

1953

Natural Law and the American Constitution

Charles S. Desmond

Recommended Citation

Charles S. Desmond, *Natural Law and the American Constitution*, 22 Fordham L. Rev. 235 (1953).

Available at: <http://ir.lawnet.fordham.edu/flr/vol22/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

NATURAL LAW AND THE AMERICAN CONSTITUTION*

CHARLES S. DESMOND†

MY SUBJECT is "The Natural Law and the American Constitution", but any intelligent treatment of that subject takes us back decades, or even centuries, before the signing of the document, and draws us on from that time to the present. If we were here merely to demonstrate that the Constitution, as to its preamble and its Bill of Rights Amendments, is explainable and understandable only in the light of natural law, we would take little of your time, and that little would be spent in laboring the obvious and self-evident. So we will deal with origins and sources.

The Declaration of Independence which touched off the Revolution and announced to the world that the colonists had, and were exercising, a right to separate themselves from the mother country expresses a whole litany of natural law concepts. Indeed, it presents a short and pithy statement of natural law ideas then prevalent in America, as follows:

"When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the Opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty & the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

That was, of course, a recognition and assertion of the natural rights of men, a declaration that, in a state of nature and before the formation of political society, men were equal in their possession of certain inalienable rights which Jefferson, author of the great Declaration, described

* Address at Symposium held by Guild of Catholic Lawyers of New York City, December 5, 1953.

† Judge, New York Court of Appeals.

as rights to "life, liberty and the pursuit of happiness." In other words, that men, as men, were created equal as to the possession of those rights, whatever might be their individual intellectual, physical, moral or spiritual inequalities. Even the phrasing of "life, liberty and the pursuit of happiness" was directly adapted from the great English exponent of natural law, Locke, whose version was "life, liberty and property." Jefferson substituted "pursuit of happiness" for Locke's word "property", probably because Jefferson wanted to make it clear that the first purpose of government was the increase and promotion of the happiness of men, not merely the protection of property. The language of the Declaration was, in this connection, a paraphrase, also, of the Virginia Bill of Rights, drawn up a few weeks earlier, and which historic document stated that "all men are by nature free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring happiness and safety."

When we turn to the Federal Constitution itself, we find, even in its preamble, direct reference to natural rights—indeed, its opening words "We, the People" sends us a long way back into history. It was "the people" of the American states, not the states themselves, or any governments or other rulers or ruling groups who were, by natural rights, entering into the new compact. The people were taking their stand on a fundamental natural rights theory that all legitimate governmental power and authority comes ultimately from God but comes, directly to the ruler, through the people themselves, and that men, entering into a state of society and forming a government, voluntarily surrender some rights to insure the protection of others. Elsewhere in the Preamble, where the purposes of the Constitution are stated as being "to establish Justice" and "secure the Blessings of Liberty", we again recognize natural law ideas, since those references to justice and liberty plainly related to the natural law theories held by all principal American thinkers of the time, that there were outside and absolute standards of justice and liberty to which governments and positive law must conform, and to which the English government had not conformed.

Of course, the really striking applications of natural law in our Federal Constitution are in the First Eight Amendments, that is, in the Bill of Rights. We all know how they came to be advocated and adopted so soon after the ratification of the original Constitution itself. On the floor of the Constitutional Convention in Philadelphia, there had been some contention that a national constitution would be inadequate without a bill or declaration of individual rights, but the quick and oversimplified answer was then accepted, that the existing state constitutions already had bills of rights, and no more were necessary. Another answer

which seems to have found favor at the Philadelphia convention was that the new Federal government was to have only limited, specified powers and that it was accordingly unnecessary to negate its possession of any other powers over citizens—in other words, that there was no occasion to specify what Congress could not do.

However, when the contests over ratification of the Constitution began in the several states, its opponents seized upon the absence of a Bill of Rights and insisted that this omission would make it possible for the new national government, acting within its own sphere of sovereignty, to encroach directly on the individual liberties of the People. The proponents of the Constitution, relying in terms of the natural law, insisted that its guaranty of natural rights were so well-known and so completely accepted that enumeration of such rights in a federal constitution would be absurd. However, to make ratification certain by silencing the arguments of the antifederalists, the amendments were agreed upon, in 1791, and the debate over ratification ended.

