, made sacred by the Constitution," and that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man."[106]

98. Chisholm v. Georgia, 2 U.S. 419 (1793).
99. *Id.*
100. *Id.* at 453.
101. *Id.* at 469–70.
102. *Id.* at 465.
103. *Id.* at 462.
104. Mark Strasser, *Chisholm, The Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 618 (2001).
105. VanHorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795).
106. *Id.* at 309–10.

Beyond *Dorrance*, the Court evoked a more complete application of Natural Law in the majority opinion issued by Justice Samuel Chase in the case of *Calder v. Bull*.[107] The case was notable for deciding upon four important facets of Constitutional law. It emerged after the Connecticut state legislature nullified a Probate Court decision that denied the written will of Normand Morrison, who sought to receive his grandfather's inheritance.[108] The Justices here applied the Contract Clause to resolve a criminal case. In abiding by the law passed by the legislature, the Probate Court established a new hearing that approved Morrison's will. The matter was appealed in an attempt to revoke the will and allege that the state law violated the Constitution's ex post facto provision of Article I, Section 10.[109] In the *Calder* case, the Supreme Court unanimously held that the Connecticut legislature's law did not violate the Constitution's ex post facto provision and Justice Chase provided an extended passage that encapsulates the essence of Natural Law, serving as a means to allow men to enter into a social contract that cannot be violated by interference from the state or, in this case, a state legislature.[110] Chase's opinion champions the preservation of individual natural rights against governmental intrusion. The passage reads:

> The purposes for which men enter into society will determine the nature and terms of the social compact. . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . It seems to me, that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode, or manner, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society . . . and is always subject to the rules prescribed by positive law.[111]

Justice Chase listed examples of positive laws that are contrary to and come into conflict with the basic natural right to contract and own property.[112] Two cited examples being, "a law that makes a man a Judge in

107. Calder v. Bull, 3 U.S. 386, 388 (1798).
108. *Id.* at 387.
109. *Id.* at 397 (explaining ex post facto pertains to a law that is enacted to retroactively alter the legal consequences derived from some prior action or change the circumstances of some situation prior to when the law was enacted).
110. *Id.*
111. *Id.* at 388, 394.
112. *Id.*

his own cause, or a law that takes property from A. and gives it to B."[113] Chase's powerful invocation of Natural Law and the natural rights against the application of ex post facto to void a legislative act that permitted a justifiable social compact (i.e., a family will) served to establish two of the four pillars that the Court's decision rested upon. Firstly, that the Connecticut state legislature, and any other state legislative act, does not violate the ex post facto clause of the U.S. Constitution, and secondly, that no individual can be compelled to do something that the laws do not require; nor to abstain from acts which the laws authorize.[114] Justice Iredell's concurrence took a contrary approach to the case—while it agreed with the Court's authority to review legislative acts, its authority should be derived from something more concrete than what he viewed to be "abstract principles of natural justice," and more in line with notions of popular sovereignty.[115]

Beyond *Calder*, there were other important cases where the Court relied upon principles of Natural Law to render decisions. Another notable example can be seen in Justice Story's majority opinion in *Terrett v. Taylor*,[116] one of the most significant cases in the 19th century involving church-state relations and which formerly established the rights of private corporations in the U.S. The case follows a 1784 law that granted the Episcopal church, then the official church of Virginia during colonial times, incorporation with state-granted land and tithes.[117] However, a 1786 act would upend this and demote the church to be on the same level as other denominations.[118] A subsequent 1798 law passed by the state legislature withdrew all lands formerly provided by the state, in addition to an 1801 law mandating that the church can only be sold vacant glebe land.[119]

The case concerned a state official, Terrett, enforcing an 1801 state law to claim church rented property (glebe land).[120] The attempted confiscation of property was challenged by the Episcopal church.[121] Justice Story's majority opinion was in favor of the church's right to property, ruling that the state of Virginia could not wrongfully encroach upon a religious body's vested right that was grounded in Natural Law.[122] Justice Story established his decision on the firm basis of "the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of

113. *Id.* at 388.
114. *Id.* at 395.
115. *Id.* at 399 (Iredell, J., concurring).
116. Terrett v. Taylor, 13 U.S. 43, 45–46 (1815).
117. *Id.* at 47.
118. *Id.* at 47–48.
119. *Id.* at 48.
120. *Id.*
121. *Id.*
122. *Id.* at 50.

the constitution of the U.S., and upon the decisions of most respectable judicial tribunals."[123] Justice Story further wrote that when the state of Virginia originally incorporated the Episcopal church, it granted the institution vested rights to property that presented "an indefeasible and irrevocable title" that could not be nullified by the state laws passed.[124] Story criticized such state laws as a threat to the "fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."[125]

This powerful defense of the natural right to property was one of the Court's methods for evoking Natural Law. Legal historians, like G. Edward White, have also pointed to the strong possibility that Justice Story spoke against a violation to the Contract Clause in his opinion when referencing the "spirit and letter" of the Constitution.[126] If true, this would provide evidence that during the early years of the Court, Justices recognized a linkage between the natural right to contract and the Contract Clause's safeguard against government intervention of contractual liberties. This provides context for examining a major case rendered five years prior that saw the Court evoke another natural right—the right to contract—as justification for rendering its decision. The seminal case of *Fletcher v. Peck*[127] lies at the center of this work, regarded for its high importance as the Court's earliest major federalism case, yet so often overlooked for its grounding in contractual natural rights. In many ways, *Fletcher* served as a subject matter precursor to the Lochner Era of the Supreme Court. *Fletcher* was a landmark decision where the Supreme Court first exercised its ability to strike down a state law as unconstitutional.[128] The Court set forth a precedent not only for striking down certain state laws that are deemed problematic and challenged at the federal level, but also for establishing a legal safeguard for the individual's freedom to contract. This case also marked one of the earliest examples of a Court opinion rendered largely on the basis of protecting a litigant's disputed natural rights.

Fletcher concerned the state of Georgia claiming new land from the Yazoo Indians, following the American victory over Great Britain with the signing of the Treaty of Paris.[129] The 54,000 square miles of land, (which would later become modern Alabama and Mississippi), was divided into four sections by the Georgia legislature and sold to four different land

123. *Id.* at 51.
124. *Id.* at 50.
125. *Id.* at 50–51.
126. EDWARD G. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815–35, at 609 (abr. ed. 1991) (quoting Justice Story's *Terrett* opinion).
127. *See* Fletcher v. Peck, 10 U.S. 87, 138 (1810).
128. *See id.*
129. *Id.* at 107.

developing companies for $500,000.[130] After the transaction, it was later revealed that the Yazoo lands were not approved on legitimate standards, with the transaction made in exchange for satisfying bribes.[131] In the subsequent election, voters in the state rejected most of the incumbent representatives and, channeling public outcry, the newly elected legislature repealed the law which voided the original transactions made under it.[132]

One such transaction was made between Robert Peck and John Fletcher, two speculators of the Yazoo lands.[133] Fletcher purchased a tract of land from Peck in 1800 while the Georgia law was still in force, and three years later, brought suit against Peck after he claimed that the sale of lands was legitimate.[134] Fletcher countered that, since the original sale of the Yazoo lands were declared void by the state legislature, Peck was legally prohibited from selling him the land and thus, committed a breach of contract as a result.[135]

The Supreme Court ruled unanimously for Peck, with Chief Justice Marshall authoring the opinion.[136] Chief Justice Marshall's primary reasoning was that the Georgia legislature lacked the legal capacity to repeal the law because doing so violated the Contract Clause of the U.S. Constitution.[137] Article I, Section 10, Clause I provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.[138]

Justice Marshall perceived the legislature's repeal of the Georgia law impeded the contractual commitment of land transferred between Fletcher to Peck.[139] Since the contract was binding between the men, it could not be nullified by the state, even on the grounds that the Yazoo lands were illicitly gained through sway of bribery.[140] Justice Marshall understood that when disputing the legitimacy of a law threatening to void a contract, the individual rights vested under original agreement were absolute and could not be altered with the repeal of a law.[141] Marshall further argued that "[a]

130. *Yazoo Land Fraud*, NEW GA. ENCYC., https://www.georgiaencyclopedia.org/articles/history-archaeology/yazoo-land-fraud/ (last visited Apr. 18, 2024).
131. *See id.*
132. *Id.*
133. *Id.*
134. *Peck*, 10 U.S. at 88–89.
135. *Id.*
136. *Id.* at 142.
137. *Id.* at 135.
138. U.S. CONST. art. I, § 10, cl. 1.
139. *Peck*, 10 U.S. at 130–31.
140. *Id.*
141. *Id.* at 136.

party to a contract cannot pronounce its own deed invalid, although that party be a sovereign State. A grant is a contract executed."[142]

The right to contract is one the most essential, yet often overlooked natural rights codified within the text of the Constitution. It is among the few that exist outside of the protections outlined in the Bill of Rights.[143] In recognizing contractual liberty as one of the fundamental natural rights of Western civilization, Justice Marshall appealed to familiar terminology when referring to Natural Law as "absolute rights" that are "vested under that contract" by which no repealed law can severe.[144] Contractual rights were perceieved as part of "general principles which are common to our free institutions."[145] Despite this, Marshall diverged from the more ardent champions of Natural Law jurisprudence, such as Justice Samuel Chase and Justice Joseph Story, in that he based his decision on a direct excerpt of the Constitution to provide what can be perceived as a textual codification of Natural Law doctrines.[146] These include absolute rights like the liberty to contract. Justice Marshall even referred to the Contract Clause as "a bill of rights for the people of each state," viewing it not only as a check against state law whenever a need arises to safeguard private contractual obligations, but as one of the fundamental rights belonging to mankind that neither state nor the federal government could ever infringe.[147]

