

LOCATING LIBERTIES: *BARRON V. BALTIMORE* AND THE ROLE OF RIGHTS IN THE  
EARLY AMERICAN REPUBLIC

By

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To Sally

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This dissertation revisits the 1833 U.S. Supreme Court case *Barron v. Baltimore* wherein two Baltimore wharf owners alleged that the city of Baltimore violated the Fifth Amendment by taking their property without compensation. Chief Justice John Marshall used the case as an opportunity to declare that the Fifth Amendment and indeed the entire Bill of Rights did not apply to the states by employing a strict textual interpretation of the Constitution. However, by contextualizing the decision, it becomes apparent that Marshall's positivist view of rights was not a universally accepted position at the time. Rather, the case tracked a larger ideological clash over where rights obtained their force and authority. There were at least three general views revealed during the course of the litigation: rights as protected by the common law; rights as fundamental liberties which were simply recognized by written constitutions; and written constitutions as the source of rights. By denying remedy to Barron based upon his view that the Fifth Amendment did not apply to the states, Marshall simply endorsed one ideological strain of thought envisioning a positivist concept of rights. This study argues that this rights debate occurred in the early republic era as a result of the transformations in the concept of sovereignty necessitated in actually implementing a federal system of government expressly predicated on

the idea of popular sovereignty. As notions of sovereignty evolved, the concept of limitations on the sovereign - rights - likewise required redefinition.

## CHAPTER 1 INTRODUCTION

In 1976, as a result of a long history of violence, the District of Columbia City Council passed an ordinance regulating the ownership of firearms.<sup>1</sup> The city down primarily on handguns, which they believed were a particular source of the problem. When discussing the need for a strict handgun ordinance, the city cited evidence showing the danger presented to municipalities by handguns and their effect on the skyrocketing crime rates in D.C. The city noted that nationally, handguns were involved in the commission of “54% of all murders, 60% of robberies, 25% of assaults, and 87% of all murders of law enforcement officials.”<sup>2</sup> However, during that same time in D.C., handguns were used in “88% of armed robberies and 91% of armed assaults.”<sup>3</sup> Frighteningly, the city noted that in 1974, 155 of the 285 homicides were committed with a handgun and every single rape which involved a firearm was aided by the use of a handgun.<sup>4</sup> As further evidence for the need for such an ordinance, the city cited statistics showing that a crime committed while using a handgun was seven times as likely to have fatal consequences as compared to a crime committed with any other type of weapon.<sup>5</sup>

The ordinance prohibited the possession of unregistered firearms within the District of Columbia, but also specifically disallowed the registration of handguns. The ordinance also required the owners of the remaining lawfully registered firearms to keep those weapons

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<sup>1</sup> *District of Columbia et al. v. Heller*, 554 U.S. 570, 128 S.Ct 2783 (2008), Petitioners’ Brief, 4, See [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_Petitioner.pdf), and Washington Post.com, [http://www.washingtonpost.com/wp-dyn/content/article/2008/03/16/AR2008031602129\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/03/16/AR2008031602129_pf.html), accessed October 12, 2008.

<sup>2</sup> *Heller*, Petitioners’ Brief, 4.

<sup>3</sup> *Heller*, Petitioners’ Brief, 4.

<sup>4</sup> *Heller*, Petitioners’ Brief, 4-5.

<sup>5</sup> *Heller*, Petitioners’ Brief, 4.

unloaded and unassembled or to use a trigger lock.<sup>6</sup> This ordinance remained in effect until it was overturned by the U.S. Supreme Court in 2008. In *District of Columbia et al. v. Heller* (2008) a D.C. resident successfully challenged the ordinance on the grounds that it violated the Second Amendment to the Constitution which guarantees the right to bear arms. The Court, in a 5-4 decision by Justice Antonin Scalia, viewed the right to bear arms as one belonging to an individual, as opposed to a collective right as argued by the District of Columbia, and held the ordinance unconstitutional as it violated the Second Amendment.<sup>7</sup>

While *Heller* was considered a victory for pro-gun advocates, the end of municipal gun restrictions was still uncertain. *Heller* could not act as the definitive statement case on the Second Amendment as the decision struck down restrictions enacted by the District of Columbia, a political district governed by Federal law. Had this been an ordinance enacted by a municipality governed by state law, the Supreme Court's analysis would have been different as the Second Amendment had never been held applicable to the states. Emboldened by the *Heller* decision, challenges were filed against similar municipal gun restriction ordinances in Chicago, as well against the nearby towns of Evanston and Oak Park.<sup>8</sup> Other local Illinois communities, such as Wilmette and Morton Grove, were spared the expense of defending a Federal lawsuit by

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<sup>6</sup> *Heller*, 128 S.Ct. at 2783.

<sup>7</sup> *Heller*, 128 S.Ct. at 2821-2822. The significance of the individual/collective right distinction is found in the emphasis the parties placed on the different clauses of the Second Amendment. Those in favor of the restrictions argued that the rights to bear arms was a collective right as evidenced by the Amendment's opening phrase, "A well regulated militia being necessary to the security of a free State,..." while those opposed to the restrictions argued that the Amendment was an individual right as evidenced by the remainder of the sentence "...the right of the people to keep and bear arms shall not be infringed."

<sup>8</sup> *American Bar Association Journal* (October 2008), John Gibeaut, [http://www.abajournal.com/magazine/article/bringing\\_lawyers\\_guns\\_and\\_money/](http://www.abajournal.com/magazine/article/bringing_lawyers_guns_and_money/), accessed October 5, 2008; *Chicago Tribune*, July 24, 2008, Susan Kuczka and Hal Dardick, [www.chicagotribune.com/news/local/chi-wilmette-gun-ban-web-jul25,0,1046608.story](http://www.chicagotribune.com/news/local/chi-wilmette-gun-ban-web-jul25,0,1046608.story), accessed October 6, 2008.

voluntarily modifying their gun restrictions.<sup>9</sup> While this distinction was appreciated by some, many journalists covering the Chicago challenge failed to recognize that the Bill of Rights did not automatically apply to the states unless the Supreme Court had specifically incorporated the subject amendment through the Fourteenth Amendment to the Constitution.<sup>10</sup> However, the Second Amendment had never been incorporated as binding the states. Many journalists erroneously chalked up Chicago's strategy of fighting the challenge in light of *Heller* to the stubbornness of Mayor Daley by failing to explain his basis for not following the ruling.<sup>11</sup>

By 2010, the challenges to the Chicago gun laws finally reached the U.S. Supreme Court. In *McDonald v. City of Chicago*, Justice Samuel Alito held that the right to bear arms set forth in the Second Amendment was finally applicable against the states.<sup>12</sup> In making the decision that the right to bear arms was an essential "liberty" that must be recognized by the states, Alito had to apply the rights contained in the Second Amendment to the states. Why did the *Heller* decision not suffice? Why was it necessary for a 2010 Supreme Court decision in order for the Second Amendment to bind Illinois? The answer can be found in the 1833 Supreme Court case, *Barron v. Baltimore*. In *Barron*, Chief Justice John Marshall held that the Bill of Rights only

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<sup>9</sup> *Chicago Tribune*, July 24, 2008, Susan Kuczka and Hal Dardick, [www.chicagotribune.com/news/local/chil-wilmette-gun-ban-web-jul25,0,1046608.story](http://www.chicagotribune.com/news/local/chil-wilmette-gun-ban-web-jul25,0,1046608.story), accessed October 6, 2008; *Chicago Tribune*, July 29, 2008, Robert Channick, [http://articles.chicagotribune.com/2008-07-29/news/0807280686\\_1\\_repeal-illinois-supreme-court-morton-grove](http://articles.chicagotribune.com/2008-07-29/news/0807280686_1_repeal-illinois-supreme-court-morton-grove), accessed October 6, 2008.

<sup>10</sup> As would be expected, the ABA's journal recognized the incorporation principle, See *American Bar Association Journal*, (October 2008); but some journalists did as well, See "Chicago lays out handgun legal strategy," *ChiTown Daily News*, July 25, 2008, Jennifer Slosar, [www.chitowndailynews.org/Chicago\\_news/Chicago\\_lays\\_out\\_handgun\\_legal\\_strategy,15284](http://www.chitowndailynews.org/Chicago_news/Chicago_lays_out_handgun_legal_strategy,15284), accessed October 6, 2008.

<sup>11</sup> "Daley promises to fight to keep handgun ban," *Chicago Tribune*, July 25, 2008, Deanese Williams-Harris and Melissa Patterson, [http://articles.chicagotribune.com/2008-07-26/news/0807250727\\_1\\_illegal-guns-handgun-ban-buyback-program](http://articles.chicagotribune.com/2008-07-26/news/0807250727_1_illegal-guns-handgun-ban-buyback-program), accessed October 6, 2008.

<sup>12</sup> *McDonald v. City of Chicago, Ill.*, 130 S.Ct 3020 (2010). Alito held the Second Amendment applicable as incorporated through the due process clause (clause 4) of the Fourteenth Amendment, rejecting the primary argument by the petitioners that the right to bear arms was one of the fundamental privileges and immunities of citizenship (clause 3). *McDonald v. City of Chicago, Ill.*, 130 S.Ct at 3030-3031.

applied to the Federal government. Thus, before *McDonald*, the states did not have to recognize the Second Amendment, unless a similar provision existed in a particular state's own constitution.

Shortly after their purchase of a profitable Baltimore wharf in 1815, John Craig and John Barron discovered that their investment was gradually becoming worthless as the harbor floor surrounding the wharf filled with sand. Because of drainage issues in Baltimore, the city diverted the water pouring through the Fell's Point district and redirected it, including the accompanying sediment, to empty at a single location in the eastern harbor, just north of Craig and Barron's wharf. When the debris ultimately rendered the wharf unsuitable for unloading large ships, Craig and Barron sued the Mayor and City Council seeking reimbursement for damage to their property. While the trial court agreed with Craig and Barron, by 1830 the city won a reversal in the appellate court. Craig and Barron appealed to the U.S. Supreme Court and argued that the damage constituted a taking of their property without just compensation, a violation of the Fifth Amendment. At the Supreme Court, Chief Justice John Marshall ruled in favor of the city and disallowed any remedy to Craig and Barron. The Court could have reached the same result by simply ruling that the damages to the wharf did not constitute a physical taking, as prior state courts had done. However, Marshall went further and held that the Fifth Amendment and indeed the entire Bill of Rights did not apply. The Bill of Rights, he declared, were only intended to bind the Federal government and not the states, a decision seemingly contrary to Marshall's own pro-Federal jurisprudence.

As a result of this decision the Bill of Rights did not apply to the majority of citizens for much of American history. We currently accept that a court, and ultimately the Supreme Court, has the final word on issues brought before the tribunal. The vindication of our rights depends

not only upon a favorable ruling by the court, but also by the proper citation of the existence of the right and textual evidence that it applies to the case. For example, a defendant in a criminal prosecution has the right to a jury trial; this is a right guaranteed by the Sixth Amendment to the Constitution. However, in 1960's Louisiana for instance, this right only applied to the extent a similar right was also found in the Louisiana constitution. For crimes that did not result in capital punishment or hard labor imprisonment, the right did not apply because the state constitution allowed for such an exemption.<sup>13</sup> How could this be? The right to trial by jury was a centerpiece of the English common law and was even included in the Magna Charta (1215) without the significant qualifications placed upon it by the Louisiana constitution. By the 1960's, however, rights in the United States were considered as granted by the various state and the Federal Constitutions. As a result of *Barron*, which held that the Bill of Rights only applied to the Federal government, the Sixth Amendment did not apply to Louisiana. By 1968, the U.S. Supreme Court finally ruled in *Duncan v. Louisiana* that the right to a jury trial in the Sixth Amendment was a fundamental right that would now universally apply as it was incorporated against the states through the due process clause of the Fourteenth Amendment.<sup>14</sup>

There is, however, another way to look at *Duncan*. This case is also emblematic of a more contemporary understanding of rights as grounded in and provided by written constitutions. Instead of holding that the Louisiana constitution violated fundamental liberties, such as the right to a jury trial, the Court had to locate the right in the Constitution and then seek to use the language of the Fourteenth Amendment to find that it now applied to the states. However, in the English common law or natural law traditions, rights considered as fundamental were included in

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<sup>13</sup> Charles H. Sheldon, "Duncan v. Louisiana" in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit Hall (New York: Oxford University Press, 1992), 239. Article I, Section 9, Louisiana Constitution (1921).

<sup>14</sup> Sheldon, *The Oxford Companion to the Supreme Court*, 239-240; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

written documents over the ages to declare - not grant - these pre-existing rights. If rights are considered granted by written constitutions, the courts can enforce or withhold the right as a matter of legal construction, similar to what occurred in *Duncan v. Louisiana* or in *Barron*. If rights are conceptualized as extra-constitutional and only declared by constitutions, the courts lose their primacy and other traditional remedies for rights violation exist, such as formal political action like voting, or less formal popular remedies like exercising the right of petition and assembly up to the rights of violent resistance and revolution.

While a narrow doctrinal interpretation of the Constitution can plausibly support Marshall's stated reasoning, it cannot adequately explain the Court's motives, for example, in even addressing the Bill of Rights. This dissertation seeks to explore the *Barron* anomaly by contextualizing the case within the early decades of the Republic. This study has two objectives. First, it will explore the shift in the conceptual location of rights. What we see in the colonial, founding, and early republic eras is a spectrum of thought regarding where rights obtained their authority. The concept that constitutions provided the basis for rights, which Marshall espoused in *Barron*, was only one of many views. There existed a spectrum of thought on this question, from rights as an inherent possession of mankind pursuant to natural law theories, to rights as the birthright of Englishmen and protected by the common law, to positivist interpretations of rights emanating from written constitutions, and finally to an inchoate blend of multiple theories.

If the first question studies this shift, the second question explores why the debate occurred. To answer that, his study considers sovereignty and rights as connected concepts. As sovereignty evolved, rights required as similar transformation. In the new United States, the "people" were celebrated as the sovereign. However, in shifting sovereignty from a king or Parliament to a system of popular sovereignty, two practical problems arose which in turn

affected the rights debate. The first concerned the creation of the federal system of dual sovereignty that is emblematic of the American federal system. In removing the royal sovereign and finding the confederation of states insufficient, the new constitutional structure provided for dual governments over many of the same persons and geographic territories. While the Constitution attempted to enunciate the jurisdictional boundaries of each, practical necessity left most of the decisions to later generations. Which government was sovereign over which areas? How much latitude did a state have to exert its police power before its actions could be considered as infringing on the sovereignty of the Federal government? What role did rights play in limiting state action? The creation of a Federal government that would have concurrent jurisdiction with the states raised questions of sovereignty that, in turn, impacted the notion of rights.

While the first transformation of sovereignty concerned the balance of power between state actors, the second transformation of sovereignty arose in the actual implementation of popular sovereignty itself. Who exactly was considered the sovereign, the state or the people? This struggle affected the question of where rights obtained their authority as rights are, at their base, a limit on the powers of the sovereign. If the people are the sovereign, how can they limit themselves? If rights are perceived as emanating from written documents, the courts have the power to grant or withhold rights, a perception which had tremendous implications. If a right is considered fundamental and inured to the individual as a possession that could not be modified by the sovereign, what would be the remedy if the right was violated? Before the shift in perception, the question of infringement of rights was largely a political question. If the government took private property without compensation or placed a person in prison to languish without charges, the objection would be raised against the government. In England, the

aggrieved party could file suit for compensation in one of the King's Royal Courts or could seek a writ of habeas corpus, as both had been enunciated as rights of Englishmen since the Magna Charta. If the party's rights of free speech and press had been censored by a community mob destroying his printing press for his pro-abolitionist sentiments, where did the remedy lie? In the 1830's, abolitionist newspaper editors began to vigorously enunciate the importance of individual rights, such as the freedom of speech and the press, to counter the actions of their local communities who often silenced them under the basis of common law rights to abate nuisances.<sup>15</sup> What about the rights of the community who destroyed the press due to their concerns for the general health, safety, and welfare of the community in wishing to preclude riots and agitation from radicals in their midst? This issue leads to a fundamental point. Are courts and jurists grounding rights in written constitutions in order to contain non-state actors from exercising sovereign power? This study posits that changes in sovereignty necessitated a corresponding change in the conceptual location of where rights obtained their authority. The study will explore how notions of the location of rights are intertwined with these other questions that are simultaneously occurring in the early republic.

Many law students know the holding of *Barron v. Baltimore* as it is often quickly passed over in Constitutional Law courses for the concise rule that the Federal Bill of Rights did not originally apply to the states. This case neatly sets up the later discussion of the Fourteenth Amendment, the post-Civil War decisions that limited the breadth of that Amendment and, finally, concludes with a discussion of the Court's twentieth century process of selective incorporation of the Bill of Rights protections through the Fourteenth Amendment which gives Americans today the full protection of these rights. Told as a story of eventual judicial triumph,

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<sup>15</sup> For examples of this type of mob action, see Richard B. Kielbowicz, "The Law and Mob Law in Attacks on Anti-Slavery Newspapers, 1833-1860," *Law and History Review*, Vol. 24, Issue 3 (2006): 559, 568, 574.

with the judiciary and the Supreme Court as protectors and guarantors of our liberties, it underscores a modern historical theme: while the courts may not have always acted to protect our rights, itself a more recent and contested conception of the individual American's relationship with the government, the courts will eventually get it right. Thus, the courts are to be celebrated as the true protectors of our civil rights and liberties. That for much of American history the Bill of Rights had virtually no practical application to its citizens, except to the extent that similar protections existed in their various state constitutions, is quite surprising for most. By telling the story of our civil liberties as they exist today, it is very convenient to start with a brief reference to *Barron*, as its negative ruling regarding the Bill of Rights provides a neat bookend to this triumphant narrative. However, this is a teleological view that fails to appreciate the contingency of events that occurred during the era that *Barron* was decided.

### **Historiography**

Much of the recent scholarship addressing *Barron* follows narrow doctrinal interpretations of Marshall's decision that can be grouped into several categories. First, some scholars view *Barron* as a product of Marshall's particular views regarding the proper balance of the federal system. Second, others explain *Barron* by exploring Marshall's particular ideas regarding the role of the judiciary in determining the constitutionality of legislative acts. Finally, many look largely outside of Marshall's legal philosophies and interpret *Barron* by placing it within an historical context.

The first category of *Barron* scholarship sees Marshall's particular view of federalism as the key to unlock *Barron*. Brendan Doherty argues that Marshall should more aptly be called a federalist instead of a nationalist, as *Barron* evidences that he sought to enforce the rights of both

the federal government as well as those of the states within the balance of the federal system.<sup>16</sup> Doherty argues that *Barron* was decided in order to keep the question of individual rights as a matter of state concern and away from the Federal government.<sup>17</sup> While it was important to assert the primacy of the Federal government in many ways, the question of the role of individual rights was properly left to the states.

Doherty's interpretation, however, leaves too many unanswered questions. For example, he argues that *Barron* brought the issues of property rights and state and Federal sovereignty before the Supreme Court.<sup>18</sup> According to Doherty, Marshall not only firmly believed in the balance of the Federal system, but was a staunch supporter of property rights, equating liberty with the right to property.<sup>19</sup> Doherty then proceeds to explain how the decision made sense with Marshall's concept of federalism, but fails to reconcile how such a staunch supporter of property rights could then discount Barron and Craig's claims for damage done to their property. Did federalism trump property rights? Further, Doherty mistakenly emphasizes Marshall's interpretation of rights as the only correct view, writing "[a]lthough its blanket declaration of the inapplicability of the Bill of Rights to the states no longer holds, *Barron v. Baltimore* has never been overruled, and is still a ringing declaration that the intent of the framers was that the Constitution was principally designed to limit the actions of the federal government, and not the states."<sup>20</sup> This interpretation is not uncommon but is also part of the problem with the *Barron* scholarship. In our notion of judicial deference, the court's rulings appear to legitimate one

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<sup>16</sup> Brendan J. Doherty, "Interpreting the Bill of Rights and the Nature of Federalism: *Barron v. City of Baltimore*," *Journal of Supreme Court History*, Vol. 32, Issue 3 (November 2007): 211, 223.

<sup>17</sup> Doherty, "Interpreting the Bill of Rights and the Nature of Federalism," 223.

<sup>18</sup> Doherty, "Interpreting the Bill of Rights and the Nature of Federalism," 220.

<sup>19</sup> Doherty, "Interpreting the Bill of Rights and the Nature of Federalism," 219.

<sup>20</sup> Doherty, "Interpreting the Bill of Rights and the Nature of Federalism," 223.

position. As we know from *Barron*, Marshall endorsed the view that rights emanated from written constitutions which was only one of several interpretations present during this era. Interpreting *Barron* as a “ringing declaration of the intent of the framers” simply misses the point.

Jason Mazzone also explains *Barron* as an example of Marshall’s belief in federalism but is much more specific in his analysis than Doherty.<sup>21</sup> Mazzone argues that *Barron* was not decided in order to enact a blanket prohibition against hold the Bill of Rights applicable to the states. Rather, “*Barron* simply affirmed the unremarkable proposition that the *federal courts* would not apply the Bill of Rights to constrain state government. Both before and after *Barron*, even with the decision in place as binding precedent, state courts were free to apply the Bill of Rights to the states.”<sup>22</sup> To understand *Barron*, Mazzone argues that we must understand the nature of the relationship between state courts and the Supreme Court that was partially codified in the Judiciary Act of 1789. Under this Act, the Supreme Court had jurisdiction to review state court decisions wherein the state court had denied relief alleging a violation of the Federal Constitution; however, the Supreme Court could not review the state court decision if that court had granted relief based upon a violation of the Federal Constitution. As a result, Mazzone argues, state courts believed that they were not bound by Supreme Court Constitutional law precedent on matters that would not be subject to Supreme Court review, such as cases where the state court granted relief under the Federal Constitution.<sup>23</sup> Essentially, a state court could freely apply Federal Constitutional protections without the possibility of Supreme Court review, but could face scrutiny it denied relief claimed pursuant to the Constitution.

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<sup>21</sup> Jason Mazzone, “The Bill of Rights in the Early State Courts,” 92 *Minnesota Law Review* 1 (November 2007).

<sup>22</sup> Mazzone, “The Bill of Rights in the Early State Courts,” 3.

<sup>23</sup> Mazzone, “The Bill of Rights in the Early State Courts,” 19.

Mazzone's framework sets forth a system of Constitutional interpretation based upon the recognition of both state and federal jurisdiction, arguing that each level had its own sphere of autonomy based on the particular jurisdiction, which counters the common perception of absolute Supreme Court supremacy. As a result of this more equal system of Constitutional interpretation, Mazzone argues that it was well accepted prior to the Civil War and the Fourteenth Amendment that state courts could, and did, apply the Bill of Rights against the states.<sup>24</sup> The end of this tradition resulted in a consolidation of constitutional rights interpretation exclusively with the Supreme Court whereas, previously, state courts and federal courts sitting in diversity cases had latitude to expand the jurisprudence in certain circumstances.<sup>25</sup> For Mazzone, this type of consolidation is wholly inconsistent with the concept of federalism which should allow for a plurality of protections.<sup>26</sup> Mazzone's interpretation is compelling, especially with respect to his nuanced appreciation of how the federal system should free all levels of courts to expand individual rights instead of compartmentalizing rights as a matter of jurisdiction. At its base, however, Mazzone also views rights as limitations on government that exist by virtue of their inclusion in a written constitution. Although Mazzone presents a very good argument that jurisprudence that located finality in the Supreme Court has operated to restrict rights, he is still operating within the same framework enunciated by Marshall that rights come from constitutions. Mazzone is not taking an incorrect position; he is just enunciating one view of the origin of rights without incorporating alternate views.

While Doherty and Mazzone analyze Marshall's belief in federalism to explain *Barron*, other scholars view the case through Marshall's particular concept of judicial review. Fred

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<sup>24</sup> Mazzone, "The Bill of Rights in the Early State Courts," 3, 73.

<sup>25</sup> Mazzone, "The Bill of Rights in the Early State Courts," 5-6, 75-76.

<sup>26</sup> Mazzone, "The Bill of Rights in the Early State Courts," 6.

Friendly and Martha Elliott contextualize *Barron* by recounting the debate over the necessity of a written bill of rights during the framing of the Constitution.<sup>27</sup> Like Marshall, Friendly and Elliott explain the basis for the *Barron* decision by seeking to determine James Madison's original intent when he drafted the Bill of Rights Amendments.<sup>28</sup> Looking at *Barron* through a purely textual lens, Friendly and Elliot ultimately interpret the decision as a kind of bookend to Marshall's view of the importance of judicial review in elevating the Supreme Court to a position of equal power within the new government. Thus, *Barron* operated much in the same jurisprudential vein as Marshall's first major constitutional opinion thirty years earlier, *Marbury v. Madison* (1803).<sup>29</sup>

However, the relationship of *Barron* and *Marbury* is more complicated than Friendly and Elliott conclude. Certainly the cases are similar as Marshall's decisions go further than simply deciding the narrow issue before the court. Marshall's holding in *Barron* that the Bill of Rights did not apply to the states is similar to Marshall's *Marbury* language wherein he used the decision to expound not only on the merits of the case, but also to pronounce the Court's power to void unconstitutional laws. In both cases Marshall could have disposed of the issue before the court without the larger holding. Outside of this similarity, there is a great deal of difference in these two cases. In *Marbury*, Marshall grandly penned the statement that "it is emphatically the province and duty of the judicial department to say what the law is" while, by the time of *Barron*, such soaring rhetoric is long gone.<sup>30</sup> In *Marbury*, Marshall held the principles contained

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<sup>27</sup> Fred Friendly and Martha Elliott, *The Constitution: That Delicate Balance* (New York: Random House, 1984), 12-15.

<sup>28</sup> Friendly and Elliott, *The Constitution: That Delicate Balance*, 13-14.

<sup>29</sup> Friendly and Elliott, *The Constitution: That Delicate Balance*, 7-8.

<sup>30</sup> *Marbury v. Madison*, 1 Cranch 137, 176-177 (1803).

in the Constitution so fundamental to the people that it was imperative to give the Court the power to hold acts impairing these rights unconstitutional. However, by the time of *Barron*, Marshall interpreted the Constitution more as ordinary law, and the rights contained in the Constitution applied only to the extent that the courts believe they fit into the larger federal system, thus jettisoning the prior concept of the rights in the Constitution as so fundamental they required the rise of judicial review. Thus, *Barron* represents both a significant evolution in Marshall's logic, while at the same time, is consistent with his tradition of using his decisions to affect policy outside of the four corners of a particular case.

Scott Douglas Gerber also views *Barron* through a judicial review analysis.<sup>31</sup> However, Gerber seeks to explain the decision by examining the role of the courts in reviewing legislation. Gerber posits that judicial review arose from the need to protect individual rights. Further, he finds that courts routinely invoked natural rights concepts when they believed that individual rights had been infringed. Historically, Gerber connects the genesis of judicial review in the U.S. to the failure of the early state legislatures to properly safeguard individual rights.<sup>32</sup> For Gerber, protecting individual liberties in the vacuum left by the failure of the legislatures to secure these rights was the impetus for the rise of judicial review. Gerber finds that Americans in the founding era expected the legislatures to act as the protectors of personal liberties, as would be expected of persons who, until recently, were British subjects. As such, they were familiar with the idea that proper representation in Parliament was the method to ensure the security of their rights. The belief in the legislature as the body that protected rights was eroded when the actions of the early state legislatures began to infringe rights, especially those

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<sup>31</sup> Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (New York: New York University Press, 1995).

<sup>32</sup> Gerber, *To Secure These Rights*, 104.

concerning private property.<sup>33</sup> While the Constitution was drafted during this era, the framers nonetheless did not explicitly resort to a model of judicial review.<sup>34</sup> Rather, Gerber argues it was commonly expected that the Supreme Court would act to strike down laws that infringed rights as it was clear that the legislatures could no longer be relied upon for such protection.<sup>35</sup>

According to Gerber, the framers believed that courts would decide rights cases in light of natural law principles as they believed the “fundamental objective of the government was to safeguard natural rights” and the early history of U.S. courts, both state and Federal, evidences that courts did just that.<sup>36</sup> Gerber finds that the Supreme Court in particular routinely used a natural law argument, but only in cases where individual rights were concerned. In cases where natural rights concepts were not used, like *McCulloch v. Maryland* (1819) or *Gibbons v. Ogden* (1824), it was because these were “allocation-of-powers” cases where natural rights played no role as these concerned the location and extent of political power in the federal system.<sup>37</sup>

However, in cases where individual rights were at issue, like *Calder v. Bull* (1789), Justice Paterson’s circuit opinion in *Vanhorne’s Lessee v. Dorrance* (C.C.E.D.Penn. 1795), *Fletcher v. Peck* (1810), *Terrett v. Taylor* (1815), and *Ogden v. Saunders* (1827), the Court routinely used natural rights vernacular to decide the matter.<sup>38</sup>

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<sup>33</sup> Gerber, *To Secure These Rights*, 99.

<sup>34</sup> Gerber, *To Secure These Rights*, 100.

<sup>35</sup> Gerber, *To Secure These Rights*, 102-103.

<sup>36</sup> Gerber, *To Secure These Rights*, 104.

<sup>37</sup> Gerber, *To Secure These Rights*, 122.

<sup>38</sup> Gerber, *To Secure These Rights*, 117-122.

Thus, Gerber argues that the existence of natural rights as a basis for judicial review is not the “all or nothing” proposition that characterizes much of the scholarly debate.<sup>39</sup> Rather, the question of individual rights determined whether the court would rely on concepts of natural rights. The outlier to Gerber’s thesis is *Barron v. Baltimore*. *Barron* does not follow the same pattern as it raised the issue of the infringement of right of private property, yet Marshall very clearly avoided any reliance on natural rights. Gerber finds that Marshall could have very easily invoked the analysis used by Justice Paterson in *Vanhorne’s Lessee*.<sup>40</sup> There, the court was faced with an argument by the state of Pennsylvania that the Fifth Amendment did not apply to mandate compensation to a landowner whose title to his property was taken and vested in another by the state legislature to settle a land dispute. Justice Paterson held that the principle of just compensation declared in the Fifth Amendment was binding on the states. Indeed it was binding on all free governments as a “natural, inherent and inalienable right[s] of man.”<sup>41</sup> Instead, in *Barron*, Marshall did not rely on any natural rights type arguments when denying relief, although the case concerned individual rights. Ultimately, Gerber is forced to contextualize *Barron* in order to explain this exception to his rule. In a cursory fashion, Gerber attempts to explain the *Barron* exception by arguing that that the political direction of Jacksonian America caused a decline in the reliance on natural law.<sup>42</sup> For Gerber, the idea of Jacksonian democracy was predicated on the idea of absolute majority rule or “the right of the people to rule

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<sup>39</sup> Gerber, *To Secure These Rights*, 104.

<sup>40</sup> Gerber, *To Secure These Rights*, 123.

<sup>41</sup> Gerber, *To Secure These Rights*, 1117-118.

<sup>42</sup> Gerber, *To Secure These Rights*, 123.

in any way they see fit” without concern for the protection of individual rights that forms the basis for natural rights jurisprudence.<sup>43</sup>

Gerber is not alone in trying to reconcile *Barron* with the rest of Marshall’s decisions. W. Allan Wilbur noted that “in light of Marshall’s expansionist views of national power, [*Barron*] has been a difficult decision for Marshall’s admirers to explain.”<sup>44</sup> Peter Irons is likewise puzzled by *Barron* and finds the decision out of line with Marshall’s jurisprudence.<sup>45</sup> Irons notes the consensus among most constitutional scholars is that Marshall arrived at the right decision. Regardless, Irons argues that “Marshall was a fervent nationalist and almost always gave an expansive reading to the Constitution. It would have been more in character for him to force the states into compliance with federal standards.”<sup>46</sup> Irons tries to explain the case by arguing that Marshall simply abandoned his nationalist beliefs when faced with a choice between individual rights against the government as Marshall had “little respect for the rights of ‘the people’ against the government.”<sup>47</sup> While it is tempting to explain *Barron* in such a concise way, this conclusion is unsatisfying.

Most historians are ultimately forced to look outside the jurisprudence of the Court and seek external factors to explain *Barron*. The last category of scholarship concerning *Barron* focuses on scholars who also look outside of legal doctrines like federalism and judicial review and attempt to explain the decision by relocating it within its historical context. For example, Michael Kent Curtis places *Barron* within the social upheaval of the antebellum era. Curtis

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<sup>43</sup> Gerber, *To Secure These Rights*, 123.

<sup>44</sup> W. Allan Wilbur, “Review of *John Marshall: A Life in Law*,” *The American Journal of Legal History* (April 1976): 155, 157.

<sup>45</sup> Peter Irons, *A People’s History of the Supreme Court* (New York: Penguin Books, 1999).

<sup>46</sup> Irons, *A People’s History of the Supreme Court*, 136.

<sup>47</sup> Irons, *A People’s History of the Supreme Court*, 136.

approaches *Barron* when addressing the question of whether the Fourteenth Amendment was intended by its Civil War era framers to apply the Bill of Rights against the states. There, Curtis viewed the Fourteenth Amendment incorporation argument by approaching it in context of the pre-Civil War abolition conflicts, where he discusses the effect of the *Barron* decision. Curtis concedes that a strictly legalistic view “seems to indicate that *Barron* was correctly decided,” but argues that slavery was the real issue lurking behind Marshall’s decision. Curtis argued that “*Barron* avoided troubling questions. It promoted stability at the expense of liberty. It left southern states free to suppress speech and press on the question of slavery and left them free to deny procedural and substantive rights to blacks.” Curtis further argues that Marshall simply ignored a tradition by antebellum jurists to hold the Bill of Rights applicable to the states.<sup>48</sup>

The argument presented by Curtis is sound and compelling. While this study will most closely follow a contextualist interpretation similar to that used by Curtis, this dissertation argues that *Barron* must be examined more closely on its own, rather than in context of the Fourteenth Amendment incorporation debate. I largely agree with Curtis but intend to connect *Barron* not only to the abolition crisis but to the larger re-conceptualization of rights necessitated by the struggles over the enactment of popular sovereignty in the early republic.

### **Methodology**

This dissertation is envisioned of course as legal history. In a broad sense, though, this is also an intellectual history or, more precisely, a history of the transformation of ideas. It places *Barron* in the context of its era. Given the wide range of views regarding the origins of rights that existed, *Barron* could have been decided in a number of ways that make Justice Marshall’s positivist view of rights only one possible outcome and not a foregone conclusion. Additionally,

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<sup>48</sup> Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham: Duke University Press, 1986), 23-25.

this project explores the larger tensions between popular sovereignty and law to ascertain why these rights debates were occurring. To answer these questions, this study uses a form of contextual interpretation. This methodology presumes that one can only discover larger meanings about a document by placing it within the context of its era.<sup>49</sup> As was argued by William Fisher, this contextualist approach is particularly suitable when researching questions of causation, particularly to help ascertain why events transpired in a certain way.<sup>50</sup> Historians like J.G.A. Pocock and Quentin Skinner or legal historians such as William Novak have all employed this methodology to great effect.<sup>51</sup>

Much of the methodological inspiration for the legal history aspect of this study was taken from Harry Scheiber and his admonition to legal historians to pay more attention to constitutional history.<sup>52</sup> Scheiber originally lamented that because of stagnation in the field of constitutional history, such as the primary focus on doctrinal Supreme Court decisions, the history of the Court as an institution, and judicial biographies, the field was ripe for criticism and marginalization as out of touch with social realities.<sup>53</sup> Scheiber noted that this narrow view of constitutional history became an easy target for the legal realists such as Karl Llewellyn who characterized this history as formalistic. This criticism was followed up by Willard Hurst and the followers of his groundbreaking “Wisconsin School” who posited a view of law and legal

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<sup>49</sup> See William W. Fisher III, “Texts and Contexts: The Application of American Legal History of the Methodologies of Intellectual History,” 49 *Stanford Law Review* 1065 (May 1997): 1068.

<sup>50</sup> Fisher, “Texts and Contexts,” 1088.

<sup>51</sup> Fisher, “Texts and Contexts,” 1076.

<sup>52</sup> Harry Scheiber, “American Constitutional History and the New Legal History: Complementary Themes in Two Modes,” *Journal of American History* 68 (Sept. 1981): 337.

<sup>53</sup> Scheiber, “American Constitutional History,” 339-340.

history in a completely opposite fashion, viewing law as a tool of the middle class through which they could negotiate primarily economic goals.<sup>54</sup>

Hurst's view opposed the traditional study of constitutional law which viewed law as something created exclusively in courtrooms or legislatures. Hurst countered this notion by denying this form of law any autonomy at all and emphasizing law's role as a mirror of society. Hurst's Wisconsin School adherents include scholars who presented variations on his general theme, such as Lawrence Friedman and Morton Horwitz.<sup>55</sup> It is within this academic argument with those who practice what he refers to as "new legal history" that Scheiber originally argued that constitutional history mattered and was not hypocritical verbiage, as was charged.<sup>56</sup>

According to Scheiber, the existing trend, which dismissed the importance of constitutional history to legal history, was inappropriate, not because the "new legal history" was wrong, but because the two approaches in fact complemented one another.<sup>57</sup> Interestingly, while Scheiber was arguing that the "new legal history" should not dissuade legal historians from using constitutional law, as the use of both approaches made for a richer legal history, subsequent scholarship decimated his "new legal history"/constitutional history binary. The advent of the Critical Legal Studies (CLS) movement changed the debate as it viewed both approaches as erroneously subscribing to an evolutionary functionalist view of the law.<sup>58</sup> According to Robert

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<sup>54</sup> Scheiber, "American Constitutional History," 340; Michael Grossberg, "Social History Update: 'Fighting Faiths' and the Challenges of Legal History," *Journal of Social History* 25 (1991): 191.

<sup>55</sup> For example, Horwitz continued the Hurst paradigm by arguing that the law and the legal system in the antebellum United States operated to promote economic growth, similar to Hurst's "release of energy" theory. Horwitz, however, presented a much darker, non-consensual version which argued that these antebellum judges instrumentally used the legal system to redistribute wealth and power. Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977).

<sup>56</sup> Scheiber, "American Constitutional History," 342.

<sup>57</sup> Scheiber, "American Constitutional History," 343-344.

<sup>58</sup> Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57, 59, 66.

Gordon, this view holds that the proper evolution of a society is toward a form of liberal capitalism and that the role of a functioning legal system is to assist in that goal.<sup>59</sup> In that regard, both approaches treat “law” and “society” as separate concepts and measure the effectiveness of the legal system in how it functionally responds to societal “needs.”<sup>60</sup> CLS, however, treats the use of these categories as artificial labels that constrain our thinking and, thus, limit our options. The evolutionary functionalists’ use of these labels gives an inappropriate impression of an inevitable evolution of society, in accord with a liberal capital model, while hiding the fact that most occurrences in society are manufactured by those with the power to enact change.<sup>61</sup>

Thus, the debate over the proper role of constitutional law in legal history evolved to an argument over whether this method of legal history was even viable any longer. In 1991, Michael Grossberg set forth an excellent summary of this newer debate, this time pitting the “neo-Wisconsin” scholars, such as Kermit Hall, against those of the CLS movement, like Robert Gordon and Christopher Tomlins.<sup>62</sup> Grossberg identified Kermit Hall’s *The Magic Mirror* as an example of the neo-Wisconsin approach.<sup>63</sup> Hall retained the Wisconsin view of law as an instrument which is used by society to reflect consensual goals. Hall updated the Wisconsin

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<sup>59</sup> Gordon, “Critical Legal Histories,” 59.

<sup>60</sup> Gordon, “Critical Legal Histories,” 61.

<sup>61</sup> Gordon, “Critical Legal Histories,” 70. Gordon sets forth a good example of the difference between the evolutionary functionalist view and CLS. Gordon assumes the existence of a nineteenth century law that gives loggers priority lien rights on wages from the sale of the lumber they cut. Gordon argues that a functionalist would likely find that the lumber industry must have been experiencing a labor shortage, thus the law was enacted in order to attract more workers by providing them more security for payment. CLS, however, would argue that the lien law was the product of a “political consciousness” which envisioned a separate realm for private business. Because of this separate realm, the government could attempt only some small regulation. However, because of this conception of business enterprises as private, and thus only subject to limited government regulation, certain possibilities, such as elevating laborers to an equal partnership level, cannot even be imagined. For CLS, the use of legal forms limits what we can even envision as possibilities. Gordon, “Critical Legal Histories,” 111.

<sup>62</sup> Grossberg, “Fighting Faiths,” 193-194.

<sup>63</sup> Grossberg, “Fighting Faiths,” 193; Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford Univ. Press, 1989).

approach by expanding the analysis to include not only the structure (the courts, legislatures, administrative agencies) and the substance (the rules and laws produced by the many levels of courts and sources of law) of the American law, but also included the importance of what he referred to as legal culture.<sup>64</sup> To a large extent, Hall was restating the Wisconsin School orthodoxy, as critics such as Tomlins charged, but did expand the paradigm to include more actors and groups in the use of the law.

Instead of trying to find a place within the Wisconsin School for constitutional history, Grossberg argued that the newer debate questioned the way legal history should be done in light of the CLS critique of the Wisconsin school, the field's previous dominant paradigm, artfully noting that Wisconsin's analogy of the law as a mirror of society "can no longer be angled to encompass the entire field."<sup>65</sup> Regardless, Grossberg argued that this debate offered legal historians an opportunity to redefine the discipline, believing that this debate would open legal history more to the ideas of social history.<sup>66</sup> Certainly, Grossberg's argument that the possibilities of fusing social history methods into legal history would enrich the field, for example by allowing us to look at the law not as dry rules and dusty cases, but as an "arena of conflict" where numerous actors traditionally not thought of inside the formal law system are

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<sup>64</sup> Hall, *The Magic Mirror*, 4-7. Hall defined legal culture as an ideology which evolved in response to individual or group interests. While Christopher Tomlins has rightly taken Hall to task for his view of legal culture, arguing that Hall is really describing a culture of the formal legal system and lawyers, Tomlins' criticism of Hall's belief in the societal acceptance of the notion of the rule of law is less persuasive. Tomlins notes that Hall, on one hand, argued for a better appreciation of the autonomy of the law while, on the other hand, he contradicted himself by noting that the instrumental use of the law by individuals or groups had always structured the law's development. Tomlins argues that Hall's invocation of the belief in the rule of law as a device to overcome this contradiction, or what Tomlins refers to as the "magic in the mirror," appears too black and white of a conclusion. Similar to Hurst, the rule of law notion - myth or not - is one so ingrained that it can also serve as a basis to enact or resist change to less powerful groups, as has been stressed by critical race scholars. See Richard Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?," 22 *Harvard Civil Rights - Civil Liberties Law Review* 301 (1987): 304-307; Christopher Tomlins, "The Mirror Crack'd? The Rule of Law in American History," 32 *William & Mary Law Review* 353 (1990-1991): 362-363.

<sup>65</sup> Grossberg, "Fighting Faiths," 191.

<sup>66</sup> Grossberg, "Fighting Faiths," 195.

shaping the law.<sup>67</sup> Grossberg identified the study of rights as a topic which was proving useful in forging connection between legal history scholars. While CLS views rights as nothing more than *obiter dictum* or window dressing to cover inequalities of power and to placate the less powerful, those specializing in gender or minority affairs, such as critical race scholars, argue that rights can provide a powerful ideological motivation to enact or resist change by these groups.<sup>68</sup>

Grossberg noted a rise in studies of popular rights consciousness movements which resulted in Hendrik Hartog's call for a new constitutional history which did not just study case law, but also identified lay persons' views of the constitution and their role within the system it creates.<sup>69</sup> By viewing the constitution not as solely perpetuated by courts, but rather as a "constitution of aspiration," it allows for a broad conception of constitutional law and history as one encompassing "a variety of narratives of constitutional struggles over power, justice, autonomy, and community."<sup>70</sup>

Any study of rights and rights consciousness must include a rich view of constitutional law. This view should not simply restate a formal, court centered interpretation which sees law as edicts handed down to the populace any more than a view which believes that rights have no power, or cannot evolve to gain meaning and force. Since this debate occurred, many scholars seem to have taken Scheiber's call for the inclusion of constitutional history to heart. For example, Mark Tushnet studied the NAACP's strategy of dismantling school segregation starting in the 1920's and ending in the 1950's with the collection of Supreme Court cases led by *Brown*

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<sup>67</sup> Grossberg, "Fighting Faiths," 195-196.

<sup>68</sup> Grossberg, "Fighting Faiths," 196-197.

<sup>69</sup> Grossberg, "Fighting Faiths," 198.

<sup>70</sup> Grossberg, "Fighting Faiths," 198; Hendrik Hartog, "The Constitution of Aspiration and 'The Rights that Belong to Us All,'" *Journal of American History*, Vol. 74, No. 3 (December 1987): 1013-1034.

*v. Board of Education* (1954).<sup>71</sup> Tushnet melded the study of the individual litigants, the NAACP as an organization, the lawyers, and the schools along with the traditional story of the cases as they existed within the Supreme Court. Tushnet argues that the litigation was a social process which depended on practical and organizational concerns and realities that cannot be appreciated by simply reading the Supreme and Federal Court decisions alone.<sup>72</sup> However, similar to Scheiber's admonishment, the story of *Brown* and its predecessors is one that naturally revolves around the Supreme Court, the Constitution, and precedent. As a result, Tushnet's approach recognizes that the story of the campaign to desegregate education cannot be told without an appreciation of both the social and constitutional contexts.

While legal history studies on rights as they relate to race and racial discrimination have kept constitutional history within their narratives, other recent works have also incorporated constitutional history in innovative ways. For example, Larry Kramer in *The People Themselves: Popular Constitutionalism and Judicial Review*, squarely engages the Constitution and attempts to contextualize its purpose at the time of framing as well as its interpretation during the years of the early republic.<sup>73</sup> However, instead of engaging in a doctrinal recounting of original intent, Kramer seeks to show that our modern concept of judicial review has not always existed. According to Kramer, while we currently all accept the rulings of the Supreme Court as the final arbiter of the Constitution, the people in early republic showed no such deference. Rather, the simple inclusion the fundamental liberties of the people in the U.S. Constitution did not mean that the Supreme Court then had any greater right to limit those

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<sup>71</sup> Mark Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987, 2004), xi.

<sup>72</sup> Tushnet, *The NAACP's Legal Strategy*, xi-xii.

<sup>73</sup> Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

rights.<sup>74</sup> Rather, those rights inured to the benefit of the people and could not be limited by a court as if they were ordinary law. Kramer argues that the move toward judicial review, or more appropriately, judicial supremacy, where the Supreme Court had the authority to interpret the Constitution - to the exclusion of all others - was the product of deliberate steps by those who feared the excesses of majority rule.<sup>75</sup> Thus, Kramer has also produced an excellent synthesis of legal, social, and constitutional history, but has approached it in a way that places the constitutional history first and uses broader legal and social history methods to give an entirely new interpretation to the idea of judicial review, a topic previously isolated to doctrinal history alone.

Other scholars have adapted a broader view of constitutional history to other fields, such as labor history. For example, Carl Swidorski links free speech protections directly to labor's attempts to organize and strike between World War I and II.<sup>76</sup> Swidorski takes a subject, labor history, which has often been approached through social history methods,<sup>77</sup> and links it not to the development of the New Deal but to the expansion of First Amendment rights, a subject usually interpreted through the lens of rights litigation and the formal edicts of the Supreme Court. For example, Swidorski aptly notes the connection to labor in numerous post-World War I cases such as in *Gitlow v. N.Y.* (1925) where the Court famously incorporated the freedom of speech and press provisions of the First Amendment against the states.<sup>78</sup> What is less well known, and

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<sup>74</sup> Kramer, *The People Themselves*, 40-43.

<sup>75</sup> Kramer, *The People Themselves*, 143-144.

<sup>76</sup> Carl Swidorski, "The Courts, the Labor Movement and the Struggle for Freedom of Expression and Association, 1919-1940," *Labor History* 45 (Feb. 2004): 61.

<sup>77</sup> For example, see Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (New York: Cambridge University Press, 1990).

<sup>78</sup> *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

which Swidorski points out, is that the *Gitlow* decision also upheld the New York law which allowed the state to determine whether certain speech could be restrained under the “prior restraint-bad tendency test,” a holdover from the 1790’s which had been dusted off and used again in the World War I cases.<sup>79</sup> Swidorski argues that the reason the Court upheld the law was that the publication that Gitlow had distributed called for, among other things, a call for a general strike of the workers.<sup>80</sup> By incorporating a constitutional history approach into his labor history research on interwar strife, Swidorski has enriched both fields.

Additionally, constitutional history can and is being incorporated in ways that are not always obvious. For example, it is easy to see a constitutional history nexus in narratives which explicitly include a Supreme Court decision. However, an even richer version of constitutional history can be seen in studies such as Bryant Simon’s study of South Carolina mill workers, *A Fabric of Defeat: The Politics of South Carolina Millhands, 1910-1948*.<sup>81</sup> In the context of the Great Depression, Simon notes how mill workers responded to Roosevelt’s New Deal Programs, such as the NRA, in a language that, for the first time, emphasized their national citizenship. In a state which had produced the nullification crisis, not to mention full blown secession and Civil War, the turn by workers to emphasize national citizenship which gave them the right to strike was remarkable.<sup>82</sup> This embrace of citizenship by the mill workers can be seen as a link to a broader constitutional history, a history that views the Constitution not simply as the work of the

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<sup>79</sup> Swidorski, “The Courts, the Labor Movement and the Struggle for Freedom of Expression and Association, 1919-1940,” 64-65, 68. *Frohwerk v. U.S. (1919)* saw the Court revisit the bad tendency test when it upheld the conviction for defendants who published articles in a German language newspaper critical of the War as these article “‘might’ have caused disloyalty and insubordination in the armed forces.”

<sup>80</sup> Swidorski, “The Courts, the Labor Movement and the Struggle for Freedom of Expression and Association, 1919-1940,” 69.

<sup>81</sup> Bryant Simon, *A Fabric of Defeat: The Politics of South Carolina Millhands, 1910-1948* (Chapel Hill, Univ. of North Carolina Press, 1998).

<sup>82</sup> Simon, *A Fabric of Defeat*, 98.

Supreme Court, but as a document which informs people's views of their identities and of their ability to enact or resist change, similar to the notion of rights argued by critical race scholars.

This study likewise seeks to heed Scheiber's advice by blending a constitutional history of the case with social, legal, and intellectual history methods and evidence. This study blends a constitutional history of the case as it made its way to the Supreme Court, a social history focus on external factors which may have influenced the decision, and a legal history focus on the nature of antebellum police power, takings, and municipal government. Of course, there are still many constitutional histories that treat the Supreme Court as a largely autonomous institution just as numerous legal histories who fail to attempt any connection to a constitution issue because of a notion of irrelevance. However, as Scheiber has argued, and the above authors have shown, a combination of these approaches will strengthen them both.

Chapter 2 discusses the background of the case and explores the early history of Baltimore which set the stage for the purchase of the wharf and introduces the major players in the case. Chapter 3 follows the case from the trial court, through appeal, and ultimately to the Supreme Court. Chapter 4 explores the range of opinions regarding where rights obtained their authority during the colonial and founding eras. Chapter 5 discusses how these ideas were transformed during the early republic era. Chapter 6 analyzes the modern criticism leveled against those jurists who did not follow Justice Marshall's positive law view of rights. Chapter 7 discusses the transformations in the conceptual location of rights caused by changes in sovereignty necessitated by the creation of the new Federal union and the implementation of popular sovereignty. Chapter 8 explores the relationship between sovereignty and rights and argues that changes in sovereignty caused the reconceptualization of rights that occurred during

the early nineteenth century. Finally, Chapter 9 tracks what happened to Barron, Craig and the rest of the players who were involved in the litigation and discusses the legacy of the case.

## CHAPTER 2 BALTIMORE AND BARRON

The wharves (for there is no *quai* in Baltimore) are always constructed for the convenience of their owners; because these piers jut out in the water there are, in the direction of the town, marshes dented with wide inlets, while neighboring wharves are just so many breakwaters. All this gives an air of disorder to a place that strict alinement would not only correct but add one charm more.

— Mederic-Louis-Elie Moreau de Saint-Mery.<sup>1</sup>

*Barron v. Baltimore* has achieved a certain amount of notoriety in Constitutional law circles for its ruling that the Bill of Rights did not apply to the state governments. *Barron* is often cited in Constitutional law courses as it sets the stage to explore the Fourteenth Amendment, which was enacted following the Civil War to extend the rights of national citizenship to those enslaved in the southern states. From there the discussion usually then centers on the evolution of the Fourteenth Amendment, from the betrayal of its promise in the late nineteenth century to its ultimate triumph as the vehicle through which the Bill of Rights Amendments were incorporated against the intransigent state governments of the twentieth century. This dissertation will confront this traditional narrative. By resituating the case within the debates of the era regarding the location of rights and the struggle over the actual contours of popular sovereignty, we see *Barron* as a moment where the Supreme Court came out on one side of these then live controversies. This dissertation views *Barron* on its own terms and in its own era without the prism of a Fourteenth Amendment to color its outcome.

Legal cases arise out of particular needs, desires, and conflicts between actual people seeking some resolution. The vast majority of litigants do not expect their names to end up as shorthand for legal principles: William Marbury wanted his commission delivered, Dred Scott

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<sup>1</sup> “Baltimore as Seen by Moreau de Saint-Mery in 1794,” Translated and Edited by Fillmore Norfleet, *Maryland Historical Magazine*, Vol. 35, No. 3 (September 1940): 221, 229.

wanted his freedom, and Clarence Earl Gideon wanted a new trial with the assistance of an attorney. John Barron was no different. Thus, before exploring the effects that John Marshall's decision had on the direction of American constitutional law and history, we must first examine the particular circumstances which gave rise to the case.

### **Maryland and Baltimore**

*Barron* arose largely because of geography and the particular environmental conditions that exist in coastal Maryland. English explorer John Smith is credited with the first European exploration of the Chesapeake Bay and its contiguous rivers in 1608. Because Smith was on a mission northward from Jamestown to scout for food and provisions, he did not initiate any settlement. Rather that distinction belongs to George Calvert, a favorite of English King James I. Calvert was fascinated by the Virginia Company's colony at Jamestown and especially by its failure to achieve financial success. Calvert began his overseas plans by obtaining a patent to land in modern-day Newfoundland, Canada in 1620. However, the bitter cold he encountered during a personal visit to his potential colony convinced him that his colony must be planted elsewhere and he began to search for a more temperate location to the south. His visits to Virginia, however, were met with suspicion and often open hostility due to his 1625 conversion to Catholicism. Upon conversion, Calvert was named by James I the first Lord Baltimore, an Irish peerage title. His warm relations with the Stuarts paid dividends as Calvert succeeded in obtaining a charter from Charles I in 1632. The charter was issued in the name of George's son, Cecilius Calvert, to establish a proprietary colony named Maryland, in honor of the English Queen, Charles I's wife, Henrietta Maria. Unlike the joint-stock Virginia Company, Maryland was initially created as a proprietary colony which the Calverts hoped would grant them more control over the colony to help avoid many of the problems encountered in Virginia. The first settlers began arriving in Maryland in 1634. By 1650, the lord proprietor Cecilius Calvert had

granted numerous parcels of land, which averaged one thousand acres per grant. The grantees of these rural parcels also gained the rights to further subdivide the land, all subject to the control of the original grantee to tax and to dispense justice, thus attempting to replicate a more feudal type arrangement in the new world.<sup>2</sup>

In the seventeenth century, Virginia and Maryland attracted between 100,000 and 150,000 European immigrants who sought economic opportunities presented by the flat, fertile soil and accessible waterways. However, the flat plain that drew immigrants to Virginia and Maryland stopped at the Patapsco River, the southernmost boundary of Baltimore County.<sup>3</sup> North of the Patapsco, the desirable plain gave way to the more rugged, mountainous piedmont terrain unsuitable for traditional farming. As a result, for much of its early history, Baltimore County was the least populated county in Maryland.<sup>4</sup>

Geography was likewise a major factor in the failure of the city of Baltimore to grow quickly and presented an impediment to later growth. For example, Baltimore was laid out between the low lying tidewater abutting the Patapsco River which rose sharply to the piedmont.<sup>5</sup> Baltimore is ringed by a line of higher ground approximately thirty miles away, beginning at the Susquehanna River in the north and ending at the Potomac River in the south, which allows for natural drainage to the Patapsco and Chesapeake Bay, often though Baltimore itself.<sup>6</sup> To cause

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<sup>2</sup> Sherry H. Olson, *Baltimore: The Building of an American City* (Baltimore: Johns Hopkins University Press, 1980), 2, 5. Aubrey C. Land, *Colonial Maryland: A History* (New York: Millwood Press, 1981), 4-9. Charles G. Steffen, *From Gentlemen to Townsmen: The Gentry of Baltimore County, Maryland, 1660-1776* (Lexington: University Press of Kentucky, 1993), 8.

<sup>3</sup> Steffen, *From Gentlemen to Townsmen*, 8.

<sup>4</sup> Steffen, *From Gentlemen to Townsmen*, 8.

<sup>5</sup> Olson, *Baltimore*, 5.

<sup>6</sup> *Report of Isaac Trimble, the Engineer appointed by the Commissioners of the Mayor and City Council of Baltimore on the Subject of the Maryland Canal* (Baltimore: Lucas & Deaver, 1837), 4.

further problems, much of the shoreline of the Patapsco itself was an ill-defined marsh which bred mosquitoes.<sup>7</sup> Jones Falls, which ran through the town, frequently caused damage as a result of its tendency to frequently overflow its banks.<sup>8</sup> Importantly, Jones Falls also made growth difficult for early Baltimore as it dumped silt into the basin, making the Patapsco much too shallow for larger ships.<sup>9</sup> For much of its early existence, Baltimore was faced with the task of trying to mitigate the natural difficulties presented by its physical location.

While it was approved and marked off as a settlement around 1729, Baltimore was not transformed into a major urban city overnight. Owing to the larger pattern of settlement in Maryland and its historical emphasis on agriculture, the necessity for an urban location was not paramount for much of Baltimore's early existence. In 1729, the colonial governor, Benedict Leonard Calvert, authorized the laying out of a town on a designated sixty acre parcel north of the Patapsco, to be called Baltimore Town after his family's peerage title. His act appointed seven commissioners, all residents of Baltimore County, to survey and divide the area into lots and allowed these commissioners first choice of the purchase of particular lots.<sup>10</sup> Soon thereafter, in 1732, the colonial governor authorized the surveying and parceling of lots east of Baltimore, which became known as Jones Town (also known as Old Town) and which was incorporated into Baltimore in 1745.<sup>11</sup> Baltimore continued to expand and incorporate more of the surrounding area, but historians generally consider the nucleus of Baltimore to originate from

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<sup>7</sup> Charles G. Steffen, *The Mechanics of Baltimore: Workers and Politics in the Age of Revolution, 1763-1812*, (Chicago: University of Illinois Press, 1984), 4.

<sup>8</sup> Steffen, *The Mechanics of Baltimore*, 4.

<sup>9</sup> Steffen, *The Mechanics of Baltimore*, 4.

<sup>10</sup> Col. J. Thomas Scharf, *The Chronicles of Baltimore*, (Baltimore: Turnbull Brothers, 1874), 20-21.

<sup>11</sup> Scharf, *The Chronicles of Baltimore*, 32.

the combination of Baltimore Town, Jones Town, and the 1773 addition of Fells Point.<sup>12</sup> From its inception and through its early growth, Baltimore continued to suffer from its geography and location, however.<sup>13</sup> Nineteenth-century Maryland historian Thomas Scharf described the initial problems facing Baltimore:

From the small quantity of ground originally taken for the town, and from the difficulty of extending the town in any direction, as it was surrounded by hills, water-courses or marshes, it is evident that the commissioners did not anticipate either its present commerce or population. The expense of extending streets, of building bridges, and of leveling hills and filling marshes, to which their successors have been subjected, and which unfortunately increases that of preserving the harbor as improvements increase and soil is loosened, have been obstacles scarcely felt in other American cities. . .<sup>14</sup>

Historian Charles Steffen also noted the disappointment many early English settlers had with the piedmont area that later became Baltimore County. For example, the uneven terrain made traditional farming difficult in a way that did not exist to the south. Steffen notes that the terrain in Baltimore County drops dramatically toward Chesapeake Bay in a series of terraces, some of which reach five hundred feet and which are located only ten miles north of downtown Baltimore. Steffen contrasts this by noting that a similar decrease in elevation takes over one hundred miles further south along the Potomac. This terrain caused most early English settlers to cede the piedmont to fur traders and hunters in favor of more favorable land to the south. For Steffen: “This was not Eden.”<sup>15</sup>

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<sup>12</sup> Olson, *Baltimore*, 7. A good discussion of the early piecemeal additions to Baltimore was written by Garrett Power, “Parceling Out Land in the Vicinity of Baltimore: 1632-1796, Part 2,” *Maryland Historical Magazine*, Vol. 88, No. 2 (Summer 1993): 151.

<sup>13</sup> Scharf, *The Chronicles of Baltimore*, 33, 45.

<sup>14</sup> Scharf, *The Chronicles of Baltimore*, 23.

<sup>15</sup> Steffen, *From Gentlemen to Townsmen*, 10-11.

As the geography of Baltimore Town did not fit the ideal model for settlement, the city did not spring up overnight. Thomas Scharf, in his 1874 history of Baltimore, relied upon a 1752 drawing of the city by John Moale, one of Baltimore's earliest residents.<sup>16</sup> In this drawing, Moale indicated that by 1752, after its first twenty-two years of existence, Baltimore had only two hundred residents.<sup>17</sup> Further, Moale's drawing showed that Baltimore had only twenty-five houses, one church, and two taverns.<sup>18</sup> In his review of the Moale drawing, Charles Steffen noted that "[i]n short, Baltimore was a typical eighteenth-century hamlet, whose social life alternated between one church, Anglican St. Paul's, and a pair of taverns."<sup>19</sup> By mid-century, this began to change.

In the 1750's, the population of Baltimore began to increase exponentially, beginning with disruptions from the French and Indian War which temporarily halted westward expansion and forced further growth within Baltimore.<sup>20</sup> However, the largest factor contributing to Baltimore's expansion came from the growth of the wheat market.<sup>21</sup> While geographically unsuited for large scale agriculture, Baltimore County is nonetheless strategically situated between the fertile growing regions of southern and central Maryland and Pennsylvania. For example, German immigrants settled southeastern Pennsylvania in the early eighteenth century and began to plant wheat, their traditional crop. For the rest of the century, these German immigrants spread

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<sup>16</sup> Scharf, *The Chronicles of Baltimore*, 47.