Of course, we are all familiar with the guarantees of the Federal Bill of Rights. Some of them are unquestionably the product of natural law thinking, and are adaptations of provisions found in Magna Carta, in the English Bill of Rights statute of 1689, in the English Habeas Corpus Act, in the Massachusetts "Body of Liberties" of 1641, in the Virginia Bill of Rights of 1776, in the Declaration of Independence, and in the Massachusetts Declaration of Rights of 1780. Generally, they state the fundamental rights of men to freedom of speech and religion, and the securing of life and property by law.

The first prohibition in the First Amendment, against establishing a religion or prohibiting the free exercise thereof, came directly from the Virginia Bill of Rights, and did not form part of the Constitution of England which then had, and still has, an Established Church. Indeed, freedom of religion had not generally been considered a natural right in colonial America. Nine colonies had established religions at the time of the Revolution, and, generally speaking, the American attitude was toleration, only—the first colonies to grant religious tolerance were, it seems, Rhode Island and Maryland in 1649. But by 1776 public opinion in America had come around to ideas of real religious freedom, and thus the First Amendment in its references to religion and its prohibition of establishment of any religion.

Freedom of speech and press, linked together in the First Amendment, are generally so treated in American constitutions. Both were guaranteed in the English Bill of Rights Act and in the Massachusetts and Virginia statement of rights. Freedom of the press, the pre-Revolutionary American political thinkers insisted, was in some ways the most essential

political liberty, on which depended the existence and orderly conduct of free government. But it is interesting to note that there was in fact no freedom of the press, indeed no press worthy the name, in seventeenth century America. Such publications as appeared were either under the sponsorship of the Colonial governors, or were closely controlled and licensed by them. The first newspaper in America did not appear until 1690 in Boston, and was soon suppressed by the authorities. But, when the Revolution broke out, eighty-five years later, there were about 25 journals. At first, most of them limited their coverage to straight news reporting, but when the Stamp Act and other unpopular measures were imposed by England, the American newspapers quickly voiced their opposition and soon became important rallying voices of protest and patriotism. Political pamphleteering too, was part of this movement, the most famous pamphleteer, of course, being Thomas Paine. The historic Zenger trial in 1753 dramatized the claim of the colonies that the political freedoms, which they claimed as English citizens by natural and English constitutional law, required for their protection an independent press.

Amendments IV, V, VI, VII and VIII all contain guaranties of free access to the courts by citizens, and of fair and equal substantive law and procedures in the courts. Included are these provisions: search warrants are to be issued only on sworn showing of cause, citizens are not to be held for trial for serious crimes except by indictment of a grand jury, double jeopardy is forbidden, self-incrimination is not to be compelled, every citizen indicted for crime is entitled to a speedy and impartial trial by a jury, with the right of confrontation of adverse witnesses, the right to call witnesses, the right to counsel, and, in civil suits, a jury trial is to be available; excessive bail is not to be demanded, nor are cruel or inhuman punishments to be imposed.

As it has turned out, an enormously important and controversial content has been given to the Fifth Amendment's famous mandate that no person shall be "deprived of life, liberty or property, without due process of law", language about which millions of words have been and will be written and which pithily expresses the whole idea, of which Americans are so proud, that a citizen's right to his personal freedom and to his property are not at the hazard of arbitrary power, but are to be protected by substantive and procedural law of fair and equal application, and to be taken from him by court judgment, only, after fair trial, and not by executive or legislative fiat. Underlying the whole "due process" concept is the idea of government limited by natural law and natural right, supreme and fundamental, and assertable and protected in courts. There was a fundamental body of natural rights belonging

to men by natural law, and any law which arbitrarily took them away was not in conformity to natural law, and so was not "due". It is not too much to say that out of the "due process" guaranty springs the whole idea of judicial supremacy, for, since the Constitution guarantees natural rights, any deprivation by the executive or the legislative is unconstitutional, and the courts must see to it that those rights are not taken away.