Following *Fletcher*, the case of *Ogden v. Saunders*[148] assessed whether states were capable of revising the law of contracts, particularly those not yet formed, by means of bankruptcy law. It tested this against the prohibition of the Contract Clause, which denied any state from inhibiting the responsibilities of contracts.[149] The case concerned a dispute between plaintiff Saunders, a citizen from Kentucky, demanding payment in fulfillment of a contract from Ogden, who was a Louisiana citizen living in New York at the time the contract was signed.[150] Ogden relied upon an early nineteenth century New York bankruptcy law to justify his bankruptcy as a viable defense in failing to fulfill the contract.[151] The Supreme Court ultimately ruled that the state law did not violate the Obligations of the

142. *Id.* at 125.
143. *See* Frisbie v. United States, 157 U.S. 160, 165 (1895) ("[G]enerally speaking, among the inalienable rights of the citizen is that of the liberty of contract."); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (recognizing that the Fortheenth Amednment's due process clause includes a right of contract).
144. *Peck*, 10 U.S. at Syl.
145. *Id.* at 139.
146. *Id.*
147. *Id.* at 138.
148. *See generally* Ogden v. Saunders, 25 U.S. 213 (1827).
149. *See id.* at 215–16.
150. *Id.* at 214.
151. *Id.* at 311.

Contract Clause, as it only preempted states from passing laws against established or existing contractual agreements and not future contracts.[152]

The ruling was unusual at the time for harboring a number of concurring opinions by the Justices, during an era when virtually every opinion was rendered with unanimity.[153] Where Justice Washington's dissent was supportive of the view that the Contract Clause only protected past contracts and imposed no measure to regulate future ones, Chief Justice Marshall's assenting opinion, joined by Justices Story and Du Vall, rendered a natural rights jurisprudential argument, asserting that the Clause also prevented regulation of future contractual agreements.[154] Marshall's opinion argued that the sphere of bankruptcy law fell solely within Congress's jurisdiction and that existing state laws could not prospectively be incorporated into future contracts.[155] Chief Justice Marshall's vigorous assent asserted that "contracts derive their obligation from the act of the parties, not from the grant of government," recognizing the liberty to contract as a natural right exclusively reserved to private parties apart from governmental decree.[156] To reinforce this, he argued that because the New York law fostered conditions that released the debtor from his/her initial obligation to satisfy a contract, it should be recognized as invalid.[157] There was an understanding by Marshall that the expectation of the debtor to fulfill his purported obligation is affixed to Natural Law, which safeguards the independence of agreements between independent free agents.[158] Marshall argued that contractual obligations, the procedures that must be fulfilled as a result of the mutual agreement, are determined by the involved parties and not by the conflicting state law.[159] Even though states can regulate how contracts are to be formed, how defaults should be resolved, and which forms of contracts should be excluded, no governmental body is authorized to interfere with the obligations that are determined from the signed agreement, nor the terms of what is owed.[160]

In writing the majority opinion, Justice William Johnson found that the New York law did not violate the Contract Clause, holding that this portion of the U.S. Constitution prevented states from passing laws that impacted past agreements of contracts already signed and did not protect against laws regulating future obligations not yet fulfilled.[161] The parties were expected

152. *Id.* at 255.
153. *See, e.g.*, West v. Barnes, 2 U.S. 401 (1791); Calder v. Bull, 3 U.S. 386 (1798); McCulloch v. Maryland, 17 U.S. 316 (1819); Barron v. Mayor of Baltimore, 32 U.S. 243 (1833).
154. *Ogden*, 25 U.S. at 334 (Marshall, J., assenting).
155. *Id.* at 335.
156. *Id.* at 354.
157. *Id.* at 354–57.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 257 (majority opinion).

to consider the bankruptcy law when signing the contract, and the obligation of fulfilling the contract inherently incorporates the possibility of bankruptcy, as opposed to bankruptcy impairing contractual fulfillment.[162] The view was that the bankruptcy statute became incorporated into subsequent contracts as a potential limit, not impairment, of the obligations.[163] Marshall's natural rights assent evoked the will theory of contract,[164] which understands that a contract is based on a promise which is conveyed through the voluntary acceptance of an obligation by the parties involved. It sees that laws governing contracts must reflect the "will" or choice of those forming a contractual agreement. Where Marshall's majority opinion in *Fletcher* provides the greatest textual incorporation of a Natural Law defense to contract as construed through the Contract Clause, his first and only dissent in *Ogden* reinforces this same understanding by extending the invulnerability of contractual rights to cover both past and future agreements.

Beyond the Marshall Court, the late Nineteenth Century saw the Court invoke Natural Law jurisprudence to strike down a series of state laws that were perceived to intrude upon an individual's fundamental rights.[165] Following the Civil War, the notion of "substantive due process" emerged from the Fourteenth Amendment, which protects certain individual rights from being harmed or interfered with by the state governments.[166] It provides protection for life, liberty, and property, unless taken by due process of law, serving as an existential safeguard to these natural rights against the states in a manner that is parallel to how the Fifth Amendment's due process clause protects such rights against the federal government.[167] Some of the earliest cases argued on Fourteenth Amendment grounds were used to protect individual privileges against state laws.[168]

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162. *Id.* at 256–57.

163. *Id.*

164. *Id.* at 354 (Marshall, J., assenting). While Chief Justice Marshall does not specifically mention the "will theory of contract," his assent invokes this classical view by arguing "[t]hat contracts derive their obligation from the act of the parties," rather than by external government provisions regulating contracts. *Id.* For futher discussion on the will theory of contract, see Randy E. Barnett, *A Consent Theory of Contract,* 86 COLUM. L. REV. 269 (1986). Barnett says that will theories of contract "maintain that commitments are enforceable because the promisor has 'willed' or chosen to be bound by his commitment. 'According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect.'" *Id.* at 272 (quoting Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933)).

165. *See, e.g.,* Allegeyer v. Louisiana, 165 U.S. 578 (1897); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adams v. Tanner, 244 U.S. 590 (1917); Buchnanan v. Warley, 245 U.S. 60 (1917). Notably, the *Warley* decision was directly inspired by the Lochner v. New York, 198 U.S. 45 (1905) decision as a unanimous Court invoked the Fourtheenth Amendment's freedom of contract (substantive due process) to strike down a local ordinance that prohibited the sale of property to Blacks in majority-White neighborhoods. *See Warley*, 245 U.S. 60.

166. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

167. *Id.*

168. *See id.* at 1502–03.

A prominent example can be found in the *Slaughter-House Cases*,[169] a 5–4 landmark decision that determined that the bounds of the Fourteenth Amendment's Privileges and Immunities Clause only protected and pertained to legal rights belonging to U.S. citizens under federal law and did not apply to laws based on state citizenship. Justice Stephen Field issued a bold dissent in the case, arguing that the Court minimized the Fourteenth Amendment's powers and rendered it to be a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[170] Justice Field promoted a broader reading of the Privileges and Immunities Clause and championed the notion of using the due process clause to protect the interests of American citizens against certain state laws that imposed measures deemed hostile.[171] This position taken by Justice Field would later be adopted by the Court during the Lochner Era, a period in judicial history where the Court did not actively invoke the Privileges or Immunities Clause, but rather, relied upon other portions of the Fourteenth Amendment such as the Equal Protections Clause and Substantive Due Process Clause to invalidate state laws that conflicted with a person's natural rights and economic liberties.[172]

The Privileges and Immunities Clause was clearly defined by Justice Bushrod Washington as one to protect an individual's fundamental rights.[173] In the case of *Corfield v. Coryell*,[174] Washington explained that these "privileges and immunities" are understood to be universal natural rights proscribed to every person across all free governments.[175] In the majority opinion, Justice Washington sums up the overarching fundamental principles of natural rights protected under the Privileges and Immunities as being "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[176] Natural rights were understood to be discovered within the positive law of states, which incorporated common law rights. Washington's above quote on fundamental rights was taken directly from Founding Father George Mason's committee draft for the Virginia Declaration of Rights, a profound rendering of natural rights that would be adopted across four other state constitutions.[177]

169. *See* Slaughterhouse Cases, 83 U.S. 36, 82 (1872).
170. *Id.* at 96.
171. *Id.* at 91–92.
172. Chemerinsky, *supra* note 166, at 1502–03.
173. *See* Corfield v. Coryell, 6 F. Cas. 546 (1823).
174. *Id.*
175. *Id.* at 551.
176. *Id.* at 551–52.
177. *The Virginia Declaration of Rights—Committee Draft*, GEORGE MASON'S GUNSTON HALL, https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/the-virginia-declaration-of-rights-committee-draft/ (last visited Apr. 17, 2024).