<sup>17</sup> Scharf, *The Chronicles of Baltimore*, 48.

<sup>18</sup> Scharf, *The Chronicles of Baltimore*, 48; Steffen, *The Mechanics of Baltimore*, 4.

<sup>19</sup> Steffen, *The Mechanics of Baltimore*, 4. Many historians have used Scharf's interpretation of Moale's drawing to support their view of early Baltimore, including Charles Steffen, Sherry Olsen (*Baltimore*, 10, 387) and Garrett Power ("Parceling Out Land...", 151, 157).

<sup>20</sup> For example, Sherry Olson notes that between 1752 and 1774, the number of houses in Baltimore increased from 25 to 564; Scharf, *The Chronicles of Baltimore*, 51.

<sup>21</sup> Steffen, *The Mechanics of Baltimore*, 6.

primarily southward into central Maryland and transformed Frederick County into the agricultural center of the state.<sup>22</sup> Maryland planters from the state's eastern shore of the Chesapeake also began switching their farms from tobacco to wheat, due to poor sales and soil damage due to overproduction.<sup>23</sup> Unlike tobacco that was grown primarily on plantations closer to the water, wheat flourished in the Maryland and Pennsylvania interior. While tobacco planters could easily sell their crop without the need for transportation or middlemen given their waterfront location, upstate wheat farmers could not realistically engage the market without the services of merchants in a deepwater port.<sup>24</sup> Thus, while Baltimore was initially stymied by its poor geographic qualities, its location later made it the perfect candidate to capitalize on its position between the wheat growing interior and the larger Atlantic market.

Supplementing the contributions made by German immigrants, Baltimore also benefited from the arrival of several other immigrant groups, including French Acadians fleeing Nova Scotia in 1756, and the Scots-Irish.<sup>25</sup> The arrival of these groups, the rise of the wheat trade, and the upheaval of war all contributed to Baltimore's growth. An example of these factors can be seen through Sherry Olsen's study of the emigration of four families to Baltimore: the Smiths, Sterretts, Spears, and Buchanans. These families had originally emigrated from Scotland to Ireland, but left Ireland in the 1720's to settle and mill flour in Lancaster County, Pennsylvania. In the 1750's, these families moved to Carlisle, Pennsylvania where they opened a store and began trading wheat with Baltimore during the inception of Baltimore's early growth.

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<sup>22</sup> Steffen, *The Mechanics of Baltimore*, 6.

<sup>23</sup> Steffen, *The Mechanics of Baltimore*, 7.

<sup>24</sup> Stuart Weems Bruchey, *Robert Oliver, Merchant of Baltimore, 1783-1819* (Baltimore: Johns Hopkins University Press, 1956), 30-31.

<sup>25</sup> Olson, *Baltimore*, 11; Steffen, *The Mechanics of Baltimore*, 6; Scharf, *The Chronicles of Baltimore*, 51.

Ultimately, as a result of warfare on the western frontier from the French and Indian War, these families all moved to Baltimore. With the considerable wealth they had accumulated by this time they invested in maritime trade, including the purchase of slaves to help extend the wharves on their newly purchased waterfront property, and used the wharves to ship wheat to markets in the West Indies and Europe.<sup>26</sup>

The expanded trade likewise drew immigrants to Baltimore and helped to connect Baltimore to markets in southern Europe, the other Atlantic seaboard colonies, and Great Britain.<sup>27</sup> In addition to these markets, Baltimore became an essential port for the European colonies in the Caribbean. Baltimore found particular success in exporting wheat, lumber, and iron goods to the West Indies which required a nearby trading partner, as the Caribbean planters had long since decided to funnel most agricultural production into maximizing their output of sugar, their main cash crop.<sup>28</sup> Of course, while Baltimore's entry into these larger markets fueled growth, it also tied its growth and economic well-being to larger world events. Baltimore thrived during periods of war and unrest, such as its initial growth caused by the French and Indian War, the American Revolution, the various wars occurring during the French Revolution and its aftermath, the Napoleonic Wars, and the War of 1812. These international disruptions permitted Baltimore's merchants to step in to the vacuum and allowed Baltimore less than one century from its founding to become the third largest city in the United States.<sup>29</sup>

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<sup>26</sup> Olson, *Baltimore*, 11.

<sup>27</sup> Steffen, *The Mechanics of Baltimore*, 7.

<sup>28</sup> Steffen, *The Mechanics of Baltimore*, p. 7; Jerome Garitee, *The Republic's Private Navy: The American Privateering Business as Practiced by Baltimore During the War of 1812* (Middletown, Conn.: Wesleyan University Press, 1977), 12.

<sup>29</sup> See Olson, *Baltimore*, 10; Richard J. Cox, "Trouble on the Chain Gang: City Surveying, Maps, and the Absence of Urban Planning in Baltimore 1730-1823," *Maryland Historical Magazine*, Vol. 81, No. 1 (Spring 1986): 8, 9.

However, once again, Baltimore's geography both contributed to and altered its growth. Due to its location between steep surrounding elevations and the marshy banks of the Patapsco River, Baltimore had to contend with numerous streams in and around the city. While many of these streams provided the water power necessary to operate mills upstream that supported the wheat trade, the flowing water caused many problems for early Baltimore.<sup>30</sup> Most notably, Jones Falls ran down to the Patapsco on the east side of Baltimore Town separating it from Jones Town. The Falls required residents to construct bridges in order to carry on trade with Jones Town, thereby effectively bisecting the city after these towns were formally consolidated in 1745. Silently, the Falls also continued to dump significant amounts of sediment into Baltimore Basin, now known as Baltimore's Inner Harbor.

In 1726, the Fell brothers obtained land east of Baltimore and Jones Town which jutted into the Patapsco east of Baltimore.<sup>31</sup> Baltimore had to contend with Jones Falls and the marshes it produced at its intersection with Baltimore Basin, not to mention its often clouded land titles which discouraged capital investment. In contrast, the Fell brothers' land provided an attractive alternative.<sup>32</sup> Edward and William Fell were Quakers who emigrated from Lancashire, England and who engaged in land speculation in and around Baltimore during its early years. In 1738, Edward Fell died and left all his property to his nephew, his brother William's son also named Edward Fell. In 1746, William Fell died, which left all the Fell property to Edward Fell, Jr. In 1761, Edward Fell, Jr., consolidated the four parcels he inherited into one 343 acre parcel and two years later began selling parcels.<sup>33</sup> While Edward Fell, Jr., died in 1766, his wife and

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<sup>30</sup> Olson, *Baltimore*, 5.

<sup>31</sup> Olson, *Baltimore*, 8.

<sup>32</sup> Power, "Parceling Out Land..." 151, 157.

<sup>33</sup> Power, "Parceling Out Land..." 160-161.

executor of his estate, Ann Fell, continued to successfully market and sell lots in Fell's Prospect, which later became known as Fell's Point.<sup>34</sup>

Fell's Point grew quickly as a result of several factors. As is commonly the case with realty, location drove much of the settlement. Jutting into the Baltimore Basin east of Baltimore, the Fell's Point peninsula could naturally reach farther into the deeper water of the Patapsco. It was ideal for shipyards and for arriving and departing ships, while the shallower Baltimore Basin was choked with sediment and debris.<sup>35</sup> Similarly, the surrounding forests provided ample ship building materials and Baltimore's iron works could provide materials for the hulls.<sup>36</sup> Finally, the Fells offered attractive financing that lured laborers, shop owners, and artisans by offering lots payable in ground rents.<sup>37</sup> This form of financing was especially attractive to persons who could not afford the full or even partial purchase price, especially during this time when both specie and available credit were not readily available. Ground rent financing provided that a seller would lease property to a purchaser on a renewable basis. It differed from a traditional landlord/tenant arrangement in that the leases were usually for ninety-nine year terms that were renewable, essentially forever, at a fixed annual sum. Ground rent financing was an effective mechanism to stimulate growth in the absence of credit or specie. Often through ground rent financing the subject land was leased to speculators who subdivided the land and who built row houses for further sublease.<sup>38</sup> Ann Fell made sure that the land she sold increased its value by including in the lease a stipulation that the purchaser would erect a "substantial dwelling or

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<sup>34</sup> Power, "Parceling Out Land...", 161.

<sup>35</sup> Lawrence A. Peskin, "Fells Point: Baltimore's Pre-Industrial Suburb" *Maryland Historical Magazine*, Volume 97, No. 2 (Summer 2002): 153, 155-156.

<sup>36</sup> Peskin, "Fells Point," 156.

<sup>37</sup> Power, "Parceling Out Land...", 162; Peskin, "Fells Point," 155.

<sup>38</sup> Power, "Parceling Out Land...", 165.

business” on the subject property within two years or the property would revert back to her control.<sup>39</sup>

By the eve of the American Revolution, Fell’s Point had been transformed into a “densely built, urban, manufacturing neighborhood,” and had been legally absorbed into Baltimore in 1773, though still geographically separated from Baltimore by approximately one mile.<sup>40</sup> Following the disruptions of the American Revolution, Baltimore’s merchants again profited from the warring European powers. This time, they benefitted from the war between Great Britain and France in the aftermath of the French Revolution by supplying Spanish and French colonies in the West Indies, in defiance of the British and later the French.<sup>41</sup> Despite risking capture by both the British and French, the financial incentives proved too lucrative for Baltimore’s merchants to pass up and the value of exports from Baltimore rose from approximately \$1.7 million in 1792 to over \$10 million by 1800.<sup>42</sup>

While Baltimore had experienced exponential growth in commerce and population, its method of governance did not keep pace. From its founding in 1729, Baltimore had operated under a structure of government more fitting for a rural hamlet than an emerging center of international commerce.<sup>43</sup> For example, the city was run by commissioners appointed by the state government located in Annapolis instead of by elected representatives.<sup>44</sup> Not only was this

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<sup>39</sup> Power, “Parceling Out Land...,” 162; Olson, *Baltimore*, 23; Scharf, *The Chronicles of Baltimore*, 242.

<sup>40</sup> Peskin, “Fells Point,” 156; Power, “Parceling Out Land...,” 162; Scharf, *The Chronicles of Baltimore*, 72.

<sup>41</sup> Steffen, *The Mechanics of Baltimore*, 7; Gary L. Browne, *Baltimore in the Nation, 1789-1861* (Chapel Hill: University of North Carolina Press, 1980), 25-26.

<sup>42</sup> Browne, *Baltimore in the Nation*, 28.

<sup>43</sup> Steffen, *The Mechanics of Baltimore*, 122.

<sup>44</sup> Steffen, *The Mechanics of Baltimore*, 122. In 1786, Baltimore residents were allowed to elect the offices of street commissioners and port wardens while the 1776 Maryland Constitution gave Baltimore two representatives in the state Legislature. On the whole, however, Baltimore was woefully underrepresented in the Legislature. The

arrangement frustrating from a political standpoint, but as a matter of actually running an ever growing port city, the local government was wholly ill-equipped to deal with practical municipal concerns like sanitation, transportation, and security.<sup>45</sup> However inadequate this arrangement, it persisted until 1796 when the Maryland legislature finally incorporated Baltimore as a city pursuant to Maryland State law. Previous attempts to incorporate had been defeated by Fell's Point residents, mechanics, and carpenters.<sup>46</sup> Attempts to petition the Maryland Legislature consistently failed to gain a consensus. Charles Steffen posits that this failure was as a result of struggles over the attempt of more elite Baltimoreans to pattern the proposed city charter on the conservative Maryland Constitution, complete with a bicameral assembly with an unelected upper house and mayor.<sup>47</sup> Ultimately, after years of dissent and debate, the conservative plan succeeded and the city government was divided between the mayor and a bicameral city council meant to replicate the division of powers found in the newly ratified Federal Constitution, complete with an unelected upper house and mayor.<sup>48</sup> According to historian Gary Browne, while this arrangement evidenced the popular distrust of the executive in favor of the primacy of a representative legislature, the city government, as a corporate body, still maintained significant

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Legislature exerted an enormous amount of control over the City itself until incorporation. Steffen, *The Mechanics of Baltimore*, p. 126.

<sup>45</sup> Steffen, *The Mechanics of Baltimore*, 122.

<sup>46</sup> Scharf, *The Chronicles of Baltimore*, 267, 280. Scharf places the first attempt to petition the Legislature for municipal incorporation in 1783, while Steffen places it in 1782. Steffen notes that the first petition of 1782, which caused an enormous outcry among the citizenry, was lost and but that Scharf, a nineteenth century historian writing in the 1870's, likely had an opportunity to review it. Scharf, *The Chronicles of Baltimore*, 267; Steffen, *The Mechanics of Baltimore*, 123.

<sup>47</sup> Steffen, *The Mechanics of Baltimore*, 127.

<sup>48</sup> Browne, *Baltimore in the Nation*, 38; Steffen, *The Mechanics of Baltimore*, 139-140.

power. This was primarily due to the 1796 Charter granted by the Maryland Legislature which gave the city broad powers to provide for the safety, health, and welfare of the town.<sup>49</sup>

Seemingly overnight, Baltimore had emerged as a major port city and a prime engine of economic development for the new republic. However, as the new century arrived, the young nation was forced to navigate European power struggles played out in the upheaval of the various Napoleonic Wars. For much of his administration, President Jefferson attempted to chart a course of neutrality, aided in part by Napoleon crowning himself Emperor and thus finally severing the republican ideological ties between the former French Republic and the Jeffersonians.<sup>50</sup> However, maintaining neutrality while the major European powers battled proved to have disastrous results for both the Jefferson administration and the United States. The British naval victory over the French and Spanish fleets at Trafalgar in October of 1805 and Napoleon's victory over coalition forces at Austerlitz three months later gave the French control over the European continent, while the British established supremacy over the Atlantic.<sup>51</sup> Napoleon applied his Continental System, forbidding any trade between the French controlled Continent and Britain. In return, Britain dictated in 1806 that all neutral countries were prohibited from trading with France or any of her colonies.<sup>52</sup> Further, the British sent the Royal Navy to all French controlled harbors to blockade French ships in port.<sup>53</sup> While the British maintained naval superiority, such an extensive and ambitious blockade significantly taxed the

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<sup>49</sup> Browne, *Baltimore in the Nation*, 39; "An Act to Erect Baltimore Town, in Baltimore County, into a City, and to Incorporate the inhabitants thereof – 1796, Ch. 68, *The General Public and Statutory and Public Local Law of the State of Maryland, 1692-1839*, Vol. II, ed. Clement Dorsey, 1396.

<sup>50</sup> Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (W.W. Norton: New York, 2005), 108.

<sup>51</sup> Wilentz, *The Rise of American Democracy*, 130.

<sup>52</sup> Wilentz, *The Rise of American Democracy*, 130.

<sup>53</sup> David Gates, *The Napoleonic Wars, 1803-1815* (New York: Arnold, 1997), 38-39.

fleet both in wear and tear to the vessels themselves and more importantly in terms of manpower.<sup>54</sup> Given the harsh duty and low pay, many sailors deserted the fleet, especially those who could make their way to the United States.<sup>55</sup> In short order, the Royal Navy found itself often without full crews.<sup>56</sup> As a result, the Royal Navy began to stop and board U.S. warships looking for British deserters, including the well-known incident in which one of its warships fired on the U.S.S. Chesapeake after it refused to submit to a search. The American public was outraged upon learning of this incident which killed three U.S. sailors and wounded eighteen others.<sup>57</sup>

The combination of the British trade prohibition, coupled with incidents similar to that involving the Chesapeake, pushed Jefferson to take action. In 1807, Jefferson proposed the first in a series of embargo acts designed to punish the British economically by outlawing the U.S. shipping trade with all foreign nations.<sup>58</sup> As Baltimore profited handsomely from foreign trade, the withdrawal of the U.S. from international markets devastated the city. For a town so dependent on international trade, the embargo truly seemed an overreaction.<sup>59</sup> Certainly, the embargo did have some unforeseen long-term results, the most significant of which was the turn toward industry necessitated by the closure of foreign markets. By the end of the War of 1812,

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<sup>54</sup> Gates, *The Napoleonic Wars*, 39-40.

<sup>55</sup> Gates, *The Napoleonic Wars*, 41-42. With respect to the low wages, Gates notes that sailors serving as merchantmen could make up to five times as much as sailors in the Royal Navy.

<sup>56</sup> Gates, *The Napoleonic Wars*, 41.

<sup>57</sup> Wilentz, *The Rise of American Democracy*, 130.

<sup>58</sup> Wilentz, *The Rise of American Democracy*, 131.

<sup>59</sup> Browne, *Baltimore in the Nation*, 52.

Baltimore had begun to diversify its economy, evidenced by the establishment of three large textile mills between the 1807 embargo and 1812.<sup>60</sup>

Following the end of the War in 1815, Baltimore attracted record numbers of new residents seeking to take part in the anticipated post-war prosperity.<sup>61</sup> It was during this era that John Barron and John Craig purchased their wharf. The end of the War of 1812 was expected to finally return Baltimore to the prosperity it had earlier enjoyed. Peace with Britain would allow for a full resumption of commerce and Barron and Craig likely sought to profit from this increased trade. Their timing could not have been worse. This anticipated prosperity did not materialize as the maritime trade upon which Baltimore had become dependent had fundamentally changed. Following the War of 1812, Baltimore's exceptional economic growth slowed considerably and it began a slow decline both measured against its own prior growth, as well as against that of other U.S. port cities.<sup>62</sup> Indeed the entire nation faced economic problems as a result of the end of the War. Gary Browne argues that these problems occurred as the U.S. economy in general faced three major obstacles at this time: the exclusion of U.S. goods and shipping from the expansive British colonial trade; increased competition from European competitors no longer distracted by war; and the flooding of the U.S. market with European manufactured products that had been stockpiled during the war.<sup>63</sup>

Compounding the national economic crisis, Baltimore was hit with other unique crises which together spelled economic disaster. First, Baltimore in particular suffered greatly from the

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<sup>60</sup> Browne, *Baltimore in the Nation*, 55.

<sup>61</sup> Browne, *Baltimore in the Nation*, 91.

<sup>62</sup> Gary L. Browne, "Baltimore and the Panic of 1819," in *Law, Society, and Politics in Early Maryland*, ed. A. Land, L.G. Carr, and E. Papenfuss (Baltimore: Johns Hopkins University Press, 1977): 212.

<sup>63</sup> Browne, *Baltimore in the Nation*, 70.

significant reduction in trade from the Caribbean. After the War of 1812, this trade did not again reach its pre-war levels, which was disastrous for Baltimore's merchants and maritime economy.<sup>64</sup> Baltimore was particularly affected by these conditions because its trade with the West Indies, which had provided the impetus for much of its growth, never recovered following the war.<sup>65</sup> Second, the post-war years exposed the inadequacy of the currency used in transactions between upcountry farmers and Baltimore merchants. Following the war, these farmers' goods fell in value. Baltimore banks stopped accepting payment in notes issued by western Maryland banks. Baltimore merchants did continue to accept these notes until 1819 when merchants refused to transact further business until all outstanding debts were settled.<sup>66</sup> This proved quite impossible, and with the merchants themselves falling in debt to their overseas suppliers, the merchants allowed their buyers to pay on credit payable in exchangeable goods or commodities instead of upcountry bank notes. This situation was untenable for both the farmers and the merchants. Both were victims of an inadequate currency medium.<sup>67</sup>

Third, the local banking system proved unable to cope with these problems and could not extend credit to assist merchants suffering with the loss of markets caused by the end of the war. The requisite specie reserves simply were not available.<sup>68</sup> These problems continued until the banks began their collapse, which culminated in the Panic of 1819. This collapse was accelerated in Baltimore by fraud committed by a number of Baltimore bankers and merchants. The most notorious was the embezzlement of funds from the Baltimore branch of the Second

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<sup>64</sup> Browne, *Baltimore in the Nation*, 71.

<sup>65</sup> Browne, *Baltimore in the Nation*, 70-71.

<sup>66</sup> Browne, *Baltimore in the Nation*, 71.

<sup>67</sup> Browne, *Baltimore in the Nation*, 72.

<sup>68</sup> Browne, *Baltimore in the Nation*, 72.

Bank of the United States by its president, James Buchanan, a partner in one of the nation's largest mercantile companies, Smith and Buchanan.<sup>69</sup> Buchanan, along with the bank cashier, James McCulloch, and numerous associates including bankers at the Baltimore City Bank and the Union Bank of Maryland all drained their banks by making numerous unsecured loans for themselves and their friends. Most commonly, they used this money to buy stock in the Bank of the United States in their own names.<sup>70</sup> Word of these activities spread and by early 1819 many Baltimoreans had begun demanding payment of their accounts in specie. However, it was too late for most as the banks began to collapse in March.<sup>71</sup> By July of 1819 approximately one hundred of Baltimore's merchants had failed and approximately 6,000 had lost steady employment.<sup>72</sup> Parenthetically, it appears that both John Craig and his friend, Luke Tiernan, were the beneficiaries of at least one of these improper loans. On June 12, 1818, the bank discounted a note drawn by a prime conspirator, local merchant Lemuel Taylor, in favor of Luke Tiernan and John Craig in the amount of \$2,333.34. This note was discovered during the subsequent criminal investigation as one of many that were personally discounted and approved by the branch directors without the approval of the Board of Directors.<sup>73</sup> While the Panic of 1819 was a nationwide phenomenon, the malfeasance in the Baltimore banking community

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<sup>69</sup> Browne, *Baltimore in the Nation*, 74.

<sup>70</sup> Browne, *Baltimore in the Nation*, 74; Robert E. Shalhope, *The Baltimore Bank Riot: Political Upheaval in Antebellum Maryland* (Urbana, Ill.: University of Illinois Press, 2009), 14.

<sup>71</sup> Browne, *Baltimore in the Nation*, 74.

<sup>72</sup> Seth Rockman, "Work, Wages, and Welfare at Baltimore's School of Industry," *Maryland Historical Magazine*, Vol. 102, No. 1 (Spring 2007): 596-97; See also *North American Review*, Vol. 20, Issue 46 (January 1825): 118, which discussed the overextension of the bank and losses to stockholders which began in 1818 and ruined Baltimore for years; Gary Brown, *Baltimore in the Nation*, 76.

<sup>73</sup> *An Exhibit of the Losses Sustained at the Office of Discount and Deposit Baltimore, under the Administration of James A. Buchanan, President, and James W. M'Culloch, Cashier, Compiled by the President and Directors of the Office at Baltimore, in Pursuance of an Order from the President and Directors of the Bank of the United States, to which is appended a Report of the Conspiracy Cases, tried at Hartford County Court in Maryland* (Baltimore: Thomas Murphy, 1823), 14 (Schedule H); Browne, *Baltimore in the Nation*, 75.

ensured that it hit Baltimore earlier.<sup>74</sup> Finally, to add to the economic catastrophe, in August of 1819, yellow fever broke out in Fell's Point and over the next two months 350 people died of the disease.<sup>75</sup> In response, on February 10, 1820, the city passed an Ordinance forming a board of health, including other measures, to deal with a quarantine at the port of Baltimore.<sup>76</sup> Wealthier Baltimoreans relocated to the Maryland countryside, leaving the rest of the population behind to suffer through the epidemic.<sup>77</sup>

In December of 1815, "John Barron Junior & co." purchased three lots on the water which comprised the wharf.<sup>78</sup> However, as alleged in the Court record ultimately compiled and sent to the Supreme Court, while the deed was executed and recorded in 1815, Barron and Craig alleged in the trial court that they jointly had purchased the property "some time before the date of the said deed, and been in possession thereof from the time of said purchase, continually, until the commencement of [the] action."<sup>79</sup> While it is unclear exactly when Barron and Craig purchased the wharf, it is clear is that they quickly encountered problems. By September of 1817 their wharf was advertised for sale by auction.<sup>80</sup> By 1828, both Baron and Craig were dead, leaving only their creditors disappointed by the time the Supreme Court disposed of the claim in 1833.

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<sup>74</sup> Browne, *Baltimore in the Nation*, 74.

<sup>75</sup> Rockman, "Work, Wages and Welfare," 597.

<sup>76</sup> February 11, 1820 *Baltimore Patriot*.

<sup>77</sup> Rockman, "Work, Wages and Welfare," 597.

<sup>78</sup> MDLandrec.net, 1815, Baltimore County Court (Land Records) [MSA CE 66-184] WG Book No. 134: 474 (accessed 2/4/08).

<sup>79</sup> *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833), Transcript of Record, File Date: July 1, 1831, 31 pp., U.S. Supreme Court Records and Briefs, 1832-1978, Thompson Gale, p. 11, and Maryland State Archives SC 2221-4-20, 182-1833 (hereinafter referred to as *Barron Transcript*).

<sup>80</sup> *Baltimore Patriot*, September 26, 1817, Volume X, Issue 225, Page 3.

## Barron, Craig, and Tiernan

While the holding of *Barron* is known to many students of U.S. Constitutional History, little is known of Barron himself and the exact circumstances which gave rise to the claim. In fact, upon closer examination, it becomes apparent that John Barron was likely the junior partner. John Craig was actually of much higher standing in the community both in terms of possession of property and connections. Further, neither Barron nor Craig appears to be the catalyst for the decisions that ultimately led to the famous Supreme Court decision, that distinction belonging to successful Baltimore merchant Luke Tiernan. In fact, the actual name of the case that went before the Supreme Court was not *Barron v. Baltimore*, but *John Barron, Survivor of John Craig, for the use of Luke Tiernan, Executor of John Craig v. The Mayor and City Council of Baltimore*.<sup>81</sup> Tiernan, incidentally, outlived both Craig and Barron and was the only one still alive when the case finally reached the Supreme Court in 1833. As we will see, Tiernan was much more than a disinterested executor of John Craig's estate. As Craig and Barron began to lose money on the wharf, they looked to Tiernan for help and ultimately became hopelessly indebted to him. Who, then, was Luke Tiernan?

Luke Tiernan immigrated to Maryland from Ireland, arriving originally in Hagerstown, Maryland in 1783 and later moving to Baltimore in 1795.<sup>82</sup> Once there, Tiernan distinguished himself as a successful merchant and became a well-respected member of the business and civic

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<sup>81</sup> *John Barron, Survivor of John Craig, for the use of Luke Tiernan, Executor of John Craig v. The Mayor and City Council of Baltimore*, 32 U.S. 243 (1833).

<sup>82</sup> "Miniatures in the Collection of the Maryland Historical Society," *Maryland Historical Magazine*, Volume 51 (1956): 341, 343; Garitee, *The Republic's Private Navy*, 67; Thomas Spalding, *The Premier See: A History of the Archdiocese of Baltimore, 1789-1989* (Baltimore: Johns Hopkins University Press, 1989), 29; Whitman H. Ridgway, *Community Leadership in Maryland, 1790-1840: A Comparative Analysis of Power in Society* (Chapel Hill: University of North Carolina Press, 1979), 232; C.B. Tiernan, "Luke Tiernan of Baltimore," *The American Catholic Historical Researches*, Vol. 12 (Oct. 1895), 189, 192. There is a discrepancy regarding the date Tiernan moved to Baltimore from Hagerstown. Garitee places it during 1790 while Spalding, Ridgway, and C.B. Tiernan all contend that the move occurred in 1795.

community.<sup>83</sup> Tiernan is credited as the first person to connect Baltimore with Liverpool as a commission merchant.<sup>84</sup> Tiernan's successes led him to numerous positions of power, including being named a director of the Union Bank of Maryland (along with future U.S. Supreme Court Chief Justice Roger Taney), the Athenian Society, and the Chesapeake Insurance Company. He was also a manager of the Baltimore and Frederick-Town Turnpike Company, treasurer of the Maryland Auxiliary Society for the Colonization of Free Peoples of Color of the U.S., and, ironically, a member of the Baltimore city council.<sup>85</sup> Tiernan quickly rose to elite status in Baltimore and took advantage of the many responsibilities and benefits afforded to a man of his standing. For example, Tiernan served as a primary contributor for building of the Cathedral of the Assumption, the first Catholic Cathedral in the United States, dedicated in 1821.<sup>86</sup> Similarly, Tiernan had earned political influence. Tiernan, along with a group of six other prominent Baltimoreans including his attorney David Hoffman, convinced then President John Quincy Adams to accept an invitation to Baltimore. They had enough clout to convince Adams to remain an extra day in Baltimore due to the intervening funeral of Revolutionary War veteran,

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<sup>83</sup> Whitman Ridgway, "Community Leadership: Baltimore during the First and Second Party Systems," *Maryland Historical Magazine*, Vol. 71 (Fall 1976): 334, 346.

<sup>84</sup> Spalding, *The Premier See*, 29; Tiernan, "Luke Tiernan of Baltimore," 189, 192.

<sup>85</sup> *Fry's Baltimore Directory for 1812* (Baltimore: B.W. Sower & Co., 1812), 19, 23-24, 29-30, and 31; *Matchett's Baltimore Directory for 1824*, (Baltimore: Richard Matchett, 1824), 363, 365; *Baltimore American and Daily Advertiser*, August 7, 1817; and Seth Rockman, "Work, Wages, and Welfare at Baltimore's School of Industry," *Maryland Historical Magazine*, Vol. 102, No. 1 (Spring 2007): 572, 593. However, it appears that Tiernan was not on the City Council when the drainage decisions were made as he is listed in the 1812 City Directory as a member of the First Branch of the City Council representing the Third Ward, but does not appear thereafter. *Fry's Baltimore Directory for 1812*, 19.

The Athenian Society was formally incorporated in 1811 as a result of the turn toward domestic manufacturing necessitated by the 1807 Embargo. The Society encouraged the manufacture of domestic textiles by building a warehouse which was used as a clearing house for the commission based sale of textiles. Browne, *Baltimore in the Nation*, p. 55.

<sup>86</sup> Spalding, *The Premier See*, 86.

John Eager Howard.<sup>87</sup> It was noted that Tiernan was a “warm personal friend” of Henry Clay’s who used to stay at his home whenever Clay visited Baltimore. Clay reportedly referred to Tiernan as the “patriarch of the Whig Party in Maryland.”<sup>88</sup>

John Craig made his first appearance in the historical record with his marriage to Peggy (Margaret) Smith on June 23, 1801 at the St. Paul’s Protestant Episcopal Church in Baltimore.<sup>89</sup> A John Craig was also naturalized as a U.S. citizen three years later in the Baltimore County Court on June 13, 1804, although it cannot be confirmed that it is the same person as Baltimore had two residents by that name at the time.<sup>90</sup> Before purchasing the wharf, Craig, and to some extent Barron, had achieved some degree of success and had invested in real property in the Fell’s Point district, aided by the ground rent lease financing plan pioneered by Ann Fell which had made obtaining land in the district possible without the investment of significant capital.<sup>91</sup> Craig obtained two contiguous parcels at the corner of Ann and George Streets, a prime location approximately two blocks west of his future wharf, one block north of the harbor, and one block east of the main thoroughfare of Market Street. Craig had obtained one parcel by way of deed in 1808 and one by way of a more traditional assignment in 1805.<sup>92</sup> There, Craig established

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<sup>87</sup> John Quincy Adams, *Memoirs of John Quincy Adams, Comprising Portions of his Diary from 1795 to 1848*, ed. Charles Francis (Philadelphia, 1875), 329, 333.

<sup>88</sup> C.B. Tiernan, “Luke Tiernan of Baltimore,” 191.

<sup>89</sup> *Maryland Marriages, 1801-1820*, compiled by Robert Barnes (Baltimore, Maryland: Genealogical Publishing Co., 1993), 39.

<sup>90</sup> *Maryland Naturalization Abstracts*, Vol. 1: Baltimore County and Baltimore City, 1784-1851, Compiled by Robert Oszakiewski (Family Line Publications, 1995).

<sup>91</sup> Power, “Parceling Out Land. . .,” 162.

<sup>92</sup> The southernmost parcel, at the corner of Ann and George, was deeded to Craig by John Lee on March 26, 1808 for \$1,200.00. See MdLandRec.net, WG Book No. 97, p. 151 (1808). The parcel directly north of this was assigned by David Fisher to Craig on October 5, 1808, but was not originally recorded until 1829, following the lawsuit by Tiernan to foreclose a mortgage given to him by Craig and secured by the property. See *Tiernan v. David and John Fisher, John Craig, and John H. Staples*, MSA S512-14-11311, Acc. No.: 17,898-11483, location: 1/39/3/.

himself as a grocer and storekeeper and apparently also resided at the same address, presumably upstairs or next door.<sup>93</sup> Within a few years, Craig seemed to prosper. Craig was active in the defense of Baltimore during the War of 1812, serving as a second corporal in the Fifth Regiment of the Maryland Cavalry Militia. In addition to his military service, Craig had the financial resources to supply material for the war effort.<sup>94</sup> In addition to his other contributions, Craig was part owner of a vessel that was sunk at the mouth of the harbor to thwart an expected British naval advance.<sup>95</sup>

On June 2, 1807, John Barron, Jr., an Irish immigrant, was naturalized as a U.S. citizen in Baltimore although evidence regarding the date of his arrival has not been discovered.<sup>96</sup> There is a discrepancy, however, as there appears to be two Baltimore residents named John Barron during this time period. For example, there is a John Barron who first appears in the historical record in 1803 as a resident in a modest commercial block of Fell's Point and begins appearing in the local trade papers as an importer of foreign goods.<sup>97</sup> The *Baltimore Price-Current* lists several entries between 1803-04 showing imports entered through the custom house and the name of the person as the consignee of the goods. Barron appears nine times individually as the consignee of goods from Havana, Guadeloupe, and Sisal, a seaport in the Yucatan Peninsula.

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<sup>93</sup> *Baltimore Directory and Citizens Register, for 1807*, ed. James M'Henry (Baltimore: Warner and Hanna, 1807). Craig is also listed as a grocer or shopkeeper at this address in the directories for 1808, 1810, 1816, 1822-23, and 1824.

<sup>94</sup> Baltimore City Archives, RG 22 (War of 1812 Records), MSA-SC5458-45-20-1042 (RG 22, S1, Box 1) and MSA-SC5458-45-20-0140 (RG 22, S1, Box 1). Interestingly, while other Baltimoreans are listed as supplying items like muskets, pikes, and large bolts, or services like performing iron work or carpentry, Craig is noted as supplying "Junk." It must have had more of a miscellaneous rather than a quality designation as Craig's contribution is listed with a value of \$220.99.

<sup>95</sup> *Tiernan v. Rescaniere's Adm'rs*, 10 G. & J. 253 (Md. Ct. of App. 1838).

<sup>96</sup> U.S. Naturalization Records Indexes, 1794-1995, District of Maryland, [www.Ancestry.com](http://www.Ancestry.com) (last accessed April 16, 2010).

<sup>97</sup> *Baltimore Directory for 1803*, ed. Cornelius William Stafford (Baltimore: Butler, 1803), 17. The Directory lists John Barron as residing at 5 Market Street, a main thoroughfare in Fell's Point which led to the public wharf.

Barron imported goods ranging from sugar, logwood, coffee, hides, “Segars,” and honey.<sup>98</sup>

However, after a December 6, 1804 notation in the *Baltimore Price-Current*, there is no further record of Barron importing goods.<sup>99</sup>

Beginning in 1807, Barron listed his occupation alternatively as a lumber merchant or cordwainer and for the next several years, between 1807 and 1816, changed his residence at least four times.<sup>100</sup> For example, the 1807 and 1808 Baltimore Directories listed John Barron as a lumber merchant residing at 32 Pitt Street in Fell’s Point and the 1810 Directory likewise listed his occupation as a lumber merchant residing at the “Wolfe Street yard, De Rochbrune’s Wharf.” The 1810 Directory, however, listed him as “John Barron Jr.” Given the similarity between the occupations and residences in the previous directories, the question arises as to whether this is Barron’s son or whether Barron simply began listing himself more accurately. There is only one John Barron listed in any Directory reference; however, there are two persons named John Barron who are naturalized as citizens in Baltimore: John Barron in August 26, 1797 and John Barron, Jr. in June 2, 1807.<sup>101</sup> The 1814-15 Directory listed only John Barron as a cordwainer living at 56 Gough Street, Fell’s Point, while the 1817-18 Directory listed only John Barron Jr. as a merchant residing at 10 George Street, Fell’s Point.<sup>102</sup> In 1822-23, John Barron is listed as a

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<sup>98</sup> *Baltimore Price Current*, (Baltimore, Maryland), 5-21-1803, 5-28-1803, 6-25-1803, 7-30-1803, 10-29-1803, 11-12-1803, 7-19-1804-30-1804, and 12-6-1804 editions.

<sup>99</sup> *Baltimore Price Current*, 12-6-1804 editions.

<sup>100</sup> *Baltimore Directory and Citizen’s Register, for 1807*, James M’Henry (Baltimore: Warner and Hanna, 1807), 16.

<sup>101</sup> *U.S. Naturalization Records Indexes, 1794-1995*, District of Maryland, www.Ancestry.com (last accessed April 16, 2010). Maryland Naturalization Abstracts, Vol. 1: Baltimore County and Baltimore City, 1784-1851, Compiled by Robert Oszakiewski (Family Line Publications, 1995), 19.

<sup>102</sup> *Baltimore Directory and Citizen’s Register, for 1807*, 16; *Baltimore Directory and Citizen’s Register, for 1808*, (Baltimore, 1808), 16; *The Baltimore Directory for 1810*, William Fry (Baltimore: G. Dobin and Murphy, 1810), 29; *The Baltimore Directory and Register for 1814-15* (Baltimore: J.C. O’Reilly, 1814), p. 36; and *The Baltimore Directory for 1817-18* (Baltimore: James Kennedy, 1817), 12; See also *Fry’s Baltimore Directory for 1812* (Baltimore: B.W. Sower & Co., 1812), 9.

merchant in the “house of Barron and Craig” located on Barron’s Wharf. Further, it listed Barron’s residence in Fell’s Point, on Carolina, on the west side of German.<sup>103</sup> The next year, in the 1824 Directory, John Barron, Jr. is listed with an occupation simply as “rope store,” but his residence is also listed as “Caroline row in Caroline Street” in Fell’s Point, which is very likely the same address.<sup>104</sup> However, the 1810 Maryland Census listed both a John Barron and John Barron Jr. as residents of Baltimore County.<sup>105</sup> What is certain, however, is that John Barron, Jr. is the individual who partnered with John Craig and who was the subject of the famous case bearing his name. Barron, like Craig, also managed to invest in real property in Fells Point, purchasing an assignment, on July 18, 1807, of property at the corner of Ann and Fleet Streets (the same property Barron assigns to Craig in 1809), at a term of ninety-nine years, renewable forever from John Boardley for \$275.00 plus \$5.00 per year rent.<sup>106</sup> One year later, on June 18, 1808, Barron also received a deed from Jacob Giles for property located on the southeast corner of Wilkes and Washington Streets for \$835.00.<sup>107</sup>

Where Craig and Barron met, how long they knew each other, and the circumstances of their relationship are unknown. What is evident from the historical record is that in 1809, John Barron Jr. executed and recorded an assignment of real property at the corner of Ann and Fleet Streets in Fells Point to John Craig, which evidences the first record of their interaction.<sup>108</sup>

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<sup>103</sup> *The Baltimore Directory, for 1822-23*, Compiled by C. Keenan (Baltimore: Richard Matchett, 1822), 20.

<sup>104</sup> *Matchett’s Baltimore Directory, for 1824* (Baltimore: Richard Matchett, 1824), 19.

<sup>105</sup> Maryland 1810 Census, Computer Index, Compiled by Ronald V. Jackson (Accelerated Indexing Systems, Utah, 1973), 5.

<sup>106</sup> Boardley to Barron Assignment, July 18, 1807, MdLandRec.net, MSA WG Book No. 95: 108.

<sup>107</sup> Giles to Barron Deed, June 18, 1808, MdLandRec.net, MSA WG, Book 99: 299.

<sup>108</sup> MDLandrec.net, 1809, Baltimore County Court (Land Records) [MSA CE 66-154] WG Book 104: 349 (accessed 2/10/08).

Because Barron and very possibly Craig both came to the United States as immigrants, presumably without much financial backing, the question of how they ever came to purchase a deep water wharf arises. A possible explanation may be had by looking at the example of Robert Oliver who immigrated penniless to Baltimore in 1783 from Ireland at the age of twenty six. Within twenty five years, Oliver had prospered as a merchant and had become a millionaire and one of the richest and most successful men in Baltimore.<sup>109</sup> Oliver biographer Stuart Weems Bruchey encountered a similar question when he investigated how a poor immigrant obtained the initial capital to begin his successful career. Bruchey set forth three possible explanations for Oliver's first business partnership with a Mr. Simm, which lasted from 1783-1785 and which appeared to launch Oliver's rise. First, Oliver could have agreed with Simm that Oliver would contribute labor to the partnership if Simm would provide the capital.<sup>110</sup> If we consider this first scenario, Barron would likely have been the junior partner as he seems to have access to less capital than Craig at the time they purchased the wharf. Bruchey's second and third scenarios posited the formation of Oliver and Simm's partnership without the infusion of initial capital. The second scenario, Bruchey argued, had Oliver and Simm having access to foreign credit that would have allowed them to trade under their own names and accounts. Bruchey argues this was a possibility in the 1780's given the generous credit often offered by British merchants to increase business in the former colonies following the Revolution. Bruchey's third scenario argues that Oliver and Simm could have accumulated capital from commissions until such time as they saved enough to import goods on their own account.<sup>111</sup> While either of these scenarios may have been possible immediately post-Independence, it appears unlikely that British

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<sup>109</sup> Bruchey, *Robert Oliver*, 19, 52.

<sup>110</sup> Bruchey, *Robert Oliver*, 52.

<sup>111</sup> Bruchey, *Robert Oliver*, 52-53.

merchants would have been so generous when Barron and Craig began business, in the immediate aftermath of the War of 1812.<sup>112</sup>

It appears most likely that Craig was the partner with access to greater capital and that Barron likely entered the partnership with either a smaller infusion of funds or an agreement to provide labor. In 1815, Craig would have had access to capital not only from the ownership of his Fell's Point grocery, but also from his participation in the privateering trade that emerged during the War, especially in Baltimore. Historically privateering, or the act of legally sanctioned piracy, arose as a result of the desire of private merchants to seek redress for piracy. While the sovereign was not concerned with matters of individual redress, the seas turned chaotic as these private wars multiplied. In an attempt to give the state a degree of control over these actions, licenses were issued by Mediterranean city states beginning in the twelfth century to give legal sanction to those acts of redress deemed permissible and to attempt to draw a line between legal redress, or privateering, and extralegal revenge, or piracy.<sup>113</sup> This model was extended into the new world with particular vigor by the English, who found licensing private ships to raid the Spanish a quicker and more profitable enterprise than government sponsored colonies.<sup>114</sup> Privateering also allowed the English to maintain an Atlantic presence during the early exploration of the Americas. The American colonies continued this tradition into the Revolution and following Independence during the 1798-1800 undeclared naval war with France.<sup>115</sup> At the same time, the U.S. also suffered from privateering during the lull in warfare

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<sup>112</sup> While Barron and Craig negotiated a deed to the wharf property in 1814-15, they alleged in the trial court record that they had actually purchased and possessed the wharf property for "some time" before the date noted in the deed. See *Barron Transcript*, 338 (11).

<sup>113</sup> Garitee, *The Republic's Private Navy*, 3.

<sup>114</sup> Garitee, *The Republic's Private Navy*, 5.

<sup>115</sup> Garitee, *The Republic's Private Navy*, 17, 25-26.

between the English and French, which ultimately contributed to the outbreak of the War of 1812 when U.S. privateering resumed in earnest in order to compete with the mighty British Navy.<sup>116</sup>

Baltimore ship owners, merchants, and craftsmen quickly received privateering commissions and outfitted their ships for raids. Whether for profit, a sense of republican patriotism, or an opportunity to get even with the British for their losses due to their raiding of Baltimorean shipping, the Baltimore maritime community quickly delivered a flotilla of ships for the fight.<sup>117</sup> While many of the ships were owned by the Baltimore elite, for example Luke Tiernan financed a ship with three other investors, many vessels were outfitted by a larger collection of men of more modest means, like John Craig.<sup>118</sup> Craig invested in several privateering vessels during the war, including the *Sarah Ann*, the *Saranac*, and the *Chasseur*.<sup>119</sup> Like many ships engaged in privateering during the war, Craig invested in these endeavors with numerous other partners. His most successful venture, the *Chasseur*, had upwards of eighteen owners at any one time.<sup>120</sup> However, Craig's privateering investments began poorly. He invested in his first ship, the *Sarah Ann*, along with three others. The *Sarah Ann* received her commission on July 27, 1812 but was soon captured by the British only a few months later on September 13, 1812.<sup>121</sup> Undeterred, and whether of financial necessity or acumen, Craig then invested in the *Chasseur* with upwards of seventeen other partners, receiving the commission on

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<sup>116</sup> Garitee, *The Republic's Private Navy*, 47-48.

<sup>117</sup> Garitee, *The Republic's Private Navy*, 48-49.

<sup>118</sup> Garitee, *The Republic's Private Navy*, 67; J.P. Cranwell and W.B. Crane, *Men of Marque: A History of Private Armed Vessels out of Baltimore During the War of 1812* (New York: W.W. Norton, 1940), 381.

<sup>119</sup> Cranwell and Crane, *Men of Marque*, 408.

<sup>120</sup> Cranwell and Crane, *Men of Marque*, 376.

<sup>121</sup> Cranwell and Crane, *Men of Marque*, 393.

December 24, 1813.<sup>122</sup> The decision to reinvest in the privateering business was a gamble, but Craig's investment most certainly paid off. The *Chasseur* was one of the most successful and storied privateering vessels of the war. Captained by Thomas Boyle, the *Chasseur* valiantly battled the British and brought in an estimated total haul of approximately \$221,000.00 for her many owners.<sup>123</sup> Craig reinvested some of his profits in the less successful *Saranac*, which was commissioned on January 3, 1815.<sup>124</sup> In addition to these three vessels, Craig also purchased an ownership interest in the privateering vessel, the *Swallow*, along with three others on January 15, 1813 which was later ordered by the U.S. Government to be sunk to protect Baltimore Harbor from the British advance.<sup>125</sup> Clearly, Craig had enough financial resources to purchase shares of at least four vessels between 1812 and 1815. While not all his ventures were successful, his investment in the *Chasseur* alone would have been sufficient to fund his purchase of the wharf.

Baltimore's reputation as a haven for privateers did not cease with the end of hostilities between the British and the Americans in 1815. While most believed that the end of the war would bring a return of prosperity, it would be years before Baltimore recovered. British goods resumed their flow into the American market and the Maryland industry that had begun out of necessity from the Jeffersonian embargo and recent war found itself struggling with unwelcome competition.<sup>126</sup> To compound these problems, the end of the Napoleonic Wars after 1815 also

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<sup>122</sup> Cranwell and Crane, *Men of Marque*, 376.

<sup>123</sup> Garitee, *The Republic's Private Navy*, 273.

<sup>124</sup> Cranwell and Crane, *Men of Marque*, 393-394.

<sup>125</sup> *Tiernan v. Rescaniere's Administrators*, 10 G. & J. 217 (MD 1838). The other owners of the *Swallow* were John Hanna, Charles Malloy, and Dutton Williams. Hanna had also invested in the privateer, *Daedalus*, while Baltimore merchant Williams invested in the *Sarah Ann*, along with Craig. See Garitee, *The Republic's Private Navy*, 257, 259.

<sup>126</sup> Robert J. Brugger, *Maryland: A Middle Temperament* (Baltimore: Johns Hopkins Press, 1988) p. 196.

meant that Maryland farmers had to reckon with falling prices due to European competitors.<sup>127</sup> The Baltimore maritime economy was also hurt by the full resumption of French and British trade in the Caribbean.<sup>128</sup>

While peace on the continent caused economic problems for the United States, it also presented opportunities for many aggressive Baltimoreans. After driving Napoleonic forces from Spain, the crown sought to reassert its control over its South American possessions that had used the turmoil to grasp for independence.<sup>129</sup> Seeking to supplement the navy much in the same way the United States had during the War of 1812, these former colonies turned to privateering. Along with New Orleans, Baltimore proved well equipped to meet the need.<sup>130</sup> Although privateering against a country with which the United States was at peace was against U.S. neutrality laws, the chance for wealth proved too great for many Baltimoreans to resist, especially in such precarious economic times.<sup>131</sup> Historians have estimated that it cost approximately \$40,000.00 on average to fully outfit a privateering vessel during the War of 1812.<sup>132</sup> Historian David Head notes that this figure would place privateering out of reach for most lower or working class Baltimoreans, except to the extent that they served on such a vessel. Rather, such an endeavor was necessarily restricted to the upper class or to merchants and others of the middle classes who could pool resources. Head notes that two of these merchants were

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<sup>127</sup> Brugger, 196.

<sup>128</sup> Brugger, 196.

<sup>129</sup> David Head, "Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820," *Maryland Historical Magazine*, Vol. 103, No. 3 (Fall 2008): 269.

<sup>130</sup> Head, "Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820," 269.

<sup>131</sup> Head, "Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820," 270.

<sup>132</sup> Head, "Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820," 271. For this proposition, Head is citing Jerome Garitee, *Republic's Private Navy*, 111-112.

John Craig and John Barron Jr. who invested in the privateer *Paz*, which was also known as the *Patriota*, along with a third investor who listed his occupation as a “biscuit baker.”<sup>133</sup>

Craig’s proceeds from privateering during the war were likely used to help acquire the wharf. Craig, and now Barron, continued the privateering endeavors after the war probably to help make the required installment payments as they could not buy the wharf for a single lump sum. Barron and Craig purchased the three lots which comprised the wharf property on December 1, 1815 from Frederick Mackubin of Ann Arundel County, Maryland, receiving ownership as tenants in common for payment of \$15,000.00.<sup>134</sup> Barron and Craig agreed to make three payments of \$5,000.00, the first due in nine months, the second due in twelve months, and the third due in eighteen months.<sup>135</sup> Mackubin and his wife Mary deeded the property to Barron and Craig on December 8, 1815. In order to secure payment, on December 14, 1815, Barron and Craig gave Mackubin a mortgage on the wharf property.<sup>136</sup> While Barron and Craig were able to make the first payment due on or about September of 1816, they quickly fell in arrears on the second note due on or about December of 1816, and looked to Tiernan for assistance.<sup>137</sup> On January 7, 1817, Craig and Barron borrowed \$15,000.00 from Tiernan and his partner Kennedy Owen, then trading under the firm name of Luke Tiernan and Company. To secure the loan Craig and Barron gave Tiernan a mortgage on the wharf property.<sup>138</sup> In an attempt to try to save

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<sup>133</sup> Head, “Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820,” 273.

<sup>134</sup> Mackubin Deed, December 1, 1815 MdLandRec.net, MSA WG, Book 134: 474.

<sup>135</sup> *James Mackubin, Administrator of Frederick Mackubin v. John Craig and John Barron Jr.*, (Baltimore County Court, 1818), Maryland State Archives, MSA S512-4-3602, Acc. No. 17,898-3495-1/2, Location: 1/36/3/, (September 16, 1818 Bill of Complaint), 1.

<sup>136</sup> *Mackubin v. Craig and Barron Jr.* (December 14, 1815 Mortgage).

<sup>137</sup> *Mackubin v. Craig and Barron Jr.*, (September 16, 1818 Bill of Complaint), 2.

<sup>138</sup> *Mackubin v. Craig and Barron*, (January 7, 1817 Tiernan Mortgage), 1.

the wharf, Craig began to receive regular advances from Tiernan and, according to a ledger filed in the Mackubin litigation, by the eve of the lawsuit filed against the Mayor and City Council five years later, Craig was indebted to Tiernan the amount of \$7,126.74.<sup>139</sup> Two months after this loan from Tiernan, on March 2, 1817, the Mackubins agreed to extend the time for the second payment, with Barron and Craig executing a new note to James Mackubin, restating the original obligation of \$5,000.00 plus \$225.00 and interest to be paid in six months, on or about September, 1817.<sup>140</sup>

While Barron and Craig were attempting to satisfy the notes given to purchase the wharf, the actions of the city in trying to remedy the drainage situation in Fell's Point were exacerbating an already dire situation. When Barron and Craig purchased the commercial wharf in the Fell's Point district extending into the Patapsco River, it was noted by many to have the deepest water and one of the best locations in the city.<sup>141</sup> However, not only did Barron and Craig purchase the wharf during bleak economic times for the maritime trade in Baltimore, they also had to contend with the actions of the city, which finally began to take measures to address the serious water and drainage issues that had plagued Baltimore since its founding. As previously mentioned, Baltimore, as a city on the water, had to continually contend with water and the accompanying sediment and debris that flowed to the harbor from its neighboring hills, often right through the center of the city. Much of this water drained either through streams that ran directly into the harbor or was diverted through man-made canals, albeit with limited capacity. The biggest

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<sup>139</sup> *Mackubin v. Craig and Barron*, (February 1822 Ledger).

<sup>140</sup> *Mackubin v. Craig and Barron*, (September 16, 1818 Bill of Complaint), 2. The note was between Barron and Craig and James Mackubin, the administrator of the estate of Frederick Mackubin following his death on December 13, 1816.

<sup>141</sup> The allegation regarding the deep water of the port was actually contained as part of Barron and Craig's pleadings as Plaintiffs in the trial court. See *Barron Transcript*, 340 (15).

problem with this drainage plan was that many of the streams did not extend cleanly to the harbor, thus dumping water and sediment into the streets which would eventually flow unevenly to the harbor. Further, those streams that did connect with the harbor were little better as they ran haphazardly through private lots and over public streets, as can be seen in the plat map (Figure 3-1) of this section of Baltimore, entered into evidence at the *Barron* lower court trial.<sup>142</sup>

Prior to the War of 1812, most of these channels ran through the city according to their natural course. For example, as can be seen from the map, a large stream ran through the district from the northeast, bisecting the district and flowing in to the harbor in the southeast section, noted on the map as point “E.” In 1809, the city council attempted to lessen the flow of water through the city and diverted this stream at Pratt Street to an unimproved lot bounded by Gough Street to the south, Pratt Street to the North, Caroline Street to the west, and Bond Street to the east, referred to by residents as “Brick Pond.” After the War, when Brick Pond was nearly overflowing, the city extended Pratt Street which caused the water which used to run into Brick Pond to simply cascade down Market Street, apparently a large thoroughfare, and into the harbor, noted on the map as point “F.”<sup>143</sup>

As a result of drainage issues, which were not limited to the Brick Pond problem, the city began to build street dams to stem the flow of water, starting in 1813. Interestingly, the city relied on building more dams exclusively and ignored advice from its own hired surveyors, one of whom later became a witness for Craig and Barron, who advised that the water could be diverted to existing stable creeks by digging canals. From planning beginning in 1813 to the final dam in 1822, the city built dams and dug trenches to address the drainage problem. The

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<sup>142</sup> BALTIMORE COUNTY COURT (Plats) 1822-1833 Plat of Fells Point from *Barron v. Baltimore*, MSA C2042-168, MdHR 19,957-244, B5/9/2.

<sup>143</sup> *Barron* Transcript, 14; Plat of Fells Point.

city's plan diverted the water from the west side of Market Street completely and redirected in first down Ann Street. While this redirection would have sent most of the flow into the harbor where Ann Street met the water at point "U," and would have only minimally affected Craig and Barron's wharf, the city continued to build more dams. These dams resulted in a funneling of the water that previously flowed separately through the entire Fell's Point district directly into the harbor north of one important location: Craig and Barron's wharf.<sup>144</sup>

Since its founding, Baltimore had sought ways to keep the harbor clear of sediment. Indeed, in 1783, before Baltimore was even incorporated as a separate municipality with any semblance of local government, the State of Maryland created a five member Board of Wardens for the upkeep of Baltimore Harbor.<sup>145</sup> Looking to the engineering feats of the Dutch in keeping the Amsterdam harbor clear, the city in the 1790's began its first attempts to remove excess soil from the harbor floor.<sup>146</sup> The city hired Captain Stephen Colver and his mud machine design he patented in 1798. Similar to Dutch models, this machine was powered by two or three horses which would provide the power to operate a large scoop capable of raising twenty-five cubic feet of sediment on each lift.<sup>147</sup> Likely recognizing that the dredging was an inescapable routine expenditure, the city ultimately purchased the machine from Colver in 1806.<sup>148</sup> In 1811, the city purchased a second mud machine, slightly smaller than the first. The first machine was too large

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<sup>144</sup> *Barron* Transcript, 11-16; Plat of Fells Point.

<sup>145</sup> Seth Rockman, *Scraping By: Wage Labor, Slavery, and Survival in Early Baltimore* (Baltimore: Johns Hopkins University Press, 2009), 81.

<sup>146</sup> Rockman, *Scraping By*, 82.

<sup>147</sup> Rockman, *Scraping By*, 83; Joseph Gary Norman, *Eighteenth-Century Wharf Construction in Baltimore, Maryland* (M.A. Thesis, Anthropology, William and Mary, 1987), 93.

<sup>148</sup> Rockman, *Scraping By*, 83.

to work in between the many private wharfs that extended into the harbor and by 1814, the first mud machine was out of commission.<sup>149</sup>

Initially, Barron and Craig appear to have sought to mitigate the damages caused by the sediment. There is no evidence that Barron and Craig used the mud machine to try to deepen the harbor floor near the wharf. However, they did attempt to lengthen the wharf deeper into the harbor and in April of 1816 received permission by the city to do so.<sup>150</sup> However, the city kept paving and grading the streets in Fell's Point which had the desired effect, as far as the city was concerned, of funneling all the water in one main direction. For example, in April of 1817, the city passed an Ordinance for paving Dulaney St. from Bond St. eastward.<sup>151</sup> At the same time, it passed an Ordinance to pave Wilkes Street, Washington Street, Castle Alley, and County Street, also requiring the placement of an embankment on Gough Street to convey water through County Street into the cove, and mandated the placement of other banks and abutments to preserve navigation.<sup>152</sup>

On September 26, 1817, Barron and Craig's wharf was advertised for sale by auction, although the wharf apparently was not ultimately successfully auctioned until several years later.<sup>153</sup> In the meantime, Barron and Craig sought to mitigate their damages by renting out the space between the two piers to James Beacham in 1820 for \$300.00 to use as a shipyard. Later, in 1825, the entire wharf property, with the exception of two buildings, was rented for \$700.00

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<sup>149</sup> Norman, *Eighteenth-Century Wharf Construction in Baltimore, Maryland*, 94-95.

<sup>150</sup> *Baltimore Patriot*, April 6, 1816, Volume VII, Issue 84, Page 2.

<sup>151</sup> *Baltimore Patriot*, April 12, 1817.

<sup>152</sup> *Baltimore Patriot*, April 12, 1817.

<sup>153</sup> *Baltimore Patriot*, September 26, 1817, Volume X, Issue 225, Page 3.

for the year.<sup>154</sup> Adding to the sediment problem, Mackubin had finally refused to forbear any longer for payment, despite the January, 1817 loan Craig and Barron received from Tiernan, and filed suit in Baltimore County Court on September 16, 1818.<sup>155</sup> The Mackubin lawsuit reveals interesting facts about the parties. For example, two days after the filing of the Mackubin suit, Barron deeded the property he owned at the corner of Wilkes and Washington Streets to the firm of Schley and Schroeder to satisfy existing debt of \$880.00, indicating that Barron had trouble meeting the demands of numerous creditors.<sup>156</sup> Similarly, Craig was also facing mounting pressure from his own creditors. On May 24, 1817, a James Colston filed suit against him for non-payment for boat ordered built by Craig on June 2, 1815, presumably placed during a sunnier financial outlook. Interestingly, three of the attorneys who appeared for Barron and Craig in the *Barron v. Baltimore* litigation, David Hoffman, Charles Mayer, and Peter Cruse, also appeared for Craig in the Colston suit.

To defend against the lawsuit brought by Mackubin, attorney David Hoffman appeared on behalf of Craig and Barron. This choice was very likely made by Luke Tiernan as Hoffman knew Tiernan for some time and was a very successful and well recognized practitioner. After overruling his initial demurrer filed on behalf of Craig and Barron, Hoffman filed an Answer to

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<sup>154</sup> *Barron* Transcript, 26. It should be noted that by 1823, Barron and Craig no longer owned the wharf, as Luke Tiernan had already purchased it at auction on January 17, 1822.

<sup>155</sup> *Mackubin v. Craig and Barron*, (September 16, 1818 Bill of Complaint).

<sup>156</sup> *1818 Barron/Schley Deed*, MdLandRec.net, WG Book 150: 236. This Deed provided that Barron could redeem the property if he repaid the \$880.00 with interest by September 5, 1819; however, there is no evidence that this ever happened. Parenthetically, co-partner Jacob Schley was one of the men taken to jail for “protective custody” during the Riot of 1812 on the offices of the Federal Republican which earned Baltimore the nickname “Mobtown.” Along with Schley, Barron and Craig’s attorney David Hoffman was also a victim of the attack. See Scharf, *The Chronicles of Baltimore*, 313.

the Bill of Complaint.<sup>157</sup> There, Hoffman did not attempt to raise defenses that could somehow evade or defeat the claim. Rather, Hoffman echoed the economic problems facing Baltimore and, indeed, much of the U.S. at the time, writing that “owing to the extraordinary and unprecedented difficulties and pecuniary embarrassments of the [commercial world the performance of which] is particularly oppressive in the city of Baltimore, these respondents would find it very difficult to procure so large a sum as is due by then...”<sup>158</sup> Hoffman did not contest a decree ordering a sale of the wharf property, but simply asked the court for as much time as possible before such a sale, possibly to allow for redemption by his clients or simply to allow time for the market to recover so that the property would draw a higher price.<sup>159</sup> Two weeks later, on February 23, 1820, Chancellor William Kilty of the Chancery Court issued a decree ordering Craig and Barron to pay Mackubin \$10,225.00 (with interest on the \$5,000.00 due from December 1, 1815, and \$5,225.00 due from March 2, 1817) by April 25, 1820 or the wharf would be sold at auction, apparently disregarding Hoffman’s plea for as much time as possible before a court ordered auction of the property.<sup>160</sup> Accordingly, in order to stave off the auction, on April 25, 1820, Craig, Barron, and Tiernan executed a Bond in the amount of \$2,111.00, which Hoffman filed and who also attested to the character and the large estate of Luke Tiernan.<sup>161</sup>

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<sup>157</sup> *Mackubin v. Craig and Barron* (Hoffman Demurrer, undated). While the Demurrer is undated, we can place it in the litigation after the September 16, 1818 Bill of Complaint and the December 16, 1819 Order by the Chancellor Kilty which overruled the Demurrer and order the Defendants to answer the Bill of Complaint.

<sup>158</sup> *Mackubin v. Craig and Barron* (February 7, 1820 Hoffman Answer).