This guaranty of "due process", it must be remembered, did not originate with the Constitutional Convention or with American political thinkers, but was centuries old in the seventeen seventies. The 39th Article of Magna Carta as granted by King John in 1215, pledged that "no freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land." In the Statute of Westminster, of 1354, the exact phrase "due process of law" appears for the first time and English and American writers from that day to this have affirmed that "due process" and "law of the land" mean the same thing, that is, they describe the immemorial, largely unwritten and not closely defined body of law and procedure which protects man's natural rights. Whether we speak of "natural rights", "fundamental rights", "inalienable rights", "substantive due process" or "law of the land" and however much we may differ as to the exact coverage of those general terms, we are asserting that, back of and beyond all man-made law, there is a law which is part of man's nature and part of his endowment by his Creator. As we shall hereafter see, the American Constitution's draftsmen meant just that. The underlying conception of government limited by law, has not, despite controversy and diversity of application, altered since the adoption of the Bill of Rights.

The last reference we shall make to the Amendments which went into effect in 1791, is to the last, or Tenth, of those Amendments, which states that "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Read that with the preamble's language: "We, the people", and you have an assertion that the people themselves are reserving to themselves, their own individual rights, except as surrendered specifically to the states or the new federal government.

It is impossible to exaggerate the importance of the Bill of Rights, not merely as positive law, but as an expression of the truth that individual men have rights which are inalienable in the absolute sense—that is, that, besides the rights men may and do entrust to government, there are others which a man cannot divest himself of. Thus arose the idea that a constitution should be divided into two principal parts: one,

a framework of government by which alienable rights are surrendered to ruling bodies for orderly conduct of society, and, second, a bill of rights, which sets forth and guarantees protection of the inalienable rights, and forbids any infringement thereof by government. No amount of specious argumentation can disprove that such is and was the true intent of our United States Constitution. The Declaration of Independence contained broad assertions as to the possession by men of all these rights; by the Constitution the citizens surrendered certain of the alienable ones, but insisted on the retention and protection of the inalienable rights. Thus, the doctrine of natural law and natural rights, one of the oldest conceptions in human thought, became part of a formal political program.

Now that we have examined the numerous and clearly identifiable natural law elements in our Constitution, let us take a brief look backward from the 1780s and 1790s, to see how these elements found their way into our fundamental charter. Previous speakers have discussed with you the natural law in antiquity and in the Middle Ages, and there was unquestionably a direct line of transmission from the thinkers and writers of those times, through the English legalists and natural law experts of the 17th and 18th century, to the American colonial leaders. In 1625, Grotius, the great Dutch law writer, published his famous treatise which became the base for modern international law. In it he expounded the idea that, prior to the creation of any government, men, then living in a state of nature, were subject, in their relation with one another, to natural law and to familiar principles of right and justice inherent in the nature of things and disclosed to men by reason and conscience. The theory continued, thus: that, for orderly living together under these natural laws, men had instituted governments by compacts between themselves and a sovereign, whose rule was limited by the compact so made, and by the natural laws themselves. Here were the beginnings of limited government, as described by the great poet Milton and other Englishmen of note, particularly John Locke, who lived from 1632 to 1704. Locke was a British politician, philosopher and political theorist whose ideas were of incalculable importance in formulating the political thought of pre-Revolutionary America. His main thesis was this: that every individual in a state of nature possessed a body of inalienable rights which he retained even in organized society, and which rights government had to protect and on which government could not infringe. From this doctrine of natural and immune rights, there followed, logically, the concept of limited legislative power, that is, the lack of power in any legislative body to enact validly any law violating natural rights, and the requirement that statutes be general and known, not arbitrary or covering special cases only. Included in Locke's body of

ideas was the one that held that "a long train of abuses" by a sovereign (a phrase that was later copied bodily into the Declaration of Independence) would justify rebellion, as it was used to justify the American Revolution, a century later.

Those teachings of Locke, as to the nature and origin of government, were not, on their face, at least, in complete accordance with Catholic or other religious thought since they omitted any reference to divine sanction for government and for civil law and authority. The Catholic teaching is, of course, that natural law is ordained by God but appreciated through man's natural reason. However, the political result was just the same, since there remained the central Christian idea of the individual dignity of man and of his possession of individual rights which could not be wrested from him by government.