Shortly after *Slaughterhouse* and *Corfield*, and without specifically referencing the Fourteenth Amendment, the Court evoked a natural justice argument in its *Loan Association v. Topeka*[178] decision, ruling in favor of limitations to state police powers. Over the next decade, the Court began to utilize the Fourteenth Amendment as a tool for striking down arbitrary state laws that violated natural rights.[179] The Lochner Era (1897–1937) occupied a 40-year period and was heralded as an unprecedented age for judicial deregulation.[180] The Supreme Court struck down a series of economic regulations adopted through state laws threatening a citizen's economic liberty or fundamental rights under the Constitution.[181]

One of the earliest precursors to this period was the case of *Yick Wo v. Hopkins*[182] which presented the first instance where the Court utilized provisions within the Fourteenth Amendment to strike down a state law deemed unconstitutional. The California law in conflict was a nondiscriminatory measure against Chinese Americans who owned laundry mats in San Francisco, imposing measures that were prima-facie nondiscriminatory, but were administered in a discriminatory manner.[183] The ordinance required all laundry mat owners in wooden buildings to possess a permit that was issued by the San Francisco board of supervisors with total discretion over who would receive a permit.[184] The law was enforced unevenly, as not a single Chinese owner was issued a permit, despite 89 percent of the city's laundry mats being Chinese owned.[185]

Two such owners, Yick Wo and Wo Lee, refused to pay the resulting fine and were imprisoned, prompting them to file a writ of habeas corpus to allege that the fine and discriminatory administration of the ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[186] The Court unanimously agreed, with Justice T. Stanley Matthews writing for the majority to declare that despite the state law's impartial and harmless wording, it was administered in a biased and discriminatory manner that violated the Equal Protection Clause.[187] A key passage from Justice Matthews's opinion states if the state law is "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar

178. Citizens' Sav. & Loan Ass'n v. Topeka, 87 U.S. 655, 668–69 (1874).
179. *See* Chemerinsky, *supra* note 166, at 1502–03.
180. *Lochner Era*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/lochner_era (last visited Apr. 2, 2024).
181. *Id.*
182. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).
183. *Id.* at 357.
184. *Id.*
185. *Id.* at 359.
186. *Id.* at 356–57.
187. *Id.* at 374.

circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[188]

The Lochner Era Court rendered many of its principal rulings against state policies that infringed upon private contractual rights, corporate independence, and the economic liberty of citizens.[189] These decisions were crafted during a period when the relationship between government and privatization in U.S. history became strained by the proliferation of policies regulating the flow of business and direction of workers' rights.[190] The end of the nineteenth century saw the rise of large-scale capitalism, with the emergence of massive companies possessing unrivaled wealth and a vigorous commitment to domestic manufacturing.[191] With it came the parallel rise of the regulatory state, which would pose a threat to select Constitutional law traditions, since the Supreme Court in times past focused only on instances of property seizure, rather than corporate regulation.[192] This regulatory "police power" provided the Court with basis to protect not only vested property rights as it had always done, but also substantive property rights, referring to contractual rights yet to be signed.[193] This inspired the Court to devise a "substantive right of property," which saw a new phase of judicial protection for the rights of property owners' title and possessions from invasive and intrusive state regulation.[194]

Within the Lochner Era existed three schools of thought among jurists interpreting corporate regulatory cases.[195] One school were champions of laissez-faire capitalism in a strict constitutionalist manner, seeking to limit state legislatures from enacting laws beyond those that prevented fraud and those governing an individual's health, safety, and morals.[196] These jurists analyzed the Constitution on a conceptual basis, rendering decisions that drew from common law and natural law principles.[197] On the other end of the extreme were liberal constitutionalists, who were prone to allow legislative restrictions to business activity and social affairs that appeared to be reasonable.[198] These were pragmatists who felt that the legislatures were better suited than the courts to determine the essence of law to solve

188. *Id.* at 373–74.
189. See Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 13–14 (1991) for a description of laws examined by the courts during the Lochner Era.
190. *See id.* at 6–8.
191. *Id.* at 6.
192. *Id.*
193. *Id.* at 6–7.
194. *Id.* at 7–8.
195. *Id.* at 9.
196. *Id.*
197. *Id.*
198. *Id.* at 9–10.

societal issues.[199] They were of the view that corporate concentration "gives some entrepreneurs too much power over their less organized competitors, and certainly over their employees, for contractual agreements to represent the uncoerced choices of both parties."[200]

In the center of these two schools were the moderate laissez-faire constitutionalists, who refused to express any sympathy toward the welfare state or embrace redistributive wealth from the privileged to the poorer classes.[201] Like strict laissez-faire constitutionalists, they were conceptualists who based their Constitutional understanding on principles of common law and natural law.[202] The Court's moderates diverged from the strict constitutionalist approach regarding use of police powers, believing that state police powers could be legally expanded to regulate the health, safety, and well-being of individuals.[203] Additionally, moderates believed that states could enact laws forbidding contractual obligations that threatened these areas.[204] They were less supportive of individual rights and more liberalistic toward permitting state regulations.[205] Between 1897–1908, the moderates dominated the Court during the middle of the Lochner era, while laissez-faire capitalists differed over certain fundamental principles raised in regulatory legal disputes.[206]

The central issue of focus during the Lochner Era resided with the Court's examination of a litigant's contractual rights when in conflict with state laws. During the early Twentieth century, the Court coined the "liberty of contract," a phrase inspired by Natural Law precedent as an incorporation of the natural right to contract without state intrusion.[207] This extended beyond individual contracts to include corporate contracts.[208] The Lochner Era Court's understanding of the liberty of contract pays homage to many of the Court's earlier natural rights cases. This is evident in *Fletcher,* with the primary difference being that, the Marshall Court relies on the Contract Clause to present a Constitutional safeguard against state intervention, as opposed to the Fuller Court, which invokes Substantive Due Process to resolve twentieth-century state regulatory matters.[209] This is most evident in the seminal case of *Lochner v. New York*,[210] where the liberty of contract concept is utilized as a justification for the ruling, drawing notable

199. *Id.*
200. *Id.* at 10.
201. *Id.* at 11.
202. *Id.*
203. *Id.*
204. *Id.* at 11–12.
205. *See id.* at 12.
206. *Id.* at 14.
207. Lochner v. New York, 198 U.S. 45, 56 (1905).
208. Siegel, *supra* note 189.
209. *See* Fletcher v. Peck, 10 U.S. 87, 139 (1810).
210. *Lochner*, 198 U.S. 45.

inspiration from Marshall's will theory of contracts, Justice Chase's cited social compact theory in the *Calder v. Bull* and *Fletcher v. Peck* decisions.[211] *Lochner* was a landmark decision that concerned a New York state law, known as the New York's Bakeshop Act of 1895 that established a minimum threshold for working hours for local bakers.[212]

The law was violated by Joseph Lochner, a German immigrant who oversaw a bakery in Utica, New York, who had his bakers work over the set minimum 10 hours per day and 60 hours per week.[213] After losing in the lower courts, Lochner appealed his case to the Supreme Court, where a narrow 5–4 majority ruled that the New York law was a violation of the Due Process Clause of the Fourteenth Amendment, determining that it did not qualify as "a legitimate exercise of [the state's] police power," but instead constituted as "an unreasonable, unnecessary and arbitrary interference with the right of the individual to . . . enter into those contracts in relation to labor."[214] Lochner argued that his right to contract freely was preserved under the substantive due process clause of the Fourteenth Amendment, which enables courts to safeguard certain rights deemed to be fundamental against the encroachment of the state.[215]

The Court rendered its decision in favor of Lochner's right to contract services from his workers that exceeded the minimum hours allotted by New York's Bake Shop Act, deciding largely on the basis of the freedom to contract.[216] This notion was inspired by the Court's 1877 decision in *Allgeyer v. Louisiana*,[217] where the Justices unanimously struck down a Louisiana statue that violated a person's liberty to contract, referencing the term "liberty" in the Fourteenth Amendment's substantive due process clause to encompass a protection for one's economic liberty. The law imposed a prohibition on consumers seeking to purchase shipping insurance from companies in other states.[218] This landmark case was the first to provide a Constitutional protection to a worker's economic liberties by means of substantive due process, officially launching the Lochner era.[219]

The fundamental element of such rights is that they generally refer to one's natural rights, which are regarded to such a high degree and reserved exclusively by divine grant to the individual to be inseparable from his/her personhood.[220] Such rights are understood to be granted by God and

211. *Id.* at 64–65.
212. *Id.* at 45–47.
213. *Id.* at 68–69.
214. *Id.* at 53, 55.
215. *Id.* at 53.
216. *Id.* at 61.
217. Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897).
218. *Id.* at 583.
219. *See id.* at 593.
220. *See* Wolfe, *supra* note 1.

provided to man through existence in nature and beyond the jurisdictional restraints of state authority.[221] Such rights can only be threatened or revoked by the state when one voluntarily opts to violate their social contract or the law to accept the proscribed consequences under due process of law.[222] Substantive due process denotes a chasm between the natural rights guaranteed to the public under the Bill of Rights' protections and other textual protections embedded in the Constitution (such as the Contract Clause) at one end, and those unprotected actions that the courts deem to be subject to governmental legislation or regulation on the other side. The latter governmental measures were found in excess of permissible authority whenever the Court ruled in favor of a claim steeped in substantive due process.[223]

Returning to *Lochner*, Justice Rufus Peckham wrote for the Court's five-Justice majority, conveying that the freedom for one to contract was a protection vested under the Fourteenth Amendment's Due Process guarantee to respect one's "life, liberty or property."[224] This liberty extends to the ability of the worker to control his expectations for labor and compensatory wages in a manner that is reasonably acceptable with the employer.[225] In other words, the wage earner possesses the right to freely contract his services with an organization that bears the ability to assign any measure of work compliant with the role.[226] The Court determined that no governing law could intercede between a contractual obligation involving a laborer and his wages, so long as the pursuit of work posed no perceivable threat to public safety, morals, or health.[227] Justice Peckham asserted that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[228]