<sup>159</sup> *Mackubin v. Craig and Barron* (February 7, 1820 Hoffman Answer).

<sup>160</sup> *Mackubin v. Craig and Barron* (February 23, 1820 Decree).

<sup>161</sup> *Mackubin v. Craig and Barron* (April 25, 1820 Bond, filed May 2, 1820).

As the debt to Tiernan mounted, Tiernan demanded further security in addition to the mortgage he already had on the wharf. On December 4, 1820, in consideration of a \$3,000.00 advance, Craig gave Tiernan a mortgage on the parcel at the corner of Ann and George Streets, which was also the location of his grocery business.<sup>162</sup> Meanwhile, Tiernan began to recover these debts and started to position himself to foreclose on Craig's assets, beginning with the wharf. On January 3, 1822, Tiernan wrote a letter to James Mackubin where he recognized that Craig owed in excess of \$30,000.00 for the purchase and improvements to the wharf.<sup>163</sup> Tiernan wrote, "[N]evertheless, owing to the state of times and the fever at the point the last two years" it was doubtful whether the wharf was worth anywhere near that amount. Tiernan further excused Craig's failure to pay, explaining that "[H]e has experienced heavy losses the last three years by Mercantile Insolvency and other transactions to a much greater amount than would pay all that was due on the wharf" and also acknowledged that Craig and Barron were indebted to him as well. With respect to Barron, Tiernan quickly dismissed him and offered his own solution, stating, "as the person interested with him (Mr. Barron) is of no use and has no property, I have suggested to Mr. Craig that if you make a sale of the wharf under the decree, that I would become the purchaser. . ."<sup>164</sup> Tiernan also possibly forecasts the *Barron v. Baltimore* litigation, stating that Craig has claims against the government for boats sunk during the war which he

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<sup>162</sup> *Tiernan v. Margaret Craig, Margaret Staples, John Craig, and Robert Craig*, MSA S512-14-11237; Craig Mortgage, MdLandRec.net, WG book 159: 713. This parcel appears to be the southern parcel directly on Ann and George, not the one to the north deeded to Craig by Fisher in 1805 and later assigned to Craig's son-in-law John Staples.

<sup>163</sup> *Mackubin v. Craig and Barron* (January 3, 1822 Letter from Tiernan to Mackubin).

<sup>164</sup> *Mackubin v. Craig and Barron* (January 3, 1822 Letter from Tiernan to Mackubin).

hopes to receive in the spring and “he also has claims in suit and others.”<sup>165</sup> Finally, Tiernan asked for the sale to be postponed until March or April.<sup>166</sup>

On the same day as Tiernan’s correspondence, Craig’s attorney David Hoffman wrote George Mackubin regarding the sale of the wharf. Hoffman advised Mackubin that Tiernan would purchase the wharf for the benefit of Craig and would pay off Mackubin in six months. Hoffman echoed Tiernan, writing that “The fact is that the property is worth much more than your debt and vastly more that it will bring. Mr. Tiernan has always been a great friend of Craig, and Barron is worth not a cent, and considerably indebted to Tiernan.”<sup>167</sup> While Mackubin’s response to these letters is unknown, the desired effect was achieved as two weeks later, on January 17, 1822, the wharf property was sold by auction to Luke Tiernan as the highest bidder for \$16,000.00.<sup>168</sup> Additionally, as the debt owed to Mackubin did not exceed this amount, on February 15, 1822, Tiernan sought the approval of the court for an accounting to recover the difference.<sup>169</sup>

Approximately one month after Tiernan’s purchase of the wharf, Barron and Craig filed suit against the Mayor and City Council of Baltimore for the damage to the wharf. On February 19, 1822, Walter Dorsey, Chief Judge of Baltimore County Court signed the Summons to the Mayor and City Council to answer Barron and Craig’s plea for trespass, thus marking the formal

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<sup>165</sup> With respect to the sunken vessels, Tiernan is apparently referring to the boats sunk in the harbor as a defensive maneuver to slow the British advance in the War of 1812. The lawsuit for reimbursement was eventually filed years later by Tiernan, as Craig’s executor in *Tiernan v. Peter Rescaniere’s Adm’rs*, 10 G. & J. 253 (Md. Ct. of App. 1838) and is discussed more fully in the Conclusion.

<sup>166</sup> *Mackubin v. Craig and Barron* (January 3, 1822 Letter from Tiernan to Mackubin).

<sup>167</sup> *Mackubin v. Craig and Barron* (January 3, 1822 Letter from Hoffman to Mackubin).

<sup>168</sup> *Mackubin v. Craig and Barron* (January 17, 1822 notation in file from R. Lemmon & Co., auctioneer).

<sup>169</sup> *Mackubin v. Craig and Barron* (February 15, 1822 Petition by Tiernan).

start of the famous case that would ultimately appear in the U.S. Supreme Court eleven years later.<sup>170</sup>

As of the filing of the lawsuit against the Mayor and City Council for damage to the wharf, Tiernan was clearly in control of the litigation since Barron and Craig had sold or mortgaged all of their significant real property. For example, on November 15, 1822, Barron placed an advertisement in the *Baltimore Patriot* for his new rope store. Barron advertised that he had just received a quantity of Russian hemp, and he would take orders for cordage, under the supervision of a Mr. Chapman. Clearly, a craftsman making rope under the supervision of another is a long way from his position as the co-owner of a successful wharf and strongly suggests that Barron was forced to return to a trade that he likely practiced before his fleeting success.<sup>171</sup> Additionally, Barron was noted as having moved his residence from 10 George Street (near the wharf) in 1818 north to a row of apartments on Caroline Street by in 1824.<sup>172</sup>

Meanwhile, Craig fared little better than his former partner and continued to rely on Tiernan for financial support. For example, the decree in the suit brought against Craig in 1817 for non-payment for the boat he ordered from James Colston went in Colston's favor. On October 29, 1825, Chancellor Bland ordered Craig to pay Colston \$3,664.45 with interest from the date of the decree.<sup>173</sup> To document Craig's continuing indebtedness to Tiernan, on February 21, 1826, Craig

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<sup>170</sup> *Barron* Transcript, 4.

<sup>171</sup> November 15, 1822 *Baltimore Patriot*.

<sup>172</sup> *The Baltimore Directory for 1817-18* (Baltimore: James Kennedy, 1817), p. 12; *Matchett's Baltimore Directory, for 1824*, (Baltimore: Richard Matchett, 1824), 19.

<sup>173</sup> *James Colston v. John Craig* (Baltimore County Court, 1817), MSA S512-9-7151, Acc. No. 17,898-7118-1/3, Location: 1/37/4/.

executed a note where he acknowledged that as of that date he owed Tiernan \$8,846.76.<sup>174</sup>

Likely seeking to call in any debts owed to him that could help offset these losses, Craig filed suit against Thomas Cowart on February 13, 1826 seeking his share of profits from the sale of a schooner that he and Cowart had purchased together in 1823. While Craig obtained a judgment against Cowart by January 15, 1827, it was left unsatisfied by the time of Craig's death one year later. Like the remainder of Craig's debts, Tiernan appeared in *Craig v. Cowart* in December of 1829 and succeeded in having the court issue the appropriate writ in order to collect the judgment from Cowart.<sup>175</sup>

Clearly, by 1822, Tiernan was the only party who would have had the financial means to hire the legal team to bring this case. Given further his financial interest in wanting Barron and Craig to recover damages against the city, as he was properly secured and would recover any potential damages granted in the case, it is obvious that Tiernan was the person driving the litigation. The conclusion that Tiernan was the driving force behind the *Barron* litigation is also supported by his business dealings with persons other than Craig. For example, Tiernan did not make his money simply from his role as a dry goods merchant in Luke Tiernan & Company.<sup>176</sup> As a successful merchant, Tiernan engaged in numerous business endeavors outside the import and export business. As always, Tiernan seemed to come out on top.

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<sup>174</sup> *Luke Tiernan v. Margaret, John, and Robert Craig, Margaret Staples and the Estate of John Craig*, Baltimore City, Chancery Court, Recorded in Liber No. 114-12, Maryland State Archives, Accession No.: 17,898-11412-1/2, MSA S512-14-11237, Location 1/39/3/ (February 21, 1826 Note executed by Craig).

<sup>175</sup> *John Craig v. Thomas Cowart*, Baltimore County Court (Chancery), February 13, 1826. Maryland State Archives, Location: 02/15/11/061, MdHR No.: 40,200-645, MSA Citation: MSA C295-647. Specifically, Tiernan's attorney, John Scott, sought (December 10, 1829) and was granted (January 6, 1830) a writ of *Scire Facias*, which orders a judgment debtor to show cause as to why an unsatisfied judgment should not be collected. The writ was used when a judgment was dormant for a period of time or, as was the case here, a new party like Tiernan as the executor of the estate was added. *Black's Law Dictionary*, Sixth Edition (St. Paul, Minnesota: West Publishing Co., 1990), 1346.

<sup>176</sup> *The Baltimore Directory for 1810*, William Fry (Baltimore: G. Dobin and Murphy, 1810), 177.

Tiernan apparently supplemented his income by loaning money. He took numerous mortgages from Craig and Barron to secure the various loans; however, these were not the only persons to which Tiernan loaned money. In the aptly titled case *Tiernan v. Poor*, Tiernan filed suit in chancery court in 1822 to foreclose on a mortgage given to him by Dudley Poor, and his wife Deborah, to secure repayment of a \$600.00 debt.<sup>177</sup> Tiernan rented a house to Poor who had apparently fallen significantly in arrears. Tiernan placed a lien on personal property owned by Mr. Poor. In order to convince Tiernan to lift this lien, the Poors agreed to give Tiernan the subject mortgage on a lot of real property owned by Ms. Poor but deeded in trust and not answerable for Mr. Poor's debts.<sup>178</sup> When the Poors failed to make payment within one year as agreed, Tiernan sued to foreclose in chancery court. However, the chancery court held that the property could not be foreclosed as Ms. Poor had transferred the subject property into a trust with no power to alienate.<sup>179</sup> Tiernan appealed the chancellor's decision who to the Maryland Court of Appeals. There, the court found it within its equitable powers to treat the transfer as a mortgage, even if it legally could not be considered as such, especially considering that Tiernan had given up his personal property lien to obtain the mortgage.<sup>180</sup> Very interestingly, the court considered Ms. Poor a *femme sole* for purposes of the property held in trust. Thus, she was

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<sup>177</sup> *Tiernan v. Poor*, 1 G. & J. 216 (Md. Ct. of App., 1829).

<sup>178</sup> *Tiernan v. Poor*, 1 G. & J. at 218.

<sup>179</sup> *Tiernan v. Poor*, 1 G. & J. at 219. Deborah Poor received this property out of the estate of her father, John O'Donnell. Afterwards, Deborah Poor and her husband Dudley conveyed the property to Columbus O'Donnell and John Poor who were presumably their siblings or other close relations. The property was to be held for the separate use of Deborah alone and was not to be subject to any debts incurred by Dudley Poor, apparently an early attempt at asset protection.

<sup>180</sup> *Tiernan v. Poor*, 1 G. & J. at 219.

legally competent to give Tiernan a mortgage on the property, despite her status as a married woman and a *femme covert*.<sup>181</sup>

In another instance, Tiernan and his business partner, and son-in-law, David Williamson acted as trustees for a woman seeking to keep personal assets out of the hands of her future husband.<sup>182</sup> As formal laws protecting married women's property did not yet exist, a married woman would lose title to all her separate property upon marriage, with her husband gaining full control of her assets.<sup>183</sup> More importantly, these assets could be used to satisfy debts incurred by her husband.<sup>184</sup> In order to provide a degree of protection, Lawrence Friedman notes that many courts of equity had relaxed these rules by recognizing the validity of mechanisms like the establishment of trusts to shelter these assets. In *Lowry v. Tiernan & Williamson*, this is exactly what occurred.<sup>185</sup> There, Sally Ann Dooris transferred U.S. Government stock worth \$8,200.00 to Tiernan and Williamson before her marriage. The assignment provided that Tiernan would pay over any of the interest accrued on the stock during her lifetime, whether she was "sole or covert" and to give any remainder to any future children following her death. In no circumstances was Tiernan to give any part of the proceeds or the principal to her husband. This is similar to what was unsuccessfully attempted to protect Deborah Poor's assets in *Tiernan v. Poor*. The lawsuit was filed three years later when Sally Ann Lowry, now using her husband's surname, sought to use the funds that had recently matured to help her husband purchase a farm.

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<sup>181</sup> *Tiernan v. Poor*, 1 G. & J. at 223.

<sup>182</sup> David Williamson married Tiernan's oldest daughter, Marie. See C.B. Tiernan, "Luke Tiernan of Baltimore,": 189.

<sup>183</sup> Lawrence M. Friedman, *A History of American Law*, 2nd Edition (New York: Simon and Schuster, 1985), 208-210. Friedman notes that the first of the married women's property acts was not passed until 1839 in Mississippi.

<sup>184</sup> Friedman, *A History of American Law*, 210.

<sup>185</sup> *Lowry v. Tiernan & Williamson*, 2 H. & G. 34 (Md. 1827).

Taking their role to be akin to trustees of an irrevocable trust, Tiernan refused to return the proceeds.<sup>186</sup> Judge Archer, the same judge who would decide the *Barron* case in the trial court one year later and who ruled in favor of Tiernan in the *Tiernan v. Poor* case, ruled in favor of Tiernan and refused her plea, holding strictly to the terms of the assignment, regardless of the alleged attempt to avoid the assignment as a “fraud on the marital rights of the husband.”<sup>187</sup>

In order to take on the Mayor and City Council for the damage to Barron and Craig’s wharf, Tiernan assembled a prestigious legal team as the attorneys he hired, David Hoffman, Peter H. Cruse, Upton S. Heath, and Charles F. Mayer represented an elite section of the Baltimore bar. It should be noted, however, that these attorneys appeared at various times and at various points in the eleven year litigation and did not necessarily constitute a cohesive group that made legal decisions as a group, as is often seen in modern high profile litigation. David Hoffman, who had handled cases for Tiernan and Craig in the past, was not only well known in Baltimore, but was also considered a national legal figure. Hoffman was best known as a professor who established his own law institute near Market Street in Fells Point in 1822 after teaching for several years under the authority of the University of Maryland.<sup>188</sup> Hoffman’s institute trained many prominent Baltimore attorneys and was unique as it relied upon a more formal course of study as opposed to the attorney/apprentice model which was the usual

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<sup>186</sup> *Lowry v. Tiernan & Williamson*, 2 H. & G. at 34.

<sup>187</sup> *Lowry v. Tiernan & Williamson*, 2 H. & G. at 39. This was not the only time Tiernan acted as a trustee. For example, in *Pierce v. Tiernan*, 10 G. & J. 253 (MD 1838), Tiernan acted as a trustee for the creditors of a William Duncan following Duncan’s deed of all his assets to Tiernan and his associates.

<sup>188</sup> Thomas L. Shaffer, “David Hoffman’s Law School Lectures, 1822-1833,” 32 *Journal of Legal Education* (1982): 127, 130-31. Shaffer notes that, while Hoffman established his own independent institute, he technically remained under the umbrella of the University of Maryland for his entire teaching career from 1814-1843. There is a slight discrepancy as to the date his connection with the University as other accounts place Hoffman as a Professor at the University from 1817-1836. See J. Thomas Scharf, *History of Baltimore City and County from the Earliest Period to the Present Day*, (Philadelphia: J.B. Lippencott & Co., 1881), 714.

custom.<sup>189</sup> Hoffman was a proponent of the study of law as a natural science which required a more expansive and vigorous study than an apprentice in a law office would normally receive. His most famous work, *A Course of Legal Study*, evidenced his belief that one must engage the great works of western thought and philosophy, including the Bible, in order to arrive at certain universal truths that all just legal systems would one day share.<sup>190</sup> This work is credited as the first outline of law in the United States and was praised by Supreme Court Justice Joseph Story, who agreed with Hoffman's perception of law as a science that deserved to be taught in the same university format as other disciplines.<sup>191</sup> As we will see in the next chapter, Hoffman contested the city's actions in court with much of the same logic.

Given the composition of the lawyers assembled to handle the case, it is likely that David Hoffman was the significantly involved in the selection of the other attorneys and in designing the strategy. For example, Peter Cruse was Hoffman's nephew. Cruse, who was educated at

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<sup>189</sup> Kevin B. Sheets, "Saving History: The Maryland Historical Society and its Founders," *Maryland Historical Magazine*, Vol. 89, No. 2 (Summer 1994): 133, 139; Friedman, *A History of American Law*, 318-321. Friedman argues that Hoffman and Kent's lectures were more for the "general education of students, and not law training strictly speaking," while the Harvard chair sought to establish law as a science co-equal with other disciplines (Friedman, p. 321). While the Harvard experience is certainly true, I believe Friedman is erroneous in his characterization of Hoffman's intent. A review of Hoffman's lectures show that he wanted to set forth a specific program which a student could follow a specific program of readings, from classics to case law, which would prepare him to practice. See David Hoffman, *A Course of Legal Study; Respectfully Addressed to the Students of Law in the United States* (Baltimore: Coale and Maxwell, 1817).

<sup>190</sup> Howard Schweber, "The Science of Legal Science: The Model Natural Sciences in Nineteenth-Century American Education," *Law and History Review*, Volume 17, Number 3 (Fall 1999), at <http://www.historycooperative.org/journals/lhr/17.3/schweber.html> (accessed July 9, 2011). See also Bill Sleeman, "David Hoffman's Lasting Influence," <http://www.law.umaryland.edu/Marshall/Hoffman/influence.asp>. (accessed March 10, 2008). Additionally, Hoffman's lectures were recognized as one of the few works which attempted to trace the history of common law jurisprudence as it had developed in England. While it was recognized as trying to correct this deficiency, some were slightly critical of the work as impractical. Specifically, one review held that Hoffman's instruction for students embarking on legal study should read Coke's treatise on Littleton as an introduction to real property or municipal law as a senseless exercise given the density of Coke's writings. "Review of the First Part of the Institutes of the Law of England, or a Commentary upon Littleton, Sir Edward Coke," *The North American Review*, Vol. 13, No. 33 (Oct., 1821): 255, 284, at <http://www.jstor.org/stable/25109086> (accessed August 11, 2010).

<sup>191</sup> Shaffer, "David Hoffman's Law School Lectures, 1822-1833," 127; Kermit Hall, William Wiecek, and Paul Finkelman, *American Legal History: Cases and Materials* (New York: Oxford University Press, 1991), 334.

Princeton and studied law, ultimately spent less time in his legal practice and gained notoriety as a writer and journalist. Cruse served as editor of the *Baltimore American* from 1822-1832 as well as the *Baltimore Patriot*. Additionally, beginning in 1818-1819, Cruse became co-publisher of a literary magazine entitled “The Red Book” along with Baltimore native John Pendleton Kennedy who, like Cruse, was also an attorney in addition to his literary pursuits.<sup>192</sup> The Red Book was a literary periodical that published the works of the Baltimore Delphian Club, a group of prominent men, including the likes of Francis Scott Key and Attorney General William Wirt, who formed a literary society following the War of 1812.<sup>193</sup> While Cruse practiced law as his occupation, he largely shunned the drudgery of law and his first love was of literature and poetry. Cruse was replaced after the initial filing of the lawsuit and appears to have little influence afterwards. He passed away in 1832 from the effects of an epidemic of cholera that had broken out in Baltimore.<sup>194</sup>

While the case was filed in 1822 by Peter H. Cruse, by the time it reached trial in 1828, Cruse had quickly been replaced with two additional attorneys, Upton S. Heath and Hugh D. Evans, with Heath appearing with Barron at the initial hearings.<sup>195</sup> Upton S. Heath was later appointed by President Van Buren to serve as a judge at the Federal District Court level, a position he held for fifteen years. Finally, Charles Mayer was a highly regarded Baltimore attorney who practiced for forty years in Baltimore and served one term as a Maryland State

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<sup>192</sup> Brantz Mayer, *Baltimore: Past and Present* (Baltimore: Richardson and Bennett, 1871), 295; *Appletons' Cyclopaedia of America Biography*, Vol. II, James Grant Wilson and John Fiske, Editors (New York: D. Appleton and Company, 1888), 23; Francis F. Beirne, *The Amiable Baltimoreans*, 1st ed. (New York: Dutton, 1951), 357.

<sup>193</sup> Kevin J. Hayes, *Poe and the Printed Word* (Cambridge University Press, 2000), 35-36.

<sup>194</sup> Charles H. Bohner, *John Pendleton Kennedy: Gentleman from Baltimore* (Baltimore: Johns Hopkins Press, 1961), 36-37.

<sup>195</sup> *Barron Transcript*, 9 (334). See Rough Transcript, *Mayor and City Council of Baltimore v. John Barron*, MSA SC 5458-58-13989.

Senator.<sup>196</sup> Charles Mayer and U.S. Heath also apparently became linked to the case through Hoffman. Mayer was known as a friend and “occasional associate” of Hoffman’s who served as co-counsel in other cases besides *Barron v. Baltimore*.<sup>197</sup> Similarly, Heath was likely also brought into the case through his connections with Hoffman as a faculty member of the law school over which Hoffman presided.<sup>198</sup> Interestingly, and indicative of the close knit and collegial nature of the professional bar in the early decades of the nineteenth century, their legal opponent Roger Taney also served on the faculty for a short time.<sup>199</sup> One interesting facet of legal representation in this era is the apparent lack of professional rules regarding conflicts. While it may still be acceptable in certain limited circumstances to act as a private counsel while also retained as a government attorney, as Taney does during the latter phases of *Barron* litigation, there were instances of representation that would clearly violate modern conflict rules. For example, during the *Barron* litigation, Tiernan hired the city’s attorney, John Scott, to reopen *Craig v. Cowart* to help recoup money for the estate. Similarly, in 1827, Barron and Craig’s attorney Charles Mayer brought suit during the *Barron* litigation against Craig and several others, later to include Luke Tiernan, to recover monies allegedly owed as the result of a brig sold by Craig shortly after the War of 1812.<sup>200</sup>

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<sup>196</sup> Scharf, *History of Baltimore City and County from the Earliest Period to the Present Day*, (1881), 714.

<sup>197</sup> Bill Sleeman, “Law and Letters: A Detailed Examination of David Hoffman’s Life and Career” (2005), All Faculty Publications, Paper 43, page 12, found at [http://digitalcommons.law.umaryland.edu/fac\\_pubs/43](http://digitalcommons.law.umaryland.edu/fac_pubs/43), last accessed April 6, 2009.

<sup>198</sup> Sleeman, “Law and Letters,” 9-10.

<sup>199</sup> Sleeman, “Law and Letters,” 9-10.

<sup>200</sup> *Peter Rescaniere v. John Hanna, Charles Malloy, Richard Williams, John Craig, and Luke Tiernan*, Baltimore County Court (Chancery), filed September 21, 1827, Maryland State Archives, Location: 1/39/2/, Accession No.: 17,898-10670-1/4, MSA Citation: MSA S512-13-10519. This case is discussed in more detail in the Conclusion.

As these attorneys, especially Hoffman, were certainly well known, there is little question of who was actually driving this case. For example, although Craig and Barron were not paupers, they had recently fallen on difficult economic times. To cope with the losses, they had been forced to liquidate most of their realty and still needed to borrow money from Luke Tiernan. Tiernan evidenced a pattern of aggressively using the courts to settle his accounts, many of which started out as someone else's claim. It is not a stretch to believe that Tiernan may have seen the difficulty encountered by Craig and Barron and essentially financed the litigation as a speculative venture. Not only did Craig give a mortgage to Tiernan, but Tiernan and two others, Charles Tiernan and David Williamson, continued the litigation by posting the \$500.00 bond following the loss at the Maryland Court of Appeals in order to take the case to the Supreme Court.<sup>201</sup> If Tiernan financed the litigation, it is not unreasonable to conclude that he selected the attorneys as well. Tiernan's input would also explain why such a prominent attorney as David Hoffman became involved with the matter, at least initially.

There are questions as to why Barron and Craig decided to file suit in court, instead of taking remedial measures into their own hands to stop the sediment, such as ripping up the dams and embankments that were destroying their livelihood more each day; however, we will address those questions later in this study.

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<sup>201</sup> *Barron* Transcript, 2.

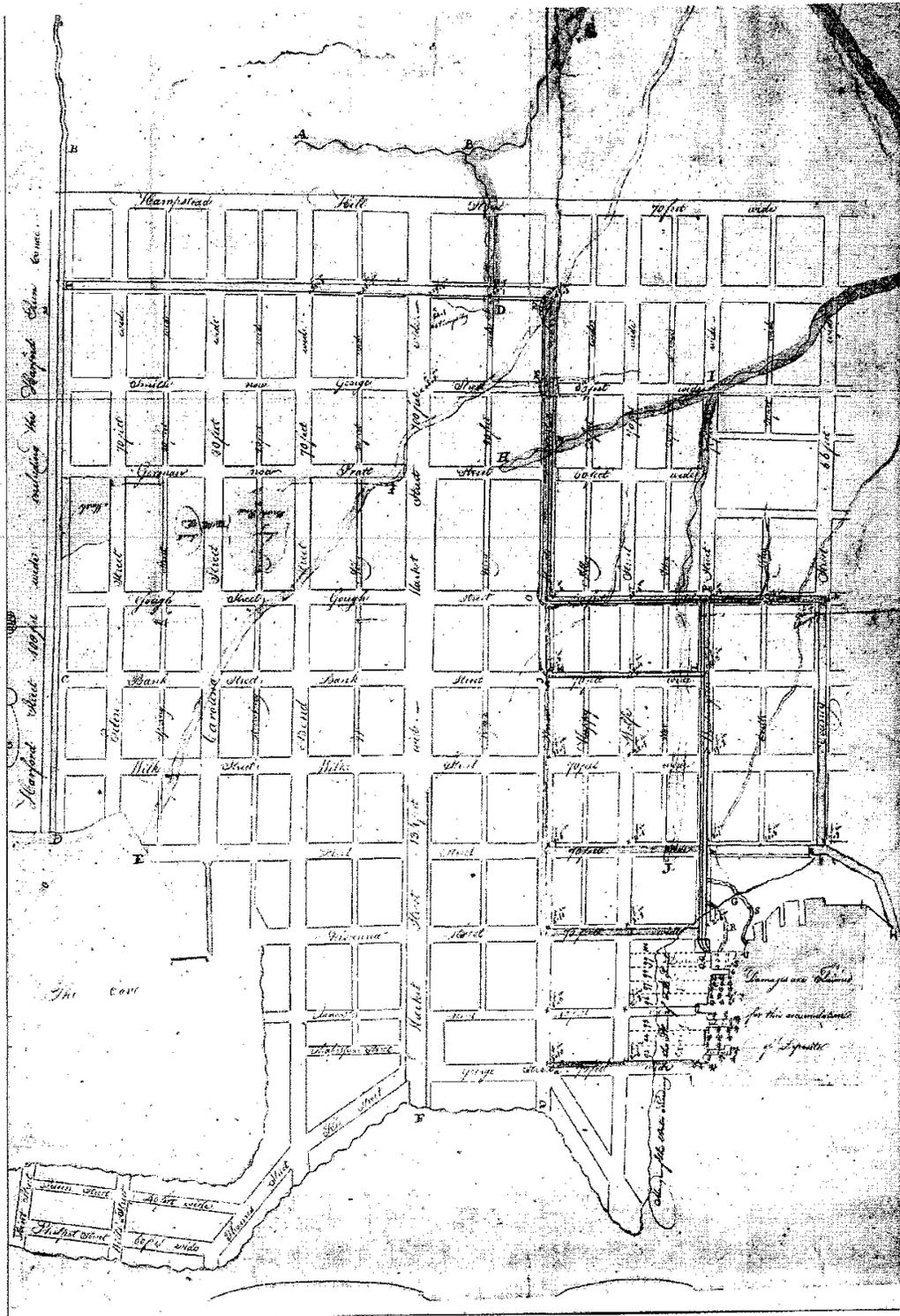


Figure 3-1. BALTIMORE COUNTY COURT (Plats) 1822-1833 Plat of Fells Point from *Barron v. Baltimore*, MSA C2042-168, MdHR 19,957-244, B5/9/2.

### CHAPTER 3 TRIAL AND APPEAL

While the succinct holding of *Barron*, that the Bill of Rights Amendments only operate to bind the Federal Government, is well known to generations of first year law students, there is much to overlook by failing to appreciate the progress of the litigation from its inception at the pleading stage, through trial, appeal and ultimately, at the Supreme Court. By doing so, it becomes apparent that this action was not initially thought of as a Fifth Amendment test case. Rather, the course of the litigation evidences a larger ideological clash over the nature of rights themselves regarding where they obtained their force and authority. In *Barron*, the parties set forth at least three general views of rights which existed simultaneously in the early republic and were all evident in this litigation: rights as protected by the common law (as set forth by the trial court); rights as fundamental liberties which were simply recognized by written constitutions (as alleged by Barron's attorneys); and written constitutions as the source of rights (as held by the Supreme Court). Ultimately, by denying remedy to Barron because the Fifth Amendment did not apply to the states, the Court endorsed just one ideological strain of thought which envisioned a positivist concept of rights.

*Barron's* holding has a familiar ring to our modern ears; the idea of locating the source of a right through a constitution, case, or statute is an expected method of analysis for a modern attorney. However, as evidenced by the entire *Barron* litigation, there were many different ideas regarding the proper foundation of rights which complicates the often teleological appreciation of *Barron* and how it provides a convenient highlight to the familiar narrative of the evolution of rights from the ratification of Constitution, to *Barron*, to the Fourteenth Amendment, and finally to the incorporation processes of the twentieth century. By situating *Barron* in the early decades of the nineteenth century, we get a richer appreciation of how rights were contested in this era.

## Trial

In 1822, Barron and Craig brought suit against the Mayor and City Council in Baltimore County Court seeking damages of \$20,000.00 for lost profits. While many attorneys would appear on behalf of Barron and Craig throughout the litigation, the case was initially filed solely by Peter Cruse, David Hoffman's nephew. Cruse pled the action against the city as one of trespass on the case, an omnibus cause of action similar to the modern tort action of negligence. The plea of trespass on the case was an accepted and routine common law remedy to recover damages for a defendant's wrongful act, but which was not accompanied by direct force; rather, the damages were a consequence of the defendant's act.<sup>1</sup> Cruse alleged damages without any larger Constitutional issue as to the applicability of the takings clause of the Fifth Amendment. Rather, he argued simply that the city's intentional diversion of the streams wrongfully impaired his clients' property and damaged their business for which the city owed reimbursement.<sup>2</sup> Interestingly, at the trial court, Cruse did not even plead reliance upon a similar, while broader, clause in the Maryland Constitution (1776) which prohibited the deprivation of life, liberty, property without due process.<sup>3</sup>

In response, the Mayor and City Council did not deny that their actions damaged Barron and Craig's wharf. Rather, they relied upon the police power granted to them by the Maryland Legislature to pass ordinances authorizing these actions, such as street paving, and that all steps

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<sup>1</sup> *Black's Law Dictionary*, Sixth Ed. (St. Paul, Minnesota: West Publishing Co., 1990), 1503.

<sup>2</sup> *Barron v. Mayor of Baltimore*, 32 U.S. 243, Transcript of Record, File Date: July 1, 1831, 31 pp., U.S. Supreme Court Records and Briefs, 1832-1978. Thompson Gale; and Maryland State Archives SC 2221-4-20, 182-1833 (hereinafter referred to as *Barron Transcript*), 8.

<sup>3</sup> Maryland Constitution (1776), Ch. XXI, which provides "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." This section is similar to Article 39 of the Magna Charta (1215) which states that "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

taken by the Mayor and City Council were done without malice and in accord with those ordinances and within the scope of their authority as public agents.<sup>4</sup> The city was initially represented solely by Baltimore attorney John Scott, who characterized the city's actions as an attempt to abate a nuisance. Abatement of a nuisance could not give rise to a private right of action, as opposed to an impairment of private property, which would. Scott further expanded on the abatement of nuisance defense and argued that the damages sought by Barron and Craig were not recoverable as any damages done to the harbor by the grading and paving projects constituted a public, rather than a private, nuisance for which damages were not recoverable.<sup>5</sup>

The general legal scheme under which the city operated requires us to conceptualize a distinction between the types of governmental actions which impair private property. To a great extent, the legal category under which we classify the impairment is instrumental in determining whether the action is considered permissible. For example, there is a world of difference between calling an impairment of private property a "taking" or an abatement of a "nuisance." If it is considered a taking, the law considers it to fall under the rubric of eminent domain and the presumption is more in favor of the property owner, since the government has to allege the necessity of the taking and must show that the property is being taken for a public purpose. Conversely, if the impairment is conceived of as an abatement of a nuisance, the act falls under the inherent police power attributable to the government. In this case, the presumption shifts to the property owner to show that his damages were unique from the public and that the government acted in excess of the law under which it proceeded. The natural question then becomes what makes an impairment of property a taking or the abatement of a nuisance?

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<sup>4</sup> *Barron* Transcript, 19-20.

<sup>5</sup> *Barron* Transcript, 25.

Scholars admit that this is an unsettled distinction that is even difficult to resolve today.<sup>6</sup> Thus, answering the question in the appropriate fashion matters, as a taking will usually require compensation while an abatement of nuisance largely will not. If an impairment is classified as an abatement of nuisance, the aggrieved party could not recover damages unless he was able to show special damages that he uniquely suffered as opposed to damages suffered by the community as a whole. The city's attorney John Scott relied on this theory by arguing that Barron and Craig suffered public instead of private damages. Even if the aggrieved party could show special damages, the government could often escape liability if they and their agents could prove that they acted lawfully within the scope of their legislative mandate and did not exceed their authority or carry out that authority wantonly or oppressively, as Scott also characterized the city's actions.

The suit was filed in 1822 and the court granted seven continuances until March of 1825 before Craig and Barron entered their plea. While the city was ordered to answer the plea at the next session of court, the case was then continued three more times until March of 1827 when the city answered and denied the charges. Interestingly, while John Scott had represented the city since the inception of the suit, by the time of the March 26, 1827 hearing to formally answer the charges, the city had added to its defense team future Supreme Court Chief Justice and John Marshall's successor, Roger B. Taney.<sup>7</sup> Taney was appointed later that summer to the post of Maryland Attorney General, a position he maintained throughout the majority of the *Barron* litigation. It appears that this appointment caused Taney little conflict as the position of Maryland Attorney General resembled more an honorary office at the time. The pay was low,

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<sup>6</sup> Michal Allen Wolf, *The Zoning of America: Euclid v. Ambler* (Lawrence, Kansas: University Press of Kansas, 2008), 91.

<sup>7</sup> *Barron* Transcript, 9.

but the position had previously been held by lawyers of great esteem, including Luther Martin and William Pinkney.<sup>8</sup> Indeed, Taney continued to represent the city all the way to the conclusion of the case in the U.S. Supreme Court in February of 1833, even after he had been appointed the U.S. Attorney General in June of 1831.<sup>9</sup> Taney did not limit his representation of private clients to the city of Baltimore after he was appointed as U.S. Attorney General. For the 1833 Supreme Court term, Taney appeared before the Court as a private attorney for three cases in addition to *Barron v. Baltimore* and his many appearances in his official capacity.<sup>10</sup>

Following the city's answer, the case finally went to jury trial in March of 1828 before Judge Stevenson Archer. In the interim, Craig died before the trial while Barron passed away shortly thereafter on June 11, 1828, three months after the trial.<sup>11</sup> By this time Baltimore merchant Luke Tiernan and his attorneys had taken over the case and long ago claimed any possible recovery.<sup>12</sup> At the trial, Barron's attorneys introduced numerous city resolutions which evidenced the city's gradual narrowing of the waterways to divert them entirely to the harbor north of Barron and Craig's wharf.<sup>13</sup> Barron's attorneys called nine witnesses, including a surveyor previously hired by the city who argued that the majority of the water now flowing into the harbor at Barron's wharf could have been easily diverted to a local creek for no more than

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<sup>8</sup> Carl Brent Swisher, *Roger B. Taney* (Hamden, Conn.: Archon Books, 1961), 114-115; Samuel Tyler, *Memoir of Roger Brooke Taney, L.L.D.* (Baltimore: John Murphy and Co., 1872), 67, 163-164; Rev. William Pinkney, D.D., *The Life of William Pinkney* (New York: D. Appleton and Co., 1853), 49.

<sup>9</sup> Swisher, *Roger B. Taney*, 141.

<sup>10</sup> The cases were *Nicholas v. Fearson*, 32 U.S. 99 (1833), *Lessee of Livingston v. Moore*, 32 U.S. 469 (1833), and *Scholefield v. Eichelberger*, 32 U.S. 586 (1833).

<sup>11</sup> See "Sale of the Property of John Craig, Deceased," *Baltimore Patriot*, March 8, 1828, Volume XXXI, Issue 59, Page 3 and Death Notice for John Barron, *Baltimore Patriot*, June 12, 1828, Volume XXXI, Issue 141, Page 3.

<sup>12</sup> For more discussion of Luke Tiernan and his role in the litigation, see Chapter 2.

<sup>13</sup> *Barron* Transcript, 11-14.

\$10,000.00, but that the city had disregarded this plan.<sup>14</sup> Barron also called Colonel Thomas Shepard, a former member of a committee empanelled by the city to study the drainage problem, who testified that the committee recommended the waters flowing down the streets could easily be redirected to their natural streams which deposited in the western part of the harbor. Shepard further testified that it “was a matter of great astonishment to him and others” that the city did not do so but instead dug ditches and dammed the streets further which “produced all the mischief.” Shepard additionally commented on the ineptness of the city in taking this course as apparently the western part of the harbor was actually in need of sediment and debris and the city was currently filling up that portion at great expense to its residents.<sup>15</sup>

In response, the city cited legislation by the state of Maryland directing and empowering it to take these measures and that all remedial measures complained of by Barron were done in accord with those acts.<sup>16</sup> The city called six witnesses, mostly former city commissioners and port wardens who testified that following the original paving of Pratt Street in 1813, which diverted water away from Brick Pond and down Market Street, the city had to take some action for the “general interests and prosperity of the city.”<sup>17</sup> The testimony of former city commissioner Nathaniel Hynson seems to indicate the final decisions on where to divert the water were the result of a political battle between factions of residents. For example, Hynson testified that the “town interest” wanted to divert the water toward the east and the “Point

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<sup>14</sup> *Barron* Transcript, 16.

<sup>15</sup> *Barron* Transcript, 16.

<sup>16</sup> *Barron* Transcript, 19-20.

<sup>17</sup> *Barron* Transcript, 21.

interest” wanted it to go west, with the city commissioners and port wardens finally deciding on an easterly direction because the westerly direction faced a more uphill grade.<sup>18</sup>

At the close of the trial, the city sought to have Judge Archer instruct the jury on four points: first, that the city acted as mere public agents in the discharge of a duty required of them by law; second, that because the city was a corporation comprised of Baltimore residents, the city was not liable for damages resulting from acts done by its agents; third, that since the harbor and underlying soil was the property of the state of Maryland, and the city was an agent of the state charged with the responsibility to preserve the navigation of the water, the city was not liable; and fourth, that any damages suffered because of the filling up of the harbor was a non-compensable public nuisance that did not give rise to a private cause of action. In addition to these points, the city argued if the jury found that that by grading and paving the streets that its agents acted impartially, without malice, and exercised their best judgment acting within the scope of their lawful authority, the city could not be held liable for the damages to the wharf.<sup>19</sup> Archer refused to give these instructions and instead gave instructions which revealed his view of the case, telling the jury that they should decide in favor of Barron if they believed the actions of the city in diverting the waters from their westerly direction into the eastern harbor caused injury to Barron regardless whether the actions of the city were:

neither malicious, negligent, or careless, but was even beneficial to the general interests of the city, made with the best advice, and with due circumspection, consulting the general prosperity of the city and its inhabitants, either for securing the health of the city, or of preserving more effectually its navigation, still, notwithstanding the jury should believe these facts, the plaintiff is entitled to damages for the injury the jury shall find the plaintiff may have sustained, in as much as this general improvement would, in such case, be made for the benefit and advantage of the inhabitants of Baltimore, and it would be unjust that the property

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<sup>18</sup> *Barron* Transcript, 22.

<sup>19</sup> Opinion of Judge Stephenson Archer, reprinted in *The American Jurist and Law Magazine*, No. 2, Vol. 4, (October 1829): 203.

of the plaintiff should be deteriorated, (and to the extent of such injury,) deprived of his property without remuneration.<sup>20</sup>

Following the close of evidence and Archer's instructions, the jury returned with a verdict in favor of Barron in the amount of \$4,500.00.<sup>21</sup> Judge Archer viewed certain rights, including non-deprivation of property without due process or proper reimbursement, as paramount liberties that could not be infringed regardless of intent or motive.

Judge Archer's written case opinion more fully evidences his view. While Barron and Craig pled the matter as a trespass on the case and set forth evidence to support what is essentially a forerunner of a modern negligence action, the city argued its delegated police power allowed it to abate nuisance, regardless of incidental damage. Judge Archer, however, bypassed a reliance on a strict determination of whether the damage to the wharf constituted a taking or whether it was a permissible exercise of the city's police power. Rather, Archer relied upon common law principles concerning damage to property generally to reach his result. Archer cited instances of damage to property where the damage was often a matter between individuals, instead of conceiving as the dispute between a governmental entity and an individual. Archer perceived the dispute between the city and Barron as one which required an evaluation of the rights and responsibilities of equal property owners, and not as a matter of the circumstances under which the government could take or regulate property. Thus, under Archer's calculus, the resulting equation looks much different than that set forth by the city. Archer cited the "undeniable principle that *ex jure naturae*," every man has a right to divert a water course from its natural flow to protect him from injury. However, this principle carried with it a consistent obligation to indemnify those who were injured by the diversion, regardless of whether the

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<sup>20</sup> *Barron* Transcript, 26.

<sup>21</sup> *Barron* Transcript, 10.

damages suffered were a direct result of the diversion or were merely consequential. He further cited the common law principle that every man must use his property with caution so as to not affect the property rights of others, referring to the prevailing common law property maxim *sic utere tuo ut alienum non laedas*.<sup>22</sup> Pursuant to the maxim *sic current et debent currere*, this common law principle applied to watercourses.<sup>23</sup> Archer conceded that the common law rule of *damnum abseque injuria* (those injuries that have no remedy) can limit losses when the lawful use of your property causes damage to that of your neighbor; however, Archer considered this rule as limited.<sup>24</sup> For example, Archer applied it to situations such as when a farmer tills his soil, which subsequently washes over the crops of his neighbor's field due to heavy rain or where a property owner erects a mill which injures the mill of an owner downriver by virtue of the decrease in the speed of the water. In both such situations, the *damnum abseque injuria* exception would apply as both property owners used their property in a lawful manner and the resulting damage to their neighbor's property did not constitute a permanent or significant injury.<sup>25</sup> Accordingly, Archer held that an individual who caused these damages to the wharf would clearly be liable. Archer was thus incredulous that because the party that caused the damage was the city, the outcome would be any different. The city unquestionably had the legal authority to take action to abate nuisances such as the water pouring through Fell's Point.

However, this authority or the question of whether this authority was exercised properly or done

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<sup>22</sup> Archer, *The American Jurist and Law Magazine*, 205; Elmer E. Snead, "Sic Utere Tuo Ut Alienum Non Laedas: The Basis of the State Police Power," 21 *Cornell Law Quarterly* (1935-36): 276.

<sup>23</sup> Archer, *The American Jurist and Law Magazine*, 205.

<sup>24</sup> Archer, *The American Jurist and Law Magazine*, 205.

<sup>25</sup> Archer, *The American Jurist and Law Magazine*, 206. Later in his opinion, Archer cited *Palmer v. Mulligan*, 3 Caines. 307 (N.Y. 1805) for the proposition that a causes of action against a municipality for acts of municipal improvement would not lie unless the damage from such acts rose to a serious and permanent level; otherwise, *damnum abseque injuria* will apply to bar such suits.

with malice was absolutely immaterial. To Archer, it made no difference that the diversion was allegedly done without malice, or whether the water could have been directed elsewhere. If the water was diverted to benefit the residents of Baltimore, and the effect of the benefit was to permanently injure Barron and Craig's wharf, "justice seems to demand that he whose property has fallen a victim to the public service should be compensated in some way."<sup>26</sup>

Next, Archer clarified his opinion to overcome a main conceptual problem with the case, namely that the wharf itself was not physically damaged or injured. To address this, Archer had to expand Barron and Craig's property interest in excess of simple ownership of the wharf. Archer conceded that the soil in the Patapsco River as well as the water covering the soil belonged not to Barron and Craig, but to the state. Barron and Craig's property interest included only the wharf itself.<sup>27</sup> Nonetheless, Archer held that this property interest was sufficient to bring suit by expanding the property interest of the wharf to include an implied easement. Archer noted that the plaintiff was indeed "disseized, or, more properly speaking, deprived of an easement appurtenant to his land, which constituted a great portion of its value."<sup>28</sup> Moreover, Archer added that "it would be in vain to guard with such vigilance the freehold itself, if the liberties and privileges appurtenant to it were not also the subject of constitutional guardianship."<sup>29</sup> The "liberties and privileges appurtenant" to the wharf included an implied easement that required the wharf be clear of obstructions; an easement of which Barron and Craig could not be deprived except upon "judgment of his peers or by the law of the land."<sup>30</sup>

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<sup>26</sup> Archer, *The American Jurist and Law Magazine*, 206.

<sup>27</sup> Archer, *The American Jurist and Law Magazine*, 207.

<sup>28</sup> Archer, *The American Jurist and Law Magazine*, 207.

<sup>29</sup> Archer, *The American Jurist and Law Magazine*, 207.

<sup>30</sup> Archer, *The American Jurist and Law Magazine*, 207.

Parenthetically, for most of the litigation no one, except for a brief reference by Taney in his appellate argument, addressed the obvious question of whether the run-off which damaged the wharf actually constituted a physical taking. That this analysis was never raised is instructional, in that it shows for much of the case, the dispositive question concerned liability for more routine allegations of damage and not whether the remedy would lie in the Fifth Amendment's taking clause.

Archer then addressed the city's argument that it had the power to abate nuisance and that Barron and Craig's damages were non-compensable since the city was simply exercising this power and duty. As such, their damages were not specific but were shared by all members of the public and therefore Barron and Craig lacked standing to bring a claim. To refute this, Archer held that Barron and Craig did suffer unique damage, namely the right to collect wharfage which was destroyed by the city's actions.<sup>31</sup> Barron and Craig's easement was destroyed by the actions of the city and the destruction of the easement also decimated their profits. These damages were special as not all residents of Baltimore suffered similarly; rather, these damages were only borne by wharf owners in the vicinity.<sup>32</sup> As Barron and Craig had a property interest that was uniquely damaged by the acts of the city, the city owed reimbursement regardless of its inherent powers allowing for such actions.

Ultimately for Archer, the case implicated larger concerns regarding infringement of fundamental rights which were recognized and protected by generations of wisdom expressed in the common law. Archer set forth his belief in the existence of certain fundamental rights, such as the Magna Charta's declaration that no man shall be disseized of his property except by

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<sup>31</sup> Archer, *The American Jurist and Law Magazine*, 207.

<sup>32</sup> Archer, *The American Jurist and Law Magazine*, 208.

judgment of his peers or by the law of the land, which was largely codified verbatim into the 1776 Maryland Constitution. Archer actually conceded in his written opinion that there was a dispute whether the Fifth Amendment's similar prohibition applied to the states; however, he argued that this principle is so fundamental that it has "a deeper foundation in all free governments than constitutions or laws; it rests upon the universal sense which all mankind feel of its equity and justice."<sup>33</sup> To Archer the critical point was not the applicability of the state or Federal constitution which contained provisions protecting private property. Rather, these rights existed completely independent of any written constitution. The Maryland Constitution's prohibition on the deprivation of private property except by the law of the land was "merely declaratory of the common law of England."<sup>34</sup> Archer agreed that while some of the Amendments to the U.S. Constitution were only intended to apply to the Federal government, many of the Amendments were created to protect the people of the United States to ensure that all were guaranteed certain freedoms regardless of which state they resided. Particularly, Archer cited the Second, Third, Fourth, Fifth, and Eighth Amendments as applying to both the Federal government as well as those of the states.<sup>35</sup> Archer relied not only on his own view of the extra-constitutional nature of certain rights but also cited in support William Rawle's contemporary treatise, *A View of the Constitution of the United States of America*.<sup>36</sup> As we will explore more fully in Chapter 6, Rawle also maintained that the Amendments to the Constitution simply

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<sup>33</sup> Archer, *The American Jurist and Law Magazine*, 206-207, 210-211.

<sup>34</sup> Archer, *The American Jurist and Law Magazine*, 211.

<sup>35</sup> Archer, *The American Jurist and Law Magazine*, 211.

<sup>36</sup> Archer, *The American Jurist and Law Magazine*, 211. William Rawle, *A View of the Constitution of the United States of America*, Chapter X (Philadelphia, 1829), [www.constitution.org/wr/rawle\\_10.htm](http://www.constitution.org/wr/rawle_10.htm), last accessed February 23, 2010. Rawle's Treatise was first published in 1825.

declared pre-existing rights of the people and thus bound both the Federal and state governments.<sup>37</sup>

### **Appeal**

Following the verdict in December of 1830, the city appealed the decision to the Court of Appeals for the Western Shore of the State of Maryland located in the state capital in Annapolis, Maryland.<sup>38</sup> It was at the Appeals Court that the parties apparently picked up on Judge Archer's discussion of fundamental rights. Whether Barron and Craig's attorneys failed to appreciate the larger rights-based constitutional argument during the initial trial, or whether they were simply constrained by the rules of pleading to fit the case into an accepted cause of action and purposefully chose not to engage the larger constitutional argument, is unclear. What is clear is that the parties, apparently encouraged by Judge Archer's opinion, began to address the larger issues of the role of the Maryland and U.S. Constitutions in the litigation.

Traveling thirty miles from Baltimore to the Maryland coast, the parties arrived in Annapolis, home of the state legislature and the Court of Appeals. While Barron and Craig had been represented at various points in the litigation by several different attorneys, only Charles Mayer and David Hoffman traveled to Annapolis for the hearing. Likewise, John Scott and Roger Taney made the trip on behalf of the city. Before a five judge appellate panel, on December 17, 1830, John Scott began the oral arguments.<sup>39</sup>

First, Scott cited nine separate state laws, local ordinances, and resolutions which collectively, he argued, constituted a grant of power from the state of Maryland to the

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<sup>37</sup> Rawle, Chapter X, 124-125.

<sup>38</sup> *Barron* Transcript, 30.

<sup>39</sup> The five judges who heard the appeal were Buchanan, Earle, Dorsey, Martin, and Stephenson. Edward C. Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 32 U.S. 243, <http://mdhistory.net/msaref06/barron/index.html> (last accessed on 4/5/08), 0047 (131).

corporation of the city of Baltimore to take all actions necessary to ensure the health and welfare of the residents of the city. Scott linked the city's general power to prevent nuisance to the power to pave and grade streets. Second, in addition to the statutory authority, Scott relied on a line of cases which held that officers and directors of a corporation and, indeed, the corporation itself could not be held liable for damages incurred in following legislative directives unless their actions exceeded the scope of the law. Given the case law that existed during this era, Scott could and did rely on a wealth of cases that supported his position, as there was ample case law that specified the non-liability of agents as long as they acted pursuant to the enabling law and without malice.<sup>40</sup> For example, Scott cited *Steele v. Western Inland Lock Navigation* (N.Y. 1807) wherein the New York legislature passed a law authorizing a company to dig a canal to aid navigation in upstate New York.<sup>41</sup> The canal, which passed partially through the Plaintiff's property, had the unintended effect of blocking the natural flow of smaller streams and ditches on his property and which resulted in significant flooding.<sup>42</sup> The court held that the company could not be held liable for these damages as it acted pursuant to the act passed by the state legislature and did not exceed its jurisdiction granted by the law.<sup>43</sup> Interestingly, the court noted that the plaintiff had been properly compensated for the taking of his property and that this compensation should have anticipated these damages when calculating the award.<sup>44</sup>

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<sup>40</sup> In addition to *Steele v. Western Inland Lock Navigation* (N.Y. 1807) and *Goszler v. Corporation of Georgetown* (1821), there existed other cases upon which Scott relied, which included *Sutton v. Clarke*, 6 Taunt. 42 (1815) (which was addressed and distinguished by Judge Archer in his trial court opinion) and the English case of *Harman v. Tappenden*, 1 East. 555. These cases collectively stood for the proposition that agents of the state who engage in the making of improvements would not be held liable for their actions, absent some evidence of malice.

<sup>41</sup> *Steele v. Western Inland Lock Navigation*, 2 Johns. 283 (N.Y. 1807).

<sup>42</sup> *Steele*, 2 Johns. at 283.

<sup>43</sup> *Steele*, 2 Johns. at 285.

<sup>44</sup> *Steele*, 2 Johns. at 285. Parenthetically, the 1777 New York Constitution did not contain a specific prohibition against uncompensated takings, other than a more general restriction on depriving any member of the state of any

*Steele* is instructional as it contains a number of similarities to the *Barron* litigation. In *Steele*, the Western Inland Lock Navigation, a private company, was directed by the New York Legislature to dig canals in order to promote and aid lock navigation through the state. To that end, the company cut a canal across the plaintiff's land. Following completion of the canal, the plaintiff sued the company but not for the actual taking of the property, which was not at issue as he was properly compensated following an appraisal. Rather, as was the case with *Barron and Craig*, the plaintiff sued the company as a result of water that overflowed his land from the cross ditches that became bottled up by the new canal. Also like *Barron and Craig*, the plaintiff brought an action for trespass on the case against the company for lost profits due to the loss of his crops and for the damage to the soil of his farmland. Finally similar to *Barron and Craig*, the plaintiff won at the trial court level, but was reversed on appeal. On appeal, the court denied remedy to the plaintiff holding that the original appraisal of the property taken for the canal should have foreseen and included these types of possible consequential damages that could have resulted from the operation of the canal.<sup>45</sup> The court also pointed out that because the company acted pursuant to the legal authority of the legislature, neither it nor the officers could be held liable, unless they exceeded the scope of the law.<sup>46</sup>

Scott cited Justice Marshall's opinion drafted nine years earlier in *Goszler v. The Corporation of Georgetown* (1821), which was similar to *Steele*, and much like the facts in

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rights unless by law of the land. By 1821, the New York Constitution contained specific language prohibiting the taking of private property without compensation. See, New York Constitution (1777), Art. XIII; New York Constitution (1821), Art. VII, Sec. 5.

<sup>45</sup> *Steele*, 2 Johns. at 285.

<sup>46</sup> *Steele*, 2 Johns. at 285.

*Barron*.<sup>47</sup> In *Goszler*, the Maryland legislature granted the municipal corporation of Georgetown the authority to make all laws necessary to grade and level the streets within the town.<sup>48</sup> After the first round of grading the streets the plaintiff, who owned property adjacent to one of the leveled streets, improved his property to meet the new gradation. However, seventeen years later in 1816, the city passed new ordinances modifying the existing gradation. The plaintiff then brought suit to enjoin the city from proceeding.<sup>49</sup> Upon appeal to the U.S. Supreme Court, Justice Marshall ruled in favor of the city and held that the original grant of power by the Maryland legislature allowed for continued grading without the need for subsequent acts. Moreover, he held that the ordinance which authorized the original grading did not constitute a compact that could not be altered, as was asserted by the plaintiff.<sup>50</sup> For Marshall a decision which held a city ordinance as a compact would operate as a “perpetual restraint” on a municipal corporation and would, in practice, limit its powers that were specifically delegated by the state legislature.<sup>51</sup>

The *Goszler* decision is interesting for a number of reasons. First, *Goszler* took a broad view of the powers granted by the Maryland legislature to a municipal corporation, allowing subsequent alteration and action taken even decades after the original grant of power. Second, the person describing the broad powers of municipalities is none other than Marshall himself and can be considered an early indicator of how later challenges to municipal improvements would be decided. Finally, and related to the second point, *Goszler* is an example of *stare decisis*

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<sup>47</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0053 (137); *Goszler v. Corporation of Georgetown*, 6 Wheat. 593, 19 U.S. 593 (1821).

<sup>48</sup> *Goszler*, 19 U.S. at 593.

<sup>49</sup> *Goszler*, 19 U.S. at 594.

<sup>50</sup> *Goszler*, 19 U.S. at 597-598.

<sup>51</sup> *Goszler*, 19 U.S. at 597-598.

jurisprudence upon which Marshall could have based the *Barron* decision. Instead of holding the Bill of Rights inapplicable to the states, Marshall could have conceivably simply cited *Goszler* as binding precedent. Alternatively, Marshall could have used the case as a foundation upon which to issue a decision that would deny relief to Barron by an expansive interpretation of municipal power instead of a constitutional opinion that formally eviscerated a body of rights for the residents of the several states.

Finally, Scott argued that the nature of Barron and Craig's damages did not merit a private right of action against the city. To this point, Scott cited *Lansing v. Smith*, an 1828 New York state case which held that no cause of action existed for consequential damages sustained as a result of public improvement projects.<sup>52</sup> In *Lansing*, the court denied all remedy to a wharf owner who brought suit to recover the depreciation in the value of his wharf caused by the creation of a basin in the Hudson River which impeded access to the wharf. The plaintiff brought suit against the commissioners of a private company created by the state legislature to construct the basin. The plaintiff also made a state constitutional argument when he alleged that his property was taken without just compensation, in violation of the New York Constitution and that the law which created the company was unconstitutional as it violated the provision prohibiting the impairment of the obligation of contracts.<sup>53</sup> Described by William Novak as a "classic *damnum abseque injuria* case," the *Lansing* court held that the wharf owner's damages were not special to him, but common to the entire community.<sup>54</sup> By classifying the damages as general and common to all, the court was able to bring its decision in line with a body of

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<sup>52</sup> *Lansing v. Smith*, 8 Cow. 146 (N.Y. 1828).

<sup>53</sup> *Lansing*, 8 Cow. at 147. The 1821 New York Constitution contained a specific provision prohibiting the taking of private property without compensation. See New York Constitution (1821), Article VII, Section 5.

<sup>54</sup> *Lansing*, 8 Cow. at 152; William Novak, *The Peoples' Welfare: Law & Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996), 142.

jurisprudence holding that special or unique damages are required in order to maintain a private cause of action for damages resulting from a public nuisance.<sup>55</sup> Ultimately, the court held that the wharf owner's damages were general and were not direct but consequential. Therefore, the damages were *damnum abseque injuria* (an injury without a remedy) and must "be borne as a part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience."<sup>56</sup>

In response to Scott's presentation, Barron's attorney, Charles Mayer, argued that "principles of truth and justice" obligated the city to pay for the injury they caused to Barron.<sup>57</sup> Mayer cited the 1796 Act of the Maryland Legislature which chartered the city and specifically prohibited it from taking any actions which were repugnant to either the Maryland or U.S. Constitutions.<sup>58</sup> Mayer attempted to persuade the Appeals Court that the acts of the city which caused the run-off to accumulate at the wharf constituted a violation of the Maryland and U.S. Constitutions. He argued the right to take private property for public use belonged to the sovereign only, and that this power was never delegated from the State of Maryland to the city. As a result, the acts under which the city proceeded were unlawful as they were required to conform to the constitutions of the state of Maryland and of the United States, but violated both.<sup>59</sup> Even if the eminent domain power could be delegated, it could only be exercised upon

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<sup>55</sup> *Lansing*, 8 Cow. at 152. For example, see *Butler v. Kent*, 19 Johns. 223 (N.Y. 1821) which was also relied upon by Scott and Taney in their respective arguments.

<sup>56</sup> *Lansing*, 8 Cow. at 148.

<sup>57</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0057 (141).

<sup>58</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0058 (142). See also Chapter 68, Section 8, The General Public Statutory Law and Public Local Law of the State of Maryland, Vol. II, Clement Dorsey, ed. (Baltimore: John Toy, 1810), 1396, 1399.

<sup>59</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0059 (143).

payment of just compensation.<sup>60</sup> Mayer specifically cited the applicability of the Fifth Amendment to negate the arguments brought by the city.<sup>61</sup> Mayer also relied upon several cases and treatises which upheld the sanctity of private property, including *Vanhorne's Lessee v. Dorrance*, a 1795 case written by U.S. Supreme Court Justice Patterson while on Federal circuit in Pennsylvania.<sup>62</sup> In *Vanhorne's Lessee*, one party in a land title dispute claimed superior title as a result of a Pennsylvania law which quieted title and vested it in his possession. Justice Patterson held that the Pennsylvania legislature could not divest the party of title to land by legislation and place title in the opposing party without compensation.<sup>63</sup>

Finally, Mayer argued that the damages to the wharf were not *damnum abseque injuria*, comparing Barron's damages to those incurred by a homeowner whose house was pulled down by order of a local law. Rather, chancery would require the public authority that made such order provide compensation to the owner. Mayer attempted to distinguish the arguments made by Scott that acts made to abate a public nuisance cannot give rise to a private cause of action by arguing that it was possible, during abatement of a public nuisance, that special damages could arise as was the case for Barron and Craig.<sup>64</sup> Mayer attempted to collapse the public/private nuisance distinction by arguing that simply because an act was deemed a public nuisance it could not also operate as a private nuisance with the requisite special damages necessary to give rise to

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<sup>60</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0059 (143).

<sup>61</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0061 (145).

<sup>62</sup> *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (C.C. Penn. 1795).

<sup>63</sup> Saul Cornell and Gerald Leonard, "The Consolidation of the Early Federal System, 1791-1812," in *The Cambridge History of Law in America, Vol. 1: Early America (1580-1815)*, Michael Grossberg and Christopher Tomlins, ed. (New York: Cambridge Univ. Press, 2008), 542. *Vanhorne's Lessee* is discussed in more detail in Chapter 5.

<sup>64</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0059, 0063 (143, 147).

a private right of action.<sup>65</sup> However, at a more fundamental level, the existence of cases like *Lansing*, which was decided after the case was filed in 1822 but before the appellate arguments took place in 1830, may have pushed Mayer and Hoffman to stress the constitutional and fundamental law arguments so forcefully on appeal.