In one form or other, those principles enunciated by Locke were adopted by the principal pre-Revolutionary American political thinkers including Winthrop, Hooker and Roger Williams and later by Otis, John Adams, Dickinson, James Wilson, Jefferson, Hamilton and Paine.

It is to be remembered that while, in earlier Colonial America, the leaders of thought and discussion were ministers of religion, the decades just before the Revolution saw a great rise in the number and influence of lawyers, many of them educated at the English Inns of Court. Almost concurrently with the rise of that new group of thinkers, came the troubles with the mother country over internal taxation, and other oppressions. The American lawyers carefully scrutinized the common law they had learned in England, to discover their rights therein, as English subjects. Fundamental to the position they took was their assertion that they were not mere colonists or subjects but English citizens, with all the immemorial rights and privileges that belonged to Englishmen by birthright. Being denied those rights by their King, they stood on their natural law rights as men, and, unable to obtain them through or from the ruling government, asserted their right to recapture them by rebellion. Intertwined with all this was the teaching of Sir Edward Coke, the great 17th century authority on the common law, who was widely read and quoted in the colonies, his being among the few lawbooks available in America. Coke's was pure natural law thinking. He taught that Magna Carta and the common law expressed fundamental or natural principles of right and justice which were supreme over both king and parliament. "When," said he in 1610 in *Bonham's case*, "an act of Parliament is against common right and reason . . . the common law will control it and adjudge such act to be void." That very language was quoted by James Otis arguing before the Supreme Court of Massachusetts in 1761, on behalf of Boston

Merchants against the legality of writs of assistance. Otis spoke of the rights of man in a state of nature, asserting that in such a state man was his own sovereign, guided by the law written in his heart and revealed to him by God through reason and conscience. Three years later, Otis published his pamphlet on "The Rights of the British Colonies," a publication which created a sensation throughout America by its clear and forceful exposition of the claims which were set out later in the Bill of Rights.

It is the simple fact that, when the Declaration of Independence was written and the Constitution ratified, practically every civilized person believed in natural law. True, they did not all agree on its origins; there were those who, like us, held it to be of immediate Divine origin, others ascribed it to some vague "order of nature," and others were probably content to ascribe natural law to the teachings of history and experience, rather than of revelation. But among the influential political thinkers there was at least general agreement with Blackstone, whose *Commentaries* were studied by every American lawyer and who had written that: "The law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." Jefferson himself, 50 years after his authorship of the Declaration of Independence, disclaims any originality of principle, argument or expression therein, but said that all that he had written was "the common sense of the subject," that the Declaration was "an expression of the American mind" and that all its authority rested "on the harmonizing sentiments of that day."

The political and legal theory of the American Revolution and the American Constitution was this:

That the political and social world is governed by certain and universal laws, which are unalterable and inescapable, which are the source of man's natural rights, and to which all human laws must conform and which accordingly limit and restrict government which must act in obedience to natural law only.

Now, having thus briefly examined the natural law language and ideas in the Constitution itself, and taken a quick backward look at their sources, let us change direction, and, moving toward our own times, see how these natural law concepts, written into our basic law, have fared in the courts. The fact is that from the Republic's founding days till now, the decisions of our highest courts have repeated over and over that there is a higher or natural law, antedating all positive law and

expressing fundamental rights which governments and constitutions do not grant and cannot take away, but must protect, and that the courts must strike down as unconstitutional legislative or administrative acts of government repugnant to natural justice. Of those numerous judicial writings, we will refer to a very few only. One of the earliest was the famous concurring opinion of Justice Iredell in 1798 in *Calder v. Bull*, 3 Dallas 389, 398, 399. Jumping to 1946, we find Justice Douglas in 1946 writing in the *Girouard* case, 328 U.S. 61, 68 that: "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State."