The majority found New York's use of police powers regulating a baker's work hours to be both misplaced and unjustified.[229] The only forms of contracts that could be regulated by the state were those not afforded protection under the Fourteenth Amendment, such as those which violated

221. *See id.*
222. *See generally* McAffee, *supra* note 68.
223. For example, see Buchanan v. Warley, 245 U.S. 60 (1917), which invoked the Fourteenth Amendment's freedom to contract to strike down a local ordinance in Louisville Kentucky that prohibited the sale of property to Blacks, and Adams v. Tanner, 244 U.S. 590 (1917), where the Court again (in the same year) invoked substantive due process to negate a Washington state ban on employement agencies. Here, the Court safeguarded an indvidual's liberty and property from state termination.
224. U.S. CONST. amend. XIV; *see also* Lochner v. New York, 198 U.S. 45 (1905).
225. *See Lochner*, 198 U.S. at 54–55.
226. *See id.*
227. *Id.* at 53.
228. *Id.* at 57.
229. *Id.* at 61.

a legislative statute or used an individual's property to fulfill some immoral purpose.[230] Additionally, any contractual obligation vested in unlawful actions were subject to prevention by the state.[231] States can only enforce their police powers against valid instances of threats to public safety, individual morality, and health.[232] In *Lochner*, the Court majority became the legal intermediary to guard against what was understood to be a tyrannical abuse of state police powers against the economic liberties of New York businesses.

Justice Peckham's opinion ascertained that the bakery profession was not abnormally dangerous and thus did not require special governmental protection under the reasoning of New York's regulation of workdays and hours.[233] Drawing a comparison between the present *Lochner* case and that of *Holden v. Hardy*[234] the Court opted to uphold a state law regulating work hours to minimize the threat to public health from prolonged exposure to coal mining and ore refining. This regulation was perceived by the Court to be a valid exercise of state powers to protect employee health and safety.[235] Such dire circumstances were not present in the *Lochner* case which factored into why the Court did not deem it necessary or proper for state intervention on behalf of the New York bakers.[236] Justice Peckham's opinion sheds light on what was at stake in this case, between the overbearing regulatory interests of the state and the natural right for one to work and contract freely, stating, "[i]t is a question of which of two powers or rights shall prevail,—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."[237] In fashioning a Natural Law argument, Peckham asserted that:

> [t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[238]

Beyond the Court's primary conclusions that the baker's profession did not pose a particular danger requiring special government protection and that the Bakeshop Act's maximum hour provision was not correlated to protecting public health, a substantive finding in the majority opinion was the allusion to the belief that state laws, like the Bakeshop Act, were

230. *Id.* at 53.
231. *Id.*
232. *Id.*
233. *Id.* at 59.
234. *Id.*
235. *Id.* at 54.
236. *Id.* at 55.
237. *Id.* at 57.
238. *Id.* at 57–58.

designed with a socialized intent to redistribute wealth.[239] The Court majority's implied stance against redistribution of resources from the wealthy, more privileged classes to the poorer classes in society would become a major point of focus for subsequent decisions throughout the Lochner era.[240] One of Justice Peckham's concluding references to state laws regulating private businesses being "passed from other motives" reveals that the legislative proponents of the Bakeshop Act bore the hidden intent to redistribute wealth, while defending the law in court under the guise of being a necessary safeguard to public health, safety, and morals.[241] Following this argument, it is important to note that Peckham's opinion champions a Natural Law approach to statutory interpretation.[242] He distinguished between the right and wrong manner for interpreting the Bakeshop Act, arguing that the "purpose of a statute must be determined from the natural and legal effect of the language employed," as opposed to looking strictly at what the purposive effect of the statute is (proclaimed legislative purpose).[243] Through this lens, the Court assesses the purpose of the law to show how it offended the Constitution by looking to its natural ramifications when implemented.[244]

The *Lochner* opinion was challenged by dissents from Justices Marshall Harlan, the opinion of which was joined by Justices Edward White and William Day, and most famously by Justice Oliver Wendall Holmes.[245] The Holmes dissent has been remembered as one of the most cited in history, not merely for its substance as an opinion, but for its aggressive challenge to the presumption of laissez-faire capitalism as the primary motivator for the Court's reasoning.[246] Justice Holmes claimed that the Court based its decision on various theories of economics, criticizing the Justices for lacking expertise in such areas, and not rendering a decision based upon established legal principles.[247] Among the host of disagreements that Holmes made against the majority opinion, he directly challenged his colleagues' assertion that the New York Bakeshop Act posed

239. *Id.* at 71.
240. See United States v. Butler, 297 U.S. 1 (1936), where the Court struck down a controversial processing tax provision of the Agricultre Adjustment Act (1933), a New Deal legislation. The tax redistributed expenditures from processors of farming products as direct payments to farmers. *See id.* The Court deemed these as coercive government-imposed contracts and struck down the Act as unconstitutional. *Id.*
241. *Lochner*, 198 U.S. at 64.
242. See *id.*
243. *Id.*
244. *See id.*
245. *See id.* at 75 (Homes, J., dissenting); *Id.* at 65 (Harlan, J., dissenting).
246. *See id.* at 75 (Holmes, J., dissenting).
247. *Id.*

a threat to one's fundamental principles as recognized under American law and tradition.[248]

Justice Holmes gave the perception that he generally agreed with the upholding of the Fourteenth Amendment's safeguard to individual liberty against state infringement but failed to understand its prominent relevance in the *Lochner* decision.[249] The Court's majority utilized the law to protect the liberty of contract that employees possessed to consent to their own work hours separate from any interfering regulation by the state.[250] The manner the Fourteenth Amendment was used as a Constitutional application against excessive state infringement of a bakeshop owner's liberty to freely contract working hours with his employees (in a manner that does not harm their health or safety) is aligned with the longstanding traditions of the American Constitution's textual safeguards to natural rights that have been recognized as sacrosanct over the course of time.

V. HOW THE CONTRACT CLAUSE COULD HAVE PROLONGED LOCHNER

The previous Section assessed many of the most notable Natural Law and natural rights-centered cases that arose before the U.S. Supreme Court. This Article traces principal disputes beginning as early as the Jay Court with the landmark *Chisolm* opinion in 1798 up through the Fuller Court with the infamous *Lochner* ruling in 1905. While each referenced case covers many discussions on natural rights and evokes a host of Natural Law arguments, nearly all these cases are tethered by a mutual appreciation and jurisprudential championing of an individual's freedom to contract. Had Justice Peckham's majority opinion in *Lochner* depended not only on the Fourteenth Amendment's Substantive Due Process protection of individual liberty[251] (by extension the freedom to contract), but also relied upon the Contract Clause in Article I, the *Lochner* decision would likely have extended its longevity well beyond the New Deal.[252] This assertion can be

248. *Id.* at 76.
249. *Id.*
250. *Id.* at 64 (majority opinion).
251. Aaron Gordon, An Empirical Appraisal of the Liberty of Contract 5 (2017) (Honors Thesis, Northwestern University) (https://polisci.northwestern.edu/documents/undergraduate/Gordon,%20Aaron%20honors%20thesis.pdf.) See where Gordon explains how the substantive due process clause incorporates the liberty to contract. "Perhaps the most controversial component of that freedom was 'The Liberty of Contract'—the right of individuals to enter into and negotiate the terms of contracts without arbitrary government interference, a right subject to restriction only when necessary to protect public safety, health, or morals." *Id.* However, Gordon falls short of attributing this natural right to contract as construed through the protections of the Contract Clause, as my Article argues it does.
252. Justice Peckham, a New York native and former judge on the New York Court of Appeals, was best positioned to author the opinion of the Lochner case. Megan W. Benett, *Rufus W. Peckham, Jr.*, *in* THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY (Hon. Albert M. Rosenblatt ed., Fordham Univ. Press 2007). Justice Peckham fully incorporated the freedom for the individual to contract against the states by sole means of the Fourteenth Amendment's Substantive Due Process Clause. *See Lochner*, 198 U.S. 45. Peckham's opinion made no reference to Article I's

further reinforced by the understanding that the Supreme Court has long recognized the natural right to contract. While the liberty to contract predates the ratification of the Constitution, it is nonetheless protected by it. This was made clear in the Court's opinion in *Frisbie v. United States*,[253] where Justice Brewer asserted that "generally speaking, among the inalienable rights of the citizen is that of the liberty of contract."

Evoking the Contract Clause could have preserved the Lochner Court's use of Natural Law Jurisprudence as a direct incorporation of the Constitution's text. If Justice Peckham relied upon the Contract Clause, the case would have been afforded a more robust Constitutional reinforcement, established not only from the implied protections of individual liberty and the freedom to contract within the Substantive Due Process Clause, but also a Congressional protection against state impairments to contractual obligations.