After Mayer presented his argument, Barron's other attorney, David Hoffman, began. As was discussed in Chapter 2, Hoffman was a well-regarded attorney and one of the first practitioners to open a formal school for training attorneys, establishing his own law institute in Baltimore in 1822 after teaching for several years under the authority of the University of Maryland.<sup>66</sup> Hoffman presented twenty-one separate points that set forth his argument, which we can categorize into several general themes.<sup>67</sup> First, Hoffman conceded the right of the city to pave and grade the streets in order to protect the health of the residents, but echoed Mayer's argument that the city was never delegated the power of eminent domain, an extraordinary attribute of sovereignty that cannot be delegated or, alternatively, must be done in express terms.<sup>68</sup> Hoffman tried to redefine the damage caused by the city as a taking and not as an attempt to abate nuisance. In this view, if the city caused damage while making street repairs, it had the duty to provide compensation.<sup>69</sup> Here, only the state of Maryland would possess the power of eminent domain and that power could only be exercised in cases of great public

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<sup>65</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0063 (147).

<sup>66</sup> Thomas L. Shaffer, "David Hoffman's Law School Lectures, 1822-1833," 32 *Journal of Legal Education* (1982): 127, 130-31. Shaffer notes that, while Hoffman established his own independent institute, he technically remained under the umbrella of the University of Maryland for his entire teaching career from 1814-1843.

<sup>67</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0064 (148).

<sup>68</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0064, 0067 (148, 151).

<sup>69</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0064 (148).

necessity and with the caveat that compensation was an essential component.<sup>70</sup> The city did not possess the power of eminent domain and even if it was delegated this extraordinary power, how could it escape the just compensation requirement? For further support, Hoffman cited Joseph Angell's "A Treatise on the Common Law in relation to Water-Courses," which was first published in 1824 and which provides an excellent primer on the contemporary remedies provided by the common law for all manners of damage to and by flowing waters.<sup>71</sup> Hoffman cited Angell's admonishment that water courses were included in the "well established principle of natural equity" and that the governmental taking of private property can only be had upon compensation, citing natural law theorists Grotius and Pufendorf in support. Without compensation, wrote Angell, it would be "not only contrary to the first principles of civil government, but also in opposition to (what is of higher authority and absolutely decisive of the sense of the people of this country) and express article of the constitution," and cited the Fifth Amendment as well as noted similar provisions in many state constitutions.<sup>72</sup> As was noted by Morton Horwitz, Angell's treatise restated the well-established orthodoxy of the common law as it related to riparian rights. The common law position restated by Angell was being challenged and would become eclipsed by the economic needs of an ever expanding nation.<sup>73</sup>

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<sup>70</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0067 (151).

<sup>71</sup> Joseph K. Angell, *A Treatise on the Common Law in Relation to Water-Courses* (Boston: Wells and Lilly, 1824), The Making of Modern Law. Gale. 2010. Gale, Cengage Learning. 15 April 2010, <http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F101718351&srchtp=a&ste=14>; Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0067 (151).

<sup>72</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0067 (151); Angell, *A Treatise on the Common Law in Relation to Water-Courses*, 53-54. In support of this proposition, Angell cited *Gardner v. Trustees of the City of Newburgh*, 2 Johns. 162 (N.Y. 1816), which is discussed in more detail in Chapter 5.

<sup>73</sup> Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), 38.

Second, Hoffman addressed the public nuisance argument which viewed his clients' damages as general to the public and not specific to the Plaintiffs. As the road grading and paving projects caused the harbor that filled up with sediment and did not directly damage the wharf itself, these damages are general and must be borne by all residents. Thus, Barron and Craig did not possess the requisite standing to sue the city. Hoffman argued that question of whether the public was injured was absolutely immaterial to the case.<sup>74</sup> The law did not recognize a distinction between direct and indirect damage to private property when taking actions for the public good. In fact, Hoffman countered the city's argument and argued that the "greater the good, the stronger the claim for compensation."<sup>75</sup>

Third, Hoffman confronted the city's argument that the Mayor and members of the City Council could not be held liable as they acted within the scope of the powers granted by the enabling laws passed by the Maryland legislature. Hoffman argued that the city was not an agent of the state of Maryland, but was an entity that could be sued. While the state would have sovereign immunity, the city would not. Hoffman then asked the appeals court what would have been the liability if a private individual owned the Fell's Point stream and diverted its course?<sup>76</sup> Under general common law principles, such an owner would be liable for the resulting damage. Hoffman had to address Scott's citation of several cases which held that agents of the government who act pursuant to their legal mandate cannot be held liable for damages. Here, Hoffman attempted to distinguish some of this authority, such as the 1815 English case, *Sutton v.*

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<sup>74</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0066 (150).

<sup>75</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0065 (149).

<sup>76</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0065 (149).

*Clarke*.<sup>77</sup> In *Sutton*, a land owner sued trustees who were empowered by law in their mandate to widen a road and to cut any watercourses in order to keep the road from flooding. Parenthetically, as part of their mandate, the law required that the trustees provide reasonable compensation to any adjacent landowners who suffered damage as a result of the project. In widening the road, the landowner alleged that the trustees dug a drainage canal from the road to his property. He argued that the canal was too shallow and narrow and did not extend far enough from the road. As a result, water had continuously overflowed the canal and damaged the landowner's crops.<sup>78</sup> At trial, the court ruled against the landowner and held that the trustees were not liable as they were not private individuals taking these actions for their own benefit but were carrying out a duty prescribed by law for a public benefit. If the trustees were private individuals, the common law would hold them liable for these damages, even if they had exercised all due care.<sup>79</sup> As they were acting under color of law, the only way they could be held liable would be if they acted in an arbitrary manner or if within their jurisdiction they behaved "wantonly or oppressively."<sup>80</sup> Hoffman seems to have cited *Sutton* in an attempt to argue that the city exceeded its authority in the manner it redirected all the water pouring through Fell's Point. Certainly, in the trial court, this would explain his emphasis on calling numerous witnesses who contested the methods taken by the city to resolve the drainage problem. Similarly, Judge Archer also cited *Sutton* in his trial court opinion wherein he addressed the holding that persons acting pursuant to legal mandate for the public good could not be held liable for damage. For

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<sup>77</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0068 (152); *Sutton v. Clarke*, 6 Taunt. 42. (1815), reprinted in Angell, *A Treatise on the Common Law in Relation to Water-Courses*, 195.

<sup>78</sup> Angell, *A Treatise on the Common Law in Relation to Water-Courses*, 196.

<sup>79</sup> Angell, *A Treatise on the Common Law in Relation to Water-Courses*, 207-208.

<sup>80</sup> Angell, *A Treatise on the Common Law in Relation to Water-Courses*, 207.

Archer, this point stressed by *Sutton* was completely inapplicable to the *Barron* case as he delved into this question further. Archer asked: “who are the defendants? They are trustees for the public; but what public? Themselves. They are trustees of the public interests *for their own benefit*, and ought to answer as an individual to the person at whose expense they are benefited” (Emphasis original).<sup>81</sup> Archer appears to have collapsed the distinction between an individual acting for his own benefit and a person acting solely for the public good out of public policy reasons. Archer argued that a contrary result would allow any private company that was chartered by the government to cause damage with impunity.<sup>82</sup> Given the number of public/private construction projects taking place during this era, this concern is not unfounded.

Fourth, Hoffman echoed Judge Archer’s opinion to argue that at common law, Barron and Craig had a property interest not only in the wharf, but also in the adjacent soil and water that covered it.<sup>83</sup> That the actual wharf was not taken or even physically damaged represented one of the biggest hurdles that Barron and Craig had to overcome. Judge Archer avoided this problem by classifying Barron and Craig’s interest in the water near the wharf as an implied easement that ran with their ownership of the wharf. Hoffman attempted to refine this analysis and argued that Barron and Craig’s property interest in the soil and water was an incorporeal real hereditament.<sup>84</sup> An incorporeal hereditament is any right that accompanies the ownership of property itself and which can be inherited along with the property itself, in this case realty.<sup>85</sup> For example, a corporeal real hereditament would be land while an incorporeal real hereditament would be the

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<sup>81</sup> Archer, *The American Jurist and Law Magazine*, 213.

<sup>82</sup> Archer, *The American Jurist and Law Magazine*, 213.

<sup>83</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0066 (150).

<sup>84</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0066 (150).

<sup>85</sup> Black’s Law Dictionary, 726.

right to rents from tenants occupying the land. The incorporeal hereditament arises out of the corporeal hereditament.<sup>86</sup> In making this argument, Hoffman may have not only tried to overcome the allegation that his clients did not suffer unique damages, but also tried to have the appeals court appreciate that the damage to the wharf constituted a taking by the city and was not the city merely acting to abate nuisance. However, in order to refocus the court on the taking argument, Hoffman had to expand the scope of Barron and Craig's property interest to include more than just the wharf itself.<sup>87</sup>

Finally, unlike Mayer, Hoffman did not argue that the damage to the wharf constituted a violation of the Maryland or U.S. Constitutions. Rather, Hoffman predicated Barron and Craig's right to recovery on an extra-constitutional appreciation of rights. Hoffman argued that the law made no distinction between direct and indirect injuries to private property caused by improvement for the public good. In all such situations, the "social compact" required that just compensation be made.<sup>88</sup> For Hoffman, an injury suffered by the owner of private property demanded reimbursement, regardless of whether the party that damaged the property was a governmental entity, whether it was done for a public good, or whether the damage was direct or incidental. Like Mayer, Hoffman also cited the Federal circuit court decision in *Vanhorne's*

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<sup>86</sup> Blackstone, William, Sir. *Blackstone's Commentaries* : with notes of reference to the Constitution and laws of the federal government of the United States and of the commonwealth of Virginia : in five volumes : with an appendix to each volume containing short tracts upon such subjects as appeared necessary to form a connected view of the laws of Virginia ... / by St. George Tucker. Vol. 3. Philadelphia, 1803. 5 vols. The Making of Modern Law. Gale, Cengage Learning (last accessed May 15, 2010) 21.  
<http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F101126104&srcthp=a&ste=14>

<sup>87</sup> In addition to classifying the adjacent water and soil as an incorporeal real hereditament, Hoffman cited *Browne v. Kennedy*, 5 H. & J. 195 (Md. 1821). There, Jones Falls (Baltimore) ran through a parcel of property. The property owner deeded the portion of his land north of the river to one party and the land on the south of the river to another. After Jones Falls was redirected, a dispute over the underlying land pitted the current owners of each parcel against one another in a boundary dispute. The court discussed the nature of rights to land under water and held that land bounded by a navigable river includes the soil under the river for purposes of granting the land to heirs. This case only discussed ownership of the soil and does not address the ownership of the surrounding water, a conceptual problem that Hoffman tried to bridge.

<sup>88</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0065 (149).

*Lessee* which held the Pennsylvania constitution as the enunciation of pre-existing fundamental law.<sup>89</sup> However, Hoffman went much further. Citing natural law theorists Vattel, Grotius, and Pufendorf, and even Roman historian Livy, Hoffman argued that in such cases of eminent domain, it could only be done in cases of “great public emergency and for the public good,” and, most importantly, accompanied by just compensation to the owner.<sup>90</sup>

In his response, the future chief justice Roger Taney took the lectern and skillfully dissected these arguments. In his opening statement to the court, Taney defused a major component of Barron and Craig’s argument, namely that the city did not possess the power of eminent domain. Taney quickly conceded that the city indeed did not possess the power of eminent domain, but argued that this deficiency was wholly irrelevant. Instead Taney contended that Barron had “no right of property in the water that passed by his wharf” any more than the general public, which supported the city’s public nuisance defense and undercut the eminent domain line of argument.<sup>91</sup> Further, Taney squarely confronted Judge Archer’s characterization of Barron and Craig’s property interest as an easement appurtenant to the wharf. In doing so,

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<sup>89</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0067 (151).

<sup>90</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0067 (151). Hoffman cited Book 31, Chapter 13, of Livy’s (Titus Livius) *History of Rome*. There, the Roman Senate sought to raise revenue to make war against Philip of Macedon after his support for Carthage in the Second Punic War which had only recently ended. Citizens who had loaned money to fight the war were to be repaid, but the Senate needed to re-equip a large army and navy and did not have the funds to make the third payment due. The Senate agreed to repay these debts by agreeing to rent public lands to these creditors at an extremely reasonable rate. For example, the rental rate was one “*as per iugerum*.” An “*as*” was the lowest monetary denomination of Roman coinage and an “*iugerum*” was a measurement of land of 28,800 square feet, which is roughly one-half acre (43,560 sq. feet = 1 acre). Thus, the creditors were “renting” public land at a purely nominal rate per acre. The creditors were also allowed to later discontinue the rental and return the property to the public, for which the Senate, counting on a better financial situation in the future, would reimburse the creditors. Presumably, Hoffman cited Livy to show that even in the classical age, the state could not keep the private property of its citizens without their consent or at least without providing some reasonable compensation or indemnity for its return, even during times of war. Livy. Books XXXI-XXXIV with an English Translation. (Cambridge, Mass.: Harvard University Press, 1935), 41 at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0164%3Abook%3D31%3Achapter%3D13>, last accessed October 8, 2010. Interview with James Crozier, Ph.D., Assistant Professor of Classics and History, Missouri Valley College (October 8, 2010).

<sup>91</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0069 (153).

Taney raised one of the most obvious defects with the case: had an actual physical taking occurred? It is puzzling that this issue was not raised more forcefully. The parties failed to emphasize the existence of the takings clause in the Fifth Amendment until later in the case and, even then, it is addressed very much as an afterthought. For example, neither of the parties raised the Fifth Amendment takings argument at the trial court; rather, it was Judge Archer who made a passing reference to it in his written trial court opinion. However, for Archer, the existence of the Fifth Amendment was irrelevant to the question of whether Barron and Craig were owed compensation for the injury, as damage required redress. Following Archer's opinion, the parties then addressed the issue of the applicability of the protections contained in the Maryland and U.S. Constitutions. However, the analysis was the same: Barron's attorneys stressed the fundamental duty of a party to provide compensation for injury, while the city's attorneys stressed its inherent police power and classified the damages a result of a non-compensable public nuisance to be shared by all. Taney also argued that the city acted as the agents of the sovereign power, the state of Maryland, and as such, the Mayor and City Council could not be sued as long as they acted in good faith.<sup>92</sup> In support, Taney also cited *Lansing* as well as *Steele*, which predated *Lansing* by twenty years and which was relied upon by Taney's co-counsel, John Scott.<sup>93</sup>

Taney chose to close his argument by addressing the larger constitutional argument that emerged during the appellate phase. Taney framed the question not as whether the state was constitutionally required reimburse Barron and Craig, but instead emphasized the larger principal that the Maryland Constitution gave the legislature the power to take private property for public

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<sup>92</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0073 (157).

<sup>93</sup> *Steele*, 2 Johns. at 283.

purposes.<sup>94</sup> For Taney, this power was an absolute attribute of sovereignty which the courts had no power to restrain. Taney argued that while the New York Constitution contained a specific clause prohibiting the taking of private property without just compensation, no such prohibition existed in the Maryland Constitution.<sup>95</sup> The Maryland Constitution of 1776 contained a provision, copied largely verbatim from the Magna Charta, that no freeman could be “disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.”<sup>96</sup> While Judge Archer cited this provision as partial support for his ruling that Barron and Craig had been wrongfully deprived of their property without due process, Taney found just the opposite and argued that this provision was inapplicable.<sup>97</sup> Taney reversed Archer’s reasoning and argued that since the provision was copied from the Magna Charta, the Maryland legislature should then be able to operate the same way as Parliament. And since Parliament could take private property without payment, the same rule should apply in Maryland, an extraordinary argument.<sup>98</sup> Taney set forth an expansive view of legislative power, stating that “If the legislature has the power to do so, then if they pass a law to that effect, it is the law of the land” which implicitly rejected the view of the legislature as limited by fundamental law, as argued by Mayer and Hoffman and set forth in decisions like *Vanhorne’s Lessee*.<sup>99</sup> Taney countered the attempts of the plaintiffs to enunciate the limits that existed on state legislatures, as they had

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<sup>94</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0074 (158).

<sup>95</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0075 (159).

<sup>96</sup> Maryland Constitution (1776), Article 21.

<sup>97</sup> Archer, *The American Jurist and Law Magazine*, 207.

<sup>98</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0075 (159).

<sup>99</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, 0075 (159).

done by emphasizing *Vanhorne's Lessee* as well as Justice Marshall's opinion in *Fletcher v. Peck*.<sup>100</sup>

In *Fletcher*, following wholesale bribery of nearly every member, the 1794 Georgia legislature sold thirty five million acres of the state's holdings located in modern day Mississippi and Alabama, referred to as the Yazoo lands, to four companies for only 1.5 cents per acre.<sup>101</sup> When the 1796 Georgia legislature passed a law rescinding the sale, a purchaser, Fletcher, and his seller, Peck, concocted a lawsuit in order to test the law.<sup>102</sup> Before the Supreme Court, Justice Marshall prefaced his opinion with an obligatory statement of deference to the legislature, but then ignored the fraud and instead held the subsequent law rescinding the land grants unconstitutional. According to Marshall, the legislature was incompetent to void the earlier land grants as they were, in effect, contracts which the state legislature could not later unilaterally modify.<sup>103</sup> As we will discuss in more detail in later, Marshall struck down the rescission law as not only violating the Contract Clause of the U.S. Constitution, but more importantly violating the larger principles which restrain all legitimate government. Marshall wrote,

“It is then the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, *either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States*, from passing a law whereby the estate of the plaintiff . . . could be constitutionally and legally impaired and rendered null and void” (emphasis supplied).<sup>104</sup>

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<sup>100</sup> Both Mayer and Hoffman cited *Vanhorne's Lessee v. Dorrance*, while only Mayer cited *Fletcher v. Peck*.

<sup>101</sup> *Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 87 (1810); Sandra F. VanBurkleo, “Fletcher v. Peck,” in *The Oxford Companion to the Supreme Court of the United States*, Kermit Hall, ed. (New York: Oxford University Press, 1992), 304.

<sup>102</sup> Sandra F. VanBurkleo, “Fletcher v. Peck,” 304.

<sup>103</sup> *Fletcher v. Peck*, 6 Cranch at 136.

<sup>104</sup> *Fletcher v. Peck*, 6 Cranch at 139.

For Marshall, the property rights in the Yazoo land vested in Fletcher and the legislature could not repeal those rights.<sup>105</sup> The legislature has limits to its powers and vested property rights provide a boundary line. In order to overcome this, Taney cited *Satterlee v. Matthewson*, an 1829 U.S. Supreme Court case which largely contradicted *Fletcher v. Peck* without overruling the decision.<sup>106</sup> In *Satterlee*, Justice Washington held that a Pennsylvania law which was intended to operate retrospectively, and which was passed to specifically overrule a decision of the Pennsylvania Supreme Court concerning a land title dispute, was not unconstitutional. A retrospective law which affected vested rights did not violate the U.S. Constitution as long as it did not constitute an ex post facto law or did not impair the obligation of contract as prohibited by Article I, Section 10 of the Constitution.<sup>107</sup>

Further, the Fifth Amendment of the U.S. Constitution did not apply as the Bill of Rights Amendments only restricted the activities of the Federal government and not those of the states. For this proposition, Taney cited *Bradshaw v. Rodgers and Magee*, an 1822 New York state case also interestingly cited by Charles Mayer in his oral argument, but for a different reason.<sup>108</sup> In *Bradshaw*, the plaintiff sued Rodgers and Magee for trespass to his land after they cut and removed an amount of timber.<sup>109</sup> The defendants defended the suit by asserting their contract with a local canal commissioner to build a road to replace one destroyed by the building of the canal and that the timber was needed for its construction. While Taney cited *Bradshaw* for the provision that the Fifth Amendment was intended to restrain only the Federal government, a

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<sup>105</sup> *Fletcher v. Peck*, 6 Cranch at 135.

<sup>106</sup> *Satterlee v. Matthewson*, 27 U.S. 380 (1829).

<sup>107</sup> *Satterlee v. Matthewson*, 27 U.S. at 413.

<sup>108</sup> *Satterlee v. Matthewson*, 27 U.S. at 413.

<sup>109</sup> *Bradshaw v. Rodgers and Magee*, 20 Johns. 103 (N.Y. 1822).

reading of the actual holding of the case evidences the basis for Mayer's reliance as well. Justice Spencer, writing for the court, held in favor of the plaintiff as he was incredulous that his land could be entered for the purpose of removing the timber without his consent. The law applied to the digging of canals and not to the construction of roads that may have been damaged as a result, which was well outside the scope of the law.<sup>110</sup> Spencer conceded that the Fifth Amendment only applied to the Federal government and the parallel provision of the New York Constitution was not yet operable since it had not been ratified as of the time of his decision. Nonetheless, Spencer held that both provisions are "declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice."<sup>111</sup> For Spencer, the requirement of just compensation for the taking of private property is not a right that existed by virtue of its inclusion in a written constitution. Spencer's view of constitutions is similar to that set forth by Hoffman and the *Vanhorne's Lessee* court: a constitution recognizes pre-existing rights; it does not provide their basis.

Without issuing an opinion, other than finding that the trial court "manifestly erred," the Appeals Court in *Barron* overruled the judgment against the city.<sup>112</sup> Barron appealed the reversal of the decision by the Maryland Court of Appeals by way of a writ of error to the U.S. Supreme Court who agreed to hear the case to determine whether the actions of the State of Maryland, upheld as valid on appeal, were repugnant to the U.S. Constitution.<sup>113</sup>

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<sup>110</sup> *Bradshaw*, 20 Johns. at 104.

<sup>111</sup> *Bradshaw*, 20 Johns. at 105.

<sup>112</sup> *Barron* Transcript, 30.

<sup>113</sup> *Barron* Transcript, 1-2, 29-31. Tiernan's attorneys obtained a writ of error from the Supreme Court on January 2, 1831. The attorneys produced the writ to the Maryland Court of Appeals on June 22, 1831. The writ gave the Court of Appeals until August 8, 1831 to deliver the record of the underlying proceedings to the court. Strictly speaking,

## Supreme Court

Ordered by the Supreme Court for oral arguments on February 11, 1833, Charles Mayer traveled to Washington, D.C. to plead the Plaintiff's case while the city kept in place its defense team of Roger Taney and John Scott.<sup>114</sup> Curiously, however, is that there is no evidence that David Hoffman appeared before the Court as the notes of the argument written by the Court Clerk evidence that only Mayer presented argument.<sup>115</sup> Hoffman was a major figure in the legal community of the early republic era and was even known and respected by Justice Marshall personally. In fact, in 1833, Marshall had penned a testimonial describing the legal aptitude of David Hoffman which he and his law partner had republished as part of a newspaper advertisement. This advertisement was published in a D.C. newspaper and was clearly intended to attract clients with cases before the Supreme Court as the advertisement noted Hoffman's status as an attorney authorized to practice before that Court.<sup>116</sup> Thus, the absence of Hoffman would not only have subtracted significant prestige from their legal team, but would have sheared much of the natural law based arguments from their case. Additionally, Mayer was opposed by Taney who, despite appearing as a private attorney and not as the Attorney General of the United States, still certainly exuded a strong presence at the Court. For example, of the

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Tiernan's attorneys were required to file a writ of error instead of an appeal. According to Lawrence Friedman, during this time, the term "appeal" only applied to actions that were brought to higher courts of equity, not law. Friedman notes that states provided, as their two methods of review, the appeal to a higher equity court of a common law case or the review of an action pursuant to a writ of error. Lawrence M. Friedman, *A History of American Law*, Second Ed. (New York: Simon & Schuster, 1985), 149.

<sup>114</sup> *Barron* Transcript, 30-31; *Barron*, 32 U.S. at 246-147.

<sup>115</sup> *Barron*, 32 U.S. at 246.

<sup>116</sup> *The Papers of John Marshall: A Descriptive Calendar*, Vol. II, Irwin S. Rhodes, ed. (Norman: University of Oklahoma Press, 1969), 413.

forty-one reported cases heard before the Supreme Court during the 1833 term, Taney appeared before the Court as counsel eighteen times.<sup>117</sup>

Whether Hoffman's presence would have made a difference seems unlikely, however, as Marshall was determined to keep the arguments focused on a single point. Marshall advised Mayer to confine his argument to whether, under the Fifth Amendment, the Court had jurisdiction to hear the case.<sup>118</sup> This admonition effectively precluded the introduction of the majority of the reasoning relied upon by Mayer and Hoffman at the appellate level. Within these confines, Mayer began by setting forth Barron's property interest that was allegedly taken. Mayer repeated Hoffman's appellate argument which viewed the use of the water around the wharf as an incorporeal hereditament.<sup>119</sup> Next, Mayer outlined five points which would grant recovery. First, the Mayor and City Council, regardless of their collective status as agents of the state clothed with sovereign immunity are nonetheless liable for their tortious acts.<sup>120</sup> Second, the acts in question were exercised under the authority of the state of Maryland pursuant to the enabling legislation granted to the city by the Maryland legislature.<sup>121</sup> Third, as the state took the property of the Plaintiffs without compensation, their acts were repugnant to the Fifth Amendment. Mayer argued that the Fifth Amendment was enacted to limit the state legislatures

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<sup>117</sup> Taney appeared before the Supreme Court as Attorney General during the 1833 term in fourteen cases: *U.S. v. MacDaniel*, 32 U.S. 1 (1833); *U.S. v. Ripley*, 32 U.S. 18 (1833); *U.S. v. Fillebrown*, 32 U.S. 28 (1833); *U.S. v. Percheman*, 32 U.S. 51 (1833); *U.S. v. Turner*, 32 U.S. 132 (1833); *U.S. v. Mills*, 32 U.S. 138 (1833); *U.S. v. Wilson*, 32 U.S. 150 (1833); *U.S. v. Brewster*, 32 U.S. 164 (1833); *Sampeyreac v. U.S.*, 32 U.S. 222 (1833); *Barlow v. U.S.*, 32 U.S. 404 (1833); *Duncan's Heirs v. U.S.*, 32 U.S. 435 (1833); *U.S. v. 84 Boxes of Sugar*, 32 U.S. 453 (1833); *Ex Parte Watkins*, 32 U.S. 568 (1833); and *Heirs of Dubourge de St. Colombe v. U.S.*, 32 U.S. 625 (1833). Taney appears as private counsel in four others: *Nicholas v. Fearson*, 32 U.S. 99 (1833), *Lessee of Livingston v. Moore*, 32 U.S. 469 (1833), *Scholefield v. Eichelberger*, 32 U.S. 586 (1833), and *Barron*.

<sup>118</sup> *Barron*, 32 U.S. at 246.

<sup>119</sup> *Barron*, 32 U.S. at 245.

<sup>120</sup> *Barron*, 32 U.S. at 245.

<sup>121</sup> *Barron*, 32 U.S. at 245-246.

in order to protect the people of all states. For Mayer, the people were perceived not as citizens of a particular state, but a people nationally who were entitled to the protection of the Fifth Amendment whether they were citizens of the United States of merely inhabitants who were subject to its laws. Fourth, the Supreme Court had jurisdiction over this case as it was an appeal regarding the constitutionality of state action from the highest appellate court in Maryland, as Mayer tried to respond to Marshall's predicate question by parroting the language granting the Supreme Court such jurisdiction in Section 25 of the Judiciary Act of 1789.<sup>122</sup> Finally, Mayer attempted to expand the argument despite Marshall's limitations, and advised that court that as an appellate tribunal it "is not confined to the establishment of an abstract point of construction" but could take into account factors other than a simple question of jurisdiction as was framed by Marshall. Mayer argued that the Court had the power to settle the nature of Barron's ownership in the water in which the wharf was located. In addition, the Court could then determine whether the property damage constituted allowed for a cause of action or whether the claim was non-actionable as the damages were suffered in the abatement of a public nuisance. In the latter event, Mayer argued that Barron could still recover as he suffered damages special to him that were not similarly suffered by the public at large.<sup>123</sup> In this last point, Mayer echoed much of his argument presented to the lower appellate court in Maryland. Given Marshall's limits, Mayer used this last point as an attempt to introduce as much of his remaining argument as possible, as would be expected from a competent practitioner.

Mayer could have saved his breath. Following his argument, Marshall stopped Taney and Scott from even presenting their rebuttal and then presumably concluded the hearing.<sup>124</sup> The

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<sup>122</sup> 1 Stat. 73, Section 25 (1789).

<sup>123</sup> *Barron*, 32 U.S. at 246.

<sup>124</sup> *Barron*, 32 U.S. at 247

Court issued its opinion February 16, 1833, five days after oral arguments.<sup>125</sup> Marshall's accompanying decision evidences the basis for his finding further argument by the city unnecessary. In the decision, the Court did not engage question of the proper role of rights in the federal system. Nor did the Court discuss the proper balance between the police power and individual property rights. Rather, the Court ensured that the case was narrowly confined to Barron's allegation that the actions of the city of Baltimore constituted a taking of his property without just compensation in violation of the Fifth Amendment. Thus, the only question was whether under the Fifth Amendment the Court had jurisdiction to review the case under Section 25 of the Judiciary Act of 1789.<sup>126</sup> Section 25 provides, in part, that the Supreme Court can hear cases from the highest court of a state where the issue of repugnancy to the Constitution is asserted.

As we have seen, the parties in the lower court proceedings debated the role of rights in the young republic. Their varied arguments exposed the many competing views that existed and were competing for primacy. The parties were engaged in a rich debate which revealed the unsettled nature of rights. For example, we saw the interplay between rights as an individual possession and rights enjoyed by a community, echoing Blackstone's absolute versus relative rights binary. Additionally, the players all enunciated different strands of thought regarding the location of rights themselves: Hoffman espousing individually based natural rights; Taney arguing community based rights to ensure harmonious order; Archer holding that compensation

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<sup>125</sup> Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore*, (*Barron Judgment*) 0144.

<sup>126</sup> *Barron*, 32 U.S. at 247; 1 Stat. 73, Section 25 (1789). The decision announced by Marshall was unanimous. The justices on the Supreme Court during the decision, along with the President who nominated them and their state, were Marshall (John Adams – Virginia), William Johnson (Jefferson – South Carolina), Joseph Story (Madison – Massachusetts), Gabriel Duval (Madison – Maryland), Smith Thompson (Monroe – New York), John McLean (Jackson – Ohio), and Henry Baldwin (Jackson – Pennsylvania). *The Supreme Court in American Life, Vol. II, The Marshall Court, 1801-1835*, ed. Adrienne Siegel (New York: Associated Faculty Press, Inc., 1987), 250; Hall, *The Oxford Companion to the Supreme Court*, 965-966.

was required by the principles of the common law; and Peter Cruse initially pleading their claim for reimbursement as predicated upon the accepted and routine procedural remedy classified under trespass.

Instead of engaging this lively debate, the Court reframed the issue as one where rights hinged solely on the explicit language of written constitutions, and then used this interpretation to demolish Barron and Craig's claim. The Court avoided the larger issue of the violation of fundamental rights and framed the questions as one which simply hinged on jurisdiction. To determine whether the Court had such jurisdiction it had to determine the pivotal question of whether the Fifth Amendment's prohibition against takings of private property applied to the states. While Mayer urged the Court to view the Fifth Amendment as protecting the right of all citizens from all governmental encroachment, the decision narrowed the issue by reframing it as question of whether the Fifth Amendment applied to state governments. Justice Marshall, writing for a unanimous Court, held that this "question thus presented is, we think, of great importance, but not of much difficulty."<sup>127</sup> True to his word, the Court disposed of Barron's case and altered the course of Constitutional history in an opinion spanning just a few pages. Marshall's opinion completely ignored the fundamental law reasoning set forth by the trial court. The opinion likewise did not follow any of the alternate grounds that could have denied Barron and Craig's claim without the need for an expansive ruling holding the Bill of Rights inapplicable to state action. Rather, the Court relied solely on a strict analysis of the text of the Constitution and the legislative history surrounding its enactment.

First, the Court held that each state established its own constitution and that the people of each state provided their own protections against their respective state governments in those

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<sup>127</sup> *Barron*, 32 U.S. at 247.

constitutions. At the time the people of the several states decided to form a government for the United States, they specifically formed a Federal government, via the Constitution, with limitations on that government built into the Constitution itself. Specifically, Marshall wrote that “the constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”<sup>128</sup> This statement is interesting as it both agrees with and contradicts Mayer’s argument that it was the people, in their capacities as citizens of the United States, who created the Federal government. Marshall echoed Mayer by stating that it was the people who created the United States. However, by arguing that the Constitution was not intended for the governance of the individual states, he held that the Fifth Amendment did not bind the states. The second part of Marshall’s statement can be considered unsound to the extent that he collapsed the idea of rights and the structure of government into one concept. For example, at its most fundamental level, a constitution accomplishes two goals: it outlines the fundamental structure of a government and also sets limits on the powers of that government. The limits on the government are conceived of as rights. If a government exceeds its authority, a citizen can interpose a defense to that action, by framing the improper act as impeding a right. Thus, Marshall is correct in the sense that the Constitution was not intended to redraw the functions of the various state governments, but what about rights? There was no allegation before the Court that the Fifth Amendment was intended to rewrite the state constitutions. However, if the people inserted limits against the United States government, does that mean that those rights vanished if the state governments infringed those rights? Under Mayer’s line of reasoning, it seems that the citizens intended the Constitution to

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<sup>128</sup> *Barron*, 32 U.S. at 247.

not only create the Federal government, but also to place limits on what any government could do to them, regardless of jurisdiction.

Second, the Court noted that Mayer relied upon Article I, Section 10, which set certain limitations on the states, such as prohibiting them from entering into foreign treaties, coining money, passing ex post facto laws, and impairing the obligations of contracts, was misplaced and actually supported the opposite conclusion.<sup>129</sup> Marshall stated that by reading this Section *in pari materia* with Article I, Section 9, which contains express limitations on the Federal government, it becomes clear that no limitations on the state governments are applicable unless specifically contained within Article I, Section 10. Marshall further noted that the prohibitions in Article I, Section 10 regulated matters that naturally related to interests common to persons in all states, such as entering into foreign treaties and coining money, which would prove chaotic if attempted individually by each state.<sup>130</sup> Again, Marshall relied on a textual reading of the Constitution to support his argument. For Marshall, Article I, Section 10 contained specific language that specified that if a state was prohibited from taking action, the same method of interpretation should be used with the Amendments. As they did not specifically reference the states, the Amendments did not apply to them.

The Court concluded by holding that if the people of each state had desired more limitations on their respective state governments, they had the power to enact such limits in their own state constitutions. Further, if the U.S. Congress had “engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power from their own governments...they would have declared

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<sup>129</sup> U.S. Const. Art. I, Sec. 10.

<sup>130</sup> *Barron*, 32 U.S. at 249.

this purpose in plain and intelligible language.”<sup>131</sup> Marshall cited the state constitutional ratifying conventions and noted that almost every state “demanded security against the apprehended encroachments of the general government—not against those of the local governments.”<sup>132</sup> Here, Marshall now addressed the rights component of a constitution. At a fundamental level, Marshall is using a combination of a textual reading and an original intent type argument. He again, however, combined two ideas that do not necessarily go together. Marshall held that the framers intended the Bill of Rights Amendments to restrain the Federal government. Certainly, the Constitution was not intended to restructure the state governments. However, when the argument turns from the structure of government to rights, the argument is not as solid. Marshall’s second point about explicitly inserting restraints against the new Federal government works only if we appreciate rights as emanating from written constitutions. From a purely legalistic reading of *Barron*, the Constitution, and the ratifying debates, Marshall’s position can be supported. Based upon this logic, if the Fifth Amendment was meant to apply to the states, it was up to the framers of the Constitution to ensure that it was drafted in such a manner. In order for the Fifth Amendment, and the rest of the Bill of Rights, to apply to the states, history would have to wait for the Civil War, the resulting Fourteenth Amendment, and the selective incorporation process that would proceed piecemeal over the next one hundred and fifty years. However, if we view the same question with an appreciation that constitutions simply declared pre-existing rights, did the insertion of those rights into the U.S. Constitution mean that such rights, such as the private property rights at issue here which trace their recognition to Magna

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<sup>131</sup> *Barron*, 32 U.S. at 250; Parenthetically, it should be noted that Marshall’s point can be considered rather contradictory to his earlier opinions, which are discussed in greater detail in Chapter Six, which expand the powers of the Federal government by reading beyond the “plain and intelligible language,” such as *McCulloch v. Maryland*, 17 U.S. 316 (1819), where Marshall held that the Federal government could charter a bank as a result of an expansive reading of the “necessary and proper” clause.

<sup>132</sup> *Barron*, 32 U.S. at 250.

Charta, now mean that those rights no longer applied because they were not explicitly mentioned as also applying to the state governments? Looking at *Barron* from this perspective makes Marshall's opinion illogical. How could these rights which predated the Constitution now not apply? In Chapter 4, we will explore how Marshall's positivist interpretation of rights was not even a tenable option for those from the colonial and founding generations.

## CHAPTER 4 RIGHTS AND THE FRAMERS OF THE CONSTITUTION

One very much in liquor, while shaking my hand, said, “Mr. President, I hope the Constitution will never be broken.” I answered, “I concur heartily with you in that wish, and hope also that *your* constitution may never be broken.”

— John Quincy Adams<sup>1</sup>

As evidenced by the evolution of the *Barron* litigation, there existed a varied and complicated ideological landscape in the early republic era regarding the conceptual location of rights. As we have seen, the actors in the *Barron* drama perceived of rights in many different ways. Their alternating views show that Marshall’s textual approach was not the only possible outcome; it was not a given.<sup>2</sup> Reading the opinion today complements our modern sensibilities regarding a written law or constitution as the source of a right. Reading the case from the view of the attorneys and judges in the early nineteenth century betrays no such similar familiarity. Rather, the case shows the courtrooms of Maryland and the District of Columbia as places where conflicting views of rights were competing for primacy.

What we will see in this chapter, however, is that this confusion was not limited to the *Barron* litigants or the other courtrooms of this era. Rather, this confusion extended back to the colonial and founding era generations who also expounded numerous and often conflicting ideas regarding the proper location for the rights and liberties they began to enunciate in response to British colonial policy. In the founding era, there was no consensus regarding the foundation of

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<sup>1</sup> John Quincy Adams, *Memoirs of John Quincy Adams, Comprising Portions of his Diary from 1795 to 1848*, Charles Francis, ed. (Philadelphia, 1875), 336. A humorous but insightful observation by John Quincy Adams during his presidency which illustrates the conceptual difference between our modern view of a constitution as a written document setting forth the framework of government and providing rights to individuals to protect them against that government, and an older view of a constitution as a collection of documents, laws, and ideas which collectively comprised the structure of the state and the general limits on the government, making the welfare of a country akin to the welfare of an individual. See Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World* (Chapel Hill, N.C.: University of North Carolina Press, 2005) who elaborates on this point.

<sup>2</sup> Chapter 6 discusses the views of historians argue that *Barron* was correctly decided.

rights and where they obtained their authority. Some identified natural law principles as the basis, some predicated rights on the unique characteristics of the English Anglo-Saxon heritage, and some espoused the ideas of an original compact and consent of the governed. The theories evidence a dizzying blend of rights as confirmed and secured by the common law, the Magna Charta, natural law, positivist legal guarantees, Greek and Roman precedents, or divine blessing. From these interpretations, however, we can begin to make sense of certain broad themes by categorizing these different and disparate views into three general categories: rights as liberties possessed by Englishmen, rights as universal possessions granted by nature or the divine, and rights as provided by an inchoate blend of numerous foundations.<sup>3</sup>

Each of these categories can be conceptualized as being comprised of many ideological subparts or subcategories. First, those who framed rights as liberties unique to Englishmen celebrated the Magna Charta as the baseline. They invoked the English constitution and viewed the common law as the mechanism which guaranteed their rights in ways that subjects of the kingdoms of France and Spain could not. They echoed the writings of Blackstone for support and promoted the mythology of the English people as the particular protectors and inheritors of the freedoms enjoyed by their Germanic forefathers. Second, those who espoused rights as inherently granted by nature evidenced a blend of thought which emphasized rights as provided by nature or by God. These views found support in Enlightenment era thinkers like Grotius and Pufendorf as well as in the colonial favorite, John Locke, and invoked Greco-Roman precedents for support. Finally, there were many who set forth a view of rights which not only combined

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<sup>3</sup> John Phillip Reid has noted that many expressions of the location of rights by founding era thinkers often blended categories and had a tendency to list numerous alternative bases for their rights. I interpret these modes of thought into three categories by grouping them more broadly; however, others, like Reid, have noted upwards of ten different categories by more narrowly drawing the categories. See John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (Madison: University of Wisconsin Press, 1986), 66.

many of these different foundations in the same conceptual argument but also drew on ideas of rights as emanating from more positive law type sources, like colonial charters.

For purposes of our study, I first intend to contextualize the rights discussion around four different historical eras or moments that gave rise to the founding era rights debate: the historical antecedents found in the Greco-Roman and early Christian traditions; the post-Reformation natural law continental jurisprudence espoused by thinkers like Grotius and Pufendorf; the writings inspired by the English Civil War, such as those penned by Hobbes and Locke; and, finally, the Glorious Revolution and subsequent rise of the concept of Parliamentary supremacy. The enunciation of rights that occurred during each of these eras were invoked during the founding era debates and were each present as a model by which they could set forth their particular interpretation of rights. These categories are not intended as an exhaustive history of the evolution of rights in the western tradition, but were chosen to represent the general eras most often invoked during the founding era rights debates.<sup>4</sup>

First, natural law jurisprudence dates to the ancient Greeks who conceptually separated law into those rules which were considered fundamental as they had as their basis a divine or natural sanction, as opposed to those laws which were created by man.<sup>5</sup> Aristotle contributed an essential ingredient to the primacy of natural law by enunciating its universality as opposed to positive man-made law which necessarily became restricted by concepts such as jurisdiction which could defeat its enforcement, restrictions which conceptually cannot restrict the timeless

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<sup>4</sup> Other scholars have divided these eras differently. For example, John Witte Jr. groups the history of the concept of rights in the Western tradition into five periods: classical, medieval, early Protestant, Enlightenment, and Modern. John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, Michigan: Wm. B. Eerdmans, 2006), Chapter 1.

<sup>5</sup> Charles Grove Haines, *The Revival of Natural Law Concepts*, (Cambridge: Harvard University Press, 1930), 4-5.

idea of a natural law.<sup>6</sup> This Greek natural law binary was modified by the Romans through the development of commercial law necessitated by interactions which arose between Roman citizens and aliens. While dealings between citizens were the only transactions expected to be governed by principles of good faith, Roman magistrates (praetors) eventually modified these harsh rules through the development of the *jus gentium*. The *jus gentium* was enacted as a body of equitable laws used to counter the more formal, and inflexible, *jus civile*. The concept of *jus naturale*, while not widely used as a body of law itself in this period, nonetheless gave the ideological support for the development of the *jus gentium* and infused its practical application with the universal notions of natural law principles.<sup>7</sup> By the Middle Ages, Christian philosophers adapted Roman legal concepts of natural law to ideologically blend with their Christian beliefs and worldview. The Spanish philosopher Isadore of Seville re-grounded the Roman natural law legal concept of *jus naturale* as a divinely enacted law while the concepts of *jus gentium* and *jus civile* were considered as man-made law and which originated by virtue of man's custom or usage.<sup>8</sup> Thomas Aquinas further sub-divided natural law into those laws which came from God from those natural laws which man could discover by applying timeless notions of good and evil to judge human conflict, creating a hierarchy of divine law, natural law, and man-made or positive law.<sup>9</sup>

Second, the seismic upheavals caused on the continent and in England following Martin Luther's 1517 revolt against the policies of the Catholic Church served to promote an intellectual reordering of the concepts of natural law. In the legal philosophies enunciated to make meaning

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<sup>6</sup> Haines, *The Revival of Natural Law Concepts*, 6.

<sup>7</sup> Haines, *The Revival of Natural Law Concepts*, 8.

<sup>8</sup> Haines, *The Revival of Natural Law Concepts*, 12-13.

<sup>9</sup> Haines, *The Revival of Natural Law Concepts*, 13-14.

of this event we see the origins of the later arguments which predicated rights on inherent, timeless natural law principles, such as those arguments made by Barron's attorney David Hoffman before the appellate court. Freed from the ideological boundaries requiring the designation of the divine as the ultimate law-giver, philosophers and jurists had the opportunity to set forth ideas of the place of natural law and natural rights in entirely new ways. Most famously, Dutch legal theorist Grotius began to locate natural law as discoverable through the exercise of man-made reason.<sup>10</sup> To scholars like Grotius, the natural law doctrine of *jus naturale* was re-conceptualized as principles of natural rights, rights that man inherently possessed.<sup>11</sup> As a right possessed by man, the larger society or state could not infringe those rights.<sup>12</sup> By articulating his theories of international law, Grotius premised natural law as a set of rules that were timeless and unchangeable even by God, and separated natural law from positive law, which was enacted by man.<sup>13</sup> With Grotius we begin to see the evolution of natural law theory by the conceptual separation of natural law as an inherent individual right from other law which was enacted by the sovereign.<sup>14</sup> Later proponents of the development of international law like eighteenth century Swiss philosopher Emerich de Vattel similarly emphasized the concept that man maintains inherent natural liberties that cannot be compromised without consent and, like Grotius, based his ideas on the law of nations as being grounded in the principles of natural

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<sup>10</sup> Haines, *The Revival of Natural Law Concepts*, 17.

<sup>11</sup> Haines, *The Revival of Natural Law Concepts*, 49.

<sup>12</sup> Haines, *The Revival of Natural Law Concepts*, 49.

<sup>13</sup> Haines, *The Revival of Natural Law Concepts*, 18-19.

<sup>14</sup> Haines, *The Revival of Natural Law Concepts*, 18-19. Haines noted that Grotius premised much of his work on the ideas set forth by Spanish thinkers of the sixteenth and seventeenth centuries, such as Vittoria, Suarez, and Gentilis. Haines further noted that some of his academic contemporaries, such as Roscoe Pound and E.D. Dickinson, believed that Grotius' theories of natural law were not nearly as complete as the Spanish thinkers like Suarez that preceded his work or the ideas of Samuel Pufendorf who came later. See Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), 82-83; and E.D. Dickinson, *The Equality of States in International Law*, (Cambridge, 1920), 43.

law.<sup>15</sup> Building on Grotius' tradition, seventeenth century German philosopher Samuel Pufendorf similarly discredited the idea of natural law as residing with the divine and accorded those rights as belonging to man as an individual being, without relying on the state or the greater society as providing those rights.<sup>16</sup> Similar to Grotius, Pufendorf was writing during the genesis of the modern age of the nation-state following the 1648 Peace of Westphalia and, also like Grotius, charged the state with ensuring the order and well-being of the polity.<sup>17</sup>

While continental theorists Grotius and Pufendorf disconnected the basis for natural law from its divine moorings, placing certain principles ideologically outside the control of human restraint, the Stuart upheaval of the seventeenth century constituted a third event which caused the reevaluation of rights thought. For example, Thomas Hobbes attempted to discredit the expansive notion of natural law that had been set forth by Grotius and sought to ground those rights with the sovereign.<sup>18</sup> The impetus for Hobbes' work was not to disconnect of the idea of natural law from the divine, but his attempt to reconnect that law with the sovereign. Hobbes presented his ideas of natural law and right in his most famous work, the *Leviathan* (1651), amid the political upheaval of England in the seventeenth century. Horrified by the English Civil War

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<sup>15</sup> Haines, *The Revival of Natural Law Concepts*, 50-51.

<sup>16</sup> Haines, *The Revival of Natural Law Concepts*, 22.

<sup>17</sup> Craig L. Carr, *The Political Writings of Samuel Pufendorf* (Oxford, 1994), 6. However, unlike scholars like his contemporary Thomas Hobbes, Pufendorf strenuously disagreed with Hobbes and his view of the legal omnipotence of the state. Rather, Pufendorf recognized that while the state could provide for the common good of the citizenry, it could also be the primary agent of oppression of those same persons. In order to prevent this, Pufendorf argued that both the citizenry and the state must recognize and accept their complementary responsibilities. For example, the citizenry must come together as a commonwealth which stresses their unified goals of security and common good. Further, the citizenry must designate a sovereign to ensure those goals and must pledge their loyalty to that sovereign. In return, while the citizenry owed the sovereign their allegiance, the state, as sovereign, was obligated to respect the fundamental natural rights of its citizenry. Similar to this notion of the existence of reciprocal obligations between the ruler and the ruled, as espoused by Pufendorf, the seventeenth century also gave rise to the social contract theories of John Locke who echoed their grounding of natural law in man's pre-societal condition. See, Carr, *The Political Writings of Samuel Pufendorf*, 7, 14-16; Haines, *The Revival of Natural Law Concepts*, 22.

<sup>18</sup> Haines, *The Revival of Natural Law Concepts*, pp. 20-21.

and the subsequent execution of Charles I in 1649, Hobbes purposefully argued against the classical republican concept of rights or liberties that was being set forth as an ideological basis to oust the monarchy.<sup>19</sup> While the proponents of this view harkened to ancient Greece and Rome as their models to assert that liberty was present by default in all republics by their very nature, Hobbes argued that such view was in fact one of the causes of the Civil War.<sup>20</sup> Hobbes argued that liberty was possible in a monarchy or aristocracy and, in fact, was better preserved in these hierarchal, non-republican forms of government.<sup>21</sup>

This definition of liberty required Hobbes to more precisely define terms such as natural law or natural rights that had been often used indiscriminately through the Middle Ages.<sup>22</sup> To Hobbes, these were different concepts. Natural law was a body of rules meant to protect the security of the persons constituting the society while natural rights were those liberties which man had in his natural, pre-societal state.<sup>23</sup> For Hobbes, a “right is liberty, namely that liberty which the civil law leaves us: but civil law is an obligation, and takes from us the liberty which the law of nature gave us.”<sup>24</sup> To Hobbes, man’s entry into a political community was a bargain whereby the individual designated the state as the exclusive legal authority in the polity. While Hobbes believed in the existence of natural laws that pre-dated the establishment of the

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<sup>19</sup> Quentin Skinner, *Visions of Politics, Volume III: Hobbes and Civil Science*, (Cambridge: 2004), 226.

<sup>20</sup> Skinner, *Visions of Politics*, 227.

<sup>21</sup> In order to prove this, Hobbes was required to more closely define liberty. To show that liberty was possible in non-republican forms of government, Hobbes defined liberty as the absence of external impediments to his action.<sup>21</sup> Hobbes defined his idea of external impediments closely to require actual physical barriers to free choice.<sup>21</sup> Thus, according to Hobbes, a person’s liberty is unaffected unless he is physically unable to take a certain act. Skinner, *Visions of Politics*, 211-212, 227-228; and A.G. Wernham, “Liberty and Obligation in Hobbes,” in *Hobbes Studies*, ed. K.C. Brown (Cambridge: Harvard University Press, 1965), 118-119.

<sup>22</sup> Haines, *The Revival of Natural Law Concepts*, 21.

<sup>23</sup> Haines, *The Revival of Natural Law Concepts*, 21.

<sup>24</sup> Thomas Hobbes, *The Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, ed. Michael Oakeshott (Oxford, 1957), Chapter 26, 189; See also, Skinner, *Visions of Politics*, 220.

commonwealth, once man agreed to enter into the commonwealth and designate a sovereign, the bond was unbreakable.<sup>25</sup> Those natural rights that man had possessed pre-commonwealth were no longer considered separate from the state as the laws of nature and the laws of the sovereign were considered as inseparable as the sovereign was the exclusive law giver.<sup>26</sup>

The political turmoil of the seventeenth century also laid the predicate for the writings of English philosopher John Locke. His writings on the nature of rights and government, *Two Treatises of Government* (1689), were written between 1679 and 1681 following his return from France where he witnessed the persecution of French Protestants.<sup>27</sup> Upon his return, Locke wrote *Two Treatises* during the turmoil caused by Whigs in Parliament who unsuccessfully sought to exclude Charles II's brother, the Catholic James, from ultimately claiming the throne.<sup>28</sup> Following the failure of the Exclusion Bill, Charles II prorogued the Parliament in 1679 and ultimately imprisoned Locke's patron, Lord Shaftesbury, in 1681.<sup>29</sup> During this uncertain period, Locke's theories took shape. For Locke, man originally existed in a state of nature, prior to the creation of any government. In the state of nature, man possessed natural rights that he carried with him following the formation of government and creation of a civil state.<sup>30</sup> These natural rights, which most notably included the rights of life, liberty, and property, were not given up once man created government; rather, the supreme obligation of government was to secure these

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<sup>25</sup> Hobbes, *Leviathan*, Chapters 14 and 15, 84-105; Chapter 17, 113; Chapter 18, 113.

<sup>26</sup> Hobbes, *Leviathan*, Chapter 26, 174-175; Haines, *The Revival of Natural Law Concepts*, 21.

<sup>27</sup> W.M. Spellman, *John Locke*, (New York: St. Martin's Press, 1997), 20-21; Katherine M. Squadrito, *John Locke* (Boston: Twayne Publishers, 1979), 95.

<sup>28</sup> W.M. Spellman, *John Locke*, 20. Locke's main supporter, Lord Shaftesbury, was a principal player in the move to exclude James.

<sup>29</sup> K. Squadrito, *John Locke*, 20-21; W.M. Spellman, *John Locke*, 20.

<sup>30</sup> K. Squadrito, *John Locke*, 102.

natural rights.<sup>31</sup> While Locke's conception of the power of the sovereign appears quite opposite to that of Hobbes, they are both, however, predicated upon the consent of the people being governed.<sup>32</sup> Their differing ideas on the place of rights appear to provide the critical distinction between the two. Locke used rights as a basis by which to measure whether the sovereign is honoring his duties under the social compact; if not, the social compact has been broken and the sovereign right forfeited. However, while Hobbes similarly recognized that pre-societal man possessed natural rights, upon entering into a political society, he agreed to merge those rights with the state exclusively. By doing so, the sovereign became the ultimate legal authority and any alleged violation of those rights could not form the basis for recourse against the state as those rights no longer conceptually existed apart from the state.<sup>33</sup>

Finally, the last era or moment occurred in England in the aftermath of the 1688 Glorious Revolution which gave rise to the notion of Parliamentary supremacy. What we see is that notions of rights were transforming in England as ideas of sovereignty were evolving. For example, following 1688, the battles over who had the sovereign power in England had been settled in favor of Parliament. Ideas of inherent natural rights which belonged to the individual were of less ideological importance as Parliament was perceived as the sovereign lawmaker which was the representation of the people themselves. As sovereignty was conceptually placed with the people or, more accurately, with Parliament as the representative of the people, the emphasis upon natural rights inherent to an individual naturally became less important in the absence of the classic tyrannical ruler against which these rights must be vigilantly maintained.

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<sup>31</sup> K. Squadrito, *John Locke*, 102; Hans Aarsleff, "The State of Nature and the Nature of Man in Locke," in *John Locke: Problems and Perspectives*, John W. Yolton, Ed. (Cambridge: Cambridge University Press, 1969), 100.

<sup>32</sup> Lowe, *Locke*, 162.

<sup>33</sup> Hobbes, *Leviathan*, Chapter 26, 174-175; Haines, *The Revival of Natural Law Concepts*, 21.

Further, while this natural law tradition in England waned as the centuries old battles between the Crown and Parliament were gradually resolved in favor of the supremacy of Parliament, a consistent turn toward the primacy of statutory law was a natural result of this change. For example, Gordon Wood notes that with the establishment of Parliamentary supremacy, Parliament was now possessed with the power to create law that did not simply rest on the custom based principles of the common law, but could create whole new positive, or statutory, law.<sup>34</sup> Historians have noted that after 1688, Parliament slowly began to increase its exercise of its legislative powers, so that by 1760-1820, Parliament was averaging 254 new statutes per legislative session, approximately five times the average number of laws passed per session from 1689-1702.<sup>35</sup> The rise of the acceptance of the idea of the supremacy of Parliament and the resulting emphasis on statutory law hastened the demise of ideas of natural law that had arisen in England to counter the Stuart excesses on the seventeenth century. To Wood, while notions of fundamental or natural law in which all governmental statutory law must be grounded still partially existed, “by the last quarter of the eighteenth century it seemed clearer than ever before to most Englishmen that all such moral and natural law limitations on the Parliament were strictly theoretical, without legal meaning, and relevant only in so far as they impinged on the minds of the lawgivers.”<sup>36</sup> In England by the late eighteenth century, the concept of fundamental law as binding the sovereign, such as seen those set forth in the seventeenth century judicial pronouncements of Lord Coke in *Dr. Bonham’s Case* (1610) for example, were of another era,

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<sup>34</sup> Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969, 1998), 265.

<sup>35</sup> P.D.G. Thomas, *The House of Commons in the Eighteenth Century* (Oxford, 1971), 61; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge, 1989), 13.

<sup>36</sup> Wood, *The Creation of the American Republic*, 260.

swept away by an omnipotent Parliament in the aftermath of the Glorious Revolution.<sup>37</sup> Of course, the rise of English Parliamentary supremacy by the late eighteenth century should not obscure that the transformation did not occur overnight. Rather, Parliamentary supremacy did not immediately eclipse the older sixteenth century natural law tradition that, at its core, considered many rights as belonging to the individual and outside the scope or control of any sovereign, and did not fully extinguish the competing English Whig tradition in England and especially in the American colonies.<sup>38</sup>

Major structural support for the transformation toward Parliamentary supremacy, or “legislative constitutionalism” was provided by the eighteenth English jurist William Blackstone.<sup>39</sup> Begun as a series of lectures at Oxford in 1753, Blackstone outlined the state of English law in his famous *Commentaries on the Laws of England*, a multi-volume legal treatise

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<sup>37</sup> In *Dr. Bonham’s Case* (1610), Lord Coke was presented with a claim of false imprisonment by Dr. Bonham against the Royal College of Physicians who had him sent to prison for his practice of medicine in London without a license issued by the College. Dr. Bonham, who graduated from Cambridge with a degree in medicine, refused to apply for license from the College. The College argued that it had the authority to take these actions as it existed pursuant to a royal grant confirmed by Parliament. Lord Coke, however, took a different view, noting that while the authority given the College allowed it to collect fines for unlicensed practice, the grant also inappropriately allowed the College act as a judge in cases to which it was a party, as the College received half of all fines collected. As a result, Lord Coke commented that Parliamentary acts are still governed by the common law and when such acts violate “common right and reason, or repugnant, or impossible to perform” the common law controls and the act is void. Professor Helmholz rightly notes that *Bonham’s Case* is often inappropriately cited as the basis for our modern concept of judicial review, which Helmholz argues was not necessarily intended by Coke. R.H. Helmholz, “*Bonham’s Case, Judicial Review, and the Law of Nature*,” *Journal of Legal Analysis*, Volume 1, No. 1 (Winter 2009): <http://jla.hup.harvard.edu>, 2-3.

<sup>38</sup> Daniel Hulsebosch describes the changes which took place during this period as “the tension between legislative constitutionalism and the older sort based upon Coke’s identification of common and fundamental law” that began post-1688 and continued into the eighteenth century. For an example of fundamental law thinking, Hulsebosch describes the writings of Lord Bolingbroke who conceptualized a distinction between government and the constitution of the polity. While strict Parliamentary supremacy ideologically collapses these categories, Bolingbroke measured whether a government was proper by the extent to which it observed and adhered to the fundamental rules of the constitution. A constitution, according to Bolingbroke, was effectively a “collection of fundamental rules against which the people could measure ministerial behavior to gauge whether it was corrupt.” Hulsebosch, *Constituting Empire*, 37-38.

<sup>39</sup> Hulsebosch, *Constituting Empire*, 38-39.

which glorified the absolute supremacy of Parliament.<sup>40</sup> To Blackstone, all societies could only contain one supreme sovereign authority, and England was certainly no different.<sup>41</sup> Blackstone further asserted the supremacy of Parliament by revisiting Lord Coke's 1610 opinion in *Dr. Bonham's Case*, which recognized the extralegal nature of certain inherent rights. However, by the mid-eighteenth century, Coke's admonition that a court could void certain statutes if they conflicted with fundamental laws, Blackstone held that a court could not void a parliamentary enactment, only modify the law if it led to a clearly absurd result that was not intended. However, an unjust law would still require enforcement if the legislature intended so.<sup>42</sup>

Blackstone's *Commentaries* provides a good example of how the change in ideas of sovereignty post-1688 affected the ideological basis for rights themselves. For example, Blackstone continued the conceptual tradition of perceiving rights as either natural and inherent to the individual or granted by the civil state and thus capable of modification, or absolute versus relative rights.<sup>43</sup> Blackstone also continued the tradition espoused by Locke and Hobbes of employing the concept of man in a pre-societal state where these natural and absolute rights first existed and which continued to exist once man entered into a communal state.<sup>44</sup> However, while Blackstone continued the division of absolute and relative rights, the existence of Parliamentary sovereignty caused him to then explode this distinction by arguing that these same absolute rights were "coeval with our form of government."<sup>45</sup> Blackstone held contrary to Locke that the

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<sup>40</sup> Lieberman, *The Province of Legislation Determined*, 31; Wood, *The Creation of the American Republic*, 264.

<sup>41</sup> Hulsebosch, *Constituting Empire*, 39.

<sup>42</sup> Hulsebosch, *Constituting Empire*, 39-40.

<sup>43</sup> William Blackstone, *Commentaries on the Laws of England* (1765), Volume I (Chicago: University of Chicago Press, 1979), 119.

<sup>44</sup> Blackstone, *Commentaries*, Vol. I, 43, 121.

<sup>45</sup> Blackstone, *Commentaries*, Vol. I, 123.

government could be removed, even in the event of tyrannical laws, as “the power of parliament is absolute and without control.”<sup>46</sup> Blackstone also echoed Hobbes’ position regarding the difference between natural law and natural rights in drawing his distinction between absolute and relative rights, but then made the distinction useless by locating supreme power in the sovereign.<sup>47</sup>

Thus, the colonial and founding generations had ample sources to inspire their visions for the basis of rights. Before examining the different ways in which these generations digested these sources, a final interpretative point should be addressed. We should appreciate the linguistic difficulty in attempting to discuss rights when there is disagreement over whether that term had the same meaning as it does today. For example, Jack Rakove argues that we must first appreciate that the idea of a right had a much different connotation before the seventeenth century. Before then, the English definition of the term “right” simply meant that a person held valid title or owned property, especially realty. Other aspects that we would now consider within the modern definition of a “right” were referred to as “liberties and privileges.” Further, these liberties and privileges were effective against the power of the government; however, they were also considered as granted by the government and could be rescinded.<sup>48</sup> Rakove argues that the upheaval of the seventeenth century associated with the Stuart dynasty led to an expansion of the idea of a right, first, to include those qualities previously associated with liberties and privileges and, second, to perceive of these newly defined rights as something owned by an individual that could not be granted or taken away by the government, arguing that this was the genesis of the

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<sup>46</sup> Blackstone, *Commentaries*, Vol. I, 157.

<sup>47</sup> Blackstone, *Commentaries*, Vol. I, 119-120, 123.