The controversy as to the exact meaning of the Fourteenth Amendment and its separate references to "the privileges and immunities of the citizen of the United States" and to "due process of law" is not within the limits of our present discussion. However, these disputes produced a number of Supreme Court decisions which in one form or other repeated the classic statement of Justice Van Devanter in 1926 in *Hebert v. Louisiana*, 272 U.S. 312, 316, that the due process provisions in the 5th and 14th Amendments require that state action "shall be consistent with the fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions and not infrequently are designated as the law of the land." Similar statements that there are fundamental principles of liberty and justice, in other words a natural law, at the base of all our American governmental institutions, abound in the Supreme Court's opinions from 1790 to 1950 (see *Hurtado v. California*, 110 U.S. 516 (1884); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Buchalter v. New York*, 319 U.S. 427 (1943), and the famous *Adamson* case, 332 U.S. 46, in 1947). Of course, to complete our statement fairly, we must admit that a great many of what we may call the unofficial law writers take a dim view of our natural law theories, their attitudes ranging from doubt to scorn and ridicule. However, it is accurate to say that the United States Supreme Court, in more than a century and a half, has not retreated from Justice Iredell's position: that fundamental natural laws underlie and are written into our constitution and that statutes, for validity, must conform to those natural laws. Justice Black, in two recent dissents (in *Betz v. Brady*, 316 U.S. 455 (1942), and *Adamson v. California*, 332 U.S. 46 (1947)), has criticized what he calls the "natural-law-due-process formula" used by the court, but even those dissents do not deny natural law a place in our constitutional legal system, but

they argue that the Fourteenth Amendment has specifically adopted the specific requirements of the Fifth Amendment, and so does not call for any new recourse to natural law when state legislation or other act is assailed as repugnant to due process or is abridging the citizen's privileges.

Most of the state constitutions contain language referable to natural law but we cannot examine all of them here today. Most interesting are the constitution of Kentucky, as adopted in 1850, and that of Wyoming, which went into effect in 1890. The Kentucky Charter, besides giving, in its Preamble, thanks to Almighty God for the civil, political and religious liberty enjoyed by Kentuckians, describes at length "the inherent and inalienable rights" of all men, asserts that "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority" and, further, that "all power is inherent in the people," that governments are founded on the authority of the people for their peace, safety and happiness and the protection of their property, and that for the advancement of these ends they have at all times an indefeasible right to reform or abolish their government. Similar striking language is in the Wyoming constitution, which refers specifically to "natural rights." The New York Constitution, has in its Preamble this language: "We, the People of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution."

As to state court decisions proclaiming the natural law idea, we have time to look at only a few, and those in our own state. In the famous *Wynehamer* case (13 N.Y. 378) decided in 1856, our Court of Appeals approved earlier authorities saying that "laws which, although not specifically prohibited by written constitutions, are repugnant to reason, and subvert clearly vested rights, are invalid, and must be so declared by the judiciary." Almost a century later, and dealing now with family rights rather than property protection, in *Packer v. The University*, 298 N.Y. 184, 81 N.E.2d 80 (1948), the same court took occasion to call attention to the rights of parents to send their children to private schools and the right of private schools to exist, subject to the limited right of the Legislature to regulate such schools in the public interest. As recently as July of this present year, in *Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953), the New York Court of Appeals reaffirmed the holding of the *Portnoy* case in 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952), that "the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court." These two recent decisions, of course, follow *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. the Society of Sisters*

in 268 U.S. 510 (1925), the famous "Oregon School Case." *Matter of May*, 305 N.Y. 486, 114 N.E.2d 4 (1953), decided the same day, as the *Kropp* decision contains a reference to the "prohibition of natural law" as to incestuous marriages. Natural law concepts are at the base also of such old New York tax cases as *Weisner v. Douglass*, 64 N.Y. 91 (1876), and *Stuart v. Palmer*, 74 N.Y. 183 (1878).

What is the practical importance of all this? It is, I think, that there remains in undiminished vitality the cardinal principle that all American governmental power is limited by the absolute rights of the individual derived from the immutable laws of nature and nature's God, and that the State, organized by men possessing these absolute rights, exists for those individual men to protect their natural rights and promote their individual welfare. Constitutions, of course, exist, in form at least, in countries throughout the world, including countries which are frankly totalitarian. But our constitution is more than a mere document to be exhibited to the people to quiet them, or to the world for purposes of propaganda. Ours has an inner meaning and an inherent strength, the natural law.