The Contract Clause provides a viable defense against the enforcement of state police powers, as applicable in the Lochner case, by ensuring that no state law can interfere with the fulfillment of a contractual agreement.[254] Since the Supreme Court had determined that the New York law violated the freedom to contract based on a Fourteenth Amendment protection of individual liberty, it would have been relatively appropriate for the majority coalition to invoke the Contract Clause as a means for providing a solid, tangible source of protection to one's freedom to contract.[255] The Contract Clause provides citizens with an explicit, constitutionally construed protection of the natural right to contract.[256] The Clause is likened by some scholars as being the textual equivalent of Natural Law doctrines, such as "vested rights," with the liberty to contract being understood as one of those rights that is regarded as sacred.[257] States are both obligated to respect and

safeguard against states voiding or manipulating the right for individuals to contract with one another. The Court established a clear and prominent precedent for this in *Fletcher v. Peck* when relying upon the Contract Clause. *See* Fletcher v. Peck, 10 U.S. 87 (1810); U.S. CONST. art. I, § 10, cl. I. The opinion in *Lochner* could have been greatly reinforced by reliance on the Contract Clause.

253. Frisbie v. United States, 157 U.S. 160, 165 (1895).

254. U.S. CONST. art. I, § 10, cl. 1.

255. While both the Substantive Due Process Clause of the Fourteenth Amendment and the Contract Clause provide protection to one's contractual liberty, the Contract Clause is construed with an explicit safeguard to an individual's contractual obligations. This written protection can be utilized as an express power of Congress to deprive a state or states of the authority to nullify or manipulate any portion of an established contract. *See Peck*, 10 U.S. 87. But not future contracts. *See* Ogden v. Saunders, 25 U.S. 213 (1827). By comparison the Substantive Due Process Clause's protection is implied, since the freedom to contract is an unspecified right that falls within the Clause's preservation of liberty, as understood by the Court in Lochner.

256. U.S. CONST. art. I, § 10, cl. 1.

257. *See* THE HERITAGE GUIDE TO THE CONSTITUTION 224–25 (David F. Forte & Matthew Spalding eds., 2d ed. 2014). Richard Epstein addresses how the Obligation of Contract Clause safeguards an individual's vested rights in private contracts. *Id.* Epstein also notes that "since Ogden, the Obligation of Contract Clause has been an observer, not a central player, in the constitutional struggle to limit prospective state economic regulation," reinforcing my argument for how the Supreme Court has traditionally failed to apply the Contract Clause when nullifying intrusive state laws. *Id.* at 225.

constitutionally prohibited from violating an individual's vested rights, including the liberty to contract.[258] As conveyed in Chief Justice Marshall's dissenting opinion in *Ogden*, state laws governing contractual relations must reflect the will of those forming contracts.[259]

What the Supreme Court has traditionally understood the Contract Clause to prohibit when interpreting the provision that no state shall pass a "Law impairing the Obligation of Contracts" is that the term "law" encompasses a host of governmental actions.[260] These include constitutional provisions, municipal ordinances, legislative statutes, and administrative regulations (which carry the force and effect of laws). The Court has traditionally recognized the Contract Clause to explicitly prevent state, rather than federal, impairment of contractual obligations.[261] State courts retain jurisdiction over contractual formation, determining whether contracts are rendered properly and legally construed within the boundaries of existing law.[262] An exception to this may arise in situations when the existing state law impairs the obligations of contracts already signed, going beyond a mere flaw in the structure of the contract itself. This triggers judicial review by the Supreme Court on a perceived state violation or breach to the Contract Clause.[263]

Contracts can be dissected along two portions—the agreement itself, which derives from the parties involved, and the obligation, which derives from the state law that binds the agreement on the parties. Both elements of the contract must be fulfilled and upheld.[264] Contractual "obligations," by its textual understanding, imply that the Constitution was designed to protect contracts awaiting enforcement or executory contracts.[265] Chief Justice John Marshall viewed the obligation of contract as constituting "an agreement, in which a party undertakes to do, or not to do, a particular

258. U.S. CONST. art. I, § 10, cl. 1.

259. *Ogden*, 25 U.S. at 332 (Marshall, J., dissenting).

260. U.S. CONST. art. I, § 10, cl. 1.

261. Notably, the Contract Clause does not reference or apply to acts of the federal government to interfere with contracts. *Id.* The Supreme Court has interpreted the Clause to apply exclusively to states. *See, e.g.*, U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17 (1977).

262. *Contract*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/contract#:~:text=Contract%20law%20is%20generally%20governed,may%20vary%20between%20the%20states (last visited Apr. 2, 2024).

263. *See Ogden*, 25 U.S. at 266–67. The Supreme Court invoked the Contract Clause to prevent states from passing laws that obstructed the obligations of currently signed contracts. *Id.* The New York law in question was spared, since the Court determined that it affected the obligation of future contracts not yet signed, which the majority did not perceive as being covered under the Contract Clause. *Id.*

264. The Supreme Court has traditionally understood contractual obligations to incorporate the applicable state law for enforcing these binding agreements and the specific terms of the agreement itself, struck between the involved parties. *See U.S. Trust*, 431 U.S. at 19–20. "The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement." *Id.* at 19 n.17.

265. U.S. CONST. art. I, § 10, cl. 1.

thing."[266] The law binds him to perform his undertaking in the case, as he expressed in his opinion in *Sturges v. Crowninshield*.[267]

In line with the requirement that the courts must respect the obligations of a contract to be upheld by the parties involved is the expectation that the law from which the obligation derives must synchronize with Constitutional law. The "impairment" portion of the Contract Clause has been most clearly understood by Chief Justice Charles Hughes in his decision in *Home Building & Loan Ass'n v. Blaisdell*,[268] to which he cited *Sturges* when arguing that "the obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."

Chief Justice Hughes established an important point on the corresponding significance of constitutional safeguards to contractual liberties, as best expressed through the Contract Clause, and why the law must be understood to ensure that the government safeguards the sanctity of agreements from governmental impairment.[269] To this end, Justice Hughes argued that:

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society.[270]

VI. Modern Theories and Perceptions of Natural Law

With the above understanding in mind, the following section will bring to fore the prevailing views of select contemporary legal scholars in the U.S., examining differing perceptions toward Natural Law theory and jurisprudence. Since the mid-Twentieth Century, Natural Law theory has largely gone unmentioned in legal decisions rendered by American courts. The Lochner Era came to a screeching halt with the advent of the Court's decision to uphold the Constitutionality of state minimum wage legislation in *Westcoast Hotel v. Parrish*.[271] This decision was the turning point in the Court's longstanding tendency to uphold and maintain tenets of Natural

266. Sturges v. Crowninshield, 17 U.S. 122, 197 (1819).
267. *See generally id.*
268. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934) (internal citation omitted). The quoted passage cites the justification for contractual obligations becoming impaired as outlined in Sturges.
269. *Id.* at 435.
270. *Id.*
271. *See generally* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

Law jurisprudence, such as the liberty to contract, primarily by invalidating draconian state policies that superciliously regulated worker rights and private business practices.[272] The ruling overturned the prior case of *Adkins v. Children's Hospital*[273] and allowed for states to set minimum wage laws that restricted an individual's natural right to contract whenever this law was perceived to protect communal health and safety or safeguard vulnerable groups.[274]

The *Parrish* decision was aimed at a Washington state law regulating minimum wage for women and was upheld due to the Court's perception that the state had a special interest to protect female health and their ability to support themselves.[275] This judicial upset to *Lochner* and unexpected ruling by the Court was largely due to the unconventional decision by Associate Justice Owen Roberts to break ranks with the conservative bloc of the Court (dubbed the "Four Horsemen") and join the liberal bloc ("Three Musketeers").[276] Roberts joined with Chief Justice Hughes as the pair of swing votes needed to render a majority ruling for the minimum wage law.[277] This stood in stark contrast with Justice Roberts's track-record of striking down state minimum wage laws in previous cases, with his sudden change giving credence to the name "the switch in time that saved nine."[278] This phrase was also in reference to Roberts's decision being motivated by the need to avert the Judicial Procedures Reform Bill of 1937 that was proposed by President Franklin D. Roosevelt as a threat to expand the size of the Court and preserve his New Deal legislation in the Court.[279]

Despite Natural Law dormancy in the Court's decisions since the New Deal, there have been a host of legal scholars in the U.S. that have distinguished themselves as modern proponents of Natural Law. One of the greatest advocates is Robert P. George, McCormick Professor of Jurisprudence and Director of the James Madison Program at Princeton University, who is credited by Law Professor James E. Fleming for "reviving the natural law tradition in political, legal, and constitutional theory."[280] Professor George has written and edited various books that have championed Natural Law tradition and advocated for its revival in modern American jurisprudence. George has promoted an acceptance of Natural Law theory as being an ideal form of political morality that should be

272. Chemerinsky, *supra* note 166, at 1502–03.
273. Adkins v. Children's Hospital, 261 U.S. 525 (1923); *see also W. Coast Hotel*, 300 U.S. at 400.
274. *W. Coast Hotel*, 300 U.S. at 391, 400.
275. *Id.* at 394.
276. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).
277. *Id.*
278. *Id.*
279. *See id.*
280. James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285, 2285 (2001).

embraced and as a higher form of thinking for solving pressing issues of justice.[281] However, George's embrace of Natural Law doctrine does not extend so far as to promote the view that the Supreme Court should wield Natural Law as a legal tool for rendering case decisions.[282] As the Section on the Framers' collective views toward Natural Law expressed, George champions a view of the Founders as inserters of Natural Law principles in the text of the Constitution, arguing that "the fabric and theory of our Constitution embodies our founders' belief in natural law and natural rights."[283]