<sup>48</sup> Jack N. Rakove, *Declaring Rights* (Boston: Bedford Books, 1998), 19.

idea of the birthright of Englishmen.<sup>49</sup> Rakove credits this evolution to the idea of a right as something which an individual owns to seventeenth century political theorists Hobbes and Locke.<sup>50</sup>

Consistent with this emerging idea of absolute individual ownership of rights was its natural corollary that written documents did not supply the basis for the right, but merely declared their existence, especially in the American colonies. For example, Rakove notes the existence of declarations contained in colonial charters and codes which affirmed the existence of the colonists' English rights and liberties. Argues Rakove, "[n]either in 1675 nor 1765 would the colonists have believed that such statements created the rights they described." For example, Bernard Bailyn noted the views of Philadelphia attorney, pamphleteer, and member of the founding generation, John Dickinson, with respect to the rights contained in the colonial charters. Dickinson argued similarly that the charters were "declarations but not gifts of liberties." Channeling natural law theory, Dickinson argued that the colonists were born with rights founded upon larger principles of reason and justice and, as a result, written laws only declared and affirmed these rights, but did not grant them.<sup>51</sup> Further, Rakove finds that "...Americans had reason to treat their charters as something more than preexisting entitlements. They were not mythic notions like the social contract... These charters provided a potent authority to which

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<sup>49</sup> Rakove, *Declaring Rights*, 19-20.

<sup>50</sup> Rakove, *Declaring Rights*, 21-22. Of course, while Hobbes and Locke share similar views regarding the agreement of individuals to combine to form an ordered society, they differed greatly with respect to the ability of those individuals to modify the government of that society after the initial agreement.

<sup>51</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), 187.

Americans could appeal whenever the status of their rights within the Empire was controverted.”<sup>52</sup>

Rakove’s argument raises an interesting point. In it, he hints at the divergence of thought regarding the location of rights between the American colonies and England which occurred during the eighteenth century and which set the stage for the many divergent views of the role of law, constitutionalism, and rights that had to be addressed post-Independence. The presence of numerous, disparate interpretations of legal thought competing in the years of the early republic is likely evidence that the U.S. was being forced to confront and craft a unique legal ideology now that it could no longer define itself in opposition to England. The presence of these numerous ideologies can be considered as directly related the particular colonial experience, both before and after Independence. Within the context of these four eras, the founding generation found numerous sources upon which they could base their arguments regarding the source of rights in order to oppose British colonial policy.

### **Rights as English Liberties**

First, there was the belief in the rights of Englishmen, the idea that subjects of the English realm inherited unique privileges under the law and immunities from arbitrary or capricious governmental or royal action based upon whim instead of law. This idea can be conceptually grouped with the sentiment that the English common law provided the basis for liberty, as was seen in Judge Archer’s trial court opinion in *Barron*. If a person possesses rights as an automatic result of his status as an English subject, for example, it is only logical that the English common law is the procedural vehicle through which violations of those rights are vindicated. This type of thought is evident in the laws and charters of the colonies where they declared their equality

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<sup>52</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996), 295-296.

of rights with their countrymen from whom they recently departed. For example, in the Act for the Liberties of the People, passed by the Maryland General Assembly in 1639, the legislature declared that the Christian inhabitants of the colony “have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England.”<sup>53</sup> These rights specifically included the Magna Charta influenced rights that one could not be imprisoned or disseised of his freehold property except in accord with the laws of the colony.<sup>54</sup> This sentiment, that the rights of the colonists are predicated upon their status as subjects of the British Empire, continued throughout the seventeenth century.

In his 1675 writings, William Penn discussed “English Rights” in the context of what he characterized as the two types of governments: those who ruled by virtue of power or those who ruled by virtue of consent. England possessed the latter form which meant it was a nation ruled by law and not men. Law, for the English under this government, consisted of those rules he termed “superficial” which could be altered by the government for the larger purpose of ensuring social harmony. In opposition to these superficial rules, the law also contained unspecified mandates he termed “fundamental” which were the foundation of all reasonable polities. For the English, there were certain rights that were unique to their society: the right to private property; the right to vote on law; and the right to limit or influence the judicial power through the use of the jury trial. This last right Penn traced to the particular Anglo-Saxon heritage of the English

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<sup>53</sup> General Assembly of Maryland, “An Act for the Liberties of the People (1639),” *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 14, Document 1, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s1.html>, last accessed September 26, 2009.

<sup>54</sup> General Assembly of Maryland, “An Act for the Liberties of the People (1639),” *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 14, Document 1, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s1.html>, last accessed September 26, 2009.

traced back to their mythic Germanic ancestors. These rights were not natural and universal, but were “the ancient and undoubted rights of Englishmen, as three great roots, under whose spacious branches the English People have been wont to shelter themselves against the storms of arbitrary government...”<sup>55</sup> Twelve years later, Penn further refined his view of the Englishness of rights for purposes of informing and reminding the American colonists of their “inestimable inheritance that every Free-born Subject of England is heir unto by Birth-right, I mean that unparalleled privilege of *Liberty and Property*.” This freedom in one’s person and his property is unique to the English because the measure of one’s societal rights and obligations is determined by law and not royal or noble whim as was the case in a country like France. The freedom from violence or oppression provided by the law is what he calls the “Englishman’s Liberty” and was protected primarily through their representatives in Parliament and their participation in the jury trial system, which gave English subjects control over laws as well as over their execution, respectively.<sup>56</sup> For Penn, the fundamental rights which protected one’s person and property were not universal but uniquely English.

Of course, discussion of rights is usually necessitated by conflict. During the Stamp Act crisis of 1764-1765, the Governor of Rhode Island, Stephen Hopkins, wrote a pamphlet protesting the British imperial policy that sought to raise revenue by enacting numerous new duties and taxes on the colonies. In *The Rights of Colonies Examined* (1764), Hopkins looked to the nature of colonial relationships to argue that the rights of colonists generally were no less

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<sup>55</sup> William Penn, “England’s Present Interest Considered, with Honour to the Prince, and Safety to the People,” Chapter I: Of English Rights, *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 14, Document 3, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s3.html>, last accessed October 10, 2009.

<sup>56</sup> William Penn, “The Excellent Privilege of Liberty and Property being the Birth-Right of the Free-Born Subjects of England,” *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 14, Document 5, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s5.html>, last accessed October 10, 2009.

than persons residing in the home country.<sup>57</sup> Historically, colonists who departed from the ancient Greek city-states took with them all the same privileges as the citizens who stayed. The colonists also took the government of the polity they left, whether a democracy or an oligarchy.<sup>58</sup> While the colonies of ancient Greece were obligated to pay tribute to their home city-state in a semi-dependent status, the colonies of Rome were considered as part of the whole. The colonies did not have different laws; rather, they remained uniquely Roman. The colonies had the right to vote in all elections and had an equal voice.<sup>59</sup> Hopkins argued that this historical pattern of inclusion of the colonies into the governance of the polity continued to the modern day, and cited the colonial relationships of Spain and France as examples. Hopkins conceded that the Spanish and French colonies did not enjoy the freedom afforded to the former Greek and Roman colonies. However, this was so because the colonists were entitled to the same liberties as the persons residing in their respective home countries which, in the case of Spain and France, did not enjoy freedom as their tyrannical governments had taken their subjects' liberties.<sup>60</sup> Of course, as Hopkins argued, as colonists are entitled to the same liberties as if they were still in the mother country, the colonists in the American colonies were entitled to the same liberties as Englishmen at home.<sup>61</sup> For Hopkins, the extent to which a right exists depends not on whether one resides in a colony or the mother country, as the same liberties exist in both locales. Rather, the nature, quantity, and extent of one's rights are predicated upon the society in which one

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<sup>57</sup> Stephen Hopkins, "The Rights of the Colonies Examined," in *American Political Writing During the Founding Era, 1760-1805*, Charles S. Hyneman and Donald S. Lutz, eds. (Indianapolis: Liberty Press, 1983), 45.

<sup>58</sup> Hopkins, "The Rights of the Colonies Examined," 47.

<sup>59</sup> Hopkins, "The Rights of the Colonies Examined," 48.

<sup>60</sup> Hopkins, "The Rights of the Colonies Examined," 48.

<sup>61</sup> Hopkins, "The Rights of the Colonies Examined," 48-49.

resides. The liberties and freedoms of the English are unique to that people and are secured by the British constitution.<sup>62</sup>

In 1769 during the crisis with British customs officials in Boston, Samuel Adams wrote an article in the *Boston Gazette* where he set forth a view of rights as natural and inherent possession of English subjects. In support, Adams reached back to the turmoil of the seventeenth century and recounted the demise of the Stuart dynasty which he attributed to their failure to recognize the natural rights of their subjects. To Adams, the Glorious Revolution of 1688 represented a return to the proper status quo with respect to the rights of the English and noted that “At the revolution, the British constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into a law, and stands as a bulwark to the natural rights of subjects.”<sup>63</sup> Note that while Adams based his argument on the rights of English subjects, he is echoing other natural law type arguments by describing the liberties contained in the English Bill of Rights as declaratory. Regardless, the proper order was restored following the Revolution when the principles of the British constitution were reinstated. The principles protected the natural rights of English subjects, thus Adams explicitly connected natural rights to one’s status as an English subject. Adams further invoked Blackstone for support of his claim that the ultimate rights of life, liberty, and property are protected by “auxiliary subordinate rights.” These rights, which included in increasing order of severity, rights to justice in court, rights to petition for redress of grievance, and, finally, rights to the use of arms for self-defense, were remedies particular to English subjects to enforce rights

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<sup>62</sup> Hopkins, “The Rights of the Colonies Examined,” 49-50.

<sup>63</sup> Samuel Adams, February 27, 1769 *Boston Gazette, The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 3, Document 4, <http://press-pubs.uchicago.edu/founders/documents/v1ch3s4.html>, last accessed October 10, 2009.

guaranteed to those same subjects as was declared in the various documents of the British constitution.<sup>64</sup>

### **Rights as Provided by Nature**

While many envisioned rights as liberties secured to Englishmen, others perceived of rights more as inherent natural possessions or based on universal principles of natural law, as first enunciated by seventeenth century philosophers like continental theorists Grotius and Pufendorf or English thinkers like Locke and Hobbes. This enunciation of rights as not necessarily the birthright of English subjects but as universal natural liberties was seized upon by the American colonists in response to their conflict with the British. While many of the preceding documents identified the colonists' rights as Englishmen to resist the policies of the British imperial government, others discussed rights not as consistent with one's status as an equal English subject, but rested on a view of rights as more natural and universal.

For example, in 1768, the Massachusetts minister, the Reverend Daniel Shute, gave an election day sermon before the governor, lieutenant governor, the governor's council, and Massachusetts House of Representatives.<sup>65</sup> Shute was a well-respected minister who was later elected to the Massachusetts Constitutional Convention to debate the ratification of the proposed Federal Constitution.<sup>66</sup> At that convention, Shute spoke forcefully in support of the Federal Constitution with respect to the Article VI prohibition on requiring religious tests to hold public office. Shute argued that such tests would exclude honest and good men from government,

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<sup>64</sup> Samuel Adams, February 27, 1769 *Boston Gazette*.

<sup>65</sup> Daniel Shute, "An Election Sermon," in *American Political Writing During the Founding Era, 1760-1805*, Charles S. Hyneman and Donald S. Lutz, eds. (Indianapolis: Liberty Press, 1983), 109; See also, Daniel Shute, *A Sermon Preached before his Excellency Francis Bernard* (Boston: Richard Draper, 1768) which notes the persons from the government of Massachusetts who were in attendance for the sermon. Shute was the pastor of a church in Hingham, Massachusetts, while the sermon was apparently given in Boston.

<sup>66</sup> *American Political Writing During the Founding Era*, ed. Hyneman and Lutz, 109.

which would deprive them of part of their civil rights, and stated that “[f]ar from limiting my charity and confidence to men of my own denomination in religion, I suppose, and I believe, sir, that there are worthy characters among men of every denomination — among the Quakers, the Baptists, the Church of England, the Papists; and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion.”<sup>67</sup> In supporting the religious test prohibition, Shute set forth a view of the qualities required for civic participation, which transcended any particular religious belief and, indeed, included those who had religious beliefs rooted in a type of universal “natural religion.” Much in this same manner, Shute, in his 1768 sermon discussed the interaction between the divine and the duties of government. For Shute, God’s will is to support and promote the happiness of man, his creation. As mankind formed into a society governed by a civil authority, it was thus the responsibility of the government to “secure to them those natural rights and privileges which are essential to their happiness.” For Shute, those natural privileges which were “gifts of the creator” were “life, liberty, and property”<sup>68</sup>

A shift from envisioning rights as English toward a conception of rights as universal was required as an ideological necessity once reconciliation with England was no longer possible. Such a shift is evident in the 1776 Virginia Declaration of Rights. This Declaration harkened to Locke when it held that “all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact,

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<sup>67</sup> Jonathan Elliot, *The debates in the several state conventions on the adoption of the federal Constitution, as recommended by the general convention at Philadelphia, in 1787. Together with the Journal of the federal convention, Luther Martin’s letter, Yates’s minutes, Congressional opinions, Virginia and Kentucky resolutions of ‘98-‘99, and other illustrations of the Constitution ... 2d ed., with considerable additions. Collected and rev. from contemporary publications*, by Jonathan Elliot. Pub. under the sanction of Congress. (1836), 5 vols. Chapter: *DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, Accessed from <http://oll.libertyfund.org/title/1906/112216>, on October 20, 2009.

<sup>68</sup> Daniel Shute, “An Election Sermon,” pp. 111-112.

deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing happiness and safety.”<sup>69</sup> Similarly, another famous and well known enunciation of this principle is seen in the 1776 American Declaration of Independence, which presumes the existence of natural “self-evident” rights that are not granted by any government. Rather, it is the duty and responsibility of any legitimate government to respect these “unalienable” rights.<sup>70</sup> Of course, both these documents were written after the decision to break with the mother country was made. However, this does not mean that these ideas were not present earlier. Thomas Jefferson’s natural rights views were evident not only in the Declaration of Independence but also appear in his earlier writings. In 1774, two years before the Declaration of Independence, Jefferson submitted a written summary of his views on the nature of the colonial relationship with England for the Virginia convention which was formed to elect members to the First Colonial Congress. While the convention rejected his position as too radical, his views were published as “A Summary View of the Rights of British America.”<sup>71</sup> In these writings, Jefferson began to set forth a more universal natural rights framework in order to counter the policies of the English while at the same time, continuing to pay homage to the Anglo-Saxon mythology of the English as unique inheritors of the freedom possessed by the Germanic tribes of northern Europe. Jefferson noted that the colonists, before immigrating to the colonies, possessed the natural rights given to all men. However, Jefferson

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<sup>69</sup> The Virginia Declaration of Rights, June 12, 1776, *The Founders’ Constitution*, 6.

<sup>70</sup> Declaration of Independence, July 4, 1776, *The Founders’ Constitution*, 9.

<sup>71</sup> *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Viking Press, 1975), xvi.

still keeps the rights linked to one's particular lineage as that can be traced to England, their Saxon forefathers, and ultimately to their Germanic ancestors.<sup>72</sup>

Much of the reliance on a universal natural law view of rights coalesced in the early attempts to draft the first state constitutions. Many contained declarations of rights which enunciated a natural law type view of rights. Those constitutions that did not provided the participants with a platform to debate the basis for rights. The latter example is seen in the battles over the failed attempts to ratify the 1778 Massachusetts Constitution. In the "Essex Result," a written objection to the proposed 1778 Massachusetts Constitution by the delegates to the Essex County constitutional convention penned by Massachusetts lawyer, and future Chief Justice of that state's Supreme Court, Theophilus Parsons, the delegates set forth a view of the proper role of government.<sup>73</sup> Parsons echoed the Lockean/Hobbesian view of government as formed voluntarily by persons and their sovereign. He argued, however, that the proper role of a free government was not just to secure the rights that existed in the pre-governmental state of nature, but to secure the greatest happiness of the people. Any government that was destructive of these ends would constitute a tyranny that would reduce the citizens to slaves. Parsons made an interesting and important point in his objections. As an attorney, Parsons was most certainly familiar with Blackstone's *Commentaries*. Thus, on one hand, he discussed rights in the same fashion as Blackstone, dividing them into two main categories, inalienable and alienable, similar Blackstone's description of absolute and relative rights. Unlike Blackstone, however, Parsons

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<sup>72</sup> Thomas Jefferson, "A Summary View of the Rights of British America," *The Founders' Constitution*, University of Chicago Press, Volume 1, Chapter 14, Document 10, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s10.html>, last accessed October 10, 2009.

<sup>73</sup> "The Essex Result," *The Founders' Constitution*, University of Chicago Press, Volume 1, Chapter 4, Document 8, <http://press-pubs.uchicago.edu/founders/documents/v1ch4s8.html>, last accessed October 2, 2009; Thomas West, *Vindicating the Founders* (Rowman & Littlefield, 1997), 86; Donald S. Lutz, "The Articles of Confederation as the Background to the Federal Republic," *Publius*, Vol. 20, No. 1 (Winter, 1990): 55, 63; Review "Memoirs of Theophilus Parsons" by T. Parsons, Jr., *The North American Review*, Vol. 89, No. 184 (July, 1859): 232, 234-235.

did not just define inalienable rights as did Blackstone, referring to life, liberty, and property. Rather, Parsons described inalienable rights as rights of conscience. The rights of the security of person and property are what each citizen received in consideration for giving up voluntary control over his alienable rights by leaving a state of nature and entering society, channeling Locke. Further contrary to Blackstone, the inalienable rights, the rights of conscience, cannot be controlled by any legislature. These rights are extra-legal and not part of any bargain struck between the citizen and the state. The proposed Massachusetts constitution was defective, according to Parsons, as it failed to define clearly those inalienable rights in a bill of rights. The constitution was also deficient as it failed to describe the bargain between the people and the state with respect to their alienable rights by failing to note that each man receives the security of person and property as consideration for the surrender of part of his natural rights.<sup>74</sup>

The delegates of the town of Beverly, Massachusetts followed the lead of Essex County in objecting to the proposed 1778 Massachusetts constitution, likewise rejecting it for the lack of a bill of rights. Conceptually, the Beverly delegates split rights into two categories, similar to the inalienable/alienable categories described by the Essex convention or the absolute/relative division described by Blackstone. What is novel in the Beverly split, however, is that they described inalienable or absolute rights as “Natural Rights of Man” which are inherited from the “Great Parent of Nature.” While these rights were so important that they must be contained in a written bill of rights, it is interesting to note the use of the term “rights of man” as this document pre-dates the French Revolution and the subsequent French Declaration of the Rights of Man and the Citizen, first enacted in 1789, which specifically invoked this term.<sup>75</sup> For the Beverly

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<sup>74</sup> “The Essex Result,” *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 4, Document 8, <http://press-pubs.uchicago.edu/founders/documents/v1ch4s8.html>, last accessed October 2, 2009.

<sup>75</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton, 2007), 21.

delegates, the rights that were relinquished to society (referred to as alienable by the Essex convention) were not properly protected in the constitution as it failed to describe what “Equivalent” the people received in return for parting with such rights.<sup>76</sup>

This widespread concern over rights was remedied and resulted in the ratification of the 1780 Massachusetts constitution, where the failure to enunciate a bill of rights which listed the inalienable rights of the people that were given by the creator or the “Great Parent of Nature” was remedied by the insertion of a Declaration of Rights that comprised the first article of the constitution.<sup>77</sup> Indeed, many early state constitutions reflected this idea that rights existed outside the frame of government. It was important that the constitutions reflect the existence of these natural rights, but there was no idea that those constitutions provided the basis for those rights.<sup>78</sup> For example, in 1776, eight states created written constitutions, with two more adopted the next year.<sup>79</sup> In these constitutions, the states created written constitutions to enunciate the organization of their body politic once the Declaration of Independence effectively nullified their former royal or corporate charters, which had previously provided such a structure. Given the headiness of the early days of the Revolution, it is not surprising that many states included written declarations of rights in these constitutions. For example, Maryland officially titled their

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<sup>76</sup> “Return of Beverly, Massachusetts,” *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 14, Document 17, <http://press-pubs.uchicago.edu/founders/documents/v1ch14s17.html>, last accessed October 6, 2009. Beverly is located in Essex County, Massachusetts.

<sup>77</sup> Massachusetts Constitution (1780), *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 1, Document 6, <http://press-pubs.uchicago.edu/founders/documents/v1ch1s6.html>, last accessed October 6, 2009.

<sup>78</sup> Suzanna Sherry argues that the first state constitutions, many of which contained declarations of rights, the constitutions were not considered as granting these rights, but merely declaring those rights that already pre-existed. Suzanna Sherry, “The Founders’ Unwritten Constitution,” *The University of Chicago Law Review*, Vol. 54, No. 4 (Fall 1987): 1127, 1131-132.

<sup>79</sup> In 1776, Maryland, Pennsylvania, Delaware, New Hampshire, South Carolina, North Carolina, Virginia and New Jersey all adopted written constitutions, while in 1777, Georgia and New York followed suit. See, The Avalon Project at Yale Law School, [www.yale.edu/lawweb/avalon/avalon.htm](http://www.yale.edu/lawweb/avalon/avalon.htm), accessed September 13, 2008; See also G. Alan Tarr, *Understanding State Constitutions*, (Princeton: Princeton University Press, 1998), 61.

constitution as “A Declaration of Rights, and the Constitution and Form of Government agreed to by the Delegates of Maryland, in Free and Full Convention Assembled.”<sup>80</sup> In it, the right of Marylanders to the English common law was confirmed and included many familiar rights, such as the freedom of the press, the prohibition against the quartering of soldiers, and the mandate that one’s life, liberty, or property could not be deprived except in accordance with law.<sup>81</sup> Similarly, the Pennsylvania Constitution was titled as a “Declaration of Rights and Frame of Government.”<sup>82</sup> The Pennsylvania Constitution majestically declared that all men possessed “natural, inherent and inalienable rights” and that it is the purpose of government to enable them to “enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man.”<sup>83</sup> An obvious omission to a modern reader of these constitutions is the lack of any enforcement mechanisms. This makes sense if we appreciate that these documents were not intended to be the basis upon which these rights existed.

### **Blending of Concepts**

As was mentioned previously, these categories were not exclusive and many in the founding era blended these concepts. Many writers espoused views that used natural law concepts, the remedies of the common law, and a view of rights as emanating from written documents, like colonial charters. The reliance on the latter category of written documents as providing the sole basis for the right itself was a much newer development, however.

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<sup>80</sup> 1776 Maryland Constitution, The Avalon Project at Yale Law School, [http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp), last accessed, March 16, 2011.

<sup>81</sup> 1776 Maryland Constitution, Articles 38, 28, and 21.

<sup>82</sup> 1776 Pennsylvania Constitution, Preamble, The Avalon Project at Yale Law School, [http://avalon.law.yale.edu/18th\\_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp), last accessed March 16, 2011.

<sup>83</sup> 1776 Pennsylvania Constitution, Preamble, Article I.

The well-known Massachusetts Circular letter of 1768 displays a good example of this multi-tiered type of argument. Penned by Samuel Adams in response to the Townshend Acts and sent to the other colonies to justify and coordinate resistance to the new duties, the letter blended concepts of rights as predicated on natural law as well as provided by the English constitution.<sup>84</sup> Adams presented a view of the English constitution as the location where natural, fundamental rights were recognized. Citing the principle that private property cannot be taken without consent, Adams wrote that it was “an essential unalterable Right in nature, ingrafted into the British Constitution, as fundamental law. . .” For Adams, the English constitution did not originally provide the right, but as the right now existed within the constitutional structure, it was now both a “natural and constitutional Right.” Thus, the colonists, as English subjects, were entitled to the natural rights contained in the constitution and the levying of duties on imports without the consent of the colonists violated their constitutional and natural rights as “American Subjects.”

The October 14, 1774 Declaration and Resolves of the First Continental Congress also rested on several alternate foundations. Written in response to the Intolerable Acts, the Congressional delegates articulated their argument as to why such Acts violated the Colonists’ rights. In doing so, the Congress enunciated the perceived basis of their rights which blended numerous theories, writing “That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS.”<sup>85</sup> Here, the delegates identified all three categories

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<sup>84</sup> Samuel Adams, “Massachusetts House of Representatives, Circular Letter to the Colonial Legislatures,” February 11, 1768, in *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 17, Document 13, <http://press-pubs.uchicago.edu/founders/documents/v1ch17s13.html>, last accessed October 2, 2009.

<sup>85</sup> “Continental Congress, Declaration and Resolves,” October 14, 1774, in *The Founders’ Constitution*, University of Chicago Press, Volume 1, Chapter 1, Document 1, <http://press-pubs.uchicago.edu/founders/documents/v1ch1s1.html>, last accessed October 2, 2009.

as the basis for their rights: natural law, the rights of Englishmen, and the contractual obligations contained in their colonial charters. The Declaration further specified those rights which likewise tracked these categories. First, the Resolution declared the colonists' rights to life, liberty, and property, a more natural law based principle with its genesis in the seventeenth century tradition of writers like John Locke in England. Second, they declared that their ancestors who came to the colonies enjoyed and retained all "rights, liberties, and immunities of free and natural-born subjects, within the realm of England." Those rights included the right to participate in legislative affairs as well as to the entitlements and protection provided by the English common law. Finally, they held that the colonists "are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws." This Declaration by the Continental Congress is instructive as they based their authority upon their status of English subjects, while at the same time partially recognizing doctrines of natural law.

After his return from the First Continental Congress, John Adams undertook a lengthy written defense of the colonial position. Written under the pseudonym "Novanglus," Adams wrote twelve separate articles published in the *Boston Gazette* from December of 1774 to April of 1775. The purpose of the Novanglus series was to respond to the pro-British articles written by the anonymous "Massachusettensis" who endorsed the absolute supremacy of Parliament over the colonies.<sup>86</sup> Not surprisingly, Adams blended multiple theories of rights in much the same manner as the 1774 Continental Congress Declaration which Adams helped draft.<sup>87</sup>

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<sup>86</sup> George Carey, *The Political Writings of John Adams*, ed. George Carey (Washington, D.C.: Regnery Publishing, 2000), 22.

<sup>87</sup> Edmund S. Morgan, *The Birth of the Republic, 1763-89* (Chicago: University of Chicago Press, 1956), 66.

Adams began by countering the proposition that Parliament had legal authority over the American colonies, and argued that neither divine sanction, the law of nations, nor the English common law provided any such basis. Statutory law purporting to give such authority was improper as it was done after colonial settlement and without the consent of the colonists.<sup>88</sup> To support his assertion, Adams presented a number of arguments. First, he provided historical examples to argue that the colonies of ancient Greece were considered independent commonwealths while Roman colonies were at least granted privileges consistent with any Roman city.<sup>89</sup> Second, the allegiance of the Massachusetts colonists was to the King, not Parliament, as the colonists made an express contract with William and Mary following their ascension to the throne, with the contract represented by the delivery of the colonial charter.<sup>90</sup> Finally, in answering the ultimate question of whom, then, had the authority to make law for the colonies, Adams blended several concepts. For example, Adams wrote, “How, then, do we New Englandmen derive our laws? I say, not from parliament, not from common law, but from the law of nature, and the compact made with the king in our charters. Our ancestors were entitled to the common law of England when the emigrated, that is, to just so much of it as they pleased to adopt, and no more.”<sup>91</sup> Here, Adams premised the colonists’ right to make law from a mix of natural law principles as well as from their written agreement with the king as contained in their charters. Adams continued to blend concepts by then equating natural law with English liberties. In describing English liberties, Adams characterized them as “but certain rights of nature, reserved to the citizen by the English constitution, which cleaved to our ancestors when the

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<sup>88</sup> *The Political Writings of John Adams*, 43.

<sup>89</sup> *The Political Writings of John Adams*, 62.

<sup>90</sup> *The Political Writings of John Adams*, 73-74.

<sup>91</sup> *The Political Writings of John Adams*, 82.

crossed the Atlantic. . .”<sup>92</sup> For Adams, English liberties are due the American colonists, liberties which are coincident with natural law principles.

As we have previously seen with the Essex Result and the response of the Beverly delegates in rejecting the proposed Massachusetts constitution, the view of rights set forth was one predicated upon rights as natural and universal. In rejecting the constitution, these counties made it known that it was deficient as it failed to properly recognize these pre-existing rights. Similar to the rejections by the Beverly and Essex contingents, the delegates to the Berkshire County convention also rejected the proposed constitution. Berkshire County, the westernmost county in Massachusetts, had not only rejected the proposed 1778 state constitution, but had remained hostile to the General Court in Boston by closing courts throughout the county until another constitutional convention was called.<sup>93</sup> After delegates from the General Court met with the Berkshire County representatives, the representatives prepared a written response which explained the reasons for their actions.<sup>94</sup> There, the representatives articulated a vision of rights that incorporated numerous parts. First, they set forth a Blackstonian view of rights belonging to the people as either alienable, for the common good, or inalienable, which cannot be delegated to the government and which formed the basis for their complaints. Second, they echoed Locke by stating that man originally existed in a state of nature. Man left the natural state to form the “social Compact,” however, in doing so, all “free Governments” must make a distinction between legislation and the “fundamental Constitution.” It is the constitution, as opposed to routine legislation, which “ascertains the Rights Franchises, Immunities and Liberties of the

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<sup>92</sup> *The Political Writings of John Adams*, 84.

<sup>93</sup> *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, ed. Oscar Handlin (Cambridge, Massachusetts: Harvard University Press, 1966), 366.

<sup>94</sup> *The Popular Sources of Political Authority*, 374.

people. . .” Thus, the constitution identifies – but does not provide - the inalienable rights of the people; the rights that cannot be given up to any legitimate government.<sup>95</sup> Interestingly, while the representatives make these declaratory type arguments, the fear caused by a lack of an effective constitution caused many in the county to close the courts until such a constitution was properly ratified.<sup>96</sup> The Berkshire County representatives thus set forth a blend of concepts over the proper location of rights. While man possessed rights in a state of nature, certain rights could not be taken away even after consenting to form civil society and constitutions were enacted as safeguards to recognize and identify the existence of these rights. However, while constitutions did not provide the basis for these rights, for the representatives, the lack of a constitution was so dangerous that they closed the courts until this was remedied. While the representatives did not set for a positivist view of rights as emanating from written constitutions, they evidenced the genesis of that concept.

In his Lectures on Law given from 1790 to 1791, James Wilson addressed the question of rights. Wilson, a member of the Continental Congress, a framer of the Constitution as a delegate from Pennsylvania, and an original justice of the U.S. Supreme Court, evidenced a view of rights which blended numerous foundations for support.<sup>97</sup> To begin with, when discussing the purpose of government itself, Wilson posited the question of the “principle object” in enacting government: “was it to acquire new rights by human establishment? Or was it, by a human establishment, to acquire a new security for the possession or the recovery of those rights, to the enjoyment or acquisition of which we were previously entitled by the immediate gift, or unerring

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<sup>95</sup> *The Popular Sources of Political Authority*, 375.

<sup>96</sup> *The Popular Sources of Political Authority*, 378.

<sup>97</sup> Stephen A. Conrad, “James Wilson,” in *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 932-933.

law, of our all-wise and all-beneficent Creator?”<sup>98</sup> Wilson argued that the purpose of government was to ensure the latter, to protect those rights that were granted by the divine, combining Lockean concepts of the social compact with early Christian ideas connecting natural rights as emanating from God.<sup>99</sup> For Wilson, government was formed to protect man’s pre-existing natural rights “to his property, to his character, to liberty, to safety.”<sup>100</sup> Wilson specifically addressed Blackstone’s contention that man must give up some of his natural liberties in order to have proper government. Wilson took specific issue with Blackstone’s description of the rights of life, liberty, and property as the “‘civil liberties’ of Englishmen” and especially with Blackstone’s conclusion that these natural rights ultimately rest on a human establishment for their existence.<sup>101</sup> Man relinquished his natural rights upon entering society, as goes Blackstone’s argument, and in return received “civil privileges” or in the case of Englishmen, his “liberties.”<sup>102</sup> For Wilson, this view of rights was fundamentally flawed as it would place the government in the position of providing rights and man could only rely or invoke those rights which society provided.<sup>103</sup>

On one hand, Wilson espoused a view of rights as natural and for any government to retain legitimacy, it must recognize and protect these pre-existing rights. This view is contrary to the concept of rights as particular to the English which then includes implicit Blackstonian notions of limitless parliamentary supremacy. However, Wilson clouded this seemingly simple

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<sup>98</sup> James Wilson, “On the Natural Rights of Individuals,” in *The Collected Works of James Wilson*, Vol. 2, Kermit Hall and Mark David Hall, eds. (Indianapolis, Indiana: Liberty Fund, Inc., 2007), 1053-1054.

<sup>99</sup> Wilson, “On the Natural Rights of Individuals,” 1054.

<sup>100</sup> Wilson, “On the Natural Rights of Individuals,” 1061-1062.

<sup>101</sup> Wilson, “On the Natural Rights of Individuals,” 1057-1058.

<sup>102</sup> Wilson, “On the Natural Rights of Individuals,” 1054, 1057.

<sup>103</sup> Wilson, “On the Natural Rights of Individuals,” 1058.

Blackstone/natural rights binary when he discussed the methods by which these natural rights were protected. For example, in discussing the natural right of life, Wilson held that it was partially the common law that protected these natural rights. Wilson interestingly described a right that found its basis in natural law, but grounding its enforcement in the common law which was a view of rights typically associated with a vision of rights as liberties enjoyed by one's status as an Englishman.<sup>104</sup>

As we have seen, Wilson was not alone in his multi-layered analysis of where rights obtained their authority. Indeed, the founding era debates evidenced a blend of numerous perceptions regarding this question. These debates were crafted to oppose British colonial policy and evidenced that the ideas of where rights originated was ill-formed and subject to numerous interpretations. The debate focused primarily on ideas of rights as liberties guaranteed to English subjects, rights as extra-governmental natural and universal freedoms, and rights as a blend of these two. However, the idea of rights as coming from written documents like colonial charters or early state constitutions existed only as additional support. Arguments predicated upon a written document, like a charter, declaration of right, or early constitution, as providing the basis for the right itself are very much in the background. As we will see in Chapter 5, this will begin to change.

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<sup>104</sup> Wilson, "On the Natural Rights of Individuals," 1068.

## CHAPTER 5 RIGHTS IN THE EARLY REPUBLIC

The confusion evidenced by the founding generation over the proper location of rights was not solved by the ratification of the Constitution. Rather, these ideas co-existed and began to compete as the new nation entered the next century as courts, lawyers, litigants, and the people more generally wrestled with the concept of where rights fit within the new Federal scheme. As we have seen, the *Barron* litigation evidenced a more complicated picture as the various players all set forth differing views of where rights were located. This confusion, however, was not limited to *Barron*, as case law from this era shows that that many other courts and litigants also held conflicting and sometimes contradictory ideas regarding the location of rights. This chapter will explore how courts, judges, and lawyers set forth many different views of where rights obtained their authority. The presence of these many varying interpretations demonstrates that Marshall's positivist view of rights set forth in *Barron* was not the only available outcome. Rather, there existed an ideological spectrum of rights all competing for primacy. These views can be separated into four categories that were present during this era: rights as protected by the common law; rights as fundamental liberties which were simply recognized by written constitutions; written constitutions as the source of rights; and, finally, rights as emanating from an inchoate blend of multiple sources.

### **Rights as Provided by the Common Law**

First, many viewed rights as coming from the wisdom and experience of the English common law similar to Judge Stephenson Archer, the jurist who issued the trial court opinion in *Barron*. In *Lindsay v. Commissioners* (S.C. 1796) the South Carolina Constitutional Court was presented with a case which pitted the road commissioners appointed by the city of Charleston

against a property owner whose land was taken for the purpose of constructing a new road.<sup>1</sup> The property owner sought a writ of prohibition to prevent the commissioners from proceeding with the construction. The primary basis was that the law was unconstitutional as it allowed a taking of property without consent, full compensation, or jury trial.<sup>2</sup> Because the court could not reach a majority decision, the writ was denied. However, the case is instructional as all parties, the judges and litigants, used the vernacular of the common law to support their conflicting positions. The plaintiff's attorneys argued that the taking violated the Ninth Article of the 1790 South Carolina Constitution which copied the language from the Magna Charta that no freeman could be disseised of his property except by a judgment of his peers or by law of the land. This provision is virtually identical to the similar article in the 1776 Maryland Constitution cited in the *Barron* case.<sup>3</sup> In support, they cited the natural law style opinion delivered by Justice Patterson in *Vanhorne's Lessee v. Dorrance*. This case, relied upon by Mayer and Hoffman during the appellate arguments, held that the Pennsylvania legislature had acted illegally by attempting to settle a land title dispute through enactment of legislation. Such an action effectively took property from one party and vested it in another without any compensation.<sup>4</sup> The plaintiffs also cited the 1792 South Carolina case, *Middleton v. Bowman*.<sup>5</sup> There, the then South Carolina colonial legislature had, in 1712, attempted to resolve a boundary dispute by

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<sup>1</sup> *Lindsay v. Commissioners*, 2 Bay 38 (S.C.Const.App. 1796).

<sup>2</sup> *Lindsay v. Commissioners*, 2 Bay at 38. The secondary basis for the writ was that even if the commissioners had such authority, they surpassed their legislative authority by making excessive tax assessments against the owners of the adjacent lots to pay for the improvements. *Id.*

<sup>3</sup> The only difference between the South Carolina provision and Article XXI of the 1776 Maryland Constitution is that South Carolina inserted the words "no freeman of this state, shall be taken. . ." instead of "no freeman ought to be taken. . ."

<sup>4</sup> *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (C.C.D.Penn. 1795).

<sup>5</sup> *Middleton v. Bowman*, 1 Bay 252 (S.C.Com.Pl.Gen.Sess. 1792).

confirming the propriety of the title of one of the owners in the descendants of the owner following his intestate demise. Years later, the purchaser of the adjacent land brought suit and argued that this act by the colonial legislature was void as it was against the principles of the Magna Charta as it effectively took property from the legal heirs without any due process. The court agreed as the act was against “common right” as well as the Magna Charta since it took property of one man and vested it in another without compensation or even jury trial.<sup>6</sup>

The attorneys for the city of Charleston in *Lindsay* likewise viewed the common law as the basis upon which the city could take private property for public improvements. The city admitted that the rules against takings recognized in cases like *Vanhorne’s Lessee* and *Middleton* were correct as they violated the Magna Charta and the South Carolina Constitution. However, the city argued that the power of the sovereign to maintain roadways for the convenience of society was part of the law of the land well before the Magna Charta or the South Carolina Constitution ever existed.<sup>7</sup> Similarly, the city relied on continental theorists like Vattel that are normally considered part of the natural law tradition to support its case. For example, Vattel was cited for the argument that a state cannot exist if it cannot dispose of property under its authority for the public benefit. This right of eminent domain was an essential part of the sovereign power.<sup>8</sup> Similarly, Rousseau wrote that a person’s power over his property is always subordinate to the right the community has over all property.<sup>9</sup> From these principles, argued the city, the state’s eminent domain power was part of the common law of South Carolina.<sup>10</sup> The city did not

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<sup>6</sup> *Middleton v. Bowman*, 1 Bay at 253.

<sup>7</sup> *Lindsay v. Commissioners*, 2 Bay at 40.

<sup>8</sup> *Lindsay v. Commissioners*, 2 Bay at 42.

<sup>9</sup> *Lindsay v. Commissioners*, 2 Bay at 42.

<sup>10</sup> *Lindsay v. Commissioners*, 2 Bay at 45.

interpret the common law as given by the Magna Charta. Rather, the city argued for a more common understanding of what were originally considered English liberties. The common law, thus, tracked the wisdom of the ages formed when the mixtures of the customs of the Saxons, Normans, and Romans with that of the original inhabitants of the British Isles.<sup>11</sup>

The court split on the decision. Two judges agreed with the city and held the right of eminent domain as an essential component of sovereignty and recognized in the common law. This sovereign right was part of the common law and was included in the Magna Charta. The Magna Charta did not grant this right; instead, it simply confirmed its existence.<sup>12</sup> Likewise, the Ninth Article of the South Carolina Constitution also declared these “ancient rights and principles” in the same way. For these judges, the common law provided the basis for the right of the sovereign to take property through its eminent domain power. No individual right could trump this power. For the other judges, the common law was just as important, but for different reasons. For these judges, the power to take property for public purposes was an essential attribute of sovereignty, but even Vattel argued that it must be done with compensation to the owner.<sup>13</sup> In addition to Vattel, the other side cited the sage of the common law, William Blackstone, for the proposition that the common law required compensation upon the exercise of the takings power.<sup>14</sup> For all the parties in *Lindsay*, the common law was the basis for rights. It contained the basis for the right of the sovereign to take property; it contained the right of the individual to demand payment. All claims to right flowed through the language and concepts of the common law.

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<sup>11</sup> *Lindsay v. Commissioners*, 2 Bay at 45.

<sup>12</sup> *Lindsay v. Commissioners*, 2 Bay at 48.

<sup>13</sup> *Lindsay v. Commissioners*, 2 Bay at 49.

<sup>14</sup> *Lindsay v. Commissioners*, 2 Bay at 49.

In *New York v. Goodwin* (N.Y. 1820), the court held that the Fifth Amendment prohibition against double jeopardy applied in a state court proceeding.<sup>15</sup> The court held the double jeopardy rule applicable, but not necessarily because the Fifth Amendment applied to the state. To Chief Justice Ambrose Spencer, that was the wrong question, writing that “I do not consider it material whether this provision be considered as extending to the state tribunals or not; the principle is a sound and fundamental one of the common law” but added for good measure that the Fifth Amendment “does extend to all judicial tribunals in the United States, whether constituted by the Congress of the United States, or the states individually.”<sup>16</sup> Spencer’s opinion in *Goodwin* raises two points. First, Spencer set forth a vision of the rights contained in the Constitution which emphasized the declaratory nature of written constitutions themselves. Second, Judge Spencer equated fundamental rights, like the prohibition against double jeopardy, as protected by the common law. In discussing the prohibition, Spencer cited Blackstone, and stated that the prohibition “is grounded on this universal maxim of the common law of England.”<sup>17</sup> To Spencer, the common law grounds these rights. Written constitutions enunciate those rights, but do not provide them. Accordingly, it was wholly irrelevant the extent to which the Constitution applies in New York as it was the common law which recognized these rights.

The equation of fundamental principles with the common law was again shown in the 1844 case *Commonwealth v. Flanagan* (Penn. 1844). There, the Pennsylvania Supreme Court was presented with a motion by the defendants for a new trial after the initial case ended in a guilty verdict against them for murder.<sup>18</sup> Among other grounds, the defendants argued that the intense

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<sup>15</sup> *New York v. Goodwin*, 1 Wheeler C.C. 440 (N.Y. 1820).

<sup>16</sup> *New York v. Goodwin*, 1 Wheeler C.C. at 477.

<sup>17</sup> *New York v. Goodwin*, 1 Wheeler C.C. at 477.

<sup>18</sup> *Commonwealth v. Flanagan*, 7 Watts & Serg. 415, 1844 WL 5033 (Penn. 1844).

excitement surrounding the charge of murder in the local community prejudiced them from having an impartial jury.<sup>19</sup> In denying the motion, the court addressed the portion of the Pennsylvania constitution which guaranteed a speedy trial by an impartial jury. The court stated that this provision was “declaratory of the common law.”<sup>20</sup> Furthermore, the question of what constituted a fair trial was a question for the courts.<sup>21</sup>

In *New York v. Toynbee v. Wynhammer* (N.Y. 1856), the New York Court of Appeals was presented with an appeal from a conviction for selling alcohol subsequent to an 1855 state prohibition law.<sup>22</sup> In holding the law unconstitutional, the court raised two important points. The first concerns its view of the role of the constitution in constraining the legislature. As we will see later in this chapter, there were courts that were beginning to hold the powers of the legislature supreme and limited only by the exact written prohibitions contained in the Federal Constitution or their own state constitution. In *Wynhammer*, however, the court agreed with the contention that the legislature is not limited solely by the language of the constitution as written, but also by “limitations implied by the nature and form of our government” and recognized the tradition which held 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 be declared by the judiciary.”<sup>23</sup> For the court, the New York law deprived the person charged with a violation of his property and, just like any other deprivation of property, was improper

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<sup>19</sup> *Commonwealth v. Flanagan*, 7 Watts & Serg. at 418.

<sup>20</sup> *Commonwealth v. Flanagan*, 7 Watts & Serg. at 421-422.

<sup>21</sup> *Commonwealth v. Flanagan*, 7 Watts & Serg. at 421.

<sup>22</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. 490 (N.Y. 1856).

<sup>23</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. at 497.

unless done in accordance with the strictures of fundamental law.<sup>24</sup> The fundamental law cited by the court included the provisions in the New York Constitution (1846) regarding the prohibition against the deprivation of any rights or privileges except by the law of the land, the provision against the deprivation of life, liberty, or property without due process, or the provision outlawing takings of property without just compensation.<sup>25</sup> Importantly, the *Wynhammer* court held that the phrases “law of the land” or “due process of law” did not mean that the legislature could then take property as long as it properly passed legislation allowing the taking.<sup>26</sup> Rather, the court held that it was the common law which determined whether the taking, for example, was done in accord with law. To hold otherwise would make the constitutional restraint on the legislature absurd as it would allow the legislature to circumvent its own prohibitions.<sup>27</sup> The second point raised in *Wynhammer* concerns enforcement. If the common law was the check on the legislature, the judiciary would naturally be the branch to determine questions of constitutionality of the laws. The concurring opinion anticipated this role for the judiciary by enunciating the primacy of the common law and arguing that the common law was “virtually incorporated into the constitution itself, and made thereby a part of the paramount law.”<sup>28</sup> By celebrating the common law as the means by which rights have been preserved over the centuries, and arguing that the new constitutions implicitly incorporate all of its many rules, the concept of the location of rights was not only being perceived as emanating from outside of those

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<sup>24</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. at 495, 498.

<sup>25</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. at 498; New York Constitution (1846), Article I, Sections 1 and 6.

<sup>26</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. at 498.

<sup>27</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. at 498.

<sup>28</sup> *New York v. Toynbee v. Wynhammer*, 2 Parker Crim. Rep. at 511-512.

documents, but the judiciary was positioning itself to be the branch that preserves those rights, instead of the legislature which were ostensibly the peoples' direct representatives.

### **Rights as Provided by Nature**

Second, for many, like Barron and Craig's attorney David Hoffman, the concept of universal fundamental rights was paramount and was often coupled with the idea that these rights were declared in the various American constitutions. A good example of this logic can be seen in *Vanhorne's Lessee v. Dorrance*, a 1795 case cited by Barron and Craig's attorneys at the trial court level regarding a dispute over competing land titles in western Pennsylvania.<sup>29</sup> In *Vanhorne*, U.S. Supreme Court Justice Paterson, while presiding over the Federal Circuit Court in Pennsylvania, was called on to settle a dispute between two parties who claimed land, one who claimed superior title pursuant to a Pennsylvania law which quieted title and vested it in their possession.<sup>30</sup> In the court's charge to the jury, Paterson explored the propriety of the legislature specifically granting title in one party and, in the process, set forth his view of the new U.S. constitutions and the rights they contained. The court discussed the available prohibitions on the actions of a duly elected legislature. According to the court, unlike the unlimited power of Parliament, the U.S. placed restrictions on the legislature. The critical key for the court was the written constitution which did not exist in England as "there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested."<sup>31</sup> To the Court, the constitutions of the U.S. were where "certain first

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<sup>29</sup> *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 2 Dall. 304 (C.C. D. Penn., 1795).

<sup>30</sup> Saul Cornell and Gerald Leonard, "The Consolidation of the Early Federal System, 1791-1812," in *The Cambridge History of Law in America*, Vol. 1: Early America (1580-1815), ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge Univ. Press, 2008), 542.

<sup>31</sup> *Vanhorne's Lessee v. Dorrance*, 2 U.S. at 308.

principles of fundamental laws are established.”<sup>32</sup> The American act of writing down the rules of government into a “constitution” supplies certainty to those pre-existing fundamental rights, one of which is the right of property, which the court considers one of the “inalienable rights of man.”<sup>33</sup> As a fundamental right, the court tellingly stated that the “preservation of property then is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law.”<sup>34</sup> As a result, the court held that the Pennsylvania legislature could not divest the party of title to land by legislation and to place title in the opposing party without compensation.<sup>35</sup>

For the *Vanhorne* court, the Pennsylvania constitution was the enunciation of fundamental law. As a result, the court was required to void the offending law taking property as it did not comport with the fundamental laws of property which were contained in its Declaration of Rights. However, the court had not yet made the leap to looking solely to the constitution as the lone source of rights, holding that the offending act was unlawful in four respects: it was “inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary to both the letter and spirit of the Constitution.”<sup>36</sup>

In 1802, the Virginia courts were faced with the validity of a joint debt where one of the obligors was deceased.<sup>37</sup> In *Elliot’s Executor v. Lyell*, three persons jointly agreed to payment of

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<sup>32</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. at 308.

<sup>33</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. at 309.

<sup>34</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. at 309.

<sup>35</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. at 309.

<sup>36</sup> *Vanhorne’s Lessee v. Dorrance*, 2 U.S. at 309.

<sup>37</sup> *Elliot’s Executor v. Lyell*, 3 Call 268 (VA. 1802).

a £600 bond. Four years later, Virginia passed an act which provided that the representatives of a co-obligor of a debt would be liable for the debt as if they were jointly and severally liable.<sup>38</sup> This act modified the common law rule which held that the executors of the estate of a deceased co-obligor were discharged by the death.<sup>39</sup> After the law had passed, one of the co-obligors died. Thus, the question before the court was which law to apply: the common law rule in effect at the time the bond was given, which would release the estate from the debt, or the subsequent 1786 law which would make the estate liable? More importantly for our purposes, the court was required to determine whether applying the 1768 law would violate any rights of the parties that they held when they gave the bond. The court noted that legislative acts are to be interpreted as operating prospectively only. Otherwise, the subject law would act as an *ex post facto* law if it were criminal in nature. Even if the law did not hold any criminal penalties, it would be contrary to “the principles of natural justice” as it would impair what the parties believed the law required of them at the time the bargain or agreement were struck. The court noted that the U.S. Constitution prohibited the states from passing *ex post facto* laws. That the Constitution was drafted and ratified after the date of the Virginia law in question was immaterial as the Constitution was simply “declaring a principle which always existed.”<sup>40</sup>

Approximately twenty years later in New York, the state chancery court was presented with a bill by a farm owner who sought to enjoin the trustees of his village who had successfully obtained an act from the state legislature to allow them to divert water from his upstream

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<sup>38</sup> *Elliot’s Executor v. Lyell*, 3 Call at 277.

<sup>39</sup> *Elliot’s Executor v. Lyell*, 3 Call at 268.

<sup>40</sup> *Elliot’s Executor v. Lyell*, 3 Call at 277.

neighbor, thus depriving him of water essential to the maintenance of his farm.<sup>41</sup> In *Gardner v. Trustees of the Village of Newburgh* (N.Y. 1816), the chancery court, in an opinion written by Chancellor James Kent, cited the principle that a landowner has the right to the water that runs through his land and that any obstruction is a private nuisance, instead of a public nuisance that must be borne by all, making the damages special to the plaintiff and, thus, actionable in court.<sup>42</sup> Further, not only do the courts provide a procedural remedy, the court held that the right to the water is a property right that cannot be disseised except by due process, as it is “an ancient and fundamental maxim of common right to be found in the Magna Charta, and which the legislature has incorporated into an act declaratory of the rights of the citizens of [New York] state.”<sup>43</sup> The court granted the injunction as it held that the act of the legislature which diverted the Plaintiff’s stream without making just compensation violated his fundamental rights. Any act of the sovereign in appropriating private property for public use must be accompanied by a just indemnity, citing natural law philosophers Grotius and Pufendorf.<sup>44</sup> The court noted that this principle was so important that had “frequently been made the subject of an express and fundamental article of right in the constitution of government,” noting that similar provisions had been incorporated into the constitutions of Pennsylvania, Delaware, and Ohio, as well as in the U.S. Constitution in the Fifth Amendment, and even in the French Constitution of 1795.<sup>45</sup>

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<sup>41</sup> *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. 162 (N.Y. 1816). While the opinion is simply written by “the Chancellor,” Kent was the Chancellor of the New York Chancery Court at the time. Carl F. Stychin, “The Commentaries of Chancellor James Kent and the Development of an American Common Law,” *The American Journal of Legal History*, Vol. 37, No. 4 (Oct., 1993): 440, 442.

<sup>42</sup> *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. at 163.

<sup>43</sup> *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. at 164.

<sup>44</sup> *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. at 164.

<sup>45</sup> *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. at 165.

The *Gardner* case is instructive in two ways. First, the opinion shows that some courts viewed certain rights, like those prohibiting takings of property without compensation, as fundamental principles that were enunciated and incorporated by written constitutions rather than provided by them. Second, *Gardner* helps provide insight into the litigation strategy pursued by Barron and Craig’s attorneys. For example, Barron and Craig filed their initial action in the trial court in 1822, six years after the *Gardner* decision. Like the attorneys for Mr. Gardner, Barron and Craig’s attorneys also believed that the diversion of water could constitute a property right for which actionable damages would lie.

In *New York v. Westchester* (1848), private property was taken by the county to improve a road. While the 1845 statute required the road commissioners to reimburse any such property owner, and an amount was designated, a subsequent statute revoked the reimbursement.<sup>46</sup> The court held that the failure to reimburse the property owners not only violated the takings clause of the New York constitution as well as the contract clause of the U.S. Constitution, but that the legislature fundamentally exceeded its powers by passing the statute in question, characterizing the liquidated damages award as a vested property interest.<sup>47</sup> To the court, the legislature was not the supreme authority which could pass any law, regardless of whether the law was “against natural right and justice.”<sup>48</sup> Rather, purpose of all government was to protect life, liberty, and property.<sup>49</sup> In the court’s estimation, the written constitutions of the various states did not provide this right.<sup>50</sup> For example, the court cited Chancellor Kent’s opinion in *Gardner v.*

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<sup>46</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. 64, 65 (N.Y. Sup Ct., N.Y. County, 1848).

<sup>47</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 67.

<sup>48</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 68.

<sup>49</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 68.

<sup>50</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 68.

*Village of Newburgh* (N.Y. 1816) which held that all property taken for public use required compensation, further noting that the decision preceded the inclusion of the takings compensation requirement into the New York Constitution, which occurred during its 1821 constitutional revision, and noted that Kent held that the principle applied “independent of any positive constitutional provision” as a matter of universal law.<sup>51</sup> The court further noted that this principle of compensation for takings of property was well recognized by legal scholars like Chancellor Kent and Justice Story, as well as by decisions of many state courts.<sup>52</sup> The purpose of written constitutions, to the *Westchester* court, was to rein in the legislature and not to provide the basis for rights, which to the court existed fundamentally outside of the control of legislature and recognized in places like the Magna Charta and found in the social compact.<sup>53</sup>

### **Rights as Enactments of Positive Law**

Third, the idea that the written constitutions provided the basis for the right in question itself also began to appear in cases other than Justice Marshall’s *Barron* opinion. In 1824, a New York court addressed an issue similar to *Goodwin* regarding the applicability of the Eighth Amendment to a state court proceeding. In *Barker v. New York* (N.Y. 1824), the court was

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<sup>51</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 68; *Gardner v. Trustees of the Village of Newburg*, 2 Johns. 162 (N.Y. 1816).

<sup>52</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 68-69. The court cited Chancellor Kent in *Gardner v. Trustees of the Village of Newburg*, 2 Johns. 162 (N.Y. 1816) and Justice Story in his famous *Commentaries on the Constitution of the United States*, Section 1784. The court also cited the South Carolina Supreme Court in *Bowman v. Middleton*, 1 Bay. (S.C. 1792) for the proposition that an act of the colonial legislature which resolved a boundary dispute by vesting title in one party violated the principle that property could not be taken without compensation. Interestingly, the New York court held that this requirement was upheld “although the act was not prohibited by any express constitutional provision.” *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 69. While the *Bowman* court did hold that the act was void as to “being against common right and the principles of magna charta,” and did not mention the South Carolina Constitution of 1778, that Constitution did contain the provision from the Magna Charta prohibiting the disseisin of property except by the law. See South Carolina Constitution (1778), Section XLI.

<sup>53</sup> *New York v. The Board of Supervisors of the County of Westchester*, 4 Barb. at 68.

presented with a challenge to an 1816 state law which prohibited dueling.<sup>54</sup> The law stated that upon conviction for dueling, that person would be unable to hold any public office.<sup>55</sup> Barker appealed his conviction on the grounds that the Eighth Amendment prohibiting cruel and unusual punishment prohibited the sentence. While not specifically mentioning the *Goodwin* opinion four years earlier, Barker's attorney seemed to try to track former Chief Justice Spencer's logic. For example, Barker's attorney recognized that New York revised its constitution in 1821 and did not include a specific prohibition against cruel and unusual punishments.<sup>56</sup> However, this exclusion was not dispositive as the law in question was against the "spirit" of the new constitution and the prohibition against cruel and unusual punishment was a "fundamental principle of all free governments" similar to the "rule that the freehold of one man shall not be arbitrarily divested and conferred upon another."<sup>57</sup> The court, however, took the opposite view and methodically set forth the basis for the prohibition against cruel and unusual punishment.<sup>58</sup> The court recognized that the Eighth Amendment prohibited the practice as against the Federal government, and further noted that many of the states then amended their respective state constitutions to include the prohibition.<sup>59</sup> The problem for Barker was that New York was not one of those states. The court took a broad view of the powers of the state legislature, holding that the constitution gave it the power to define acts that constituted a crime and that the state legislature was not one of strict delegated powers, but the sovereign lawmaking authority.<sup>60</sup> The

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<sup>54</sup> *Barker v. New York*, 3 Cow. 686 (N.Y. 1824).

<sup>55</sup> *Barker v. New York*, 3 Cow. at 686.

<sup>56</sup> *Barker v. New York*, 3 Cow. at 689.

<sup>57</sup> *Barker v. New York*, 3 Cow. at 689-690.

<sup>58</sup> *Barker v. New York*, 3 Cow. at 693.

<sup>59</sup> *Barker v. New York*, 3 Cow. at 693.

court further recognized Barker's argument that certain acts which implicate fundamental rights cannot be regulated or punished by the legislature. However, to determine what acts are deemed indicative of fundamental rights, the court looked again to the constitution itself.

Five years after *Barron* was decided by the Supreme Court, the Pennsylvania Supreme Court was presented with an appeal on certiorari regarding the removal of a husband, considered by the court as a pauper, and his wife from their property for which they held proper title.<sup>61</sup> In *Forks v. Easton* (Penn. 1837) the couple had lived in the Forks township but had purchased property in the nearby borough of Easton in 1832, building a house on the property over the course of the next year.<sup>62</sup> However, due to poor laws, the couple was required to bring a certificate of settlement from their former residence of Forks or, in the alternative, were required to post security with the Easton overseers of the poor in the event they became a public charge, as required by a 1771 state law.<sup>63</sup> As the couple did not bring a certificate or provide security evidencing settlement in Forks, the Easton authorities ordered them removed back to Forks, who appealed the decision of the county court approving the removal.<sup>64</sup> As the couple resided in their new home in Easton for almost four years before the order of removal, the issue before the court was whether the couple gained "settlement" in Easton by virtue of residence as provided by that state law.<sup>65</sup> In support of the argument against removal, the court recognized English common law precedent which held that a pauper could not be removed from property he held as a

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<sup>60</sup> *Barker v. New York*, 3 Cow. at 693-695.

<sup>61</sup> *Forks v. Easton*, 2 Whart. 405 (Penn. 1837).

<sup>62</sup> *Forks v. Easton*, 2 Whart. at 405.

<sup>63</sup> *Forks v. Easton*, 2 Whart. at 406.

<sup>64</sup> *Forks v. Easton*, 2 Whart. at 405.

<sup>65</sup> *Forks v. Easton*, 2 Whart. at 406.

freehold, as it would be contrary to the Magna Charta's prohibition that no one shall be dissesied of his property.<sup>66</sup> However, while the court held that the removal did not technically constitute a dissesien, it more importantly held that the provision did not apply here as the Magna Charta had no force in the U.S.<sup>67</sup> The court wrote, "...however that may be in England, the case is necessarily different here, where the principles of Magna Charta are no further in force, than they have been infused into our fundamental laws; and here is no such clause in our declaration of rights, or any other part of our constitution."<sup>68</sup> Significantly, the Pennsylvania Supreme Court echoed Marshall's *Barron* decision, viewing the guarantees of the Magna Charta as incorporated into the constitution, on one hand, while simultaneously holding that since the subject provision was not in the declaration of rights of the Pennsylvania constitution, the right no longer existed.<sup>69</sup>

In 1843, the Pennsylvania Supreme Court addressed an appeal by a business entity licensed by the state in 1803 to construct a dam on the Monongahela River. In the *Monongahela Navigation Company v. Coons* (Penn. 1843), the court entertained an appeal from the trial court who ruled in favor of the plaintiff whose mill on the Youghiogeny River, a tributary of the Monongahela, was damaged as a result of the obstruction of the water in the river upstream.<sup>70</sup> The 1803 statute allowed owners of property adjoining navigable rivers the right to erect dams on those rivers to allow power for mills, provided that they did not interfere with the navigation of the rivers.<sup>71</sup> The aggrieved mill owner prevailed in the trial court for damages against the

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<sup>66</sup> *Forks v. Easton*, 2 Whart. at 407.

<sup>67</sup> *Forks v. Easton*, 2 Whart. at 407.

<sup>68</sup> *Forks v. Easton*, 2 Whart. at 407.

<sup>69</sup> *Forks v. Easton*, 2 Whart. at 407.

<sup>70</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. 101 (Penn. 1843).

<sup>71</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 101.

Monongahela Navigation Company (the “MNC”), where the court held that the state of Pennsylvania, by incorporating the MNC, could not exempt the company as its agent for the incidental and consequential damages caused by the building of the dam to the private property of owners downstream.<sup>72</sup> On appeal to the Pennsylvania Supreme Court, the attorneys for the MNC logically presented their argument that there was no actual taking of private property by virtue of the abatement of the water flow that would grant it a right to compensation.<sup>73</sup> Significantly, MNC’s attorneys grounded whether a taking occurred by defining the term as it existed in the written text of the Constitution, arguing that it did not entail consequential injuries to property.<sup>74</sup> The majority opinion of the court ruled in favor of the MNC, agreeing that a taking, as defined by the Pennsylvania Constitution, did not occur.<sup>75</sup> Further, the court engaged in a discussion which emphasized the pre-eminence the Constitution took over similar action that could have been decided differently under the common law. For example, the court conceded, “[i]t is true, that a nuisance by flooding a man’s land was originally considered so far a species of ouster, that he might have had a remedy for it by assize of novel disseisin, or assize of nuisance, at his election, but we are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes of *jus antiquum*.”<sup>76</sup> Rather, to the court, the state is sovereign and supreme, and its power could not be limited except as specifically provided by the Constitution. The state could not be sued except with its consent. Accordingly, if the state was not responsible for the damage, the MNC likewise was not liable, as the act which gave it

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<sup>72</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 101.

<sup>73</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 107. The Court also cited *Callender v. Marsh* (Mass. 1823) which is discussed more fully in Chapter Six.

<sup>74</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 107.

<sup>75</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 110.

<sup>76</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 110.

corporate status did not provide for reimbursement for consequential damages, only for actual takings.<sup>77</sup> The court took an explicitly positivist view of the law of takings, arguing that the written Pennsylvania Constitution provided the basis for remuneration of takings of property, and as the Constitution did not specifically include consequential damages, the MNC would not be held responsible, further specifically failing to apply common law principles which could have provided for reimbursement.

### **Blending of Concepts**

Finally, to add to the confusion, many courts blended these three categories, sometimes in the same case opinion. In 1843, a New York court was also presented with competing conceptions of the basis for rights when presented with a case where a plaintiff brought an action for trespass against the builders of a private road which they laid across his property.<sup>78</sup> In *Taylor v. Porter & Ford* (N.Y. 1843) builders had entered the plaintiff's land and constructed a private road, allegedly without his permission. The builders did so pursuant to a 1772 New York statute which allowed them to apply to the highway commissioners, who in turn would summon twelve local property owners to determine the necessity of the proposed road and, if so, to set the proper compensation for the owner of the property.<sup>79</sup> The court held the statute unconstitutional as it allowed property to be taken for private roads, thus taking private property for private use without the owner's consent.<sup>80</sup> For the Court, the issue of the amount of fair compensation for such a taking was irrelevant as the taking was not for public purposes and was not within the

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<sup>77</sup> *Monongahela Navigation Company v. Coons*, 6 Watts & Serg. at 110-111.

<sup>78</sup> *Taylor v. Porter & Ford*, 4 Hill 140 (N.Y. Sup. Ct. 1843).

<sup>79</sup> *Taylor v. Porter & Ford*, 4 Hill at 141.

<sup>80</sup> *Taylor v. Porter & Ford*, 4 Hill at 144.

eminent domain powers of the state.<sup>81</sup> Judge Bronson, writing the majority opinion, emphasized that this private taking violated the well accepted principle that the security of private property lies at the very heart of the social compact upon which all free government rested. Bronson used the same language Barron and Craig's attorney, David Hoffman, employed at the trial court level arguing that the social compact, and not a specific constitutional provision or statute, mandated that property taken for public use required reimbursement.<sup>82</sup> While the legislature is considered supreme, it nonetheless cannot violate this fundamental principle. To that end, the 1821 New York Constitution included language similar to that contained in the Magna Charta and the Maryland Constitution which prohibiting the deprivation of any of "the rights or privileges secured to any citizen thereof, unless by the law of the land, or judgment of his peers."<sup>83</sup> Judge Bronson noted that the prohibition against the taking of private property without lawful process was codified in the New York constitution, as well as in the constitutions of several others such as North Carolina and Tennessee.<sup>84</sup> However, this codification was not the dispositive issue. Rather, Bronson emphasized the importance of the phrase "law of the land" that was contained in the language of all of these prohibitions to note that this phrase required that only the common law could impose the manner through which private property could be taken, noting that the common law did not allow a taking for private use.<sup>85</sup> The court recognized that rights of private property against unauthorized takings were codified in many written constitutions, including

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<sup>81</sup> *Taylor v. Porter & Ford*, 4 Hill at 142.

<sup>82</sup> *Taylor v. Porter & Ford*, 4 Hill at 142; Edward C. Papenfuse, *Outline, Notes and Documents Concerning Barron v. Baltimore*, 32 U.S. 243, <http://mdhistory.net/msaref06/barron/index.html> (last accessed on April 5, 2008), 0065 (149).

<sup>83</sup> *Taylor v. Porter & Ford*, 4 Hill at 143; 1821 New York Constitution, Article VII, Section 1; 1776 Maryland Constitution, Section XXI; Magna Charta (1215), Section 39.

<sup>84</sup> *Taylor v. Porter & Ford*, 4 Hill at 143.

<sup>85</sup> *Taylor v. Porter & Ford*, 4 Hill at 143.

New York's, but that the procedure to determine what constituted a lawful taking did not reside in those documents. Rather, the ultimate security of property was left to the restrictions handed down by the common law.

In the *Taylor* dissenting opinion, however, Judge Nelson took a narrower view of private property rights, initially attempting to locate them solely within the written mandates of the applicable constitutions. Nelson noted that, unlike the current state constitution, the first constitution (1777), which postdated the 1772 statute in question, did not contain a specific prohibition regarding this exact situation. Further, Nelson cited *Barron* as precedent which specifically excluded the Fifth Amendment from applicability.<sup>86</sup> Recognizing that a purely textual interpretation of the location of rights was not yet a completely accepted principle, Judge Nelson wrote that “[w]hether the security of the citizen against such arbitrary legislation as the argument contemplates, depends upon this clause of the constitution, or rests upon the broader and more solid ground of natural right never delegated by the people to the law making power, it is unnecessary to enquire.”<sup>87</sup> For Nelson, the law was constitutional as a valid exercise of the state’s police power, broadly interpreting the power to conclude that, in many instances, a private road could still serve the public interest of community growth.<sup>88</sup> The majority and dissenting opinions in *Taylor* evidence an important interplay between ideas of the location of rights of property. For the majority, the constitutions of the several states emphasized the sanctity of private property, but that the rights themselves did not come from those constitutions. Rather, the collective rulings contained in the common law provided the protection of those property rights from legislative encroachment. For the dissent, however, the constitutions themselves

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<sup>86</sup> *Taylor v. Porter & Ford*, 4 Hill at 144.

<sup>87</sup> *Taylor v. Porter & Ford*, 4 Hill at 144.

<sup>88</sup> *Taylor v. Porter & Ford*, 4 Hill at 144-45.

were the place where the right existed. Alternatively, even if the constitution did not provide the basis for the right, a broad view of the state's police power as paramount to individual rights made such a debate unnecessary.

In *Day v. Maryland* (Md. 1848), the Maryland Court of Appeals was presented with an appeal from a conviction for violating a state law which prohibited the selling of out of state lottery tickets.<sup>89</sup> This law also required that any person suspected of selling illegal lottery tickets was required to answer a bill of discovery under oath which could then be filed against that person by the lottery commissioners in court.<sup>90</sup> Following conviction, the defendant appealed on the grounds that the law violated the common law as well as the Maryland constitution, which recognized the protections of the common law and prohibited the compulsion of a person to bear witness against himself.<sup>91</sup> The court, however, made a critical distinction in refusing to overturn the conviction. The defendant stated that the common law guaranteed the prohibition against self-incrimination and that this right, as well as all others enunciated by the common law, was incorporated into the Maryland constitution in its third article which states that "the inhabitants of Maryland are entitled to the common law of England."<sup>92</sup> The court was not persuaded by the defendant's argument that the entire common law was incorporated into the constitution as the legislature was empowered to modify the common law. Further, the court held that the

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<sup>89</sup> *Day v. Maryland*, 7 Gill 321 (Md. 1848).

<sup>90</sup> *Day v. Maryland*, 7 Gill at 322. A bill of discovery was a process by which a party could seek information about an opponent, through the production of documents or the answering of interrogatories under oath, before the suit was filed in order to assist in the prosecution of the case. This bill in an antiquated procedure which has been replaced by both by the Federal Rules of Civil Procedure as well as by most states, including Florida, which both allow discovery to be had only after the filing of the suit and in accord with strict rules of procedure. See *Black's Law Dictionary*, Sixth Edition (St. Paul, Minn.: West Publishing Co., 1990), 166.

<sup>91</sup> *Day v. Maryland*, 7 Gill at 322; Maryland Constitution (1776), Articles III, XX (the court mistakenly refers to the nineteenth article instead of the twentieth).

<sup>92</sup> *Day v. Maryland*, 7 Gill at 323; Maryland Constitution (1776), Article III.

constitutional provision against self-incrimination likewise did not apply as the provision was qualified by language which excepted its application “as may hereafter be directed by the legislature.”<sup>93</sup> To the court, the only constraints on the power of the legislature are those written prohibitions contained in the Maryland constitution or the applicable sections of the U.S. Constitution.<sup>94</sup> Reading those provisions narrowly, the prohibition against self-incrimination did not apply as the language of those documents did not prohibit the legislature from enacting a law requiring likely incriminating admissions.

What we again see in *Day v. Maryland* are competing views of the location of rights. While the court viewed the powers of the legislature very broadly and limited only by specific written constitutional prohibitions, the defendant’s attorney argued that the law violated a “fundamental principle of right and justice, inherent in the nature and spirit of our social compact.”<sup>95</sup> The defense constructed its argument on a conception of rights as enunciated by the common law and incorporated into the written constitutions as a safeguard, not as a source of the rights themselves, while the court located the law making power in the legislature and limited it only by the terms of the written constitution, ignoring any discussion of extra-constitutional rules or notions of fundamental rights. These differing views were again seen when the same Maryland law was again litigated in 1855 in the case of *Broadbent v. State* (Md. 1855).<sup>96</sup> There, the defendants again questioned the law following their convictions on the grounds that they were compelled to incriminate themselves. The defendants likewise argued that the prohibition against self-incrimination was a fundamental principle recognized by the common law which

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<sup>93</sup> *Day v. Maryland*, 7 Gill at 323; Maryland Constitution (1776), Article XX.

<sup>94</sup> *Day v. Maryland*, 7 Gill at 323.

<sup>95</sup> *Day v. Maryland*, 7 Gill at 322.

<sup>96</sup> *Broadbent v. State*, 7 Md. 416 (Md. 1855).

was even recognized by the Magna Charta and which could not be surrendered to the legislature.<sup>97</sup> The Maryland Court of Appeals again held that this law was within the scope of the powers of the legislature as nothing in the Maryland constitution prevented its enforcement.<sup>98</sup>

In 1826, the Pennsylvania Supreme Court considered a law granting an upstream property owner the right to dam the Schuylkill River which diverted water from the plaintiff's property downstream, similar to the question presented to the New York Supreme Court in *Gardner* in 1816. In *Schrunk v. Schuylkill River Navigation Company* (Penn. 1826), the downstream plaintiff owned property which fronted the Schuylkill and operated a fishery whose business was decimated by the dam erected by the Company who operated under an act of the legislature granted in 1815.<sup>99</sup> However, unlike the *Gardner* court ten years earlier which held that the water flowing through the downstream plaintiff's property was part of his freehold estate and, accordingly, violated the plaintiff's fundamental property rights, the *Shrunk* court viewed the issue differently.<sup>100</sup> In *Shrunk*, the Plaintiff appears to have hired William Rawle as counsel. As is discussed further in Chapter 6, Rawle was a major legal figure of the era whose writings, including his work on the U.S. Constitution, set forth his view that the Bill of Rights applied to both the Federal and state governments.<sup>101</sup> Before the Pennsylvania Supreme Court, Rawle argued that the deprivation of the right to the fishery in the waters was actionable for a number of reasons. First, the act authorizing the dam allowed for compensation for injuries caused by the

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<sup>97</sup> *Broadbent v. State*, 7 Md. at 419.

<sup>98</sup> *Broadbent v. State*, 7 Md. at 421.

<sup>99</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle 71 (Penn. 1826).

<sup>100</sup> *Gardner v. Trustees of the Village of Newburg*, 2 Johns. at 164.

<sup>101</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle at 72. William Rawle, *A View of the Constitution of the United States of America*, Chapter X (Philadelphia, 1829), [www.constitution.org/wr/rawle\\_10.htm](http://www.constitution.org/wr/rawle_10.htm), last accessed February 23, 2010.

diversion.<sup>102</sup> Second, the English common law gave his client a property interest in the fisheries that he lost.<sup>103</sup> Finally, even if American courts had modified this common law rule, simple long standing custom exclusive of the common law held that property owner had “an exclusive right to fish” in adjacent waters, a right that was damaged by the construction of the dam.<sup>104</sup> However, the court refused to recognize the English common law principle, holding that the right to fishery in England is derived from the soil where, in the U.S., that rule had never been applicable.<sup>105</sup> The court also bypassed any argument about fundamental rights of property owners which existed outside the written dictates of the law. Rather, the court denied remedy to the Plaintiff, basing the simply on the view that the plaintiff did not suffer any special damages different than the public at large as he did not have a property interest in the fishery. As a result, his damages were *damnum abseque injuria*, an injury without a remedy.<sup>106</sup>

In 1830, the Pennsylvania Supreme Court addressed a writ of certiorari brought by the owners of the Germantown/Perkiomen turnpike.<sup>107</sup> The turnpike owners had been authorized by the legislature in 1801 to build a road; however, in 1824 the legislature allowed the District of Kensington to lay out a town plan, and gave them eminent domain powers which encroached on part of the turnpike. Faced with these competing interests, the court held that the original act granting the company the right to build the road was a vested right. Accordingly, the court held that it was “a fundamental principle of all government, that the rights of individuals must yield to

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<sup>102</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle at 72.

<sup>103</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle at 73.

<sup>104</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle at 74.

<sup>105</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle at 78.

<sup>106</sup> *Shrunk v. Schuylkill Navigation Company*, 14 Serg. & Rawle at 83.

<sup>107</sup> *Case of the plan of the Third Division of the District of Kensington*, 2 Rawle 445 (Penn. 1830).

the general welfare, and that the only security of the citizen, (and in most cases it is an ample one,) consists in the constitutional provision: ‘That no man’s property shall be taken or applied to public use, without the consent of his representatives, and without a just compensation being made,’” citing the words of the Pennsylvania Constitution and allowing damages to the company.<sup>108</sup> This is significant as the court specifically tied individual rights to the terms of the constitution, without any discussion or reference to any other natural law basis, or even mentioning that the constitutional provision was declaratory of any natural of fundamental right. To the court, the right was to be found in the constitution itself.

In 1839, the Maryland Court of Appeals entertained a dispute between the owners of a turnpike and a railroad company which presented facts similar to the famous U.S. Supreme Court decision in *Gibbons v. Ogden* (1824).<sup>109</sup> In *The Washington and Baltimore Turnpike Road v. The Baltimore and Ohio Railroad Company* (Md. 1839), the Maryland legislature had incorporated the Washington and Baltimore group in 1812 for purposes of building a turnpike road from the District of Columbia to Baltimore. However, in 1827, the legislature incorporated the Baltimore and Ohio group and allowed them to construct a railroad, part of which also ran directly between D.C. and Baltimore.<sup>110</sup> While the court denied remedy to the turnpike company by affirming the lower court without delivering an opinion, the arguments raised by the parties similarly tracked those made in the *Barron* case. For example, the turnpike company unsuccessfully argued, similar to *Gibbons*, that the franchise given to them by the legislature was a property interest and that the later incorporation of the railroad company along a similar route violated their vested

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<sup>108</sup> *Case of the plan of the Third Division of the District of Kensington*, 2 Rawle at 448. Pennsylvania Constitution (1790), Art. IX, Section 10.

<sup>109</sup> *The President, Managers, and Company of the Washington and Baltimore Turnpike Road v. The Baltimore and Ohio Railroad Company*, 10 G & J 392 (Md. Ct. of Appeals 1839).

<sup>110</sup> *Washington and Baltimore Turnpike Road v. The Baltimore and Ohio Railroad Company*, 10 G & J at 392.

rights. As a result, the grant to the railroad company was void as it violated not only the Maryland and U.S. constitutions, but more generally “those fundamental principles which presume the private rights of property inviolable.”<sup>111</sup> To the turnpike company, their property rights required compensation for their infringement, while the railroad successfully pled primarily that the alleged damages were *damnum abseque injuria*, an injury without a remedy.<sup>112</sup>

Finally, while this section primarily examined state court and lower Federal court cases, in order to gain a fuller picture of how courts and litigants were interpreting the basis of rights, a brief detour back into the Supreme Court is in order. In the same 1833 term that the Supreme Court heard *Barron*, the Court was also presented with the case of *Livingston v. Moore* (1833), where the Court was asked to decide the constitutionality of a Pennsylvania statute which allowed the state to lien and sell the real property of the former state comptroller who mishandled approximately \$100,000.00 in state funds and, while acquitted of criminal charges, resigned and was found civilly liable for the debt.<sup>113</sup> Years after the property was sold, the heirs of John Nicholson, the disgraced comptroller, brought an action for ejectment against the owners and occupants who held title through the purchase of the property at the sale. Interestingly, in *Livingston*, the plaintiffs were represented by Roger Taney and Pennsylvania attorney and legislator Charles J. Ingersoll. While Ingersoll made the argument before the Supreme Court instead of Taney, they nonetheless relied partially on the same argument made by the Plaintiffs in *Barron*. Decided nine days after *Barron*, Ingersoll and Taney were likewise unsuccessful. The legal argument devised by Ingersoll and Taney to recover the property was quite similar to that crafted Hoffman and Mayer in the *Barron* litigation. For example, they argued that the acts

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<sup>111</sup> *Washington and Baltimore Turnpike Road v. The Baltimore and Ohio Railroad Company*, 10 G & J at 396.

<sup>112</sup> *Washington and Baltimore Turnpike Road v. The Baltimore and Ohio Railroad Company*, 10 G & J at 396.

<sup>113</sup> *Livingston v. Moore*, 32 U.S. 469 (1833).

of the Pennsylvania legislature which resulted in the sale of the property violated the Pennsylvania Constitution and the U.S. Constitution - specifically the Contract Clause of Article 1, Section 10, barring a state from impairing the obligations of contract, the Fourth Amendment prohibiting unlawful search and seizure, and the Seventh Amendment guaranteeing the right to jury trial - and contravened natural law principles that were partially recognized in documents like Magna Charta. The plaintiffs argued that “the obnoxious acts violate, 1<sup>st</sup>, universal law or common justice; 2d, the constitutional or organic law of this federal union of the states; 3d, the constitutional or organic law of the state of Pennsylvania. In other words, they violate natural, federal and municipal law.”<sup>114</sup> Relying heavily on *Vanhorne*, the plaintiffs argued that legislation that takes private property without just compensation was contrary to “the common law of all nations.”<sup>115</sup> To the plaintiffs, like Barron and Craig’s attorneys, the taking of property by virtue of legislation without compensation violated not only the Constitution, but more generally the principles upon which the Constitution declared or enunciated, but did not provide. The Supreme Court, in its opinion written by Justice William Johnson, relied on a strictly textual interpretation of the Constitution to dispose of the claim. Johnson evidenced a view of the legislature as supreme, except where explicitly restricted by the written prohibitions of a constitution, writing “that the legislature possess all the legislative power that the body politic could confer, except so far as restricted by the instrument itself.”<sup>116</sup>

Thus, in analyzing these decisions we see two trends that are occurring regarding the location of rights in the first half of the nineteenth century. First, we see a complicated picture of where rights obtained their authority. Some view rights as based in the natural law or the

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<sup>114</sup> *Livingston v. Moore*, 32 U.S. at 482-483.

<sup>115</sup> *Livingston v. Moore*, 32 U.S. at 492.

<sup>116</sup> *Livingston v. Moore*, 32 U.S. at 548.

common law traditions. By envisioning rights as grounded outside of written constitutions, the legislatures are positioned as the creators of ordinary law, but must mind carefully not to infringe on pre-existing rights. Second, we see the rise of the concept of rights as granted by written constitutions themselves. Under this view, the legislatures were supreme and could pass any law unless specifically limited by the explicit written prohibitions of the constitutions. As this view revered the written constitution as the source of rights, courts which subscribed to this view employed a textual approach similar to Marshall in *Barron*. While this approach is most familiar to contemporary lawyers and legal sensibilities, it does not change that this newer textual based interpretation did not immediately extinguish the competing natural law and common law traditions that stretched back centuries. As we will see, there were many judges and lawyers who maintained the logic of these older traditions.

## CHAPTER 6 THE BILL OF RIGHTS

As we have seen, the question of the origin of rights was unsettled before and after *Barron*. In the colonial and founding eras, there were many conceptions of where rights obtained their authority. Some argued that rights came from the English common law or were a birthright of Englishmen, others followed the European natural law tradition especially enunciated in the seventeenth century with the emergence of international law jurisprudence, and many set forth a blend of these views. Following the ratification of the Constitution and into the early republic era, a positive law interpretation emerged which held that written documents like constitutions granted rights. However, this positivist interpretation of rights did not extinguish these competing traditions. By contextualizing *Barron* within these larger debates over the source of rights, it becomes apparent that Justice Marshall's view of rights as emanating from written constitutions was just one of many possible interpretations.

There are scholars, however, who minimize this rights debate precisely because of their view that *Barron* was correctly decided. Some scholars discount competing ideologies regarding the location of rights and view Marshall's opinion as proof that only his positivist view is accurate. A prime proponent of this interpretation is Akhil Reed Amar who argues that the idea that the Bill of Rights declared pre-existing rights applicable to all government, state and Federal, was largely invented in the 1830's by anti-slavery forces in response to repressive actions by Southern states to maintain slavery in light of abolitionist agitation, such as censoring

the free speech and press of the abolitionists.<sup>1</sup> However, Amar’s conclusion does not portray the full picture.<sup>2</sup>

Amar argues that abolitionist “crusaders” concocted an argument that the Bill of Rights Amendments were not created to restrain the Federal government, but were inserted into the Constitution to declare the existence of pre-existing fundamental rights in order to “write their views into the Constitution itself and to overrule *Barron*.”<sup>3</sup> While Amar recognizes that many antebellum lawyers and judges applied all or some of the Amendments to state action both before and after *Barron*, and in courts both North and South, he minimizes the significance of this evidence. Instead of recognizing the existence of legitimate competing traditions, Amar dismisses those jurists as wildcards or outliers to a well-accepted principle of non-applicability of the Bill of Rights.<sup>4</sup> By focusing his wrath on these jurists, referring to them as “*Barron* contrarians,” Amar fails to properly credit the larger natural law and common law traditions that significantly preceded *Barron* and continued despite the ruling.<sup>5</sup>

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<sup>1</sup> Akhil Reed Amar, “Creation, Reconstruction, and Interpretation of the Bill of Rights,” in *The Nature of Rights at the American Founding and Beyond*, Barry Alan Shain, Ed. (Charlottesville: University of Virginia Press, 2007), 165.

<sup>2</sup> For this chapter, I am focusing on two of Amar’s works, his 1998 book, *The Bill of Rights*, and his 2007 chapter in the compilation, *The Nature of Rights at the American Founding*. In the *Bill of Rights*, Amar sets forth his argument regarding the correctness of the *Barron* decision and distinguishes contrary holdings by other jurists of the era. In his article in *The Nature of Rights*, Amar builds on his prior argument by arguing that the idea that the Constitution simply enunciated pre-existing rights, what he refers to as the declaratory theory, was invented by abolitionists in the 1830’s.

<sup>3</sup> Amar, “Creation, Reconstruction, and Interpretation of the Bill of Rights,” 165.

<sup>4</sup> Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, (New Haven, Conn.: Yale University Press, 1998), 145-147.

<sup>5</sup> Amar, *The Bill of Rights*, 145. Amar finds that these “contrarian” jurists used two main theories to support their claim that the Bill of Rights applied to state action. The first method he refers to as the negative-implication theory which viewed the failure to provide limiting language in the Amendments to mean that they had universal application. Amar refers to the second method as the declaratory theory of rights, which argued that the guarantees contained in the Bill of Rights were not simply enacted to check the new Federal government, but simply declared the existence of those rights.

Amar arrives at his conclusion largely because of his particular perspective and his interpretive techniques. First, Amar views *Barron* with a positive law interpretation very similar to that of a contemporary attorney, concluding that, as a matter of “lawyerly rules of construction, Marshall’s argument is hard to beat.”<sup>6</sup> Indeed, if we read *Barron* through the eyes of a modern attorney, the opinion seems reasonable. Under our current system of jurisprudence, we look to written documents for guidance in legal matters. An attorney or judge seeks to ground their argument or ruling in precedent, such as a prior case from that jurisdiction, or in a statute, administrative rule, or constitutional provision. Without such support, most practitioners would appreciate the futility of making a legal argument without citing some specific written document to lend weight to the argument. However, as we have seen, the idea that recourse to a right depends on its inclusion in a written document for that right to exist was not always the case in American jurisprudence.

Second, Amar also partially relies upon the original intent argument made by Marshall in *Barron*. Using what he calls the “Hamilton-Marshall rule of construction,” Amar recognizes that the takings clause of the Fifth Amendment is not limited by the text to apply only to the Federal government. Amar notes that Marshall held the absence of such language harmless because the states were already in existence when the Constitution was drafted.<sup>7</sup> Amar posits that Marshall was invoking Hamilton’s writings from the *Federalist Number 83* which stated that the new United States was the subject to which all the provisions of the Constitution referred.<sup>8</sup> Amar relies upon the anti-Federalist view that the Bill of Rights was added to the Constitution to limit

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<sup>6</sup> Amar, *The Bill of Rights*, 142.

<sup>7</sup> Amar, *The Bill of Rights*, 141.

<sup>8</sup> Amar, *The Bill of Rights*, 141.

the Federal government exclusively and to preserve individual and states' rights.<sup>9</sup> In attempting to ascertain the framers' intent through legislative history, Amar supports Marshall's stated position that, at that the time of ratification, many state ratifying conventions demanded amendments to check encroachment by the new Federal government. Marshall held that there was never any implication that the suggested amendments would then bind the state governments that were already well established at the time.<sup>10</sup> Thus, as Article I, Section 10 contains specific limits on state action, if the Fifth Amendment was meant to apply to the states the framers would have made that clear in the same manner, as Marshall noted.<sup>11</sup> This conclusion is based upon an historical interpretation of two founding era debates: (1) who created the Federal Union, the states or the national people; and (2) what was the purpose of the Bill of Rights? Amar's conclusions are not incorrect, but only represent one side of each of these founding era debates. First, Amar articulates a view of the Federal system as a creation of the state governments. Certainly, the anti-Federalists placed the states at the center of this granting authority; however, there were also many who sought the establishment of the Federal government precisely because

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<sup>9</sup> Amar, *The Bill of Rights*, 144.

<sup>10</sup> *Barron*, 32 U.S. at 250. Other scholars have recognized this, noting that during the ratification debates, Massachusetts, South Carolina, New Hampshire, New York, and Virginia all approved the Constitution specifically based upon assurances that the requested amendments would be proposed for state ratification by the First Congress. Ralph A. Rossum, "The Federalist's Understanding of the Constitution as a Bill of Rights," in *Saving the Revolution: The Federalist Papers and the American Founding*, ed. Charles R. Kesler (New York, 1987), 228-29.

<sup>11</sup> Amar, *The Bill of Rights*, pp. 141-42. Article I, Section 10 of the U.S. Constitution contains specific limitations on state action, as follows:

"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. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

of what they felt was state excess.<sup>12</sup> Instead of the states creating the Federal government, this alternate view envisioned a sovereign national people creating an entirely new government that would check and in some cases overrule the states. The actions of the state legislatures in the wake of the Revolution horrified many Americans. Many states had passed laws seen as indulging debtors to the detriment of their creditors, such as allowing repayment of debts in a form other than hard currency or even halting the court system to frustrate collection.<sup>13</sup> Debt relief was not the only concern. While all states, and even the continental government, all printed paper money to help support them during the Revolution, seven states continued the practice even after the War had ended.<sup>14</sup> For many, all the negative connotations of the term “democracy,” such as unchecked majorities running over the rights of property, seemed to manifest themselves in the state legislatures. These policies convinced many framers that the loose national confederation of states must be replaced by a strong United States with the power to end these practices. Critically, the Constitution was ratified by the people through state constitutional conventions and not by the state legislatures, which supplied the necessary ideological connection between the founding of the Federal government by the people in a national sense and not the states.

Related to this debate over who created the United States, the states or a national people, were the questions regarding the intent of the Bill of Rights. In his study of the anti-Federal opponents of the Constitution, Saul Cornell notes that many objected to the Constitution for a number of reasons, including that it created an improper consolidation of the Federal and state governments, that the Federal government was insufficiently represented by the people by virtue

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<sup>12</sup> Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 28.

<sup>13</sup> Holton, *Unruly Americans*, 7-8.

<sup>14</sup> Holton, *Unruly Americans*, 8.

of expansive house districts and lack of a popular vote for the senate, and, importantly for our discussion, the absence of a declaration of rights.<sup>15</sup> When the issue of the omission of a written bill or declaration of rights was raised in the final days of the 1787 Constitutional Convention, the main objection to remedying the defect was that it was unnecessary. As the Constitution created a government of delegated powers, it had no power to act except as provided by the Constitution. Many pro-Federal advocates also alleged that such a declaration of rights could even be dangerous as there was no way to possibly enumerate all rights. Of course, this did not satisfy the anti-Federal opposition who ultimately approved ratification based on the express promise that the First Congress would provide amendments which recognized rights guarantees. Cornell notes the fondness that many anti-Federalists had for written constitutions who expressed a literal style of interpretation in order to ensure that the powers split between the people and the government was explicitly understood.<sup>16</sup> For many anti-Federalists, having a declaration of rights in the Constitution was important, not to provide their basis, but as an additional restraint on the government that certain rights existed and, thus, were outside of the scope of government. The 1776 anonymous text, *Four Letters on Interesting Subjects*, is an excellent example of genesis of many of the essential components of what came to comprise American constitutionalism, especially regarding the necessity of a separate constitution that enunciated fundamental principles that could not be modified by ordinary law. With respect to rights, the author discussed how it was important to set for the existence of the rights, but admonished:

And for the same reason perfect liberty of conscience; security of person against unjust imprisonments, similar to what is called the Habeas Corpus act; the mode of trial in all law and criminal cases; in short, all the great rights which man never

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<sup>15</sup> Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999), 30-31.

<sup>16</sup> Cornell, *The Other Founders*, 58.

mean, nor ever ought, to lose, should be *guaranteed*, not *granted*, by the Constitution. . .<sup>17</sup>

Cornell aptly notes that for many anti-Federalists, these notions of rights were intertwined with concepts of federalism which held that states were the entities that would protect rights.<sup>18</sup> Cornell also notes that anti-Federalist thought was not monolithic as many viewed constitutional issues in “Whig republican terms” which viewed laws which infringed on individual rights as permissible as long as they were passed by a properly elected legislature and passed to further the public good.<sup>19</sup> Nonetheless, many anti-Federalists still found the need for written declarations of rights. Rights were important as it reminded not only the representatives in government of essential boundaries, but also served to educate the populace.<sup>20</sup> Rights in this capacity operated as an important reminder of founding principles that the government should heed and that the people must not forget. The very idea of the Bill of Rights as providing the basis for the rights would have been unacceptable to many of these proponents as this would have allowed a court to determine the availability of a right. Indeed, for the anti-Federalists, an overreaching Federal judiciary was one of their main points of dissatisfaction with the Constitution.<sup>21</sup> As we will see from examining the opinions of some of these jurists who held the rights contained in the Bill of Rights applicably to state action, it is not accurate to exclusively view the Bill of Rights as providing the basis for rights.

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<sup>17</sup> *Four Letters on Interesting Subjects*, (Philadelphia: 1776), *The Founders' Constitution*, Volume 1, Chapter 17, Document 19, (The University of Chicago Press, <http://press-pubs.uchicago.edu/founders/documents/v1ch17s19.html> (last accessed March 16, 2011). See also Gordon Wood, *The Creation of the American Republic*, 267.

<sup>18</sup> Cornell, *The Other Founders*, 59.

<sup>19</sup> Cornell, *The Other Founders*, 79.

<sup>20</sup> Cornell, *The Other Founders*, 90.

<sup>21</sup> Cornell, *The Other Founders*, 31.

This chapter will explore this concept in three parts. First, we will examine the opinions of the jurists that Amar classifies as prime “*Barron* contrarians” and will focus on two in particular: Joseph Henry Lumpkin of the Georgia Supreme Court and New York State Chief Justice Ambrose Spencer. Second, we will explore how other courts handled claims of right based upon the rights guaranties of the Federal Constitution. Finally, we will examine the jurisprudence of John Marshall to appreciate how even his own decisions evolved over time. This evolution will show how, by the end of his judicial career, a decision like *Barron* with such a positive law basis became possible.

A quintessential example of a “*Barron* contrarian” is Georgia Supreme Court Justice Joseph Henry Lumpkin.<sup>22</sup> Lumpkin’s opinion in *Nunn v. State* (Ga. 1846) presents a good example of his theory that existing rights are declared – not granted - by written constitutions. In *Nunn*, the court received an appeal from a conviction under an 1837 Georgia law prohibiting the wearing of concealed weapons.<sup>23</sup> The court was asked to determine whether this law was prohibited by the Second Amendment’s guarantee of the right to bear arms. Lumpkin noted that courts in Kentucky, Alabama, and Indiana had addressed similar concealed weapons laws and, while ruling differently, all three assumed the right to bear arms existed in their respective cases. Lumpkin conceded that all three cases rested upon guarantees contained in their *state* constitutions; however, he used this opportunity to espouse, first, a declaratory view of these rights, noting “it is true that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no *new rights* on the people which did not belong to

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<sup>22</sup> For a biographical sketch of Lumpkin, see Bond Almand, “History of the Supreme Court of Georgia, The First Hundred Years,” in *A History of the Supreme Court of Georgia*, ed. John Harris (Macon, Ga.: J.W. Burke Co., 1948), 24.

<sup>23</sup> *Nunn v. State*, 1 Kelly 243 (Ga. 1846).

them before.”<sup>24</sup> Second, Lumpkin also recognized that the United States was created by the people and recognized the dual role possessed by all citizens. Lumpkin argued that the Bill of Rights was added to the Constitution at the insistence of many of the states who wanted more restrictions on the new Federal government. To Lumpkin, whether these rights were contained in the Federal or state constitutions was irrelevant; the act of writing these guarantees down and placing them into a constitution did not alter their fundamental basis and availability. Lumpkin argued that if the right to bear arms,

‘inestimable to freemen’ has been guaranteed to British subjects, since the abdication and flight of the last of the Stuarts and the ascension of the Prince of Orange, did it not belong to our colonial ancestors in this western hemisphere? Has it been a part of the *English* Constitution ever since the bill of rights and act of settlement? And been forfeited here by the submission and adoption of our own Constitution? No notion can be more fallacious than this! On the contrary, this is one of the fundamental principles, upon which rests the great fabric of civil liberty, reared by the fathers of the Revolution and of the country. And the Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the act of 1689, “to extend and secure the rights and liberties of English subjects”- whether living 3,000 or 300 miles from the royal palace.<sup>25</sup>

Lumpkin approached the *Barron* issue under different assumptions than Marshall. Lumpkin understood rights as protections that belonged to citizens which could be applied against governments. Declaring the protection to ensure that the new Federal government did not violate certain rights did not give the states license to do so. Thus, Lumpkin viewed rights from a declaratory rather than a positivist perspective. Without specifically naming *Barron*, Lumpkin recognized the precedent that the Bill of Rights applied solely to the Federal Government. In order to support his argument Lumpkin cited the pre-*Barron* New York state case, *New York v.*

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<sup>24</sup> *Nunn v. State*, 1 Kelly at 251.

<sup>25</sup> *Nunn v. State*, 1 Kelly at 251.

*Goodwin* (1820), as precedent, decided by New York Chief Justice Ambrose Spencer.<sup>26</sup> In *Goodwin*, in response to the issue of whether the Fifth Amendment's prohibition on double jeopardy applied to the states or only the Federal government, Spencer held the controversy immaterial as the prohibition was "a sound and fundamental one of the common law."<sup>27</sup> Justice Spencer was urged by both attorneys that the Fifth Amendment either applied to the states or it did not. Spencer felt the dispute was immaterial as the prohibition was a fundamental principle of the common law. Spencer did state however that he believed that the Fifth Amendment applied as the Constitution was the supreme law of the land.<sup>28</sup> Interestingly, Justice Spencer went further and provided in dicta that he was of the opinion that Article VI of the Constitution (the Supremacy Clause) extended all Constitutional provisions that were not specifically confined to the Federal government as also fully applicable to the states.<sup>29</sup> Justice Spencer followed this logic in a subsequent case which involved the takings clause of the Fifth Amendment. In *Bradshaw v. Rogers* (N.Y. 1822), the plaintiff landowner sued the agents of the canal commissioners for trespass after they entered his property and cut down trees in order to rebuild a portion of a private turnpike road that was broken up as a result of the building of the Champlain Canal offshoot during the construction of the Erie Canal.<sup>30</sup> While the defendants argued that state law authorized these acts, Spencer held them liable as the state law only provided for taking of land for the construction of the canal, and not to rebuild a road that was

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<sup>26</sup> *New York v. Goodwin*, 18 Johns. 187, 200 (N.Y. Sup Ct. 1820).

<sup>27</sup> *New York v. Goodwin*, 18 Johns. at 195.

<sup>28</sup> *New York v. Goodwin*, 18 Johns. at 194.

<sup>29</sup> Article VI of the Constitution provides, in pertinent part, that the Constitution "...shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Goodwin*, 18 Johns. at 195.

<sup>30</sup> *Bradshaw v. Rogers*, 20 Johns. 103 (N.Y. Sup. Ct. 1822).

damaged because of the canal, especially a private road.<sup>31</sup> More importantly, Spencer noted that the act which allowed the commissioners to take property to rebuild roads interrupted by the canal disturbingly failed to contain any provision of compensation for the owner.<sup>32</sup> Such an omission would allow for uncompensated takings in violation of the Fifth Amendment as well as a similar prohibition contained in the New York Constitution.<sup>33</sup> Spencer recognized that the “former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative,” conceding that the Bill of Rights Amendments were drafted to restrain the Federal government.<sup>34</sup> Unlike Marshall’s *Barron* analysis however, Spencer held this distinction as irrelevant. The prohibition against taking private property without providing just compensation applied in New York as this principle was declaratory of a fundamental principle of government. Any law violating that rule was void.<sup>35</sup>

In *Nunn*, Lumpkin cited Justice Spencer’s *Goodwin* dicta on the Supremacy Clause and held that there was no language in the Second Amendment that limited it only to the Federal government.<sup>36</sup> In contrast to the *Barron* holding, Lumpkin argued that because the Bill of Rights was ratified to restrict the powers of the new Federal government, did it,

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<sup>31</sup> *Bradshaw v. Rogers*, 20 Johns. at 104.

<sup>32</sup> *Bradshaw v. Rogers*, 20 Johns. at 105.

<sup>33</sup> *Bradshaw v. Rogers*, 20 Johns. at 105.

<sup>34</sup> *Bradshaw v. Rogers*, 20 Johns. at 105. The first New York Constitution of 1777 did not contain a specific prohibition against uncompensated takings, while the second Constitution of 1821 did. Spencer is apparently alluding to the fact that the 1821 Constitution was not yet full ratified as of the time of the case opinion. See, N.Y. Constitution, Article VII, Section 7 (1821), [http://www.courts.state.ny.us/history/constitutions/1821\\_constitution.htm](http://www.courts.state.ny.us/history/constitutions/1821_constitution.htm) (last accessed May 8, 2010) and N.Y. Constitution (1777), <http://www.nhinet.org/ccs/docs/ny-1777.htm> (last accessed May 8, 2010).

<sup>35</sup> *Bradshaw v. Rogers*, 20 Johns. at 103.

<sup>36</sup> *Nunn*, 1 Kelly at 252. This holding echoes Amar’s discussion of the “negative-implication” theory in Rawle’s 1825 treatise. Amar, *The Bill of Rights*, 146; See also footnote 37, *supra*.

follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed it to rest in the State governments? Is this a right reserved to the *States* or to *themselves*? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disenfranchisement from Congress, they ever intended to confer it on local legislatures. This right is too dear to be confided to a republican legislature.<sup>37</sup>

Thus, by supporting Marshall's narrow construction, Amar is simply recognizing one concept of rights that was emerging in the early republic. The intent of this chapter is not to argue that Amar is wrong. There is ample evidence to support his claims. Instead, this chapter argues that there also exists ample evidence to support the claims of the "contrarians." No one ideology had gained primacy during this era. While Marshall's position can be supported by one reading of the Constitution, another reading of the same language supports the opposite argument. Further, these antebellum jurists who held the Bill of Rights applicable to the states did so within an ideological tradition which viewed fundamental rights as something outside the realm of lawyers and courts. These jurists saw rights, such as prohibitions against taking private property without compensation or placing a defendant in double jeopardy, as fundamental principles that could not be given or taken away simply because of their inclusion or omission in a written constitution.

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<sup>37</sup> *Nunn*, 1 Kelly at 252. Michael Kent Curtis has also used and addressed the same two above-cited excerpts from Justice Lumpkin's opinion in *Nunn* in his book, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*. There, Curtis viewed the Fourteenth Amendment incorporation argument by approaching it in context of the pre-Civil War abolition conflicts, where he discusses the effect of the *Barron* decision. Curtis concedes that a strictly legalistic view "seems to indicate that *Barron* was correctly decided," but argues that slavery was the real issue lurking behind Marshall's decision. Curtis argued that "*Barron* avoided troubling questions. It promoted stability at the expense of liberty. It left southern states free to suppress speech and press on the question of slavery and left them free to deny procedural and substantive rights to blacks." Curtis further argues that Marshall ignored a tradition by antebellum jurists to hold the Bill of Rights applicable to the states, as was also recognized by Mazzone and Amar, in light of their perception of those rights as fundamental and reserved to the people, not the states. Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke Univ. Press, 1986), 22-25. While I largely agree with Curtis, I am attempting to focus on *Barron* more closely on its own, rather than in context of the Fourteenth Amendment incorporation debate.

This sentiment was not limited to Justice Lumpkin in Georgia or Justice Spencer in New York. Rather this view can be found in all levels of the court system, state and Federal, and appear both pre and post-*Barron*. Court decisions from the Supreme Court, to lower Federal courts, to state courts all had numerous instances of rulings similar to Lumpkin and Spencer. This chapter will review many of the same cases as did Amar; however, this chapter views the evidence differently. Where Amar sees ambiguity or wrongheadedness, the chapter sees competing ideological traditions.

Consider first the U.S. Supreme Court. For example, Amar cites the 1819 *Bank of Columbia v. Okely* decision where the Supreme Court held the Seventh Amendment guarantee of a civil jury applicable in a state court proceeding.<sup>38</sup> There, the Maryland legislature, in its act incorporating a bank, gave the bank the right to use a summary procedure to levy on the assets or the person of a borrower who fell in default on the loan. The defendant argued that the law violated both the Seventh Amendment right to trial guarantee as well as section twenty-one of the Maryland Constitution which codified the Magna Charta's prohibition against the taking of one's life, liberty, or property except in accord with the due process of law.<sup>39</sup> Writing for the Supreme Court, Justice William Johnson held the Maryland Constitution inapplicable as the section of the Magna Charta upon which it was based was meant to restrain governmental actions and not transaction between private individuals.<sup>40</sup> However, Johnson held the Seventh Amendment applicable but ruled against the defendant as the Court held that he properly waived

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<sup>38</sup> *Bank of Columbia v. Okely*, 17 U.S. 235 (1819); Amar, *The Bill of Rights*, 145.

<sup>39</sup> *Bank of Columbia*, 17 U.S. at 239-240.

<sup>40</sup> *Bank of Columbia*, 17 U.S. at 244. The Court also held that Article 3 of the Maryland Constitution (1776) which also provided a right to a jury trial was also inapplicable for the same reasons. Parenthetically, William Johnson was a member of the Supreme Court when *Barron* was decided.

its protections.<sup>41</sup> The basis for this view of the applicability of the Seventh Amendment is a bit uncertain as the bank was located in the District of Columbia. While the laws of the State of Maryland continued to apply following the transfer of the D.C. lands from Maryland to the Federal Government after 1801, the fact remains that the case occurred in a Federal district and not a state.<sup>42</sup>

However, one year later in *Houston v. Moore* (1820), Justice Johnson had another opportunity to address the applicability of the Bill of Rights Amendments to state action. In *Houston*, the Supreme Court was presented with an appeal from Mr. Houston, a private in the Pennsylvania militia, who failed to muster when his unit was called by the U.S. government during the War of 1812, a violation of state law.<sup>43</sup> Following a state court-martial, Houston was convicted and fined. To contest the execution of the judgment against his real property, Houston filed an action for trespass arguing that Pennsylvania statute was unconstitutional as the state did not have the authority to punish his failure to report for duty for service of the Federal government.<sup>44</sup> At the Supreme Court, Justice Johnson held the statute constitution valid and ruled against Houston in a concurring opinion. In dictum, Justice Johnson, apparently referring to the Fifth Amendment, argued that prohibition against double jeopardy was applicable to both the Federal and state governments.<sup>45</sup>

Certainly, the *Barron* holding was known to the justices of the Supreme Court and we do not see opinions post-1833 that relied on a purely declaratory theory of rights in the Supreme

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<sup>41</sup> *Bank of Columbia*, 17 U.S. at 244.

<sup>42</sup> *Bank of Columbia*, 17 U.S. at 242.

<sup>43</sup> *Houston v. Moore*, 18 U.S. 1 (1820).

<sup>44</sup> *Houston v. Moore*, 18 U.S. at 3.

<sup>45</sup> *Houston v. Moore*, 18 U.S. at 35. The decision was five to two with Justices Story and Washington holding the Pennsylvania law unconstitutional.

Court. However, this did not mean that this view completely disappeared from the minds of counsel that appeared before the Court. In *Holmes v. Jennison* (1840), the Court was presented with an appeal from the denial of a habeas corpus petition.<sup>46</sup> The prisoner, Holmes, was held under a warrant issued by the Governor of Vermont, Jennison, and was to be turned over to a Canadian agent for a murder allegedly committed in the Quebec province. The Court was presented with the question of whether the acts of the Governor were unconstitutional as they were delegated to the Federal government. Holmes was ultimately released as the Court held that Vermont had no basis to hold him for the agent of a foreign government, but the Court split on their reasoning. Taney, joined by Story, McLean, and Wayne, agreed that the denial of the habeas petition by the Vermont Supreme Court constituted sufficient final action to vest the Court with jurisdiction. Thus, Taney held that Vermont could not enter into an agreement with British Canada as it would violate Article I, Section 10 which held in part that no state could enter into a treaty, alliance, or agreement with a foreign nation without the consent of Congress.<sup>47</sup> The remainder of the Court held that Holmes did not have jurisdiction under Section 25 of the Judiciary Act of 1789. The Court relied on *Barron* to hold that the Fifth Amendment Due Process clause did not apply to Vermont, which would dispose of the case similar to *Barron*. While the Court ruled against the petitioner, Holmes's attorney, Van Ness, made arguments that are instructional. Van Ness had to address the basis for Court's jurisdiction and in doing so, he presented an argument that made Constitutional assumptions similar to those set forth by Justice Lumpkin of Georgia. Van Ness argued that *Barron* was quite simply wrongly decided. Van Ness believed that the Constitution made a distinction between limitations on the power of

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<sup>46</sup> *Holmes v. Jennison*, 39 U.S. 540 (1840).

<sup>47</sup> *Holmes v. Jennison*, 39 U.S. at 570.

government, on one hand, and rights that were by nature inherent and non-divestible, on the other.<sup>48</sup> For example, Van Ness pointed out that the Ninth Amendment spoke in terms of “rights” while the Tenth Amendment discussed “powers.”<sup>49</sup> The Constitution thus recognized this distinction. As a result, the right of personal liberty that can only be deprived upon due process as declared in the Fifth Amendment was a right designed for the protection of citizens that both the Federal and state governments were bound to protect. Rights of due process were much different than limitations on governmental power. The latter referred to powers that a government could otherwise lawfully exercise but for the limitation.<sup>50</sup> In *Holmes*, Van Ness presented his argument based largely on two assumptions. First, he presented a slightly more nuanced version of the declaratory view of rights by differentiating between rights and limitations of power. For Van Ness, the right that no one can be deprived of liberty without due process was not subject to jurisdictional concern as this right was just that, a right. Second, Van Ness made a made an argument which recognized the existence of a sovereign people in the creation of the Federal union. According to Van Ness, the right of personal liberty recognized in the Fifth Amendment, “instead of limiting the powers of the general government, directly calls into action those powers for the protection of the citizen. That it forms a part of the supreme law of the land, by which all the authorities of the states, as well as those of the Union, are bound. And that the establishment of the contrary doctrine would essentially weaken the security of the people; since it would leave without the protection of the paramount and superintending power of the Union, the great and fundamental right of personal liberty.”<sup>51</sup>

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<sup>48</sup> *Holmes v. Jennison*, 39 U.S. at 555-556.

<sup>49</sup> *Holmes v. Jennison*, 39 U.S. at 557.

<sup>50</sup> *Holmes v. Jennison*, 39 U.S. at 555.

<sup>51</sup> *Holmes v. Jennison*, 39 U.S. at 557.

Jurists riding the Federal circuit courts also often found that the Bill of Rights Amendments applied to the states. U.S. Supreme Court Justice Henry Baldwin, while on circuit, held the Amendments applicable to state actions in *Johnson v. Tompkins*, an 1833 case stemming from an attempt to recover an enslaved fugitive from across state lines.<sup>52</sup> In *Johnson*, a man enslaved to Caleb Johnson, a resident from New Jersey, escaped to Pennsylvania and was hired by John and Isachar Kenderdine.<sup>53</sup> Mr. Johnson, his brother, and two friends followed the enslaved man, Jack, into Montgomery County, Pennsylvania.<sup>54</sup> After securing accommodations in the local tavern, Johnson and his party went to the Kenderdine residence. Creating a ruse that their wagon had suffered an accident, they were allowed to enter the Kenderdine home where they recognized Jack and took him into custody, which was initially made easier by the temporary absence of the men of the Kenderdine family. After shackling Jack and taking him back toward the tavern, the Kenderdines and a mob of between forty and fifty caught up with the Johnsons and attacked them with clubs. The Johnson party was then sequestered in the tavern until a judge could be called. In a turn of events, Johnson and his associates were held in custody on charges of kidnapping. Ultimately, after Johnson was acquitted, he brought suit against the justice of the peace and others who arrested and detained him.<sup>55</sup> In ruling in favor of Johnson, Baldwin took an expansive view of the applicability of the Amendments, arguing first that the Second (right to bear arms), Fourth (rights against unreasonable searches and seizures),

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<sup>52</sup> *Johnson v. Tompkins*, 13 F. Cas. 840 (C.C.E.D.Penn., 1833). Henry Baldwin was also on the Supreme Court when *Barron* was decided.

<sup>53</sup> *Id.* As the enslaved man, Jack, was abducted in the kitchen of the home of his new employer, it is plausible to believe either that Jack was hired as a domestic servant.

<sup>54</sup> It is unclear from the case how Johnson knew that Jack was in Montgomery County, Pennsylvania.

<sup>55</sup> *Johnson v. Tompkins*, 13 F. Cas. at 842. Interestingly, after the initial trial which cleared Johnson, he manumitted Jack who continued to reside near Johnson in Princeton, New Jersey. Jack also appeared in the first trial as a witness for Johnson.

Fifth (rights of due process) and Sixth (right to confront accusatory witnesses) Amendments applied to the states before holding that all the Amendments applied.<sup>56</sup> The rights contained in the Pennsylvania and Federal constitutions were “not the source of these rights, or the others to which we have referred you, they existed in their plenitude before any constitutions, which do not create but protect and secure them against violation by the legislatures or courts, in making, expounding or administering laws.”<sup>57</sup>

In *Bonaparte v. Camden & A.R. Co.*, Baldwin offered a similar analysis when presented with a dispute brought by Joseph Bonaparte, the older brother of the Napoleon Bonaparte and the former king of Naples and later of Spain.<sup>58</sup> After Napoleon’s defeat at Waterloo in 1815, the elder Bonaparte left for America and eventually settled outside Bordentown, New Jersey on a two thousand acre estate. In order to transform rural New Jersey into a home befitting a former king, Bonaparte spent over \$300,000.00 installing parks, walkways, gardens, a lake, and other similar improvements.<sup>59</sup> The problem was that Bonaparte’s immaculate estate was situated in between the towns of Camden and Amboy, New Jersey, between which the state of New Jersey had incorporated a private company build a rail line. After workers of the Camden and Amboy Railroad Company entered onto his estate and marked out the proposed route, Bonaparte sought an injunction to halt work. In order for the court to issue an injunction, a plaintiff is required to prove that he will suffered irreparable injury; an injury is deemed irreparable if money damages

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<sup>56</sup> *Johnson v. Tompkins*, 13 F. Cas. at 852.

<sup>57</sup> *Johnson v. Tompkins*, 13 F. Cas. at 852. While unclear, it appears the court exercised its Federal diversity jurisdiction given the Plaintiff’s status as a resident of New Jersey and the Defendants’ status as residents of Pennsylvania. This case pre-dates *Swift v. Tyson*, 41 U.S. 1 (1842) which provided that Federal courts exercising diversity jurisdiction must apply statutory law of the state in which it is located but not the common law.

<sup>58</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821 (C.C. Dist. N.J. 1830). Patricia Tyson Stroud, *The Man Who had been King* (Philadelphia: University of Pennsylvania Press, 2005), 221.

<sup>59</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 821. Stroud, 222.

will not suffice. Here, Bonaparte did not plead that compensation would not be made. In fact, the company answered the complaint and alleged that it intended to make full compensation and indeed that state law required it.<sup>60</sup> Rather, Bonaparte argued that he would suffer irreparable injury as he would not be compensated for the damages that occurred *during* the construction. Even when presented with this rather loose definition of irreparable injury, Justice Baldwin held for Bonaparte and issued the injunction.<sup>61</sup> Baldwin conceded that the applicability of the Fifth Amendment’s prohibition on takings without just compensation against the states was in some doubt. However, the question was immaterial as the principle expressed by the Fifth Amendment was a declaration of the existing rights of citizens, stating that “[t]hough it may well be doubted whether as a constitutional provision, this applies to the state governments, yet it is the declaration of what in its nature is the power of all governments, and the right of its citizens; the one to take property, the other to compensation.”<sup>62</sup> Later in the same opinion Baldwin again conceded that the Fifth Amendment “may not apply” to bind state governments, but again did not find this dispositive as “it may be taken as a correct definition of the rule of public law; there must be ‘just compensation’ made to the owner.”<sup>63</sup> Like Barron’s attorney David Hoffman, Baldwin invoked natural law theorists Grotius, Pufendorf, and Vattel for the principle that while

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<sup>60</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 824.

<sup>61</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 834. Specifically, Baldwin held that the company did not follow the compensation procedure set forth by the state in its articles of incorporation for the company.

<sup>62</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 828. Interestingly, the editor preparing the case book included a foot note which cited the recent *Barron* decision that was entered after the *Bonaparte* opinion was issued. *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 829.

<sup>63</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 831. For the proposition that the Fifth Amendment might not apply, Baldwin cited *Bradshaw v. Rogers*, 20 Johns. 103 (N.Y. 1822), a decision by New York Chief Justice Spencer which was cited by both the plaintiff and defendant for different purposes during oral arguments in the Barron appeal in 1830, discussed in more detail in Chapter 4, as well as later in this Chapter.

the right to take property for public use is an attribute of sovereignty, the right to make just compensation is an absolute corollary to that right.<sup>64</sup>

While William Johnson and Henry Baldwin made arguments in the Federal courts that viewed constitutions as declarations of pre-existing rights, these types of arguments were also widespread among many state court jurists. State courts across the Union held all or portions of the protections contained in the Bill of Rights applicable to state action, both north and south. A number of state court jurists argued that the protections listed in the Bill of Rights could be applicable to state action, and for a variety of reasons. For example, in *State v. Antonio*, the South Carolina Constitutional Appeals Court was faced with an appeal from a defendant accused of counterfeiting.<sup>65</sup> The defendant argued that since the coinage of money was the exclusive domain of the Federal government, the state of South Carolina could not prosecute him for counterfeiting.<sup>66</sup> If the prosecution was held valid, the defendant argued, he could conceivably be tried again for counterfeiting by the Federal government. The court held that as it was the practice between separate sovereign nations to recognize the finality of judgments of fellow courts, surely the same rule would be exercised between the state and Federal courts. The court felt the possibility of the defendant's subsequent prosecution,

could not possibly happen: first, because it is the established comitas gentium, and is not unfrequently brought into practice, to discharge one accused of a crime, who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties? But a guard yet more sure is to be found in the 7th article of amendments to the federal constitution.<sup>67</sup>

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<sup>64</sup> *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. at 828.

<sup>65</sup> *State v. Antonio*, 3 S.C. 562, 2 Tread. 776 (S.C.Const.App., 1816)

<sup>66</sup> *State v. Antonio*, 2 Tread. 776.

<sup>67</sup> *State v. Antonio*, 2 Tread. at 778. "Comitas" is defined as "Courtesy; civility; comity. An indulgence of favor guaranteed another nation, as a mere matter of indulgence, without any claim of right made. *Comitas inter*

For the court, this belief that further prosecution would not lie was not just illusory because the Seventh Amendment would bar further prosecution.<sup>68</sup>

In *State v. Buzzard* (Ark. 1842) the Arkansas Supreme Court was presented with a challenge to a state law that outlawed the possession of concealed weapons as violating both the Arkansas Constitution and the Second Amendment.<sup>69</sup> While the Court ultimately upheld the law as a valid exercise of the State's police power, the Court did not entertain any notion that the Bill of Rights protections were not applicable to state action.<sup>70</sup> Rather, while the right to bear arms was considered as fundamental, it must nonetheless bend to the common law maxim "*Sic utere tuo non laedas alienum*:" that one should use his property in a way that will not injure the property of others.<sup>71</sup> The Court did not rely on a textual reading of the Constitution to hold that the state law was valid; rather, they simply held that the rights contained in the Second Amendment, like all rights, are never absolute in a commonwealth. The Arkansas Supreme Court maintained this view in *Atkins v. State* (Ark. 1855) where it was presented with an appeal of a criminal conviction on a double jeopardy claim.<sup>72</sup> The Court again held that the prohibition against placing a defendant in jeopardy twice was prohibited by the Arkansas Constitution, the Fifth Amendment, "and in, perhaps, all of the American bills of rights" as well as by the common law.<sup>73</sup> While the Court held that the illness of one juror which caused a continuation of

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*communitas*; or *comitas inter gentes*; comity between communities or nations; comity of nations. *Black's Law Dictionary*, Sixth Ed. (West Publishing Co., 1990), 267.

<sup>68</sup> *State v. Antonio*, 2 Tread. at 778.

<sup>69</sup> *State v. Buzzard*, 4 Ark. 18 (Ark. 1842).

<sup>70</sup> *Buzzard*, 4 Ark. at 28.

<sup>71</sup> *Buzzard*, 4 Ark. at 32; *Black's Law Dictionary*, 1380.

<sup>72</sup> *Atkins v. State*, 16 Ark. 568 (Ark. 1855).

<sup>73</sup> *Atkins*, 16 Ark. at 573.

the trial to the next term did not constitute double jeopardy, the Court viewed the prohibition against double jeopardy as a right recognized by many sources: state constitutions, the Federal Constitution, the common law. However, those sources did not provide the basis for the prohibition. The Court felt no need to engage in jurisdictional questions over the applicability of the Fifth Amendment to state court proceedings. Prohibiting double jeopardy was a given.

Louisiana also routinely applied this logic when it encountered similar rights claims. In two separate cases, Justice Johnson of the Louisiana Supreme Court addressed double jeopardy appeals. In *State v. Brown* (La. 1844) and *State v. Hornsby* (La. 1845), Johnson held that the state could bring new trials as the filing of a nolle prosequi did not prohibit future prosecution (*Brown*) or a subsequent retrial on a lesser included charge (*Hornsby*).<sup>74</sup> In both opinions, Johnson held the double jeopardy prohibition of the Fifth Amendment applicable without reference to its applicability to state courts. For Johnson, the double jeopardy prohibition of the Fifth Amendment was simply a “re-affirmance of a *magna charta* maxim of the common law.”<sup>75</sup> Similarly, in *Mississippi v. Moor* (Miss. 1823), the court was faced with a case where a criminal jury retired to deliberate, but failed to a verdict before the statutory time for the court session expired.<sup>76</sup> The court ruled against the defendant seeking to use double jeopardy as a defense to a second trial. However, the court found the double jeopardy protections of the Fifth Amendment applicable as the Constitution was “the paramount law of the land” binding on all courts, Federal and state.<sup>77</sup> The Mississippi court cited New York state law and specifically Justice Spencer’s opinion in *Goodwin* as a persuasive interpretation of the Fifth Amendment.

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<sup>74</sup> *State v. Brown*, 8 Rob. (LA) 566 (La. 1844); *State v. Hornsby*, 8 Rob. (LA) 583 (La. 1845).

<sup>75</sup> *Brown*, 8 Rob. (LA) at 566.

<sup>76</sup> *Mississippi v. Moor*, 1 Miss. 134 (Miss. 1823).

<sup>77</sup> *Mississippi v. Moor*, 1 Miss. at 135.

The Supreme Court of Georgia of course routinely ruled that the Bill of Rights applied to state action most notably by virtue of the influence of Justice Lumpkin, author of the 1846 *Nunn* opinion discussed earlier. Certainly, Lumpkin continued his similar line of thought in subsequent opinions. In *Flint River Steamboat Company v. Foster* (Ga. 1848), the Court was presented with the legality of a state statute allowing steamboat workers to file liens on vessels whose captains failed to pay wages.<sup>78</sup> After one steamboat company appealed the law on the basis that it violated the due process clause of the Fifth Amendment, the jury trial right of the Seventh Amendment, and the similar provisions of the Georgia Constitution, Lumpkin again had the opportunity to set forth his view of the applicability of these rights to the states.<sup>79</sup> In discussing the right of the jury trial, Lumpkin explained,

It would be out of place, on this occasion, to expatiate on the importance of trial by jury. In England, it has long been esteemed the great bulwark and safeguard, both of civil rights and of political freedom. It is incorporated prominently into *Magna Charta*. Our ancestors, when they removed to this country, brought this admirable system with them, as their *birth right* and inheritance. And for greater security, have had a guarantee for its preservation inserted, not only in the Federal, but in all their State Constitutions.<sup>80</sup>

Similarly, in *Allen v. Georgia* (Ga. 1851), Lumpkin held that the Eighth Amendment applied to state action while in *Campbell v. Georgia* (Ga. 1852) he held that the Sixth Amendment right to confront witnesses also applied.<sup>81</sup> Indeed, in *Campbell*, Lumpkin argued that the entire Bill of Rights applied. In doing so, he again made two constitutional assumptions. First, the Bill of Rights Amendments were simply declaratory of “the ‘birthright’ of our ancestors,” which echoed

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<sup>78</sup> *Flint River Steamboat Company v. Foster*, 4 Ga. 194 (Ga. 1848).