Fleming criticizes George for at once claiming that the Constitution embodies principles of Natural Law and preserves natural rights, but at the same time arguing that it "places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts."[284] By this understanding, George believes that applications of Natural Law and safeguards to natural rights should only be confined to democratic institutions presided over by elected officials in Congress and the President, and not by unelected judges.[285] In his work, George points to how the Constitution is silent on which branch of government—legislative or judicial—actually wields authority over maintaining whether man-made positive law is conformed to Natural Law and which branch is capable of addressing a person's natural rights.[286] As a strict Originalist, George believes that Justices cannot enforce principles of Natural Law as means of safeguarding natural rights from legislative impairment, with the understanding that this would require judges to go beyond the bounds of the Constitution.[287]

Fleming invokes a potential solution to the query of who can actually interpret Natural Law when referencing the Constitution, citing both the landmark *Marbury v. Madison*[288] decision and *Federalist Paper No. 78*.[289] Both forwarded the understanding that the Supreme Court is compelled to interpret the precepts of Natural Law within the Constitution, as they are found within provisions such as Bill of Rights protections, the Fourteenth Amendment, and the Contract Clause, to safeguard these rights against any

281. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1995).
282. *See* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269 (2001).
283. *Id.* at 2282.
284. Fleming, *supra* note 280, at 2886 (quoting George, *supra* note 282, at 2282). Fleming critiques the perceived anomaly in Robert George's embrace of natural law theory in the Constitution and promotion of the contrary view that it can only be enforced by the executive and legislative branches of government. *Id.*; *see also* George, *supra* note 281.
285. George, *supra* note 282, at 2282.
286. *Id.*
287. *Id.*
288. Marbury v. Madison, 5 U.S. 137 (1803).
289. THE FEDERALIST NO. 78 (Alexander Hamilton).

encroachment that may arise from positive law or falling out of conformity with the Constitution.[290] This presents a heightened manner of looking at the Court's application of judicial review, used as a method for preserving Natural Law doctrines embedded in the text of the Constitution. Fleming's understanding also runs contrary to and overturns George's notion that the Court cannot enforce the Constitution against positive law to preserve the sanctity of Natural Law.[291]

The primary legal theory in opposition to Natural Law is legal positivism. The primary proponents of legal positivism were men like Judge Robert Bork, Justice Hugo Black, Chief Justice William Rehnquist, and Justice Antonin Scalia.[292] Bork and Scalia were prominent adherents of public meaning Originalism, which strictly interpreted the general public's perception of the meaning of the Constitution's text and its legal context during enactment.[293] Bork and Scalia were of the view that the Constitution should only be understood as a strict set of detailed rules, a codebook which excluded any notions of abstract moral principles that entailed Natural Law or natural rights.[294] Legal positivism does not perceive any connection between law and morality, viewing the law as strictly a product of man-made commands.[295] Positivism derives the source of law from its establishment by socially recognized institutions that grant authority to the law.[296]

Bork was particularly outspoken against Natural Law adherents.[297] Bork's embrace of legal positivism was heavily criticized by conservative Professor Harry Jaffa, who did not consider Bork to be a true conservative because of his unwillingness to embrace Natural Law jurisprudence.[298] Jaffa criticized Bork and Rehnquist for failing to recognize that the Constitution protected fundamental principles of Natural Law, with the understanding that they have overlooked the very moral values embedded within the document that they were tasked with clearly interpreting.[299]

Jaffa also criticized Scalia and Rehnquist's claims that civil liberties are not inherently good or intrinsically moral, as the Justices have previously written that such liberties become validated only when they

290. Fleming, *supra* note 280, at 2292.
291. *Id.* at 2294.
292. *Id.* at 2292.
293. *Id.* at 2293.
294. *Id.* at 2292–93.
295. *Id.* at 2293.
296. *Id.*
297. Erik Linstrum, *Political Scholar Jaffa Defends Moral Foundation of Government*, THE DAILY PRINCETONIAN (Sept. 30, 2003), https://web.archive.org/web/20090605200549/http://www.dailyprincetonian.com/2003/09/30/8663/.
298. *Id.*
299. *Id.*

evoke the will of the majority.[300] Jaffa derided this view, with the understanding that "[t]he ends served by majority rule are not themselves decided by majority rule," but are instead decided through inalienable natural rights that God has provided to mankind.[301] Another school of legal thought that embraced Natural Law adherence is the moral reading of the Constitution, promoted by legal scholar Ronald Dworkin.[302] This view directs that the Constitution contains abstract moral principles that are important pillars undergirding the stated rights promised to American citizens.[303] Using a simplified understanding, these moral principles are akin to principles of natural rights.[304] A moral reading requires a certain fidelity to the Constitution, as judges should uphold not only the text of the document, but also be capable of enforcing the underlying principles of Natural Law morality embedded in the text.[305]

Another notable Natural Law theorist is John Finnis, an Australian legal scholar whose works examine the history of Natural Law theories and preservation of natural rights. In his book, *Natural Law and Natural Rights*,[306] Finnis proposes his own legal theory while presenting a "re-presentation" or restatement of classical and mainstream fundamentals of Natural Law theories and their merits. Finnis understands that an ideal theory of Natural Law is one that can discover principles of proper and practical understanding, while also looking to a correct order that exists among individuals and guiding human conduct.[307] Finnis seeks to provide practical assistance to the many legal scholars, practitioners, politicians, and judges who are concerned with and reflect upon notions of Natural Law in their professions.[308] Finnis understands Natural Law to be a broad combination of ethical principles governing human conduct and elements of jurisprudence, political philosophy, and adjudication.[309] Natural Law is also understood to provide an explanation for the obligations and obligatory power commanded by positive laws.[310] Duke Law Professor, George C. Christie, described Finnis's scholarship as urging for a return to the classic, intellectually enriched form of Natural Law that is evocative of St. Thomas Aquinas, who (as previously mentioned) built upon the legacy of Aristotle

300. *Id.*
301. *Id.* (quoting Jaffa).
302. *Id.*
303. *See id.*
304. *See id.*
305. *Id.*
306. FINNIS, *supra* note 57, at v–vi.
307. *Id.* at 59.
308. *Id.* at v.
309. *Id.* at 23–24.
310. *Id.*

and Cicero.[311] This form of Natural Law focuses squarely upon the achievement of the common good from a social perspective, promoting this good based on morality and social mobilization, as opposed to a strict focus on individual natural rights.[312]

Finnis does not define Natural Law as a divine expression of God's will nor does he define the obligations of positive law as submitting to a superior divine authority.[313] He does, however, understand that human appeals to God's will and explanations of obligation cannot be ignored or refuted.[314] Like most proponents of Natural Law, Finnis is diametrically opposed to legal positivism, viewing it as largely incoherent and "never coherently reaches beyond reporting attitudes and convergent behaviour (perhaps the sophisticated and articulate attitudes that constitute a set of rules of recognition, change, and adjudication.)"[315] Positivism is incapable of explaining where the measure of authority claimed by those in positions of power derives from and how power is enforced by officials of the legal system beyond mere conscientious action.[316] The redundancy inherent in positivism is that it merely repeats what any Natural Law adherent or competent lawyer would perceive from "intra-systematically valid laws," while enforcing legal requirements and the consequences that come with being incompliant with the law.[317] By contrast, Finnis asserts that "[n]atural law theory has no quarrel with—indeed, promotes—a bifurcation between *intra-systemic* [*legal*] *validity* (and *obligatoriness*) and *legal validity* (and *obligatoriness*) *in the moral sense*."[318]

Professor Fred Schauer's embrace of Constitutional positivism takes an oppositional view to Finnis's support of Natural Law, as it separates law and morality while at the same time possessing no view on the notion of obedience to the law, as based on principles of positive law.[319] According to Schauer, positivists are of the belief that the subsistence of a law is separate from its moral underpinnings, a view in direct contrast to a Natural Law understanding, which he defines as being derived from foundational principles of morality.[320] Schauer is of the belief that a judge's moral reasoning is relevant only in narrow circumstances pertaining to Supreme

311. George C. Christie, *Judicial Decision Making in a World of Natural Law and Natural Rights*, 57 VILL. L. REV. 811, 811 (2012).
312. *Id.*
313. John M. Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1599–1600 (2000) [hereinafter *Incoherence of Legal Positivism*].
314. *Id.* at 1610–11.
315. *Id.* at 1611.
316. John Finnis, *Natural Law Theory: Its Past and Present,* 57 AM. J. JURIS. 81, 100–01 (2012) [hereinafter *Natural Law Theory: Past and Present*] (citing FINNIS, *supra* note 57, at 314–20).
317. *Incoherence of Legal Positivism*, *supra* note 313, at 1611.
318. *Natural Law Theory: Past and Present*, *supra* note 316, at 95.
319. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993).
320. *Id.* at 798.

Court Constitutional adjudication.[321] Randy Barnett, Professor of Constitutional Studies at Georgetown University, counteracts Schauer's claims by asserting that Natural Law is relevant beyond the scope of the Court's decision-making.[322] Barnett asserts that Natural Law is a belief not confined to the public law boundaries of the Constitution or Constitutional adjudication.[323] Whenever a positive law affects a citizen's life and sense of liberty, that presents a potential threat to Natural Law being capable of being addressed by a relevant judicial institution below the Supreme Court.

Some modern-day proponents of the Contract Clause underscore its durability as a safeguard to the economic liberties enjoyed by corporations apart from governmental intrusion. Richard Epstein, Professor of Law at New York University, provides a robust defense of the Contract Clause's protection of "economic liberties against legislative, and perhaps judicial, interference."[324] Epstein brings to fore how the Constitution's design intentionally limits the control that states may exercise over the economic affairs of the private market.[325] With this limited control that states have over private interests, Epstein uses specific examples of how the Contract Clause's internal design was intended to tightly restrain what individual states could regulate in the market.[326] The limits on regulation extend to a host of covered activities established by contractual obligations, including employee wages, working hours, corporate decisions over hiring/firing of workers, and the exchange of private goods and services.[327] Thus, Epstein's support of the Contract Clause is from the more practical, market-based standpoint of protecting a citizen's economic liberty to contract, as opposed to the perspective that it protects an individual's natural right to contract.[328]

While both interpretations enshrine the inherent right to contract free from government coercion into private agreements, Epstein's economic view is from the standpoint of civil protection rather than higher law protection afforded by one's unalienable rights. However, Epstein does invoke the Contract Clause's application of natural law by attributing the Constitution itself to being very much "a natural law document."[329] Epstein's reasoning sees that the Constitution does not contain a "definition[s]" section, and by this, the Framers left the term "Contract" as

321. *Id.* at 811.
322. *See* Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights,* 20 HARV. J.L. & PUB. POL'Y 655 (1997).
323. *Id.* at 680–81.
324. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705 (1984).
325. *Id.*
326. *Id.* at 705–10.
327. *See id.* at 733–34.
328. *See id.*
329. *Id.* at 728 (Epstein mentions "natural law" in relation to the Contract Clause).

undefined.[330] Thus, the right to contract is a natural right unrestrained by any redefinition that a state charter or local ordinance may impose as a means to negate or limit the right itself. It is a broad agreement between parties existing beyond the confines of a legislative act that targets a specific aspect of contractual rights.

Grounded in the firm notion that the law cannot properly function nor uphold justice without possessing a firm foundation in morality lies the scholarship of my father, Professor Ellis Washington.[331] Professor Washington is one of the few modern legal scholars who has been a vocal proponent of Natural Law and natural rights. He has vigorously championed Natural Law jurisprudence and theory for over 30 years, emphasizing its core significance across judicial practice, governmental lawmaking, and academic discourse. Washington's most focused application of Natural Law jurisprudence can be found in his reply to Judge Richard Posner, who is diametrically opposed to the scholarship of Natural Law.[332]

Posner strictly opposes moralism in legal theory or "academic moralism," believing that it does not serve to be morally or intellectually cogent for changing the views and behaviors of others.[333] In a 1998 *Harvard Law Review* article, Posner paints a negative critique of academic moralism, while promoting a visceral disdain for the fusion of law and morality, believing that both areas must remain separate.[334] Posner's article was set to honor the 100-year anniversary of Justice Oliver Wendall Holmes' work, *The Path of Law*,[335] and disparage the profound influence that moral philosophy imposes on the shaping of law, famously established by great minds, such as Aristotle and Aquinas.

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330. *Id.* at 727.

331. *See* ELLIS WASHINGTON, THE INSEPARABILITY OF LAW AND MORALITY: THE CONSTITUTION, NATURAL LAW, AND THE RULE OF LAW (2002) [hereinafter INSEPARABILITY OF LAW AND MORALITY]. Washington provides a natural law analysis to several areas of law, including feminist theory, juvenile law, Critical Legal Studies, and obscenity law. *Id.* This book advances the notion that every facet of positive law must be tethered to a moral foundation, with the understanding that Natural law legitimizes human law. *Id.* In Washington's view, an ideal legal system is one that upholds and vigorously protects the moral principles that it was built upon. *Id.* Chapter 10 serves as the cornerstone of the book, providing a critique of Judge Richard Posner's stance on law and morality. *Id.* at 233–47. For a more recent treatment of the subject of Natural Law, see Ellis Washington, *1918–2018: 100 Years of Unnatural Law of Justice Oliver Wendell Holmes*, 9 FAULKNER L. REV. 171 (2017). *See also* ELLIS WASHINGTON, THE PROGRESSIVE REVOLUTION: HISTORY OF LIBERAL FASCISM THROUGH THE AGES, VOL. V: 2014–15 WRITINGS (2018).

332. INSEPARABILITY OF LAW AND MORALITY, *supra* note 331. Refer to Chapters 10–12 of Washington's book, which is an incorporation of his law review article. *See also* Ellis Washington, *Reply to Judge Richard A. Posner on the Inseparability of Law and Morality,* 3 RUTGERS J.L. & RELIGION 1 (2001).

333. *See* Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1997).

334. *See id.*

335. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

Posner is best described as a pragmatist, whose focus on the law is guided by situational, practical considerations rather than abstract moral considerations of right versus wrong and good versus evil. To this end, scholars like Posner and Holmes reject the abstract moral principles inherent within Natural Law and do not see the Constitution as a mechanism by which to preserve and protect the natural rights of its citizens. Ellis Washington's work exposes the philosophical traps of Posner's bleak outlook on the separation of law and morality, shedding light on how Posner's work, *The Problematics of Moral and Legal Theory*,[336] is established not as a means of disparaging moral theory in the law, but to expose a lack of theistic-centered jurists willing to defend the moral underpinnings of Natural Law.

Washington effectively refutes the sophism of separating law from morality and draws upon an important correlation between positive law pragmatists like Judge Posner, Justices Holmes, Cardozo, Pound, and Professor Laurence Tribe's embrace of an evolutionary outlook toward the Constitution.[337] Such men understood the meaning of law to evolve over time and develop with changing societal views (i.e., Living Constitutionalism).[338] Such men were also of the view that notions of morality should be limited only to personal religious devotions, wholly independent from applications of the law.[339]

The secularism of law is often associated with a Living Constitutionalist approach to legal interpretation, much like the inverse for how present-day strict Constitutionalists and Textualists on the Supreme Court, like Justices Clarence Thomas and Neil Gorsuch, are firm adherents to Natural Law jurisprudence.[340] The Living Constitutional positivists believe that a theistic approach to understanding the Constitution is antithetical and "irrelevant to determining what the actual law is."[341]

To this point, Washington underscores how positive law adherents are exclusively focused on the Mitcham of what the law is, as opposed to what the law should be, as Natural Law theorists would portray it.[342] Washington reminds that positive law (while not directly attributed) is largely derivative of Jeremy Bentham's philosophy of utilitarianism, which presupposes that the law is inherently good if it promotes the greatest level of happiness for

336. INSEPARABILITY OF LAW AND MORALITY, *supra* note 331.
337. *Id.* at 235–36, 239.
338. *Id.* at 239.
339. *Id.*
340. E. Christian Brugger, *Supreme Court Justice Neil Gorsuch: A Natural Law Originalist,* PUB. DISCOURSE: THE J. OF THE WITHERSPOON INST. (Sept. 3, 2018), https://www.thepublicdiscourse.com/2018/09/39335/.
341. INSEPARABILITY OF LAW AND MORALITY, *supra* note 331, at 239.
342. *See id.*

the greatest number of people.[343] According to Washington, "the Higher law doctrine states that all [living things] (including mankind) was created by God and for his glory, therefore all laws of man must be based on God's immutable laws as codified in his word—the Bible."[344] Washington, like Finnis, believes that law and morality are inseparable, unified toward achieving the common good.[345] Professor George Christie evokes Finnis in arguing that "while law and morality are not exactly the same, it is nevertheless impossible to separate law completely from morality."[346] Washington's infusion of law and morality goes a step beyond Finnis in that he adopts a theistic approach, invoking Judeo-Christian inspirations for the developed facets of morality as adopted by the modern West.[347]

Thus are the origins of positive law perceptions vs. Natural Law doctrine, with modern scholars like Bork, Dworkin, Schauer and Posner being on the side of pragmatic positivism, whereas those such as Finnis, George, Jaffa, Fleming, and Washington have been showcased as ardent proponents of Natural Law theory in judicial decision-making, appealing to an infusion of moral principles in the law. With the advent of *Lochner* in 1905, Natural Law jurisprudence was on the ascendency in its application of moral principles to resolve major legal disputes that fostered a clear divide between private corporatism and public regulatory intervention. The Contract Clause is one such tool of Constitutionally incorporated Natural Law intending to preserve this divide when judicially invoked by opinions like *Fletcher v. Peck*, and indirectly through abstract applications of Natural Law as seen in cases like *Chisolm v. Georgia* and *Calder v. Bull*.

VII. CONCLUSION—WHAT WE CAN LEARN FROM THE CONTRACT CLAUSE

The often-overlooked Contract Clause represents a vitally important infusion of natural rights in the U.S. Constitution.[348] It provides one of the few incorporations of Natural Law protections and legal safeguards to a

343. *Id*. at 240. To this extent, utilitarians ultimately believe that the consequence of a law justifies its moral or immoral purpose, deriving this from Niccolò Machiavelli's famous quote, which states "the end justifies the means." *Id*. (quoting Machiavelli's *The Prince*). By comparison, Natural Law is derived from an ancient judicial doctrine known as *Higher law*, which is regarded as providing the legal foundation for all of Western civilization. *Id*. at 243.

344. *Id*.

345. *See id*.