<sup>79</sup> *Flint River Steamboat Company v. Foster*, 4 Ga. at 197.

<sup>80</sup> *Flint River Steamboat Company v. Foster*, 4 Ga. at 204.

<sup>81</sup> *Allen v. Georgia*, 10 Ga. 85, 90 (Ga. 1851); *Campbell v. Georgia*, 11 Ga. 353 (Ga. 1852).

his other decisions like *Nunn* or *Flint River*.<sup>82</sup> Second, Lumpkin again made an argument which also recognized the role of the people in the creation of the Union instead just the states, writing,

For let it constantly be borne in mind, that notwithstanding we may have different governments, a nation within a nation, *imperium in imperio*, we have but *one* people; and that the same people which, divided into separate communities, constitute the respective State governments, comprise in the aggregate, the United States Government. . .<sup>83</sup>

However, Lumpkin was not the only jurist in Georgia to make these types of arguments.

Justice Hiram Warner of the Georgia Supreme Court also held in *Young v. McKenzie* (Ga. 1847) that the takings clause of Fifth Amendment applied.<sup>84</sup> Warner was not unmindful of *Barron* as counsel for the defendant cited it for the proposition that the Fifth Amendment did not apply.<sup>85</sup>

Rather, for Warner, *Barron* simply did not apply. Explained Warner,

Does the amended Constitution of the United States, by declaring “Private property shall not be taken for public use without just compensation,” introduce, or create, a *new principle of restriction*, which did not exist before? Did not the same principle of restriction exist, both as it regards the Federal and State Government, before the adoption of the amendment in question? Does the amended constitution do anything more than declare a great common law principle, applicable to all governments, both State and Federal, which has existed from the time of *Magna Charta*, to the present moment? The amended constitution of the Union asserts a great principle applicable, it is said, to the *National Government*. Why is not the same great principle equally applicable to the *State Government*?<sup>86</sup>

Similarly, in *Parham v. Decatur County* (Ga. 1851), Justice Eugenius A. Nisbet of the Georgia Supreme Court was also presented with an appeal which questioned the legality of a state law which allowed the local road commissioners to take unenclosed private property for

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<sup>82</sup> *Campbell v. Georgia*, 11 Ga. at 361.

<sup>83</sup> *Campbell v. Georgia*, 11 Ga. at 362.

<sup>84</sup> *Young v. McKenzie*, 3 Ga. 31 (Ga. 1847); Almand, “History of the Supreme Court of Georgia,” 24-25.

<sup>85</sup> *Young v. McKenzie*, 3 Ga. at 36.

<sup>86</sup> *Young v. McKenzie*, 3 Ga. at 39.

road construction, but only required compensation if the property was enclosed at the time.<sup>87</sup> Nisbet recognized that necessity sometimes warranted takings, but that this was not one of those occasions. Rather, the requirement that the sovereign provide compensation upon a taking was recognized in the Fifth Amendment. This principle was “founded in natural equity,” was “of universal application” and could be found not only in the Bill of Rights but in the common law, Magna Charta, Blackstone’s *Commentaries*, Kent’s *Commentaries*, the writings of Continental theorists like Grotius, Vattel and Pufendorf, the Napoleonic Code, the Civil Code of Louisiana, and even in the laws which governed exotic lands like Turkey.<sup>88</sup> Nisbet was also aware that the Bill of Rights Amendments had been held inapplicable to state action, but this did not change his opinion. This obligation to compensate an owner of private property for a taking was a right that the Fifth Amendment simply declared and recognized. Nisbet was incredulous that placing the right in the Fifth Amendment somehow meant that it no longer existed unless it was specifically spelled out in the state constitution. For Nisbet, the power to take private property without compensation did not belong to any government.<sup>89</sup>

Decisions regarding the applicability of the Bill of Rights were not simply a southern phenomenon attributable to Lumpkin and a few like-minded judges. In *Hoffman v. State* (Md. 1863), the Maryland Appeals Court was faced with a double jeopardy appeal by a defendant convicted of murder.<sup>90</sup> At the first trial, a jury was selected and sworn in; however, the court discharged the jury and rescheduled the trial to the next term as the state’s witnesses failed to

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<sup>87</sup> *Parham v. Decatur County*, 9 Ga. 341, 345 (Ga. 1851); Almand, “History of the Supreme Court of Georgia,” 25-26.

<sup>88</sup> *Parham v. Decatur County*, 9 Ga. at 347-348.

<sup>89</sup> *Parham v. Decatur County*, 9 Ga. at 348.

<sup>90</sup> *Hoffman v. State*, 20 Md. 425 (Md. 1863).

appear. The appeals court adopted a rule similar to the double jeopardy cases we have already discussed, namely that jeopardy did not attach until an actual verdict was rendered.<sup>91</sup> Here, the court was presented with the appeal on the basis that the second trial violated the double jeopardy clause of the Fifth Amendment. The court could have simply cited *Barron* and rejected the Fifth Amendment claim. Instead, the court held that the double jeopardy rule applied to criminal trials as an indispensable part of the common law.<sup>92</sup> The *Hoffman* court interpreted the prohibition on double jeopardy contained in the Fifth Amendment as declaratory of the common law, and held that the

importance and value of the principle on which the motion to discharge is founded in this case, is shown in the fact, that although handed down by the common law for centuries, and recognized in innumerable instances, it was thought proper to embody it in the Constitutions of several of the States, and engraft it, by way of amendment, on that of the United States.<sup>93</sup>

Other state courts across the north also applied the Bill of Rights to state action and relied on similar constitutional assumptions. New Jersey, both before and after *Barron*, held the takings clause of the Fifth Amendment applicable. New Jersey also presents an interesting example of how courts addressed rights claims where a state either did not have a constitution or had a constitution that contained few rights provisions. The latter example is seen in New Jersey's 1776 constitution which announced its separation from Great Britain and provided the rudimentary frame of government, but did not contain a separate declaration or bill of rights. Outside of a general provision for the applicability of the common law until superseded by later state law, the 1776 New Jersey constitution only specifically listed the rights of religious freedom, the right of a jury trial, and the right of assistance of counsel in criminal prosecutions,

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<sup>91</sup> *Hoffman v. State*, 20 Md. at 434-435.

<sup>92</sup> *Hoffman v. State*, 20 Md. at 434.

<sup>93</sup> *Hoffman v. State*, 20 Md. at 432.

but little else.<sup>94</sup> While the subsequent constitution of 1844 corrected these omissions, New Jersey courts presented with rights claims before this time did not have the option of relying upon written provisions in the state constitution in order to locate rights. In *Scudder v. Trenton Delaware Falls Company* (N.J. 1832), the chancery court was presented with an appeal by a property owner whose riverfront property was damaged by the construction of a nearby dam.<sup>95</sup> The court viewed the damages to the property owner not as a temporary inconvenience, but as a permanent injury.<sup>96</sup> The property owner objected in part to the law allowing the construction of the dam as it took private property without a mechanism for providing compensation in an amount set by a local jury.<sup>97</sup> However, it was the court that cited the applicability of the Fifth Amendment, and held that private property could be taken for public use as long as compensation was made.<sup>98</sup> While the court ultimately refused the injunction as money damages could suffice to reimburse the property owner for damages, and did not require a jury trial to set the compensation, the court nonetheless held that compensation was required pursuant to the Fifth Amendment. For the *Scudder* court, the lack of a takings clause in the New Jersey constitution did not mean that the right of compensation did not exist as the Fifth Amendment enunciated the rule.

While *Barron* was decided a year after *Scudder*, the New Jersey Supreme Court had the opportunity to revisit almost the same issue six years after *Barron* was decided. In *Sinnickson v. Johnson* (N.J. 1839), the court reviewed the legality of a state law which allowed a property

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<sup>94</sup> New Jersey Constitution (1776), Articles 16, 18, 19, and 23. See also Gordon Wood, *The Creation of the American Republic*, 271, n. 21.

<sup>95</sup> *Scudder v. Trenton Delaware Falls Company*, 1 N.J. Eq. 694 (N.J. 1832).

<sup>96</sup> *Scudder v. Trenton Delaware Falls Company*, 1 N.J. Eq. at 710.

<sup>97</sup> *Scudder v. Trenton Delaware Falls Company*, 1 N.J. Eq. at 712.

<sup>98</sup> *Scudder v. Trenton Delaware Falls Company*, 1 N.J. Eq. at 712.

owner to dam a canal that was exclusively on his property.<sup>99</sup> In *Sinnickson*, the question before the court was whether this law provided a defense to the owner of the dam from damages alleged by his upstream neighbors.<sup>100</sup> Similar to *Scudder*, the absence of a state takings clause was immaterial. In fact, counsel for the defendant in *Sinnickson* attempted to distinguish those cases where private entities authorized by statute to make improvements were held liable for actual and consequential damages to owners of private property.<sup>101</sup> Counsel argued that those cases were decided by a reliance on the takings clauses of the various state constitutions. As New Jersey had no such provision, the legislature could exercise its sovereign power as only the constitution provided limits to check that power. The court, well aware of the *Barron* decision, held that *Barron* only meant that as a constitutional principle the Fifth Amendment did not apply. The court held *Barron* as irrelevant as the concept of only taking property upon providing a just compensation was “operative as a principle of universal law” and that the damages alleged by the neighboring property owners were proper.<sup>102</sup> For the court, the obligation to make payment for takings existed entirely separate from any constitutional pronouncements as was recognized by natural theorists like Pufendorf, Vattel, Montesquieu, by Blackstone, and by American jurists and theorists like Kent, Story, and Supreme Court justice Henry Baldwin.<sup>103</sup> For the *Sinnickson* court, this principle operated as an innate part of universal law that served as an essential counterbalance to the sovereign’s right to take property.

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<sup>99</sup> *Sinnickson v. Johnson*, 17 N.J.L. 129 (N.J. 1839).

<sup>100</sup> *Sinnickson v. Johnson*, 17 N.J.L. at 140.

<sup>101</sup> The cases were: *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. 162 (N.Y. 1816); *Crittenden v. Wilson*, 5 Cow. 165 (N.Y. 1825); and *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466 (Mass. 1815).

<sup>102</sup> *Sinnickson v. Johnson*, 17 N.J.L. at 142.

<sup>103</sup> *Sinnickson v. Johnson*, 17 N.J.L. at 141. The court cited Henry Baldwin’s circuit opinion in *Bonaparte v. Camden & A.R. Co.*, 3 F Cas. 821 (C.C. Dist. N.J. 1830) in support.

Finally, in 1841 the New Jersey Supreme Court was presented with a claim for damages against a canal company by a property owner who alleged that their improvements caused the river that flowed through his property to overflow and destroy his crops.<sup>104</sup> In *Ten Eyck v. the Delaware and Raritan Canal Co.* (N.J. 1841), the canal company defended the case with many of the same arguments made by the city of Baltimore in *Barron*, namely that they had been chartered by a legislative act of the state to take these actions, they did so in full compliance with the enabling law, and the damages suffered were non-compensable public damages.<sup>105</sup> Like the *Barron* trial court, the New Jersey Supreme Court did not find these arguments persuasive. While property was not actually taken, the court held that the owner had a “right to the advantages of these streams of water in their ordinary and natural flow” and that the interruption of these streams gave rise to an obligation to provide compensation for the damage.<sup>106</sup> While the right of eminent domain is an attribute of the state’s sovereignty, that right is limited by “principles of natural justice and equity” which demand compensation to the affected property owner.<sup>107</sup> The court did not locate the right to compensation in the New Jersey constitution, as such right did not appear, nor did it cite the Fifth Amendment. It simply held that the right of the sovereign to take property could only be exercised upon payment of compensation, as if such a rule were a given.

Across the river, New York courts also heard similar claims arising from takings of private property. In *People v. White* (N.Y. 1851), the Supreme Court of New York County was presented with a question of what happens to property taken by the state under its eminent

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<sup>104</sup> *Ten Eyck v. The Delaware and Raritan Canal Co.*, 18 N.J.L. 200 (N.J. 1841).

<sup>105</sup> *Ten Eyck v. The Delaware and Raritan Canal Co.*, 18 N.J.L. at 200.

<sup>106</sup> *Ten Eyck v. The Delaware and Raritan Canal Co.*, 18 N.J.L. at 201.

<sup>107</sup> *Ten Eyck v. The Delaware and Raritan Canal Co.*, 18 N.J.L. at 201.

domain powers when the public project is abandoned.<sup>108</sup> In *White*, land was taken by the state for the construction of a canal in 1819. By 1842, when railroads had surpassed canals as the preferred method of transportation, the state abandoned the canal but maintained that it still owned the property. Like the *Sinnickson* court, the *White* court held that the eminent domain power was an attribute of sovereignty that could only be exercised upon necessity and payment of just compensation. According to the court, this principle was recognized “throughout the civilized world” and cited Grotius, Pufendorf, Blackstone, and Kent in support.<sup>109</sup> Also similar to *Sinnickson*, the *White* court was aware of the *Barron* ruling which held the Fifth Amendment inapplicable to state action.<sup>110</sup> The court overcame the positive law obstacles with two arguments. First, the court countered *Barron* by holding that the takings clause of the Fifth Amendment “was only declaratory of a previously existing and universal principle of law.”<sup>111</sup> Second, the court was aware that when the taking occurred in 1819, the New York Constitution of 1777 which was in effect at the time did not contain a similar takings prohibition.<sup>112</sup> New York had a similar constitutional experience as New Jersey. Until revision in 1821, the 1777 New York constitution provided little in the way of rights guarantees.<sup>113</sup> The *White* court deflected this problem and held that the obligation that takings can only be had upon public necessity and just compensation was a principle recognized by court long before the provision

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<sup>108</sup> *People v. White*, 11 Barb. 26 (N.Y. 1851).

<sup>109</sup> *People v. White*, 11 Barb. at 28.

<sup>110</sup> *People v. White*, 11 Barb. at 28.

<sup>111</sup> *People v. White*, 11 Barb. at 28.

<sup>112</sup> *People v. White*, 11 Barb. at 28. The New York Constitution of 1821 incorporated a takings clause (Article VII, Section 7) as did the New York Constitution of 1846 (Article I, Section 6).

<sup>113</sup> The 1777 New York constitution provided for the right to a jury trial (Art. XLI) and religious freedom (Art. XXXVIII). New York Constitution (1777).

was placed into the 1821 state constitution. In support, the court cited Georgia Supreme Court Justice Hiram Walker's decision in *Young v. McKenzie* (Ga. 1847) which held the takings clause of Fifth Amendment as declaratory of a pre-existing common law right as well as the decision of Chancellor Kent of the New York Chancery Court in *Gardner v. Newburgh* (N.Y. 1816).<sup>114</sup> In *Gardner*, which was discussed in Chapter 5, the court set forth a view of rights as predicated largely on the idea that they existed as a matter of natural law. Chancellor Kent held that a property owner's right to the enjoyment of a stream that had been redirected was a right that could be found as far back as the Magna Charta. However, the obligation to make compensation for the redirection was a duty imposed on all governments as a matter of "natural equity."<sup>115</sup>

Similarly, the Pennsylvania Supreme Court also addressed the issue of the applicability of the Fifth Amendment. In *Ervine's Appeal* (Pa. 1851), the court struck down an act of the state legislature which ordered the sale of a decedent's property in contravention of the terms of the will.<sup>116</sup> According to the court, the due process clause of the Fifth Amendment prohibited the unilateral passage of a law which ordered the sale against the wishes of potential beneficiaries.<sup>117</sup> Due process required notice and an opportunity to be heard.<sup>118</sup> The court held that the Fifth Amendment and the similar clause in the Pennsylvania Constitution of 1838 (Article IX, Section 9) recognized this principle. The court did not address *Barron* or any argument holding the Fifth Amendment applicable only to the Federal government. Rather, the court simply assumed the applicability of the due principle clause as it was "an affirmation of a great doctrine contained in

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<sup>114</sup> *White*, 11 Barb. at 28; *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. 162 (N.Y. 1816).

<sup>115</sup> *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. at 164.

<sup>116</sup> *Ervine's Appeal*, 16 Pa. 256 (Pa. 1851).

<sup>117</sup> *Ervine's Appeal*, 16 Pa. at 263.

<sup>118</sup> *Ervine's Appeal*, 16 Pa. at 266.

Magna Charta.”<sup>119</sup> The due process clauses found in both the Federal and state constitutions “address themselves to the common sense of the people, and ought not to be filed away by legal subtleties. They have their foundations in natural justice, and, without their pervading efficacy, other rights would be useless.”<sup>120</sup>

There were courts in New England who also addressed rights claims in similar ways. In *Stone v. Dana* (Mass. 1842), the Massachusetts Supreme Court discussed the legality of a state statute regarding the requirements of a search warrant, and held that if the statute made significant changes to the search procedure, it would run afoul of the search and seizure protections of the Fourth Amendment as well as a similar provision in the state constitution.<sup>121</sup> Courts in the western states also followed a similar view of rights. In *Stein v. State* (Mo. 1828), a Missouri law allowed justices of the peace to try and sentence persons charged with breach of the peace offenses without the necessity of a grand jury indictment.<sup>122</sup> In assessing the legality of this law, the Court looked to the due process clause of the Fifth Amendment as well as a similar provision in the Ohio Constitution. In order to determine the meaning of these provisions, the Court looked solely to Chancellor Kent who, in his recently published *Commentaries*, held that the rights of personal liberty that were written into all American constitutions derived their basis from the Magna Charta and similar acts of the English Parliament.<sup>123</sup> Thus, the meaning of the “law of the land” provisions of the due process clauses in both the state and Federal constitutions derived its meaning from English precedents. According to Kent, due process required

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<sup>119</sup> *Ervine's Appeal*, 16 Pa. at 263.

<sup>120</sup> *Ervine's Appeal*, 16 Pa. at 263.

<sup>121</sup> *Stone v. Dana*, 46 Mass. 98, 102 (Mass. 1842)

<sup>122</sup> *Stein v. State*, 2 Mo. 67 (Mo. 1828)

<sup>123</sup> *Stein v. State*, 2 Mo. at 67. The first volume of Kent's commentaries was in 1826, two years before the *Stein* opinion. See Carl F. Stychin, “The Commentaries of Chancellor James Kent and the Development of an American Common Law,” *The American Journal of Legal History*, Vol. 37, No. 4 (Oct., 1993): 440, 443.

presentment of charges by way of an indictment by a grand jury. These rules of due process were incorporated into both the Fifth Amendment as well as the Missouri constitution.<sup>124</sup>

In *McArthur v. Kelly and Williams* (Ohio 1831), the Ohio Supreme Court was presented with an appeal from a property owner who sought an injunction to keep the local canal commissioners from digging a water course over his property to supply water to a newly constructed canal.<sup>125</sup> In reviewing the state law which gave the commissioners authority to create these water courses, the Ohio Supreme Court was guided by two principles. While a government can exercise its eminent domain powers for the greater welfare, it can only take property for (1) a public use and (2) upon a just compensation to the owner, as recognized by the Ohio Constitution and the Fifth Amendment. For the court, the obligation to pay for private property taken for a public use is a “fundamental principle of which our constitutions are only declarative, that when the government takes private property for public use, full compensation shall be made to the owner.” Citing Vattel: “the laws of nations require it.”<sup>126</sup> For the Court, Chancellor Kent was also persuasive as the court held his opinion in *Gardner v. Newburgh* (N.Y. 1816) as dispositive.<sup>127</sup>

In *Rhinehart v. Schuyler* (Ill. 1845), the Illinois Supreme Court was presented with an appeal from a debtor whose property was sold to satisfy an outstanding tax bill.<sup>128</sup> The debtor argued that the law was unconstitutional as it violated the Illinois Constitution (1818).<sup>129</sup> While

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<sup>124</sup> *Stein v. State*, 2 Mo. at 67.

<sup>125</sup> *McArthur v. Kelly and Williams*, 5 Ohio 139 (Ohio 1831).

<sup>126</sup> *McArthur v. Kelly and Williams*, 5 Ohio at 143.

<sup>127</sup> *McArthur v. Kelly and Williams*, 5 Ohio at 143-144.

<sup>128</sup> *Rhinehart v. Schuyler*, 7 Ill. 473 (Ill. 1845).

<sup>129</sup> Specifically, the appellant argued that the sale violated three provisions of the Illinois Constitution (1818). First, it violated Article VIII, Section 11 which contained a provision similar to the takings clause of the Fifth

the appellant only made a state constitutional argument, possibly informed by the *Barron* decision made a decade earlier, the Court did not feel so constrained. The court equated the phrase “due process of law” contained in the Fifth Amendment with the phrase “law of the land” contained in the Illinois constitution. The court held that “in this respect” the U.S. Constitution is “obligatory on all the States of the Union...”<sup>130</sup> The court ultimately held the law authorizing the sale constitutional, but nonetheless did so by viewing the rights of due process as universal and not subject to jurisdictional limitations. For the court, the right that one’s property can be taken only by following the dictates of law was a right “secured by his Anglo-Saxon forefathers by magna charta. . .”<sup>131</sup>

These opinions evidence the existence of a wide range of opinions regarding the basis for the rights guaranteed in the Bill of Rights. Courts across the country were presented with rights claims, from takings without compensation, to double jeopardy, to due process objections. Likewise, judges faced with these claims had a variety of interpretations of where these rights existed. If we revisit the opinion of the *Barron* trial court, the decision in favor of Barron and Craig falls along the same spectrum. There, the judge, Stephenson Archer, recognized that the rights of property included the duty to use it in a manner that was not detrimental to others.<sup>132</sup> While Judge Archer recognized that certain damages were *damnum abseque injuria* (an injury

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Amendment. Second, he argued that it violated Article VIII, Section 8 of the which contained the language similar to Section 39 of the Magna Charta, “That no freeman shall be imprisoned or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.” Third, the appellant argued that it violated Article VIII, Section 20 which provided that property taxes be determined by land value, which the appellant argued was violated as his property was either exempt or that the law in question allowed for an arbitrary method of valuation. *Rhinehart v. Schuyler*, 7 Ill. at 473.

<sup>130</sup> *Rhinehart v. Schuyler*, 7 Ill. at 504.

<sup>131</sup> *Rhinehart v. Schuyler*, 7 Ill. at 504.

<sup>132</sup> Judge Stephenson Archer, reprinted in *The American Jurist and Law Magazine*, Vol. 4 (October, 1829): 203, 205.

without a remedy) as well as noted the importance of the common welfare rule *salus populi est suprema lex* (the welfare of the people is the supreme law), he held regardless that “justice seems to demand that he whose property has fallen a victim to the public service be compensated in some way.”<sup>133</sup> Regardless that there was no intent or malice to destroy Barron and Craig’s wharf, Judge Archer held that the people of the city of Baltimore re-graded these streets for their benefit and, as a result, should be held liable to reimburse them for the damages<sup>134</sup>

Judge Archer found the city of Baltimore liable for damages in a manner very similar to the *Barron* “contrarians.”<sup>135</sup> While he acknowledged that “it seems to be a matter of doubt whether these [Bill of Rights] amendments are not solely restrictive of the general government,” Archer adhered to a view that the Bill of Rights did not grant rights, but rather enunciated those rights that the people already possessed. Second, Archer posited that the framers intended the Bill of Rights “to secure to the *people* of the Union, as one nation, certain rights essential to their existence as a free government, and the infringement of [these rights] which, in any one state, would hazard its durability as a free state.” (Emphasis supplied).<sup>136</sup> Archer cited William Rawle’s treatise on the U.S. Constitution, originally published in 1825, where he wrote his interpretation of its various articles and sections, including the powers granted to the Federal government as well as its restrictions. Amar criticizes Rawle’s interpretation as one of “negative-implication” by arguing that since the First Amendment begins with a specific limitation on the Federal government, “Congress shall make no law . . .,” the remainder of the

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<sup>133</sup> Archer, *The American Jurist and Law Magazine*, 205-206; William Novak, *The Peoples’ Welfare: Law & Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996), 9, 128.

<sup>134</sup> Archer, *The American Jurist and Law Magazine*, 212.

<sup>135</sup> Archer, *The American Jurist and Law Magazine*, 212.

<sup>136</sup> Archer, *The American Jurist and Law Magazine*, 211. Judge Archer stated that he believed specifically that the Second, Third, Fourth, Fifth, and Eighth Amendments cannot be abridged by any state; however, not the First.

Amendments which did not contain any such limitation were intended to apply to the states, further noting that this “negative-implication” theory was implicitly denounced in *Barron* by Marshall’s reliance on Article I, section 9.<sup>137</sup> However, Rawle did not simply rely on this one interpretation alone to support his argument. Rather, he set forth explanations that are both textual and extra-constitutional. For example, Rawle investigated the limits on power contained in the body of the Constitution, such as the prohibition on laws passing ex post facto laws or those constituting bills of attainder which operate to restrain both the Federal and state governments, as set forth in Article I, sections 9 and 10 respectively.<sup>138</sup> However, Rawle held that Article I, section 10 was not the only part of the Constitution which constrained the states as the Bill of Rights Amendments also largely applied to both levels of government. With respect to the First Amendment, he recognized that the text itself specifically referenced that Congress was prohibited from passing certain laws and not the state legislatures. While Rawle appreciated that limitation, he noted that the remaining amendments did apply to the states as well as the Federal government not simply because they did not contain the prefatory term limiting it just to Congress, but that since these rights were incorporated as amendments to the Constitution they “form[ed] parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them.”<sup>139</sup> In support, Rawle cited the Tenth Amendment’s delineation of powers in the Federal system which held the powers not specifically delegated to Congress reserved to the states or the people for the proposition that the people, in their capacity

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<sup>137</sup> Amar, *The Bill of Rights*, 146.

<sup>138</sup> William Rawle, *A View of the Constitution of the United States of America*, Chapter X (Philadelphia, 1829), [www.constitution.org/wr/rawle\\_10.htm](http://www.constitution.org/wr/rawle_10.htm), last accessed February 23, 2010; U.S. Constitution, Art. I, Sec. 9, 10.

<sup>139</sup> Rawle, *A View of the Constitution of the United States of America*, 5.

as citizens of a nation, have certain rights that neither the Federal nor state governments can infringe.<sup>140</sup>

Thus, Archer's decision tracks a similar logic that was followed by many jurists of the era. Archer felt that constitutions declared rights that existed at common law, entirely separate from the documents themselves. In addition, Archer held the rights set forth in the Bill of Rights as those secured to the people, not the respective state governments. As we have seen, Archer continued a line of thought that began at the Constitutional Convention, where many felt that a national sovereign people were creating a new government of the "United States" that would fundamentally alter the prior confederation of wholly separate sovereign states. These jurists maintained the ideological tradition of holding certain rights fundamental to the people and outside the realm of the government.<sup>141</sup> Whether the Bill of Rights applied to the states did not get to the heart of the matter. Many of the *Barron* "contrarians" and even Judge Archer, who ruled in favor of Barron and Craig in the trial court phase, entertained doubts about whether the Bill of Rights applied to state action.<sup>142</sup> However, that question was immaterial. Placing the right to compensation for takings of private property did not mean that this right existed in the Constitution exclusively. Rather, they viewed the Fifth Amendment as simply recognizing the existence of the right.

Finally, we can view Justice Marshall's own jurisprudence for insight regarding how a positive law opinion like *Barron* was even possible from the person who is known most for his advocacy of a strong national union. A decision which held that the states did not have to

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<sup>140</sup> Rawle, *A View of the Constitution of the United States of America*, 5.

<sup>141</sup> Other scholars have also engaged Amar's interpretation of the *Barron* contrarians. Their views are discussed more fully in Chapter 1.

<sup>142</sup> Archer, *The American Jurist and Law Magazine*, 211.

observe the guarantees of the Bill of Rights appears out of place when we consider the breadth of Marshall's jurisprudence. However, if we consider the evolution of Marshall's opinions from *Marbury* (1803) to his final written decision in *Barron* (1833), we may be able to better explain the discrepancy. Over the span of his time as Chief Justice, the forcefulness and authority of his decisions gradually lessened for two decades due to judicial succession and the effects of presidential, namely Jacksonian, politics on the Court. If we return to the beginning of Marshall's judicial career in *Marbury*, we see Marshall asserting the right of the Supreme Court to hold legislative acts unconstitutional.<sup>143</sup> Marshall eloquently described the basis for this power by describing the purpose of a constitution:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, are deemed *fundamental*. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent” (Emphasis supplied).<sup>144</sup>

With respect to altering the Constitution, “...there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.”<sup>145</sup>

The language in this famous opinion is well known. But compare it to the opinions of *Barron* “contrarians,” like Justice Lumpkin of the Georgia Supreme Court. For example, in *Campbell v. Georgia* (Ga. 1852), Lumpkin used logic much like *Marbury* when confronted with the issue of whether the Sixth Amendment's right to confront one's accuser applied to the

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<sup>143</sup> *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

<sup>144</sup> *Marbury v. Madison*, 5 U.S. at 176.

<sup>145</sup> *Marbury v. Madison*, 5 U.S. at 177.

states.<sup>146</sup> In regard to whether the Bill of Rights applies, Lumpkin conceded that the question, specifically referring to *Barron*, was unsettled but that nonetheless,

governments are not clothed with absolute and despotic power; but that independently of written constitutions, there are restrictions upon which the legislative power, growing out of the nature of the civil compact and the natural rights of man. And that, when certain boundaries are overleaped and a law passed subversive of the great principles of republican liberty and natural justice – as for instance, taking away without cause, and for no offence, the liberty of the citizen – that it would become the imperative duty of the Courts, to pronounce such Statute inoperative and void.<sup>147</sup>

Both Lumpkin in 1852 and Marshall in 1803 were setting forth very much the same propositions, that there were limits to the legislative power and it is the duty of the courts to ensure the fundamental liberty of the citizens in the event those limits are breached.

We can compare the language used in *Marbury* and *Campbell to Barron*, written thirty years after *Marbury*. In *Marbury*, Marshall bravely and radically set forth the equality of the judiciary in order to act as a guardian against encroachment from the legislature, much in the same ideological vein as Justice Lumpkin. However, thirty years later in *Barron*, Marshall veered sharply into the perspective of rights as given or taken away by positive enactments of legislators. After reading sections 9 and 10 of Article I which place limitations of the powers of the Federal and state governments, respectively, Marshall determined that all limitations on the states must be specifically set forth in the Constitution, strictly construing that “if, in every inhibition intended to act on state power, words are employed, which directly express that intent;

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<sup>146</sup> *Campbell v. Georgia*, 11 Ga. 353 (Ga. 1852). The specific issue in *Campbell* concerned the admissibility of a dying declaration during the trial of the appellant, James Campbell, for homicide. The trial court allowed the testimony of a witness who alleged that the victim told the witness that Campbell had perpetrated the crime, resulting in Campbell’s conviction. Upon appeal to the Georgia Supreme Court, Campbell argued that the testimony should have been excluded as violating the Sixth Amendment, while the State argued, in part, that the Sixth Amendment applied only to the Federal government. While Justice Lumpkin agreed with the State that the testimony was admissible as it was made in anticipation of imminent death, he took the opportunity to expound on the admissibility of the Bill of Rights that he began with *Nunn v. Georgia*, 1 Kelly 243 (Ga. 1846).

<sup>147</sup> *Campbell v. Georgia*, 11 Ga. at 363.

some strong reason must be assigned for departing from this safe and judicious course, in framing the amendments, before that departure can be assumed. We search in vain for that reason.<sup>148</sup>

What caused this evolution? Given the context of the nullification crisis of the 1830's as well as the rise in abolitionist sentiment and the resulting demands for greater first amendment protection, it is plausible to believe that these contemporaneous events caused Marshall to make a political decision. Indeed, we can connect much of Marshall's jurisprudence to its historical context. The grandeur and vision of Marshall's decisions waned as the country had changed and his career neared its end. The bold declarations of judicial power proclaimed at the outset of his career as Chief Justice in *Marbury* were no longer there in *Barron*, which was his final opinion written in the twilight of his career and life. Marshall's tenure as Chief Justice has been divided by some historians into three phases: first, from 1801 through 1811, when Marshall dominated the decisions and direction of the Court; next, from 1811 through 1823, when he was forced to share power and compromise more in order to keep consensus, but clearly retained his role as the leader of the Court; and, finally, from 1823 through his death in 1835, the time period of the *Barron* decision, when Marshall was forced to become increasingly accommodating in order to attempt to maintain control.<sup>149</sup> Although the exact dates of this trilogy are not universally agreed upon, it appears that Marshall's role in controlling of the direction of the Court became increasingly marginalized beginning in the 1820's.<sup>150</sup>

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<sup>148</sup> *Barron v. Baltimore*, 32 U.S. at 249.

<sup>149</sup> Hall, *The Oxford Companion to the Supreme Court*, 526.

<sup>150</sup> For example, both William Wiecek and William Swindler divide Marshall's tenure into only two main segments, using his 1824 opinion in *Gibbons v. Ogden* as the end of his dominance over the Court. William Wiecek, *Liberty Under Law: The Supreme Court in American Life* (Baltimore: Johns Hopkins Press, 1988), 53; William F. Swindler, *The Constitution and Chief Justice Marshall* (New York, 1978), 21.

The first third of Marshall's tenure was marked by great success such as his opinion in *Marbury v. Madison* where he took control of the Court and established the equality of the judicial branch of the Federal government by enunciating the Court's power of judicial review.<sup>151</sup> Seven years later, in *Fletcher v. Peck*, Marshall interpreted the Constitutional prohibition against state impairment of contracts contained in Article I, Section 10.<sup>152</sup> The second stage of Marshall's tenure began with the 1811 appointment and confirmation of Joseph Story of Massachusetts by President Madison. Historians attribute the consensus building aspect of this stage to the combination of the equally willful Story and William Johnson, who had been appointed by President Jefferson in 1804.<sup>153</sup> Nonetheless, finding an unusual ally in the republican-appointed Story, Marshall continued to produce decisions that built on *Marbury* and *Fletcher* and furthered Marshall's tradition of consolidating and expanding the power of the Federal government, regardless of the republican sentiments of the White House.

For example, in *Trustees of Dartmouth College v. Woodward*, Marshall again cited the Constitutional prohibition in Article I, Section 10 against state impairment of contracts and held that the royal charter granted by Parliament in 1769 to establish Dartmouth as an institute to educate and convert Indians was, in fact, a contract that the State of New Hampshire in 1816 was impairing as a result of its actions in seeking to reform the administration and direction of the

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Donald Morgan divided the Marshall Court into five separate periods (1801-1804, 1805-1811, 1812-1823, 1824-1829, and 1830-1833). However, Morgan's segments roughly relate to Wiecek and Swindler's dual stage analysis or the trilogy cited above as he asserts the 1812-1823 period as "easily the most notable" and the period beginning in 1824, citing *Gibbons v. Ogden*, as "one of transition," reserving the most difficult period for Marshall until the last segment beginning in 1830. Donald Morgan, "Marshall, the Marshall Court, and the Constitution," in *Chief Justice John Marshall: A Reappraisal*, ed. W. Melville Jones (Ithaca, N.Y., 1956), 171-183. Regardless of the particular timeline, it appears that most scholars consider the *Gibbons* decision the end of Marshall's dominant period over the Court.

<sup>151</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>152</sup> *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

<sup>153</sup> Hall, *The Oxford Companion to the Supreme Court*, 526.

school.<sup>154</sup> Approximately one month later, in *McCulloch v. Maryland*, Marshall upheld the right of the Federal government to charter the Second Bank of the United States through the “necessary and proper” clause of Article I, Section 8, thus establishing the doctrine of implied powers and insuring that the Federal government would not be limited, such as the government established by the Articles of Confederacy, to *only* those powers specifically enumerated in the text of the Constitution itself.<sup>155</sup> In *Sturges v. Crowninshield* (1819), Marshall held a New York State bankruptcy law which granted the discharge of debts incurred from contracts executed prior to the enactment of the law unconstitutional as it modified the terms of contracts that existed at the time that the statute was enacted, in violation again of Article I, Section 10’s prohibition against state impairment of contracts.<sup>156</sup> Finally, in 1821, in *Cohens v. Virginia*, Marshall did not hesitate to reprimand his own home state, Virginia, and reaffirm the appellate jurisdiction of the Supreme Court over state court decisions as not barred by the Eleventh Amendment.<sup>157</sup>

However, it is the last phase of Marshall’s tenure, from 1823 through his death in 1835, on which we should focus in order to attempt to find new meaning behind *Barron*, Marshall’s final

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<sup>154</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819)

<sup>155</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>156</sup> *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

<sup>157</sup> *Cohens v. Virginia*, 19 U.S. 264 (1821). The Eleventh Amendment provides that “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The Eleventh Amendment was proposed (1794) and ratified (1795) in response to the Supreme Court decision in *Chisholm v. Georgia*, 2 Dallas 419 (1793). In this case, Chisholm served as the executor of an estate of a South Carolina resident who supplied the state of Georgia with materials to help fight the Revolutionary War. Chisholm sued the state of Georgia in Federal court to recover payment for these goods for the estate. The Supreme Court, under Chief Justice John Jay, held that Federal courts had jurisdiction to hear such cases, ruling against the state of Georgia who argued that its inherent sovereignty precluded the claim. The extreme backlash to this decision prompted the move toward the adoption of the Eleventh Amendment which disallowed such cases. *Documents of American Constitutional and Legal History*, Vol. I, ed. Melvin Urofsky and Paul Finkelman (New York: Oxford University Press, 2002), 130-131.

opinion. According to William Wiecek, the final decade of Marshall's term "was a time of frustration, accommodation, and reluctant concession. With one exception, the constitutional decisions of the Marshall Court after 1824 either fell short of the nationalist scope of the earlier opinions, or met with severe resistance. And even that one exception – *Craig v. Missouri* (1830), in which Marshall struck down a state note issued under the Bills of Credit clause of Article I, Section 10 – was soon evaded by the Taney Court."<sup>158</sup>

In 1824 in *Gibbons v. Ogden*, which has been described as Marshall's "last great opinion," the Court was faced with the constitutionality of a New York statute granting a monopoly to Robert Livingston and Robert Fulton to operate steamships within the navigable waters of the State.<sup>159</sup> Livingston and Fulton later licensed this right to the partnership of Aaron Ogden and Thomas Gibbons. After an acrimonious dissolution of the partnership, Ogden retained the rights under the New York monopoly, but Gibbons obtained a Federal license to operate the line.<sup>160</sup> After repeated enjoinder of the Gibbons line as a result of Ogden's exclusive rights to the monopoly by the New York State courts, the case came before the Supreme Court where it had to decide between the two permits, Ogden's exclusive State permit or Gibbons' Federal license. This question of which license was superior gave Marshall a platform from which he could expand the Federal powers by an opinion giving an expansive reading to the Commerce Clause of Article I, Section 8. As could be expected, Marshall took aim, at least initially.

Marshall acknowledged that the Constitution created a Federal government of enumerated powers, but asked, with respect to the power of Congress to enact its enumerated powers through

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<sup>158</sup> Wiecek, *Liberty Under Law*, 53.

<sup>159</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824); Wiecek, *Liberty Under Law*, 50.

<sup>160</sup> Irons, *A People's History of the Supreme Court*, 131; *An Act for Enrolling and Licensing Ships...in the Coasting Trade and Fisheries*, 1 Stat. 302, Ch. VIII, Feb. 18, 1793, cited in Swindler, *The Constitution and Chief Justice Marshall*, 330.

the “necessary and proper” clause of Article I, Section 8, “It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule?”<sup>161</sup> Marshall held that the power of Congress to regulate commerce governed the matter but also used this opinion to expound on the extent of the commerce clause by famously responding to those who believe that this power is to be strictly construed, famously writing that,

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested, but refined and metaphysical reasoning...explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.<sup>162</sup>

Although Marshall recognized the right of a state to use its police power to regulate its internal affairs, the validity of such law still depended on whether it interfered with “an act of congress passed in pursuance of the constitution” and where such a conflict existed, the state law was invalid because “the constitution is the supreme law.”<sup>163</sup>

Although *Gibbons* appears in line with Marshall’s pro-Federal jurisprudence, holding the state regulation as pre-empted by Federal statute and building common law precedent by asserting the expansive power of the commerce clause, Wiecek noted that Marshall “waffled, uncharacteristically” when discussing Federal superiority.<sup>164</sup> Instead of simply asserting that the Federal government had exclusive power over interstate commerce, regardless of whether Congress had actually legislated in a particular area, “it seems reasonably clear that he

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<sup>161</sup> *Gibbons v. Ogden*, 22 U.S. at 187.

<sup>162</sup> *Gibbons v. Ogden*, 22 U.S. at 222.

<sup>163</sup> *Gibbons v. Ogden*, 22 U.S. at 210-211.

<sup>164</sup> Wiecek, *Liberty Under Law*, 52.

[Marshall] recognized that, though commerce must be regulated by Congress, local interests pressed for and required recognition.<sup>165</sup> Similarly, five years later in *Willson v. Black-Bird Creek Marsh Company* (1829), we can see that Marshall continued this line of thought.<sup>166</sup> In *Willson*, the owners of a sloop were sued for to recover damages to a dam built across a Delaware river.<sup>167</sup> The defendants appealed the decision on the ground that the river was a public highway and that the state had violated the Federal commerce clause by authorizing the dam which blocked public navigation. Much like his decision in *Gibbons*, Marshall held that Delaware could exercise this authority because the Federal government had not passed any law regarding traffic or commerce on the river. Thus, the law which authorized the dam was constitutional as Delaware did not impede on the dormant Federal commerce power.<sup>168</sup>

Wiecek surmises that Marshall was so “mealy-mouthed” when failing to simply endorse Federal supremacy over commerce in *Gibbons* because of a “hidden controversy” lurking under the surface of the opinion: slavery.<sup>169</sup> Wiecek further implies that Marshall may have recognized the growing gap between the Federal government and the states as exemplified by the slavery question.<sup>170</sup> To support this contention, Wiecek cites *Elkison v. Deliesseline*, a United States Circuit Court opinion, decided by Justice William Johnson while on circuit, from the year before which held unconstitutional the South Carolina Negro Seaman’s Act as a violation of the Federal

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<sup>165</sup> George L. Haskins, “Marshall and the Commerce Clause of the Constitution,” in *Chief Justice John Marshall: A Reappraisal*, ed. W. Melville Jones (Ithaca, N.Y.: Cornell University Press, 1956), 155.

<sup>166</sup> *Willson v. Black-Bird Creek Marsh Company*, 27 U.S. 245, 2 Pet 245 (1829).

<sup>167</sup> *Willson v. Black-Bird Creek Marsh Company*, 27 U.S. at 246.

<sup>168</sup> *Willson v. Black-Bird Creek Marsh Company*, 27 U.S. at 252.

<sup>169</sup> Wiecek, *Liberty Under Law*, 52.

<sup>170</sup> Wiecek, *Liberty Under Law*, 52.

power to regulate commerce under Article I, Section 8.<sup>171</sup> Wiecek argues that, as a result of the extreme backlash against the strong Federal position in *Elkison*, when *Gibbons* came before the Court one year later, Marshall recognized the issue of slavery lurking behind Commerce clause cases as a critical dispute that precluded what would normally have been a routine decision where Marshall would expand the Federal commerce power to its fullest extent.<sup>172</sup> R. Kent Newmyer and Herbert Johnson both agree with Wiecek, in part, that *Gibbons* left some autonomy to the states as a result of Marshall's recognition of the growing power of the rising states' rights movement, but are silent as to whether the slavery issue was a determinative factor.<sup>173</sup>

After *Gibbons*, Wiecek further noted that Marshall not only continued to fail to press his Federalist beliefs as he had so forcefully done in past cases, but in fact began to chip away at his own precedent.<sup>174</sup> Three years later, as seen in *Ogden v. Saunders*, the Court showed "Signs of the ending of the Marshall Court's activism, either through the aggressiveness of the Jacksonian administration as in the Cherokee cases or the breaking up of the old judicial consensus with Justice [Smith] Thompson [replacing Marshall ally Henry Brockholst Livingston in 1824], were clear to see in the 1830's."<sup>175</sup> In *Ogden*, the Court, in a four to three opinion written by Justice William Johnson, held a New York State bankruptcy law Constitutional because it only applied

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<sup>171</sup> Wiecek, *Liberty Under Law*, 52. The Negro Seaman's Act required free blacks sailors arriving in South Carolina to remain on their ships; otherwise, the sailor would be detained if he came on land until such time as his ship departed. Further, the captain of the ship would also be required to pay all costs of the sailor's detention and, if refused, the sailor would be sold as a slave to recoup those costs. *Id.*

<sup>172</sup> Wiecek, *Liberty Under Law*, 52-53.

<sup>173</sup> R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, (Baton Rouge, La., 2001), 314-315; Herbert A. Johnson, "Federal Union, Property, and the Contract Clause: John Marshall's Thought in Light of *Sturges v. Crowninshield* and *Ogden v. Saunders*" in *John Marshall's Achievement: Law, Politics, and Constitutional Interpretations*, ed. Thomas C. Shevory (Westport, Conn.: Greenwood Press, 1989), 48.

<sup>174</sup> Wiecek, *Liberty Under Law*, 54.

<sup>175</sup> Swindler, *The Constitution and Chief Justice Marshall*, 21.

prospectively and did not alter contracts retrospectively as did the New York bankruptcy law held unconstitutional in *Sturges v. Crowninshield*.<sup>176</sup>

To come full circle, the positive law interpretation of rights enunciated in Marshall's *Barron* opinion does not even fit comfortably within his own jurisprudence, much less with the opinions of contemporary state and Federal judges who did not envision rights in the same fashion. Many courts evidenced a judicial philosophy that valued the primacy of the common law or of natural law in deciding cases rights cases. Of course, many courts also adjudicated rights cases with the same positivist logic as Marshall in *Barron*. This is not to attempt to state that one interpretation is more correct than another. Certainly, the *Barron* logic appears "right" from our modern perspective, but advocating that interpretation as proof of its correctness to the exclusion of all others is a teleological mistake. As was shown in Chapters 4 and 5, the concept of where rights obtained their authority was never an all or nothing question. Rather, the answers to this question formed an ideological spectrum instead of a binary. On one end, we see rights as emanating from natural or universal law or equity. In the middle, there was the less ambiguous idea of the common law as the source of rights. While many liberties are conceptualized as the birthright of Englishmen, the source of these rights can be traced to documents like the Magna Charta, to other documents that collectively make up the English constitution, or to centuries of judicial pronouncements. Finally, on the opposite end of the spectrum, we see the newer positivist ideology that held that written constitutions themselves must be invoked in order to assert a right. Thus far, this dissertation has explored these larger debates regarding where rights obtained their authority. However, we will now shift to examine the some of the reasons that these debates occurred. This study finds that *Barron* fits within a set

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<sup>176</sup> *Ogden v. Saunders*, 25 U.S. 213 (1827); *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

of much larger transformations that were occurring in the United States at the time. First, the U.S. was attempting to work out the proper balance between the Federal and state governments, which Justice Marshall feared was devolving into a collection of states instead of a Federal union. Second, the country was forced to confront the realities of enacting popular sovereignty and the question of where final authority rested within such a system. *Barron* speaks to both of these transformations.

## CHAPTER 7 SOVEREIGNTY

“Many people of the United States are ‘out of joint.’ A spirit of riot or a disposition to ‘take the law into their own hands,’ prevails in every quarter,” warned an 1835 newspaper article which proceeded to list over thirty separate incidents of rioting, mobbing, and lynching occurring across the United States from New Orleans to Lynn, Massachusetts.<sup>1</sup> The early republic witnessed numerous incidents where people did not look to the courts or the government to redress grievances, settle private scores, enforce community norms, or to abate nuisances. Instead, people often took action themselves, from community leaders seeking to silence abolitionist tracts by a local printer, to a neighborhood tearing up unwanted and dangerous railroad tracks, to the murder of a man who had dishonorable premarital sexual relations with a young girl.<sup>2</sup> Taken together, these individual and collective actions can be viewed as the exercise of extralegal authority by non-governmental actors. However, at a more fundamental level, what defines these actions as extralegal? Answering this question requires us to reevaluate our ideas of who makes, interprets, and enforces law. To put it another way, it requires us to consider who possesses sovereign power, as an essential attribute of sovereignty is the power to make law and enforce discipline upon those found in violation.<sup>3</sup> Part of the answer lies in the struggle over the proper role of the people in a system of government predicated upon popular sovereignty. The actors in these events personally exercised their sovereign power, but did so by disregarding the formal legal mechanisms of the state. As we will see, these acts had larger

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<sup>1</sup> “Riots!,” *Niles Weekly Register*, August 22, 1835, 439.

<sup>2</sup> Elizabeth Dale, “Popular Sovereignty: A Case Study from the Antebellum Era,” *Constitutional Mythologies: New Perspectives on Controlling the State* (Alain Marciano, ed., forthcoming from Springer 2011); University of Florida Levin College of Law Research Paper No. 2009-17, available at SSRN: <http://ssrn.com/abstract=1361322>.

<sup>3</sup> See William Blackstone, *Commentaries on the Laws of England*, Vol. I (Chicago: University of Chicago Press, 1979), 46.

implications as their violent nature caused many to seek to strengthen the state as the vehicle through which sovereignty would be exercised. Popular sovereignty would exist, but would be channeled and moderated through the law making and enforcement apparatus provided by the state. Thus, these incidents can be viewed not simply as extralegal, but also as symbolizing an assertion of sovereignty by the people. These events evidence a common theme that many people were taking the idea of their own sovereignty seriously.

Up to this point, this dissertation has discussed the ways in which the concept of rights was being contested. We examined the newer tradition of rights as emanating from written constitutions that arose to complement the existing concepts of rights as protected by the wisdom and custom of the common law or by a more inchoate basis in fundamental or natural law. While so far we have examined this debate regarding where rights derived their authority, this study will now shift to explore a larger question: why was this debate taking place? This chapter concludes that struggles over defining and implementing popular sovereignty caused a re-evaluation in the conceptual location of where rights obtained their authority.

At a macro level, two ideological debates over sovereignty occurred simultaneously. The first concerned the balance of state power. The federal system created by the Constitution set forth a concept of dual governments covering the same geographic territory. How would dual sovereignty work? Which government was supreme and over what issues? What were the proper boundaries between Federal and state power? Rights were not only adjusted to deal with this new system of shared or dual sovereignty, but sovereignty itself was being redefined. The struggle to delineate the proper balance of power between the Federal and state governments is a well-known story. Indeed, it is a struggle that continues throughout American history. However, this struggle between the Federal and state governments still took place under an assumption of

state centered sovereignty. The second question raised an issue more fundamental than just federalism: ultimately, where did sovereignty reside? What form would popular sovereignty take in actual practice? Did sovereignty truly rest with the “people” or with their representatives in government more generally, regardless of whether it was at the Federal, state, or municipal level? The answer to this question was being worked out during this era. Ultimately, the question of whether sovereignty was to lie with the people or with the peoples’ representatives, the state, caused a reevaluation in the concept of rights because sovereignty and rights are inseparable concepts. One cannot undergo an ideological revision without redefining the other.

### **Transformations of Sovereignty – Federalism**

First, the practical balance of the system of dual sovereignty that is a hallmark of the U.S. federal system was one of those founding era questions that had to be worked out in practice. Marcus Dirk Dubber describes this first transformation of sovereignty in the United States where the new nation struggled to define the proper balance between the Federal and state governments. Dubber locates the origins of federalism by noting the conceptual problems encountered when a king or other sovereign absorbed a smaller political governing unit, particularly regarding how the smaller unit could be preserved in any capacity following integration into the kingdom.<sup>4</sup> Dubber argues that following the Revolution, the states had to address these same issues when attempting to create a federal union without destroying state governing authority.<sup>5</sup> In order to maintain any semblance of governing power by the states, the states absolutely had to have police power; without such power, Dubber argues, “the states could

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<sup>4</sup> Dubber, *The Police Power*, 44.

<sup>5</sup> Dubber, *The Police Power*, 44.

not continue as separate institutions of governance: to surrender the police power, literally, was to surrender the right, and the power, of self-preservation.”<sup>6</sup>

In August of 1829, William Thompson, captain of the ship *Emily*, sailed into New York Harbor with a cargo of one hundred immigrants arriving for the first time to America.<sup>7</sup> While immigrants such as these embarked for a new life in America, officials of the city of New York were not always pleased at their arrival. In 1824, in an attempt to stem the flow of mostly indigent Irish immigrants, the city passed a statute that mandated that the master of every ship entering New York from a foreign port, within twenty-four hours, provide a written report of all persons disembarking.<sup>8</sup> This report was to include the name, place of birth, last legal settlement, age, and occupation of every passenger landing at the Port of New York.<sup>9</sup> The master of the ship was also required to post a bond of up to \$300.00 to cover expenses in the event any of these immigrants became an indigent charge upon the city within two years of their arrival.<sup>10</sup> Failure to provide such a report would subject the master and commander, the owner, consignee or consignees, to monetary penalties of \$75.00 for each passenger not reported, or for every person whose biographical information was falsely reported.<sup>11</sup>

In *Miln*, the city assessed penalties of \$15,000.00 for failing to submit the required report. *Miln* contested the assessment on the grounds that the law was an unconstitutional infringement

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<sup>6</sup> Dubber, *The Police Power*, 44.

<sup>7</sup> *New York v. Miln*, 36 U.S. 102, 131 (1837).

<sup>8</sup> Paul Finkelman, “The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations,” 4 *Barry Law Review*, 1 (2003): 15. While Finkelman posits that the law was designed primarily to protect against the flood of Irish immigrants, it is unclear whether the *Emily* originated from Ireland.

<sup>9</sup> *Miln*, 36 U.S. at 104.

<sup>10</sup> *New York v. Miln*, 36 U.S. at 105.

<sup>11</sup> *New York v. Miln*, 36 U.S. at 104-105; Finkelman, “The Root of the Problem,” 15.

upon the Federal Commerce Clause, which reserves to Congress the right to regulate foreign and interstate commerce.<sup>12</sup> When the case finally reached the Supreme Court, during Justice Roger Taney's first term, the Court upheld the New York law and held that it did not interfere with commerce and thus did not violate the Commerce Clause, ruling that it was a permissible state police power function.<sup>13</sup> Paul Finkelman rightly notes that when the Supreme Court spoke of the state police power, it referred not simply to a notion of police as a modern law enforcement entity, but as representing a larger right of state and local governments to pass all laws necessary to protect the health, safety, and welfare of the citizenry.<sup>14</sup> The police power is tied up with notions of sovereignty, the right of a sovereign to enact regulations to ensure the common good. What we see in a case like *Miln* is a conflict over the boundaries of power within the federal system, with the Taney Court squarely behind the concept of balancing Federal power by enunciating the role of the state police power at the Federal level. While Dubber describes the role of police power as essential to maintaining the theoretical balance of a federal system, Finkelman argues that the Supreme Court specifically promoted the concept of state police power largely in order to protect slavery.<sup>15</sup> Finkelman tied the basis for the *Miln* opinion to growing sectional tensions over slavery, arguing that the Court was cognizant of the problems such as the Negro Seamen Laws enacted in South Carolina to keep black sailors from entering the state while their ships were docked.<sup>16</sup> Finkelman argues that the real message behind *Miln* was announce to the southern states that they could regulate who could enter their jurisdictions,

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<sup>12</sup> U.S. Const., Article I, Section 8, Clause 3.

<sup>13</sup> *New York v. Miln*, 36 U.S. at 152.

<sup>14</sup> Finkelman, "The Root of the Problem," 15.

<sup>15</sup> Finkelman, "The Root of the Problem," 15.

<sup>16</sup> Finkelman, "The Root of the Problem," 15.

notwithstanding the Commerce Clause or the precedent set forth in Marshall's *Gibbons v. Ogden* opinion.<sup>17</sup>

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<sup>17</sup> Finkelman, "The Root of the Problem," 15. Finkelman further notes that *Miln* represented the first time the Supreme Court expressly used the notion of state police power to recognize the validity of a state law. Before this time, state laws challenged on the grounds of repugnancy to the commerce clause were routinely overturned. However, the term "police power" and the concept were enunciated before *Miln*. In *Brown v. Maryland*, 25 U.S. 419 (1827), a Maryland law required all wholesale importers and sellers of foreign goods to purchase a \$50.00 license. The issues before the Court were: (1) did the law violate Article I, Section 10 prohibiting states from laying duties on imports/exports without the consent of Congress; and (2) was it repugnant to the Commerce Clause? Taney, arguing for the state of Maryland, held that the law did not constitute a tax on imports/exports, but was an occupational tax on the importers and sellers after the goods were within the state. Taney argued that this law was an incident of sovereignty and the right to tax remained with the states. If the law was struck down, what would prohibit an importer of gunpowder from selling it anywhere free from all attempts by the state to intervene? Marshall held this example spurious and stated that "the power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States." *Brown v. Maryland*, 25 U.S. at 443. While Marshall recognized the existence of a state police power, he held the law as repugnant to the Constitution as it constituted a levy on imports/exports, not a reserved state tax, and violated the Commerce Clause.

Indeed, the concept of police power existed in Federal jurisprudence earlier than *Miln*, both explicitly and implicitly. As noted above, *Brown v. Maryland* (1827) specifically used the term. Similarly, Marshall recognized the concept in *Gibbons v. Ogden* (1824). *Gibbons*, 22 U.S. at 81. In addition, there were cases that implicitly recognized the state police power such as in *Willson v. Black-Bird Creek Marsh Company*, 27 U.S. 245 (1829), which was discussed in Chapter 6.

*Miln* represents the first time the state police power was affirmatively recognized as a legitimate exception to the Commerce Clause, for example, but the concept was enunciated earlier. Taney seemed to exploit the failure of the Supreme Court to ever make a complete preemption argument and used that space to enunciate the police power concept. Finally, it appears that the whole line of cases including *Miln* held the police power as the exclusive province of the states. The issue was raised most often in relation to the Commerce Clause challenges and the tension between the two drove the analysis of whether a law was a permissible police power or an unconstitutional violation of the Commerce Clause (Article I, section 8). As there was no universal appreciation of the commerce power as exclusively residing with Congress, this provided space for the police power argument. Throughout the 1840's and 1850's *Miln* is cited mostly approvingly, along with *Gibbons*, *Willson*, and *Brown*. There are a number of cases where it is cited, but for interesting reasons. For example, *Thurlow v. Mass.*, 46 U.S. 504 (1847), Taney held three state laws limiting the purchase of liquor to wholesale quantities did not violate the Commerce Clause. The attorneys cited *Miln*, in addition to *Gibbons*, *Willson*, and *Brown*. Taney puzzlingly stated that "In the case of the *City of New York v. Miln*, 11 Pet., 130, the question as to the power of the States upon this subject [the relationship between the commerce clause and the state police power] was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court." *Thurlow v. Mass.*, 46 U.S. at 584.

This makes more sense if you look at *Smith v. Turner*, 48 U.S. 283 (1849), where Justice Wayne held that New York and Massachusetts laws which imposed taxes on alien passengers violated the Commerce Clause. Wayne stated that *Miln* was reported incorrectly. Wayne stated that four of the justices felt that *Gibbons* and *Brown* meant that the Federal government had exclusive commerce clause power, and three felt otherwise. Additionally, the justices split on what constituted "commerce" and whether that meant passengers in addition to goods. Justice Thompson was assigned the task of writing the decision on the grounds that the law was a constitutional police regulation. However, when he read the opinion, a majority of the justices did not agree with it over the extent of Congress' power to regulate commerce. *Smith*, 48 U.S. at 430-432.

Analyzing *Miln* with an eye to the Federal/state sovereignty tension, we can look at *Barron* in a new light. By focusing on a view of police power as a state, as opposed to Federal, function, we can see that a decision enunciating and preserving the police power as a prerogative of the states was critical to maintain the balance of the Federal system, as *Miln* recognized four years after *Barron*. First, by viewing rights as granted by the U.S. Constitution and then holding them inapplicable, the Marshall court reaffirmed the dual sovereignty prescribed to the states in the Federal system, as noted by Dubber. For example, Marshall held that “the constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.”<sup>18</sup> Marshall rejected the view that the Constitution secured the liberties of a broadly defined “citizen” against encroachment by any American government, Federal or state.<sup>19</sup>

To a great extent, *Barron* can be interpreted as Marshall’s commentary on the struggle between the Federal and state governments over the parameters of their respective sovereignties. Much of Marshall’s jurisprudence reflected personal and historic connections to contemporary events, but *Barron* seems out of place. The holding that the Bill of Rights did not bind the states has puzzled many, including one historian who viewed as “an extraordinary concession to state autonomy not compelled by the language of any of the original ten amendments except the first.”<sup>20</sup> Marshall’s *Barron* opinion is usually considered an uncharacteristic outlier to his pro-

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<sup>18</sup> *Barron v. Baltimore*, 243 U.S. at 247.

<sup>19</sup> *Barron v. Baltimore*, 243 U.S. at 247.

<sup>20</sup> William Wiecek, *Liberty Under Law: The Supreme Court in American Life* (Baltimore: Johns Hopkins Press, 1988), 54. For these interpretations of *Barron*, see Chapter One.

Federal jurisprudence. However, if we view the opinion within the context of the transformation of sovereignty required by American Federal system, the decision looks different.