346. Christie, *supra* note 311.

347. *See* Ellis Washington, *Excluding the Exclusionary Rule: Natural Law vs. Judicial Personal Policy Preferences*, 10 DEAKIN L. REV. 772, 784 (2005) ("In American legal history, the rule of law is deeply rooted in the Judeo-Christian concepts of judgment, the principle of reaping what you sow, and what Lon Fuller referred to as, 'fidelity to law,' all of which are anathema to contemporary liberalism and the academic class." (quoting Lon Fuller, *The Problem of Interpretation: The Case of the Penumbra, Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958))).

348. *See* U.S. CONST. art. I, § 10.

citizen's rights beyond the confines of the Bill of Rights and subsequent Constitutional Amendments.[349] Contained in Article I, Section 10, Clause 1, the Contract Clause is part of a larger subset of limitations to the powers wielded by the states.[350] The Contract Clause was designed to limit the powers of the states from intrusions to contractual relations devised between private individuals and institutions.[351] Sections 9 and 10 serve as a counterbalance to the various powers that Congress is afforded through Section 8, which sets forth a host of restrictions on what the legislative branch cannot do.[352] This Article has underscored the profound Constitutional significance of the Contract Clause, demonstrating how it provides a nationally protected measure against state violations to a person's contractual rights and preserves their ability to satisfy the obligations of an agreement free from government intervention.

The central focus on the Contract Clause being regarded as a tool of Natural Law jurisprudence is to provide a more specialized manner for examining this important yet overlooked provision of the Constitution. This Article argues that situating the Contract Clause during the Lochner Era would have extended the relevance and justification for using Natural Law arguments in Supreme Court opinions well beyond the height of the New Deal. The Lochner Era may well have extended far beyond the infamous year of 1937 and survived the anti-privatization, pro-regulatory climate of the New Deal, particularly given that the New Deal saw the imposition of severe governmental restrictions to corporate labor practices and employer-employee contractual relations. In *Lochner,* the majority relied primarily on the Fourteenth Amendment's substantive due process protections against state overreach on the liberty to contract between businesses and their workers.[353] While the Fourteenth Amendment was used to incorporate the due process clause and freedom to contract against state restrictions, the Court did not consider applying the stronger, textual-based Contract Clause as the primary legal safeguard for contractual rights.[354]

Where various legal critics have adopted the view made in Justice Harlan's dissent,[355] reliance on the Contract Clause would have provided a more concrete and direct measure of protecting contractual liberties against intrusive regulations. The Contract Clause's primary application is as a

349. *Id.*
350. *Id.*
351. Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1420–21 (1984).
352. U.S. CONST. art. I, §§ 8–10.
353. *See* Lochner v. New York, 198 U.S. 45 (1905).
354. *See generally id.*
355. *See id.* at 65 (Harlan, J., dissenting). Harlan's dissent (which focused on the Fourteenth Amendment) could have been resolved if the majority appealed directly to the Contract Clause. This would have provided a more concrete and direct measure of protecting contractual liberties against intrusive regulations. The Contract Clause's primary application is as a federal safeguard to prevent states from "impairing the Obligation of Contracts." U.S.CONST. art. I, § 10, cl. 1.

federal safeguard to prevent states from "impairing the Obligation of Contracts" and serving as a Congressionally imposed barrier to state interventionism in private agreements.[356] Justice Peckham and the other Justices in the majority would have served to better preserve the legacy of *Lochner* if the ruling invoked the Contract Clause as the pillar of Constitutional reinforcement to their argument for protecting the liberty to contract. This important, constitutionally protected, natural right is not only embedded within the due process clauses of the Fifth and Fourteenth Amendments but is also among the Article I powers of Congress to prevent state impairment of private contracts.[357] The Clause specifically restricts state legislative mandates and ordinances from impeding the inviolable obligations of contracts between individuals.[358] Courts have recognized that states (at times) may regulate private contracts to further a pressing public interest, such as for eminent domain in the constructing of new highways.[359]

When drafting the Constitution, the Framers were said to have recognized economic mechanisms like trade and commerce as social goods essential for a flourishing society.[360] According to Epstein, such economic goods were "best fostered by institutions that restrained the use of force and stood behind private commercial arrangements."[361] This understanding of the clause imposed severe limitations to state jurisdictions over economic activity, much in the way that the Fuller Court viewed substantive due process as a bulwark that strictly limited a state's ability to regulate economic activity during the Lochner Era.[362] Epstein believed that the post-Lochner Supreme Court of the 1980s gave too much of a broad deference to the police power exception of the Contract Clause, which enables law enforcement to impair an agreement if there is a perceived danger to someone's health or safety.[363] Epstein warned that "[t]he limitation, however, should not be construed so broadly as to destroy the impact of the constitutional prohibition."[364] Left to its proper interpretation, the Contract

356. U.S. CONST. art. I, § 10, cl. 1.

357. *See id.*; Lynch v. United States, 292 U.S. 571 (1934) (Fifth Amendment); *Lochner*, 198 U.S. 45 (Fourteenth Amendment).

358. Chisholm v. Georgia, 2 U.S. 419, 467 (1793). The Supreme Court has interpreted the Clause to *limit* states from revising or removing aspects of existing contracts among private individuals or entities. *See* Ogden v. Saunders, 25 U.S. 213, 266–67 (1827). States are restricted from legislatively interfering with or "impairing" the obligations of existing private contracts. *See id.*

359. *See* W. River Bridge Co. v. Dix, 47 U.S. 507, 535–36 (1848) (determining that a state regulation to commandeer a private company's toll bridge for the construction of a public highway did not impair the company's rights under the Contract Clause).

360. Epstein, *supra* note 324, at 707.

361. *Id.*

362. *See id.*

363. *Id.* at 733–34.

364. *Id.* at 732.

Clause is viewed as an essential part of America's constitutional structure of limited government, and as extension of individual liberty.

The ability of individuals and institutions to contract freely while acting in a private capacity is one of the fundamental natural rights enshrined in the Constitution.[365] This right should be regarded not only as a privilege afforded to one's due process rights, but also as a sacred natural right that the federal government is obligated to safeguard against state intrusion via the Contract Clause of Article I, Section 10. As this Article demonstrates, many of the Framers were outspoken proponents of Natural Law and provided a host of impassioned endorsements of natural rights protections in the texts of the nation's founding documents. Among the many natural rights that the Founders incorporated against government intervention were the right to property, freedom of religion, freedom of speech, right to peaceably assemble, and the liberty to contract. These rights stem from nature and nature's God, having been recognized as sacred by the leading philosophers of Western civilization over the centuries, including Plato, Aristotle, Cicero, St. Thomas Aquinas, and John Locke.

To preserve the natural right to contract, the Framers devised the Contract Clause to counteract the tendency for states to grant "private relief" to privileged individuals under the Articles of Confederation.[366] State legislatures were free to pass measures that relieved certain affluent, noteworthy individuals of their obligation to satisfy debts.[367] The Contract Clause put a stop to this by preventing states from preferencing debtors over creditors, creating a federal prohibition on state legislative enactments, threatening to alter or abrogate provisions of existing contracts.[368] The Contract Clause was devised to ensure that a balanced creditor-debtor relationship was maintained, preventing the enforcement of laws that undermined creditors or tampered with the fairness of contractual relationships.[369]

In closing, the liberty to contract is among the most sacred, yet often overlooked natural rights preserved in the Constitution's text. Chief Justice John Marshall even invoked the will theory of contract to enshrine the natural right to contract from state intervention, the private obligtions of which could not be usurped by state law. The Contract Clause represents a rare provision of the Constitution that incorporates a textual defense of the liberty to contract from state law. As this Article has demonstrated, the Contract Clause can be understood not only as a federal deterrent against state intervention in private interests, but as a direct incorporation of Natural

365. U.S.CONST. art. I, § 10, cl. 1.
366. *Id.*
367. Epstein, *supra* note 324, at 732.
368. *Id.*
369. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934).

Law doctrine in the text of the Constitution. Had the conservative majority of the Lochner Era utilized the Contract Clause as a textual application of Natural Law, the Constitutional justification for defending the freedom to contract would have been much more substantial and enduring. The Contract Clause would have served to accompany and substantially reinforce the Court's use of the Substantive Due Process Clause of the Fourteenth Amendment to invalidate state legislation that abused contractual rights and obligations. When scholars look upon the significance of the Lochner Era as a prominent period of Natural Law jurisprudence, it is paramount to consider and reflect upon the importance of the Contract Clause as a testament for how the Framers incorporated direct textual protections to abstract principles of Natural Law.

The Contract Clause highlights the historical significance in how the Supreme Court was more reliant upon Natural Law justifications during the institution's earliest years (1790s), followed by a retreat of Natural Law-based rulings amid the controversies of the French Revolution in the early nineteenth century, and a subsequent resurgence of Natural Law doctrine in the early twentieth century during *Lochner*. The Contract Clause represents a unique tool in the Court's arsenal of Natural Law inspired decision-making, bridging the nexus between Natural Law theory and text-based Constitutional provisions that preserve enduring and fundamental natural rights like the freedom to contract. It is imperative for today's legal scholars to be aware of the Contract Clause's significance and its applications to Natural Law. This Article provides a robust understanding of the Contract Clause's use in Natural Law Jurisprudence and brings to fore how the *Fuller* Court may well have extended the Lochner Era if the majority faction had invoked the Clause to nullify state-level, New Deal regulations.