Marshall's contemporaneous personal correspondence bears out much of his concern over the continued existence of the Republic in light of the nullification crisis between South Carolina and the Federal government. Marshall wrote several letters to fellow Supreme Court Justice Joseph Story during 1832 and 1833 which evidenced a growing anxiety and sense of resignation. In his September 22, 1832 letter to Justice Story, penned less than five months before the announcement of *Barron*, Marshall initially congratulated Story on his progress in finishing his *Commentaries*. Marshall, however, continued more ominously, writing that "I yield slowly and reluctantly to the conviction that our constitution cannot last. I had supposed that north of the Potowmack a firm and solid government competent to the security of rational liberty might be preserved. Even that now seems doubtful. The case of the south seems to me to be desperate. Our opinions are incompatible with a united government even among ourselves. The union has been prolonged thus far by miracles. I fear they cannot continue."<sup>21</sup>

On December 25, 1832, three months after the letter quoted above, Marshall again wrote to Story regarding the crisis and his concern over Virginia's upcoming discussion of resolutions concerning South Carolina's actions. Marshall wrote, "On Thursday these resolutions are to be taken up, and the debate will, I doubt not be ardent and tempestuous enough. I pretend not to anticipate the result. Should it countenance the obvious design of South Carolina to a form of a southern confederacy, it may conduce to a southern league, - never to a southern government...The northern and western section of our State, should a union be maintained north of the Potowmack, will not readily connect itself with the South...Any effort on their part to

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<sup>21</sup>John Edward Oster, *The Political and Economic Doctrines of John Marshall* (New York: Franklin, 1967), 143.

separate from Southern Virginia and unite with a northern confederacy may probably be punished as treason. ‘We have fallen on evil times.’”<sup>22</sup>

Again on June 3, 1833, approximately four months after *Barron*, Marshall’s correspondence to Story continued to lament the Southern crises, congratulating Story on the use of his *Commentaries* in American universities, but also taking the occasion to set forth his concern on how the younger generation in the South had failed to appreciate the importance of union. Marshall wrote Story, “The first impressions made on the youthful mind are of vast importance; and most unfortunately, they are in the South all erroneous. Our young men generally speaking, grow up in the firm belief that liberty depends on construing our constitution into a league instead of a government; that it has nothing to fear from breaking these United States into numerous petty republics. Nothing in their view is to be feared but that bugbear, consolidation; and every exercise of legitimate power is construed into a breach of the constitution. Your book, if read, will tend to remove these prejudices.”<sup>23</sup>

Marshall authored the *Barron* opinion at approximately the same time as was penning the letters to Story, which occurred during the height of the nullification crisis. For example, the *Barron* oral arguments were held February 11, 1833 and the decision issued less than a week later.<sup>24</sup> In fact, on the day the *Barron* opinion was issued, February 16, 1833, John C. Calhoun was upstairs in the Senate giving a two day speech justifying South Carolina’s actions and arguing the illegality of the Force Bill passed by Congress to ensure the state’s compliance with

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<sup>22</sup> Oster, *Doctrines of John Marshall*, 145.

<sup>23</sup> Oster, *Doctrines of John Marshall*, 151.

<sup>24</sup> For the date of the oral arguments, see *Barron* Transcript, 30-31. For the date the opinion was issued, see *Barron*, 32 U.S. at 246-147; Papenfuse, Outline, Notes and Documents Concerning *Barron v. Baltimore (Barron Judgment)*, 0144., located at <http://mdhistory.net/msaref06/barron/html/index.html>.

Federal law.<sup>25</sup> Critically, the South Carolina constitutional convention met in November of 1832 and outlawed the collection of the Federal tariffs within the state to begin February 1, 1833, eleven days before *Barron* came before the Supreme Court.<sup>26</sup> If we read *Barron* with an appreciation for this constitutional crisis as a backdrop, the opinion make sense as an attempt to provide stability to the Federal/state balance that seemed to be unraveling before Marshall's eyes.

*Barron* can be seen as a concession to South Carolina, or at least as an attempt to keep from exacerbating a precarious situation even further. In fact, *Barron* contains striking similarities to opinions held by jurists who would normally be thought of as Marshall's opposites, such as St. George Tucker, a pro-state Virginia lawyer, judge, and law professor.<sup>27</sup> Tucker's views were presented in his lectures at William and Mary, which he envisioned as an American complement to Blackstone's *Commentaries*.<sup>28</sup> In supplementing Blackstone, Tucker intended to modify the lectures for the different political landscape created by independence from England and the subsequent attempts to create new governments, both in the states as well as for the collective nation through the U.S. Constitution.

For Tucker, the Constitution was entered into by an agreement of the states, and was not as an agreement of the people separate and apart from their identity as citizens of the various states.<sup>29</sup> The Constitution was enacted as a compact between sovereign states that, by entering

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<sup>25</sup> John C. Calhoun, "On the Revenue Collection (Force) Bill, February 15-16, 1833," in *Calhoun: Basic Documents* (State College, Pa.: Bald Eagle Press, 1952), 135-190.

<sup>26</sup> William W. Freehling, *The Road to Disunion, Volume I: Secessionists at Bay, 1776-1854* (New York: Oxford University Press, 1990), 277.

<sup>27</sup> St. George Tucker, *View of the Constitution of the United States*, with selected writings, with a forward by Clyde N. Wilson (Indianapolis: Liberty Fund, 1999), vii-viii.

<sup>28</sup> St. George Tucker, *View of the Constitution of the United States*, 4.

<sup>29</sup> St. George Tucker, *View of the Constitution of the United States*, 91.

into the agreement, retained their structure and sovereignty.<sup>30</sup> Tucker viewed the Constitution as a compact and not as a charter or grant, the latter which implied that a higher authority had granted a degree of sovereignty.<sup>31</sup> By creating written constitutions which established the form of government and designed limits on those governments, the states set forth declarations of the peoples' "natural, inherent, and unalienable rights."<sup>32</sup> This position was informed by his views regarding Blackstone's identity of sovereignty and the legislature as entities one in the same.<sup>33</sup> Given the Revolutionary struggles against the omnipotence of Parliament, Tucker set forth an alternate view. Where in the old world governments could not be traced to a constitutional moment of a written compact creating a government by mutual consent, as had been done in the U.S., these countries experienced constant turmoil in defining the boundaries of rights and sovereignty as the powerful continually limit the rights of the weak.<sup>34</sup> However, in the U.S., the creation of new governments necessitated by the vacuum created from the absence of the king allowed a compact of the people, through their states, to erect a new government of consent. This compact, the U.S. Constitution, was "declared to be the supreme law of the land."<sup>35</sup> Tucker's use of the term "compact" is important as he is describing the Constitution similarly to the social compact theories of writers like Hobbes and Locke, but with a significant difference. While Hobbes and Locke described the social contract as an implied contract that was entered into when man decided to formally enter civil society, and thus gave up certain natural rights in

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<sup>30</sup> St. George Tucker, *View of the Constitution of the United States*, 92.

<sup>31</sup> St. George Tucker, *View of the Constitution of the United States*, 91.

<sup>32</sup> St. George Tucker, "On the Study of Law," *View of the Constitution of the United States*, 6.

<sup>33</sup> St. George Tucker, "On Sovereignty and Legislature," *View of the Constitution of the United States*, 18.

<sup>34</sup> St. George Tucker, "On Sovereignty and Legislature," *View of the Constitution of the United States*, 19.

<sup>35</sup> St. George Tucker, "On Sovereignty and Legislature," *View of the Constitution of the United States*, 19.

order to live cooperatively, Tucker characterized the Constitution as a written social compact which Americans entered into to create a Federal union of states.<sup>36</sup> This is a critical distinction as the Constitution becomes the evidence of the actual contract made between the people of the United States, as citizens of their respective states, to form a collective government. Further, the distinction does not hinge solely on its written form. Many historians have found that scholars sometimes mistakenly emphasize the act of writing down the Constitution as the essential act in creating the American version of our constitutional system, and Tucker bears this out.<sup>37</sup> Mary Sarah Bilder argues that the colonists had relied on written documents, specifically letters patent or colonial charters, to enunciate their liberties for generations before charters gave way to constitutions in the Revolutionary era.<sup>38</sup> Similarly, Daniel Hulsebosch notes that the emphasis on the act of creating written constitutions is misplaced. Much is made of the evolution from the malleable unwritten British constitution, subject to the whim of Parliament, to the fixed American Constitution as the bedrock of fundamental laws. However, Hulsebosch argues, much of what was commonly understood to comprise the British constitution, the Bill of Rights, the Magna Charta, the Petition of Right, was written. The act of writing down the Constitution was not the dispositive change.<sup>39</sup> It was not simply the act of writing down fundamental laws that created this new system, as Tucker wrote that “there is nothing new or singular in this circumstance, as all national compacts since the invention of letters have probably been reduced

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<sup>36</sup> St. George Tucker, *View of the Constitution of the United States*, p. 91.

<sup>37</sup> Mary Sarah Bilder, “Colonial Constitutionalism and Constitutional Law” in *Transformations in American Legal History: Essays in Honor of Morton J. Horwitz*, ed. Alfred L. Brophy and Daniel W. Hamilton (Cambridge, Mass.: Harvard University Press, 2009), 28-29; Hulsebosch, *Constituting Empire*, 6-7.

<sup>38</sup> Bilder, “Colonial Constitutionalism and Constitutional Law,” 31-32.

<sup>39</sup> Hulsebosch, *Constituting Empire*, 7-8. Primarily, Hulsebosch is arguing against the position taken by historians like Bernard Bailyn (*Ideological Origins of the American Republic*) and Gordon Wood (*Creation of the American Republic*). Hulsebosch traces this idea to Charles McIlwain and Oscar and Mary Handlin. Hulsebosch, *Constituting Empire*, 310, n. 24.

to that form.”<sup>40</sup> Rather, the unique invention was that this social compact had been entered into at the beginning of a new nation.<sup>41</sup> The act of creating a written Constitution was significant as it marked the birth of this new order and rendered the structure of government and location of sovereignty plain for all literate persons to read and understand.<sup>42</sup> Thus, Tucker balked at the arguments presented by pro-Federal advocates that amending the Constitution to add a written bill of rights would not only be pointless but actually dangerous as it could imply that only the enumerated rights were protected.<sup>43</sup> For Tucker, affixing written declarations of rights to the Constitution was important as it informed the people of their liberties so that “by reducing speculative truths to fundamental laws, every man of the meanest capacity and understanding may learn his own rights, and know when they are violated.”<sup>44</sup>

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<sup>40</sup> St. George Tucker, *View of the Constitution of the United States*, 104.

<sup>41</sup> St. George Tucker, *View of the Constitution of the United States*, 104.

<sup>42</sup> St. George Tucker, *View of the Constitution of the United States*, 104.

<sup>43</sup> St. George Tucker, *View of the Constitution of the United States*, 246.

<sup>44</sup> St. George Tucker, *View of the Constitution of the United States*, 246. Further, Tucker’s pro-state views of sovereignty led him to oppose the attempts by Federalist judges to create a Federal common law. Tucker argued that the English common law existed in the Federal courts much in the same way that civil and ecclesiastical law operated in England, that these rules are observed only when “written law is silent” and, even then, the common law operates as a kind of persuasive, but not authoritative point. St. George Tucker, *View of the Constitution of the United States*, 246. Tucker argues that to infer that “the common law of England is the general law of the United States, is to the full as absurd as to suppose that the laws of Russia, or Germany, are the general law of the land, because in a controversy respecting a contract made in either of those empires, it might be necessary to refer to the laws of either of them, to decide the question between the litigant parties. Nor can I find any more reason for admitting the penal code of England to be in force in the United States...than for admitting that of the Roman empire, or of Russia, Spain, or any other nation, whatever.” St. George Tucker, *View of the Constitution of the United States*, 362.

Thus, it appears that Tucker set forth three main points. First, he viewed the Federal union as created by the states which retained their sovereignty. Second, he argued that the Constitution was the written embodiment of fundamental law which constituted the social compact of the peoples comprising the new nation. Third, he argued that English common law was not the domain of the Federal courts. It appears that the third point is, to a great extent, driving the first two. The best way for the states to remain sovereign is to disallow overreach by the Federal judiciary. How do you accomplish this? One way is to set forth a vision of the Constitution as written fundamental law. A view of the Constitution which set forth the dual role of the Federal and state governments, and preserved the sovereignty of the latter, allowed Tucker to oppose Federal misuse of the common law to overrun state law.

Tucker viewed the Constitution as the embodiment of fundamental law that was written down to allow the citizenry to intelligently participate in government. Certainly, Marshall did not subscribe to the compact theory of union which held that the states created the United States, as opposed to a national collective people. However, in *Barron*, Marshall largely echoed Tucker's view of the Constitution which held that all questions of Federal government power and limits could only be answered through a strict textual and original intent interpretation of the document itself. In *Barron*, Marshall outlined his view of what steps were necessary for the protections contained in the Bill of Rights to apply to the states. Marshall stated that if the people of the states wanted similar protections from their state governments, they would have either needed to form state constitutional conventions to amend the offending state's constitution or had their state's representatives to the Constitutional Convention of 1787 specifically and unequivocally state that the Federal Bill of Rights also bound the state governments.<sup>45</sup>

As we will discuss, in this era local police power that regulated and attempted to ensure the good of the community was in the forefront, while arguments of the primacy of First Amendment protections by abolitionist press editors, for example, were very much in the background.<sup>46</sup> An opposite ruling in *Barron* could have completely inverted this accepted order and would have caused unimaginable dissent from the southern states, as was evidently feared by Marshall in his personal correspondence. If we consider *Barron* in the context of the federalism debate, it is apparent that an opposite decision in *Barron* could have led Marshall to believe that he was compromising the essential foundations of the Federal system. A decision which subordinated the states' essential police functions to the rights guarantees of the Fifth

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<sup>45</sup> *Barron*, 32 U.S. at 249-250.

<sup>46</sup> Richard Kielbowicz, "The Law and Mob Law in Attacks on Antislavery Newspapers, 1833-1860," *Law and History Review*, Vol.24, No. 3 (Fall 2006).

Amendment would have constituted a limitation on their police power which, unlike law, is not based on consent of the governed but on the householders' patriarchal duty to ensure the common good of the entire household. *Barron* had the effect of screening the states from the rights portion of the Constitution and removed the Federal courts from the business of sitting in judgment over state decisions, at least where individual rights were concerned.<sup>47</sup> In *Barron*, Marshall interpreted rights as granted by written constitutions. The Federal Constitution contained the rights operable against the Federal government, while the state constitutions operated against their respective governments. *Barron* helped maintain the boundaries between the state and Federal governments by allowing the states wide latitude to use their police power without interference. If rights were perceived of as having a natural inherent quality or universal application, these jurisdictional arguments would have easily collapsed.

### **Transformations of Sovereignty – Enacting Popular Sovereignty**

The second and, more fundamental, transformation occurred over the actual implementation of popular sovereignty. While the above debate concerned the proper balance of sovereignty among institutions of the state, between the Federal and state governments, the second transformation concerned the placement of sovereignty between the state and the people more generally. We previously discussed the nullification crisis of the 1830's as context for the *Barron* opinion. While the decision seemed out of place with the pro-Federal tenor of Marshall's jurisprudence, it made more sense when considered as an artifact of this crisis. It is very possible that Marshall tied rights specifically as granted by the Constitution so that he could release the states from the Bill of Rights by a seemingly simple textual and original intent reading.

However, if we view the nullification crisis not simply as a moment where the states' rights

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<sup>47</sup> See Brendan J. Doherty, "Interpreting the Bill of Rights and the Nature of Federalism: *Barron v. City of Baltimore*," *Journal of Supreme Court History*, Vol. 32, Issue 3 (November 2007): 223.

argument threatened to upset the Federal balance but as an event where notions of popular sovereignty were being asserted, the crisis takes on different attributes.<sup>48</sup>

If we return to the February 15-16, 1833 speech given by Calhoun on the Senate floor regarding the Force Bill, we see Calhoun responding to the many critics of nullification by outlining its underlying legal philosophy. One of the provisions of the nullification ordinance required all state officials to take an oath swearing to enforce the ordinance or they would be stripped of their title, which placed intense pressure on pro-Union South Carolinians.<sup>49</sup> Calhoun defended the oath and, in doing so, revealed another aspect of the nullification position. Certainly, Calhoun maintained his view of the compact theory of the creation of the United States, that the states and not a national people created the Federal Union through agreement or compact. However, he did not stop there. Calhoun noted that the people of the South Carolina passed the nullification ordinance in the same way they ratified the Constitution: through a convention and not by legislative decree.<sup>50</sup> The tariff was thus nullified by the same people who approved the Constitution, the people of the state. In South Carolina, there was no higher sovereign than the people in convention. For Calhoun,

the ordinance [of nullification], thus enacted by the people of the State themselves, acting as a sovereign community, was, to all intents and purposes, as a part of the constitution of the State; and though of a peculiar character, was as obligatory on the citizens of that State as any portion of the Constitution.<sup>51</sup>

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<sup>48</sup> See Elizabeth Dale, *A Government of Laws or Men? Criminal Justice in the United States, 1789-1939* (Forthcoming from Cambridge University Press, New Histories of American Law series).

<sup>49</sup> *South Carolina Ordinance of Nullification* (November 24, 1832) in *The Nullification Era: A Documentary Record*, ed. William W. Freehling (New York: Harper Torch Books, 1967), 150-152.

<sup>50</sup> John C. Calhoun, "On the Revenue Collection (Force) Bill, February 15-16, 1833," in *Calhoun: Basic Documents*, 155-156.

<sup>51</sup> John C. Calhoun, "On the Revenue Collection (Force) Bill, February 15-16, 1833," in *Calhoun: Basic Documents*, 156.

As a result, Calhoun equated the oath to uphold nullification ordinance with an oath to uphold the Constitution. By organizing themselves as an extra-governmental convention, the assembly could conceptually hold itself out as the sovereign, with all law making powers that accompany the sovereign. By enunciating a view that the people of South Carolina reconstituted themselves as the sovereign, Calhoun set up a counterpoint to the argument that the state was acting unconstitutionally. By framing the argument this way, the dispute became a question of the primacy of sovereignty. Who would prevail: the Federal government, as the state-based entity who demanded enforcement of its tariffs, or the people of South Carolina, as opposed to the state government, who argued that they were the sovereign? Calhoun did not envision that a national sovereign people created the United States. Rather, the sovereign people of the state of South Carolina had created the Constitution. As the sovereign, the people of South Carolina were entitled to renounce the laws of the Federal government that they created.

Thus, the nullification crisis that took place in the background of the *Barron* decision can also be understood as a battle between the proper location of sovereignty between the state – here the Federal government – and the people of South Carolina who Calhoun argued created this government and retained the ultimate veto over its actions by virtue of their sovereignty. This crisis is emblematic of a larger tension in this era regarding the true location of sovereignty: is it with the people (true popular sovereignty) or with the state (as the representatives of the people)? This tension was exposed by the methods each side had at its disposal to enforce its view of popular sovereignty. Those who sought to keep sovereignty located directly with the people often used direct action methods that, in later years, come to be associated only with government, like community abatement of nuisance. Who had the right to abate nuisance? If it were the state, they could rely on the police power doctrine, while if it were persons in the community,

they could rely on common law principles and abate the nuisance without the involvement of the state. As we will see, these actions were sometimes peaceful, but many times were not. Those who sought to keep the people out of direct control enunciated a view of sovereignty as located with governmental institutions like the courts. The era witnessed a battle between differing conceptions of governance. If the state was to be the actual sovereign, it would enforce that sovereignty largely through the police power. If the people were sovereign, they would enforce their sovereignty through popular actions. We will now turn to the methods by which these two visions of sovereignty were exhibited.

### **Police Power**

The sovereignty of the state is being supported by the evolution of the notion of the police power doctrine. While we discussed the importance of the police power of the states in maintaining the balance of the federal system, the concept of police power has alternate qualities. Here, we will view the police power doctrine as an attribute increasingly relied upon to provide state-based order. Marcus Dubber studied the history of the police power, referring to “two modes of state governance:” law and police, and argues that the governmental authority of police power arose from traditions similar to the patriarchal authority of a head of a household.<sup>52</sup> Dubber finds that the concept of police power was formed when the government of the household was superimposed on the governance of the state itself, with the sovereign of the state acting as the theoretical head of the state household.<sup>53</sup> As the head of the state household, the sovereign is thus charged with ensuring the well-being of the household by using the police power, which Dubber finds as the public equivalent of a father’s use of discipline to ensure order

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<sup>52</sup> Marcus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government*, (New York: Columbia University Press, 2005), 3.

<sup>53</sup> Dubber, *The Police Power*, 81.

in a private family setting.<sup>54</sup> Harry Scheiber traced the origin of the term “police power” to Blackstone who classified certain offenses as being against the “public police and economy.”<sup>55</sup> Blackstone likened the individuals that made up a polity as members of a family who are “bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners.”<sup>56</sup> As a result of the “very miscellaneous” nature of this category, the offenses covered broad range of prohibitions, including most notably the power to abate common nuisances, as opposed to private nuisances.<sup>57</sup> Blackstone cited a long list of what constituted a common nuisance which could be abated, which included: “annoyances” in common highways like public rivers, roads, or bridges; “offensive trades” like ale houses, gambling dens, unlicensed theaters, and inns which promoted disorderly conduct; unregulated lotteries; fireworks; the presence of idlers, gypsies, and vagrants; and night poaching, to name a few.<sup>58</sup> Scheiber argues that both the common law and civil law traditions long granted the sovereign these types of broad powers to ensure the public good. In the case law of the early American republic, Scheiber finds this power was also envisioned as an essential and indispensable attribute of sovereignty or, alternatively, arose from a common law based theory emphasizing the common welfare of the community.<sup>59</sup>

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<sup>54</sup> Dubber, *The Police Power*, 58.

<sup>55</sup> Harry N. Scheiber, “Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth Century America,” *The Yale Law Journal*, Vol. 107 (1997): 823, 824, n. 6; William Blackstone, *Commentaries on the Laws of England, Vol. 4: Of Public Wrongs* (London: J. Murray, 1857), 176.

<sup>56</sup> Blackstone, *Commentaries*, Vol. 4, 176.

<sup>57</sup> Blackstone, *Commentaries*, Vol. 4, 176.

<sup>58</sup> Blackstone, *Commentaries*, Vol. 4, 176-199

<sup>59</sup> Scheiber, “Private Rights and Public Power,” 824, n. 6.

Christopher Tomlins places the police power within this tension over whether the state was sovereign or whether sovereignty truly resided with the people. Tomlins argues that it was the transformation of the police power, originally kept by the people as their method of local control, away from the people and its relocation as an instrument of law as an essential change occurring during this era.<sup>60</sup> Tomlins argues that there was a backlash against popular constitutionalism and that affirmative steps were taken to strengthen the judiciary in order to restrain the majoritarian excess of the states. Tomlins places the genesis of this concept as coming out of the Federalist/Anti-Federalist debates at the Constitutional Convention which culminated in a largely unaccountable judiciary designed to ensure the primacy of the law as the primary discourse of American society.<sup>61</sup> Further, Tomlins proclaims the triumph of law at the Convention as similar to the redefinition of the concept of the common good as one now predicated on individual rights as the triumph of classical liberalism over pre-Constitutional ideas of the polity based upon its virtuous republican citizenry.<sup>62</sup>

Tomlins argues that the idea of police as a term largely synonymous with the common good pre-dated the early republic and existed as far back as the early modern Europe.<sup>63</sup> Like Scheiber, Tomlins dates an important milestone in the concept to Blackstone. However, unlike Scheiber, Tomlins argues that by the time of Blackstone's *Commentaries*, police power began to be reassessed as a function of state power that was concerned more with security rather than

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<sup>60</sup> Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge Univ. Press, 1993), 78.

<sup>61</sup> Tomlins, *Law, Labor, and Ideology*, 70.

<sup>62</sup> Tomlins, *Law, Labor, and Ideology*, 75. Tomlins' argument contrasts with the view set forth by Larry Kramer, who places the move toward judiciary review, and later judicial supremacy, as a post-Constitutional effort to restrain the primacy of popular constitutionalism that the ratification of the Constitution was supposedly to ensure.

<sup>63</sup> Tomlins, *Law, Labor, and Ideology*, 45.

larger issues of public welfare.<sup>64</sup> Similar to William Novak's well-regulated society, Tomlins argues that the Constitution succeeded in elevating law over popular politics as the primary discourse, successfully "separat[ing] power from participation in pursuit of an earlier and more familiar pattern of elite rule in the American polity."<sup>65</sup> While the discourse of police, and its focus on common good or happiness, had a brief period of expression, when it met the discourse of law it became a power of the state.<sup>66</sup> By the nineteenth century, the idea of police had become one "stripped of the language of democratic participation that had been so essential a component of the ideal of police-as-happiness current in the revolutionary era."<sup>67</sup> Tomlins' observations regarding the evolution of the police power are compelling. Like popular sovereignty, the police power is being redefined as a power belonging to the state, instead of a tool retained by a community to ensure harmonious living. The police power is being expanded to provide for a method of control and regulation by the state to punish offenders, abate nuisance, or regulate trade or business as opposed to a popular power that existed to provide communal order.

We can gain a better understanding of the links between the sovereignty of the state and the police power by focusing on the ordinances and regulations passed by the state of Maryland and the city of Baltimore and examining how those laws gave rise to the suit by Craig and Barron. In their lawsuit, Craig and Barron cited numerous local ordinances and resolutions to support their position, including a March 24, 1813 ordinance appointing wardens for the port of

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<sup>64</sup> Tomlins, *Law, Labor, and Ideology*, 81.

<sup>65</sup> Tomlins, *Law, Labor, and Ideology*, 91; William Novak, *The Peoples' Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

<sup>66</sup> Tomlins, *Law, Labor, and Ideology*, 94.

<sup>67</sup> Tomlins, *Law, Labor, and Ideology*, 94.

Baltimore.<sup>68</sup> Pursuant to this ordinance, these wardens were given powers to ensure the continued use, navigation, and the safety of the port and the surrounding district. For example, the port wardens were given extensive jurisdiction over the port district, including all wharves, public or private, and specifically possessed the authority to cause even private wharves to be torn down and rebuilt if found defective. This ordinance further directed the wardens address the drainage issue by commanding them to hire a surveyor to report on the feasibility of redirecting the water currently flowing through the port district to Harris' creek, an adjacent outlet.<sup>69</sup>

The port wardens hired a surveyor, Jehu Boulden, to perform the study. Boulden, later a witness for Craig and Barron, indicated that the plan was feasible and would cost no more than \$10,000.00. However, on July 19, 1815, the port wardens issued a report to the city council which disregarded Boulden's plan and instead recommended the regrading of Ann Street, a large road which dispensed directly into the harbor, a report that Craig and Barron also entered as evidence.<sup>70</sup> Likewise, Craig and Barron also entered into evidence two April 10, 1817 ordinances which directed additional paving of streets in the port district which caused the water to be redirected even further.<sup>71</sup>

In response, the city entered into evidence the same ordinances enacted by Craig and Barron, but also cited numerous acts of the Maryland General Assembly to support their argument that all actions done without malice and were taken pursuant to law. For example, the city cited a 1796 act to incorporate the city of Baltimore under the structure of a mayor and a two

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<sup>68</sup> *Barron v. Mayor of Baltimore*, 32 U.S. 243, Transcript of Record, File Date: July 1, 1831, 31 pp., U.S. Supreme Court Records and Briefs, 1832-1978. Thompson Gale; and Maryland State Archives SC 2221-4-20, 182-1833 (hereinafter referred to as *Barron* Transcript), 11; Ordinances of the City of Baltimore (Warner & Hanna, 1807), 72-73; Ordinances of the Corporation of the City of Baltimore (William Warner, 1813), 12-19.

<sup>69</sup> Ordinances (1813), 12-19

<sup>70</sup> *Barron* Transcript, 16.

<sup>71</sup> Ordinances of the Corporation of the City of Baltimore (William Warner, 1817), 32-35.

branch city council. The Maryland legislature gave the city broad powers to pass all necessary laws including those concerning health measures, abatement of nuisances, surveying and setting boundaries of streets and alleys, altering and straightening streets “with the consent of the proprietors of the lots or houses adjoining such streets,” and preserving the continued navigation of the Patapsco River, upon which the city financially relied.<sup>72</sup> The city also relied upon a November, 1797 act of the General Assembly giving the city full power to pave and repair all streets, as well as the 1813 ordinance appointing the port wardens.<sup>73</sup>

By entering many of the same ordinances into evidence, the parties were arguing before the court two very different visions of the powers of the municipal government. Craig and Barron argued that the actions of the city damaged their business, which is readily apparent. Shortly after their purchase of the property, the city passed these laws which directly dumped the sediment that had been flowing through the entire port district right at their doorstep. Craig and Barron at first attempted to mitigate the damage by successfully petitioning the city in April of 1816 to allow them to extend their wharf.<sup>74</sup> However, it appears that the April 1817 ordinances directing further street paving was the final straw. On September 30, 1817, the *Baltimore Patriot* reported that Craig and Barron’s wharf was to be auctioned. Recognizing that their property was no longer fit to be used as a deep water wharf, the auctioneers touted it as a “desirable situation for a Steam Grist Mill.”<sup>75</sup> Interestingly, John Barron resurfaced in the *Baltimore Patriot* in November of 1822, the year the *Barron* suit was filed, advertising his new Rope business,

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<sup>72</sup> “An Act to Erect Baltimore Town, in Baltimore County, into a City, and to Incorporate the inhabitants thereof” (1796, Ch. 68), in *The General Public Statutory Law and Public Local Law of the State of Maryland*, ed. Clement Dorsey, 1396, 1400.

<sup>73</sup> Dorsey, ed. *The General Public Statutory Law*, 1404.

<sup>74</sup> *Baltimore Patriot*, April 6, 1816, Vol. VII, Issue 84, 2.

<sup>75</sup> *Baltimore Patriot*, September 26, 1817, Vol. X, Issue 225, 3.

although under the supervision of a more seasoned craftsman, a far cry from his prior co-ownership of a profitable wharf.<sup>76</sup>

Regardless of the damages, the city did not contest these losses or that their actions were the cause. By simply relying on these laws that gave the city the power to take these actions, they argued that they were acting within the scope of their authority granted by these ordinances and that the damages alleged constituted a public nuisance which were not recoverable by an expansive interpretation of the common law principle *damnum abseque injuria*: that some wrongs do not have a remedy. It is also interesting to note that this was not the first time the city relied upon this type of defense.

In 1825, the city was sued following the enactment of ordinances in 1817 which directed the paving of numerous streets. Parenthetically, these were the same paving ordinances that ultimately contributed to the damage to Craig and Barron's wharf. In the *Mayor and City of Council of Baltimore v. Moore and Johnson* (1825), the Maryland Court of Appeals ruled in favor of Moore and Johnson, two property owners who contested their tax assessment from the 1817 street repairs. These property owners were taxed the costs of the repairs due to a 1797 act allowing the city to not only pass all ordinances to make improvements such as street repairs, but also to tax the land owners of that district if the repairs specifically benefited those residents. The city, represented by the same attorneys in *Barron*, John Scott and Roger Taney, raised similar arguments to those they relied upon later that decade in *Barron*, namely that the city is not liable as it acted in accord with the ordinances, but the court ruled otherwise.<sup>77</sup> The Court

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<sup>76</sup> *Baltimore Patriot*, November 15, 1822, Vol. XX, Issue 114, 3.

<sup>77</sup> In fact, John Scott for the City of Baltimore attempted to distinguish this case in his arguments before the Appeals Court in December 1830, while Charles Mayer for Barron and Craig cited it in support. Edward C. Papenfuse, *Outline, Notes and Documents Concerning Barron v. Baltimore*, 32 U.S. 243, <http://mdhistory.net/msaref06/barron/index.html> (last accessed on 4/5/08), 134, 146.

strictly construed the 1817 ordinance and found that, because it contained a preamble stating its intent was to pave the streets in order to preserve proper navigation of the city's most important roads, the repairs did not provide a special benefit to the adjacent property owners, and thus affirmed Moore and Johnson's exemption from the tax.<sup>78</sup>

Similarly, Judge Archer, the trial court judge in *Barron*, had another opportunity to rule on a case pitting the police power of the city versus the rights of its residents. In *Glenn v. Mayor and City Council of Baltimore* (1833), an 1832 fire damaged a turpentine distillery within the city limits. While the owner, John Glenn, rebuilt the distillery and resumed operations, the city fined him under an 1826 ordinance prohibiting activities within the city limits, such as operating a slaughterhouse or, here, a turpentine distillery.<sup>79</sup> Judge Archer, sitting in an appellate capacity, reviewed the 1826 ordinance in light of the 1796 and 1817 acts by the Maryland General Assembly which gave the city the power to pass all ordinances to prevent nuisances and prevent fires in Baltimore.<sup>80</sup>

Archer used the opinion to rein in the city by differentiating two separate standards of review for city ordinances. For example, ordinances which related to laying out new streets, establishing night watches, and surveying were permissible because they are simply executing the city's delegated powers. However, Archer noted, abating nuisances and preventing fires "are grants of a totally different description." In this opinion, Archer found that the city's police

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<sup>78</sup> *Mayor and City Council of Baltimore v. Moore & Johnson*, 6 H. & J. 375 (Md. Ct. App. 1825).

<sup>79</sup> Parenthetically, John Glenn was also a prominent Baltimore attorney who later served as a U.S. District Court judge. Glenn was a business associate of Reverdy Johnson, another elite Baltimore Attorney whose accomplishments included his appointment as U.S. Attorney General in 1849 and his election as a U.S. Senator in 1863. Johnson and Glenn also served as counsel to the Bank of Maryland which, following its collapse in 1834, led to the 1835 Baltimore Bank Riots which lasted from August 6, 1835 through August 10, 1835. Enraged by the loss of personal savings, a mob overran both of their houses, looted and vandalized them both, and set Johnson's house ablaze. J. Thomas Scharf, *History of Baltimore City and County from the Earliest Period to the Present Day*, (Philadelphia: J.B. Lippencott & Co., 1881), 784-785.

<sup>80</sup> *John Glenn v. The Mayor and City Council of Baltimore*, 5 G. & J. 424 (Md. Ct. App. 1833).

power was great, but not unlimited, and noted that “it is true the corporation [the city of Baltimore] have power to pass all laws, which are necessary or proper to carry into effect any given power, and the degree of its necessity or propriety would not be minutely, or critically scrutinized; but the court ought to see that it may be the means of accomplishing the object of the grant.” As a result, instead of simply ruling that a turpentine distillery constituted a nuisance, Archer noted that the 1826 ordinance did not contain any preamble classifying that a distillery constituted a nuisance or which connected the ordinance to its original grant of power to abate nuisances, and thus reversed the judgment against Glenn, the property owner.<sup>81</sup>

While we see that the city continued to expand its police power to govern and regulate, we also see that individuals, such as Craig and Barron, Moore and Johnson, and John Glenn contested these actions. While Craig and Barron raised an issue most fundamental, the taking of private property without just compensation, all the litigants were aggrieved by similar concerns. Further, some antebellum jurists, such as Archer, put the brakes on the city’s police power by holding in many cases that this power was not unlimited. Thus, *Barron* can be envisioned as a moment where Marshall attempted to enunciate the primacy of the police power of state and local governments and to remove all obstacles to their free exercise, namely, the property rights guarantees of the Bill of Rights that many litigants and jurists had embraced.

If we return to Judge Archer’s opinion during the trial court phase of *Barron*, we can view the trial court decision in a new light. For example, in Chapter 3, Archer’s opinion was presented as enunciating a particular conception of rights as granted by the common law, as opposed to the fundamental law reasoning of Barron and Craig’s attorneys and the textual reading of rights as ultimately espoused by Justice Marshall. However, if we read Archer’s

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<sup>81</sup> *Glenn v. Baltimore*, 5 G. & J. at 427-430.

opinion in the context of the evolution of the police power as residing with the state, a different picture emerges. In Archer's opinion granting relief to Barron and Craig, he began with a common law analysis, predicating his ruling on the "undeniable principle" that a man can divert the natural flow of watercourses to protect himself from injury. However, this right carried with it a corresponding responsibility to indemnify any other persons whose property is damaged by such diversion as the common law mandates that all must use their property in ways that will not affect the property of others.<sup>82</sup> Archer held that the aggressive reliance on the common law maxim, *damnum abseque injuria* (an injury without a remedy), that was often used to insulate municipalities from payment of damages when abating nuisances, did not apply when the damages caused were of a permanent or material nature.<sup>83</sup>

Archer recognized and responded to potential criticism that such a ruling could bring, and wrote that "I perceive no danger of an infinity of suits growing out of these doctrines. The exercising of the right of cutting down streets and diverting water-courses into particular parts of the basin, for the benefit of the navigation, does not necessarily lead to a loss for which a suit may be maintained."<sup>84</sup> For this proposition, Archer cited the New York case *Palmer v. Mulligan* (N.Y. 1805), where the court refused to hold an upstream mill owner liable for damages by the owner of the downstream mill resulting from the diversion of water.<sup>85</sup> The court, through the majority opinion written by Justice Spencer, held that all mills will necessarily injure the mill of any other downstream on the same river; thus, the damages were *damnum abseque injuria*.<sup>86</sup> In

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<sup>82</sup> Opinion of Judge Stephenson Archer, reprinted in *The American Jurist and Law Magazine*, Vol. 4, (October, 1829): 205.

<sup>83</sup> Archer, *The American Jurist and Law Magazine*, 214.

<sup>84</sup> Archer, *The American Jurist and Law Magazine*, 214.

<sup>85</sup> *Palmer v. Mulligan*, 3 Cai. R. 307 (N.Y. 1805).

<sup>86</sup> *Palmer v. Mulligan*, 3 Cai. R. at 309.

addition, Justice Henry Brockholst Livingston, wrote a concurring opinion which chipped away at the common law rules regarding the riparian rights of property owners. Livingston classified the damages to the downstream owner as merely an inconvenience which would always attend the building of additional mills or dams on a river. In a signal that he intended to bend common law rules to fit with the expansionist needs of a growing nation, Livingston wrote, “Were this not permitted for fear of some inconsiderable damage to other persons, the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry.”<sup>87</sup> Justice James Kent, joined by Smith Thompson in dissent, argued that the downstream mill was “materially and permanently” injured by the disruption of the current. *Damnum abseque injuria* can limit certain claims; however, it would only apply to those for the “insensible evaporation and decrease of water by dams, or the occasional increase or decrease of the velocity of the current, and of the quantity of the water below.”<sup>88</sup> For Kent, the downstream mill owner should collect damages in this matter as he proffered eight witnesses who set forth uncontroverted evidence that the placement of the upstream mill injured his property, including one who estimated the loss at close to \$100.00 per year.<sup>89</sup>

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<sup>87</sup> *Palmer v. Mulligan*, 3 Cai. R. at 311. Livingston was later named to the U.S. Supreme Court where he served from 1807-1823 and later became a strong ally of John Marshall. Michael Dougan, “Henry Brockholst Livingston” in *The Oxford Companion to the Supreme Court of the United States*, Kermit Hall, ed. (New York: Oxford University Press, 1992), 507-508.

<sup>88</sup> *Palmer v. Mulligan*, 3 Cai. R. at 312. Smith Thompson was also later named to the U.S. Supreme Court where he served from 1823 to 1843 and ruled in favor of the City of Baltimore in *Barron v. Baltimore* (1833). “Smith Thompson” in *The Oxford Companion to the Supreme Court of the United States*, Kermit Hall, ed. (New York: Oxford University Press, 1992), 871-872.

<sup>89</sup> *Palmer v. Mulligan*, 3 Cai. R. at 312. Kent is referred to as “Justice Kent” instead of “Chancellor Kent” as he was serving as Chief Justice of the New York Supreme Court at the time, and had not yet been appointed as chancellor of its Court of Chancery, which occurred in 1814. See, Carl F. Stychin, “The Commentaries of Chancellor James Kent and the Development of an American Common Law,” *The American Journal of Legal History*, Vol. 37, No. 4 (October 1993): 440, 442.

That Archer felt it important to distinguish *Palmer v. Mulligan* at the end of his opinion is important. Morton Horwitz described *Palmer* as a critical moment in the evolution in the concept of the paramount attributes of property ownership. Specifically, Horwitz argued that *Palmer* marked the beginning of a transformation of the idea of property ownership toward the appreciation that most important function of property was as a commodity to be developed as a business asset.<sup>90</sup> Certainly, *Palmer* reads this way. For example, Archer did not state that municipalities could never divert waterways or alter drainage which would provide a public benefit. Rather, like Justices Kent and Thompson's dissenting opinion, Archer sought to reign in an overly expansive use of the common law exception, *damnum abseque injuria*. If the state sought to abate nuisance through the use of its police power, it was entitled to do so. What the state could not do is damage property and in the process rely on a tortured interpretation of the common law to escape its responsibilities.<sup>91</sup>

However, there are other ways to view *Palmer*. For example, William Novak framed *Palmer* not as one where the courts intentionally modified the common law to facilitate economic growth, as argued by Horwitz, but as an example of the state's assertion of its powers over an essential resource: the Hudson River.<sup>92</sup> Asserting the Hudson as a public highway, Justice Spencer then classified both the plaintiff's and defendant's mills as nuisances to the river. For Novak, the court did not engage in a weighing of private interests to determine its result. Rather, it determined that the river was a public thoroughfare; accordingly, one private company

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<sup>90</sup> Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), 36-37.

<sup>91</sup> Archer, *The American Jurist and Law Magazine*, 214

<sup>92</sup> William Novak, *The Peoples' Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996), 133.

could not assert superior rights over another with respect to this public channel.<sup>93</sup> If we compare the *Palmer* majority and dissenting opinions we see a dynamic occurring in a very similar way to *Barron*. Justices Spencer and Livingston are implicitly asserting the primacy of the state over the river by disallowing two private entities to fight over superior right to the use of a public river, as posited by Novak. Similarly, in *Barron*, the city argued that it had all power to redirect the water flowing through the Fell's Point district. Any damage incurred by private actors as a result of the city's actions was non-compensable as the city had acted pursuant to its delegated police power from the state of Maryland, period. The city did not contest Barron and Craig's damages, and simply demurred to the complaint on the basis that exercising its police power within their mandate and without malice constituted an absolute defense. In contrast, Justice Kent in dissent clung to an older view that did not see the powers of the state in such an expansive manner. Kent grounded the plaintiff's right of recovery in his property rights inherent in his thirty year ownership of land on the river, which he held non-navigable at common law. Under the English common law tradition, the question of navigability of a river determined whether it was a common public highway. If it did not have an ebb and flow, it was a non-navigable inland river and thus belonged to the owners of the adjacent land.<sup>94</sup> The Hudson River at the point of the plaintiff's land was non-navigable according to Kent, thus he had a recognizable property right for which the court should have provided compensation.<sup>95</sup> Similarly, in ruling in favor of Barron and Craig, Judge Archer held that the city must provide compensation for the damage to their property, regardless of its inherent police power.

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<sup>93</sup> Novak, *The Peoples' Welfare*, 133-134.

<sup>94</sup> *Palmer v. Mulligan*, 3 Cai. R. at 312.

<sup>95</sup> *Palmer v. Mulligan*, 3 Cai. R. at 312.

## Popular Constitutionalism

We previously discussed the expansion of the police power doctrine to support: (1) the dual sovereignty of the states within the federal system; and (2) the sovereignty of the state - or, more specifically, the government – over that of the people. In contrast to this emerging state focused doctrine of the police power, there was the competing tradition of popular control. We have seen Barron and Craig, and indeed other Baltimore property owners, contest the actions of the city in the courtrooms of the early republic. A larger question, however, is why they resorted to formal law remedies instead of seeking to abate the nuisance personally. If the dams and embankments gradually funneled the water and sediment to the harbor directly north of Barron and Craig's wharf, why did they not attempt to remove the embankments themselves? Shortly after the sediment began pouring into the river by their wharf, Barron and Craig sought, unsuccessfully, to mitigate the damages and were granted permission by the city council to extend their wharf deeper into the river.<sup>96</sup> However, this request for the extension of the wharf raises two interesting questions that have largely been unanswered by the study of *Barron*. The first is raised by looking at the request for the extension itself. The *Baltimore Patriot* article which reported the granting of the extension shows that Barron and Craig were not the only wharf owners in the path of this sediment as numerous other petitions granting extensions to owners of wharves in the same area were granted at the same time. Thus, the first question is: what was the response of the other owners? Second, why were the courts the place where Barron and Craig decided to contest this action?

First, Barron and Craig were not the only persons damaged by the redirection of the drainage in the Fell's Point district. Indeed, the wharf directly to the north of Barron and Craig's

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<sup>96</sup> *Baltimore Patriot*, April 6, 1816, Volume VII, Issue 84, Page 2.

was owned by James Curtis. Due to its location, Curtis's wharf would have suffered greater damage as it was even closer to the area where the runoff entered the harbor than Barron and Craig's wharf. Similarly, the property directly across Wolf Street from the Curtis wharf, owned by William Dawson, also apparently was damaged by the same drainage plan.<sup>97</sup> Indeed, there were three filings against the Mayor and City Council in March of 1822. In addition to Barron and Craig's suit, James Curtis and William Dawson also sued the city at the same time. Dawson was represented by the same attorneys who brought the claim against the city on behalf of Barron and Craig: David Hoffman, Charles Mayer and Upton Heath.<sup>98</sup> It is unclear whether Curtis also used the same legal team, though all three suits were apparently filed in sequence and have many similarities. The Barron and Dawson claims both sought identical damages of \$20,000.00 while Curtis sought \$2,000.00. All three cases were successful in the trial court, with Barron and Craig winning \$4,500.00, Dawson winning \$2,000.00, and Curtis winning \$900.00. The city, represented in all three cases by Roger Taney and John Scott, unsuccessfully moved to arrest the judgments in all three cases.<sup>99</sup> However, it appears that the city only appealed the Barron and Dawson opinions.<sup>100</sup> At least one newspaper, the *Baltimore Patriot*, intently followed the proceedings from the Appeals Court in Annapolis. When the Court reversed the trial court decision in both cases, the *Patriot* happily reported that it was "of great moment to the city, as it

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<sup>97</sup> For the location of Dawson's property, see November 16, 1815 *Baltimore Patriot*, Volume VI, Issue 901, Page 1; January 5, 1830 *Baltimore Patriot*, Volume XXXV, Issue 4, Page 2.

<sup>98</sup> Baltimore County Court, City Civil Docket, March Term 1828, Maryland State Archives, MSA C301-14, at Papenfuse, Edward C., Outline, p. 0001, <http://mdhistory.net/msaref06/barron/html/barron-0001.html>. On March 9, 1824, the City Council passed a resolution which authorized the Mayor to hire assistant counsel to specifically defend the suits brought by Craig and Barron, Dawson, and Curtis. See March 10, 1824 *Baltimore Patriot*, Volume XXIII, Issue 58, Page 3.

<sup>99</sup> Baltimore County Court, City Civil Docket, March Term 1828, Maryland State Archives, MSA C301-14, at Papenfuse, Edward C., Outline, p. 0001.

<sup>100</sup> Maryland Court of Appeals, Western Shore (Docket), Maryland State Archives, MdHR 618; 1/66/14/29, Papenfuse, Edward C., Outline, p. 0004, <http://mdhistory.net/msaref06/barron/html/barron-0004.html>

frees them from all liability for the injury done to the wharf property of individuals by the opening and grading of Washington and other streets.”<sup>101</sup>

However, the second, and larger, question concerns why aggrieved property owners like Barron, Craig, Dawson, and Curtis owners used the courts as the place to contest the actions of the city. These men likely resorted to formal law remedies instead of seeking to abate the nuisance personally as the litigation was being funded by one of the city fathers as a largely speculative venture. Further, this damage only affected a small segment of the community while the remainder of the residents of Fell’s Point probably welcomed the improvements in drainage. Achieving a critical mass of popular outrage against a public drainage project would have been difficult. However, during this era there were many instances where individuals circumvented the courts in order to personally abate what many communities deemed nuisances. Existing historiography on this topic supports the idea that, in contrast to the police power that the sovereign state relied upon, there were also methods of popular community regulation that operated independent of the government. Larry Kramer argues that two major concepts of constitutionalism had evolved by the early nineteenth century: one stressing the primacy of the judiciary to determine and settle matters of law, and one holding that the people, through methods such as forming political parties and political activism, retained just as much a right to determine the constitutionality of laws.<sup>102</sup>

Kramer recounts eighteenth century concepts of constitutionalism which placed notions of fundamental laws and constitutions outside of the realm of the judiciary or even the legislature,

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<sup>101</sup> *Baltimore Patriot*, January 8, 1831, Vol. XXXVII, Issue 7, Page 2.

<sup>102</sup> Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

making “the people themselves” responsible for their enforcement and interpretation.<sup>103</sup> Kramer argues that under this view, the public possessed the right to resist unconstitutional acts and laws, which included the right to vote, the right to petition their grievances, and the right to assemble.<sup>104</sup> It was after these remedies had been ignored, as Parliament had prior to the American Revolution, that more serious remedies were invoked, such as the use of mobbing or group violence. Kramer notes that the use of mobbing was not unorganized violence, but was considered a legitimate right and remedy belonging to the community to correct unconstitutional acts.<sup>105</sup> It was following ratification of the Constitution that problems arose as the people did not defer to the elites as the Federalists believed the Constitution would ensure; rather, white men began to exercise their voice in government through methods many considered frightening. These community based remedies did not disappear following Independence. In response, many Federalists favored an expanded the role for the judiciary.<sup>106</sup> However, this attempt to elevate the judiciary as the proper arbiter of the constitution did not extinguish competing views which located this power in the citizenry.

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<sup>103</sup> Kramer, *The People Themselves*, 24.

<sup>104</sup> Kramer, *The People Themselves*, 25.

<sup>105</sup> Kramer, *The People Themselves*, 25. Kramer notes that modern commentators fail to understand what he refers to as “popular constitutionalism.” Modern thought assumes falsely that while the final resolution of a constitutional matter must necessarily reside “with someone...but that this someone must be a *governmental agency*.” Rather, popular constitutionalism as it existed in its eighteenth century context recognized that the government “are the regulated, not the regulators, and final interpreting authority rests with the people themselves.” Within this context then, the early appearance of concepts of judicial review simply made the judicial branch an equal partner in the governmental scheme and not the final arbiter of the Constitution. For example, Kramer argues that the “seeds of judicial review” of state action were placed in the Constitution by virtue of the inclusion of the supremacy clause over that of the Federal legislative veto and that, thereafter, the framers accepted that judicial review existed with respect to state laws. However, while Kramer attributes the role of the judiciary to a Federalist desire to resolve majoritarian abuses of republican government by using courts to “slow politics down,” Kramer recognizes that all parties involved in framing the Constitution understood that it was only through politics, and not courts, that the Constitution would be enforced. Kramer, *The People Themselves*, 25, 80-83, 107.

<sup>106</sup> Kramer, *The People Themselves*, 130.

Richard Kielbowicz, in his study of the use of law by mobs in censoring abolitionist publications, provides a few concrete examples of how these popular methods of constitutional interpretation and enforcement were carried out.<sup>107</sup> Kielbowicz uses his study of anti-abolition mobs in beginning in 1833, the year of *Barron*, to set forth the two main views of law competing for supremacy during this time: abolitionists who stressed the primacy of individual rights to protect their message; and anti-abolitionists who emphasized the supremacy of majoritarian rights of the community to determine their collective good.<sup>108</sup> Kielbowicz notes that prior to the 1830's abolitionist periodicals did not cause much concern for local communities as they were circulated primarily among the abolition groups themselves.<sup>109</sup> However, beginning in the 1830's, abolitionist editors began sharing information and coordinating activities to a greater extent in order to reach a larger national audience including, for example, the two year campaign by the American Anti-Slavery Society to use the Federal mail system to send over one million pamphlets across the country, causing enormous resistance in the South.<sup>110</sup>

The battles between abolitionist editors and the often anti-abolitionist communities in which they operated exhibited these two emerging traditions of law competing in the early nineteenth century.<sup>111</sup> Kielbowicz argues that anti-abolitionists used two main arguments to justify their actions in shutting down abolitionist newspapers: the doctrines of breach of the peace and public nuisance, which were collectively used to ensure the primacy of the collective

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<sup>107</sup> Richard Kielbowicz, "The Law and Mob Law in Attacks on Antislavery Newspapers, 1833-1860," *Law and History Review*, Vol.24, No. 3 (Fall 2006): 559.

<sup>108</sup> Kielbowicz, "The Law and Mob Law," 561.

<sup>109</sup> Kielbowicz, "The Law and Mob Law," 568.

<sup>110</sup> Kielbowicz, "The Law and Mob Law," 568-70.

<sup>111</sup> Kielbowicz, "The Law and Mob Law," 561.

good of the community.<sup>112</sup> Kielbowicz notes that while, today, the modern idea of nuisance law as being held applicable to overshadow fundamental liberties such as freedom of the press is difficult to appreciate, he notes that it formed the basis for local governance in the nineteenth century and that larger constitutional rights of freedom of the press were not considered as relevant to daily life and governance.<sup>113</sup> Kielbowicz notes that these principles underlying nuisance law, the idea that the good of the community overrules individual rights, were the basis for the dominant paradigm of the age and were well supported and accepted, such as by Justice Joseph Story in his *Commentaries* where he discussed freedom of the press. There, Story tethered this freedom to the principle of *Sic utere tuo, ut non alienum laedas* (“so exercise your own freedom, as not to infringe the rights of others, or the public peace and safety”), noting that absolute freedom of the press would destroy civil society. Kielbowicz finds that Story’s views were in line with most freedom of the press guarantees found in state constitutions which specifically made the right contingent upon the responsible exercise; whether the exercise was responsible appeared to whether it was in accord with the will of the community.<sup>114</sup> Furthermore, Kielbowicz notes that, following *Barron*, abolitionists could not rely on the Federal Bill of Rights to aid their freedom of the press arguments. As the anti-abolitionist mobs could assert

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<sup>112</sup> Kielbowicz, “The Law and Mob Law,” 574.

<sup>113</sup> Kielbowicz cites William Novak’s *The People’s Welfare* as an example of this. There, Novak argues that extensive public regulation in favor of the *salus populi*, the people’s welfare, in order to create the “well-regulated society” was the prevailing method of governance. Novak argues that a false perception has since prevailed and been reinforced by “tenacious myths” about the absence of nineteenth century government. In fact, Novak notes that, from 1781 to 1877, an unprecedented number of statutes, ordinances, and common-law decisions regulated almost every aspect of society including public health, safety, morals, and the economy. The common thread running through the majority of the laws and regulations during this period was their intent that the general welfare of the public took precedence over private property rights so often considered an essential element of the *laissez-faire* society. Kielbowicz, “The Law and Mob Law,” 575; Novak, *The Peoples’ Welfare*, 1-2, 9.

<sup>114</sup> Kielbowicz, “The Law and Mob Law,” 576.

their majoritarian rights to close the papers, the abolitionist editors could only seek to argue for a more expansive interpretation of the freedom of press.<sup>115</sup>

Laura Edwards found a similar dynamic in her study of the post-Revolutionary American south by examining local dispute resolution in North and South Carolina.<sup>116</sup> Edwards describes a system of law and adjudication which placed the keeping of the peace as the prime consideration. While firmly entrenched in a society predicated on white male patriarchal power, this system nonetheless allowed for the participation of additional actors, such as women and enslaved persons. Further, this system also provided for the punishment of white male patriarchs if the peace had been breached. The overriding concern is that all members of the local had a stake in preserving and observing the peace, the order, the norms, and the common welfare of the community. Edwards argues that this system came under fire in the 1820's as the professional legal community and governmental elites at the state level attempted to transform this local arrangement into a more uniform system of jurisprudence which relied on one body of law applicable to all situations. Where localities used magistrates to call all to account for a breach of the peace, state leaders saw chaos. As a result, Edwards posits that state leaders used the vernacular of rights to reorder who could use law and the courts to seek redress. Edwards describes a model of moving “the legal focus away from individual lives to individual rights, replacing subject of the peace, with their distinctive personalities and entangling relationships, with the theoretically uniform bodies of rights-bearing individuals.”<sup>117</sup> Edwards echoes the more general transformation of law more generally toward classical liberal conceptions which place

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<sup>115</sup> Kielbowicz, “The Law and Mob Law,” 576-77.

<sup>116</sup> Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

<sup>117</sup> Edwards, *The People and Their Peace*, 238.

the faceless, hypothetical “individual” as the center of the law’s protections. Much like the classical liberal model of contract which assumes a bargain struck by two individuals of equal bargaining power, Edwards describes a move toward ambiguous individuals who, by virtue of their possession of rights, are able to use the judiciary to vindicate or protect their interests. Edwards articulates this transformation as one much more sinister in practice than in theory as it was then coupled with the idea that some individuals have rights, and thus access to law, and some do not. This created a hierarchy of persons able to use the law based upon the seemingly universal notions of rights.

Edwards argues that the states of South Carolina and North Carolina actively promoted a uniform system of formal law adjudication which exalted the state governments as the entity that would protect rights. For Edwards, rights became the new currency of societal worth as, unlike a system of communal order which emphasized overall harmony, rights allowed for a hierarchy to determine access to law. Edwards finds that this emphasis on the primacy of rights was directed to white men who, as owners of rights, would profit most from the new system.<sup>118</sup> More importantly, the state was active in promoting its role as the entity that would protect men’s rights, an argument that Edwards notes was deployed with particular effectiveness in gathering support for the nullification crisis of 1832-1833. A similar dynamic is described by Michael Pfeiffer in his study lynching in the post-Civil War U.S.<sup>119</sup> Pfeiffer described a tension between middle classes who supported criminal justice system based on formal law remedies that prized due process protections versus advocates of “rough justice” who viewed the community as group

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<sup>118</sup> Edwards, *The People and Their Peace*, 275.

<sup>119</sup> Michael J. Pfeiffer, *Rough Justice: Lynching and American Society, 1874-1947* (Urbana, Ill.: University of Illinois Press, 2004).

that could determine whether and how severely a criminal would pay for his transgressions.<sup>120</sup> For the believers in community based justice, Pfeifer posits that they relied on older notions of fundamental or higher law to justify violent acts in order to maintain communal order, including lynching. This “ideology of lynching” had its genesis in Revolutionary era notions of popular sovereignty that the authority of government came from the people, who could exercise their sovereignty in order to see that justice was done if the courts would not.<sup>121</sup> For Pfeifer, the question of whether an offender would be allowed to go through formal court procedures was up to the community.

This dynamic which occurred in Pfeifer’s study following the Civil War can also be seen in numerous incidents which took place in the early nineteenth century. A common thread running through all of these studies is the tension over the where the ultimate legal authority resides. Who possesses this sovereign power: the courts or the people? While many felt that they retained the ultimate right to punish transgressions and provide communal order, as described by Pfeifer, Kielbowicz, or Kramer, there was a competing push to make formal courts the place where law was determined and enforced, as described by Edwards. What we see in this era are two groups competing for sovereign power: those who sought to maintain true popular sovereignty and those who sought to place sovereignty with the formal institutions of the state. This struggle to locate sovereign legal power was contested in numerous incidents across the United States, especially with respect to who had the power to silence unpopular speech, whether live lectures or written newspapers.

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<sup>120</sup> Pfeifer, *Rough Justice*, 2-3.

<sup>121</sup> Pfeifer, *Rough Justice*, 6.

If a speaker debated a contested subject, many in the community would use physical, often violent, acts to silence the speech. For example, in Vermont in 1835, a minister wrote an account to that State's Anti-Slavery Society about his four week lecture tour. Across the state, communities turned out to silence the lectures. During his first lecture, the crowd hurled snowballs and at least "one missile manifestly of a different and more baneful character" which forced him to abruptly finish. At his next stop, a procession blowing horns and beating drums tracked him to his boarding house and then shouted down the program as soon as it had begun. A third speech in yet another town was drowned out due to the stamping of the crowd, despite a plea by a local judge for order. His final speech was also interrupted by stamping and yelling from the crowd. The lecture was ended when the crowd extinguished the lights and began throwing objects at the stage. The mob followed the minister out of the hall where, but for the defense from a townsman, the crowd likely would have succeeded in a physical attack. These actions were not simply the work of drunken ruffians but included members of the local elite. At one of the speeches, the crowd was encouraged to keep the minister from speaking by a lawyer and an ex-U.S. Senator. Further, it appears that much of the impetus for shutting down these lectures was a result of his opposition to the colonization movement. As the minister recounted, it was "their unwillingness to have the people *excited* on the subject..."(emphasis original).<sup>122</sup> To a great extent, part of what seems to have occurred in Vermont during these lectures is an attempt to shut down speech that was in opposition to prevailing local opinion.

Later that year, a New York meeting of Protestants convened to discuss the topic "Is Popery compatible with civil Liberty" was similarly shut down a by a large group of Catholics. After assaulting the ministers leading the meeting and driving out the followers, the rioters

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<sup>122</sup> "Mobocracy in Vermont," *The Liberator* (Boston, Mass.), February 28, 1835, Vol. V, Issue 9, Page 35.

ripped up the benches and smashed all the furniture in the meeting room before leaving.<sup>123</sup>

Additionally, attempts by the legal authorities to punish those responsible for this type of violence were also contested in extra-legal ways. In Troy, Ohio in 1842, two men were charged with assault and battery for throwing eggs at speakers lecturing at a temperance rally, including the county prosecutor. The two men were convicted and fined \$15 each, plus court costs and ten days in jail. This was not the end of the matter as a mob formed intent on freeing the men, requiring the sheriff to rely on local and two companies of militia to defend the jail. The standoff was finally resolved in favor of the sheriff only when additional militia units arrived.<sup>124</sup>

Philip Hone, in his diary, also recorded the reaction of New Yorkers to the 1849 visit of English actor William Charles Macready who were enraged over perceived insults to American actor Edwin Forrest when touring London that were attributed to Macready. Upon Macready's visit to New York to perform *Macbeth*, a mob attacked during the performance and drove Macready from the stage amid a shower of rotten eggs and other projectiles. The city's elite, embarrassed by this display, demanded that Macready finish the performance the following night and guaranteed his safety. Security inside the theater allowed the play to continue, but outside a military unit of over three hundred soldiers was forced to fire on the rioters who were in the process of smashing the windows and kicking in the doors of the theater. Approximately twenty rioters were killed and many more were wounded, all in an attempt to silence a performance of *Macbeth* due to public hostility over Macready's perceived slights to American honor.<sup>125</sup>

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<sup>123</sup> "By Last Night's Mail," *The Gloucester Telegraph* (Gloucester, Mass.), March 21, 1835, Vol. 9, Issue 23, Page 3. The article estimated the mob at between 100 and 200 persons.

<sup>124</sup> "The Morals and Manners of Dram Drinkers," *The North American and Daily Advertiser* (Philadelphia, Pennsylvania), June 1, 1842, Volume 4, Issue 991, Page 2.

<sup>125</sup> *The Diary of Philip Hone, 1828-1851*, Vol. II, Allan Nevins, Ed., (New York: Dodd, Mead and Company, 1927), 866-870.

Popular actions were also used against newspapers whose opinions offended local sensibilities. In the event that a newspaper was printing material inflammatory to the community, many in the community reserved the right to abate the nuisance instead of seeking an injunction in court. Indeed, Kielbowicz noted that between 1833 and 1859, in response to efforts by abolitionists to amplify their message by their extensive and coordinated use of abolitionist newspapers, more than twenty incidents of mob action to shut down these presses occurred across the country.<sup>126</sup> The actions of the mob ranged from dismantling the print shop and destroying the presses, often by smashing the press and throwing it in the street or in a nearby river. The famous 1812 mob that attacked the offices of the *Federal Republican* helped earn Baltimore the nickname of “Mobtown.”<sup>127</sup> The *Federal Republican* had made the mistake of editorializing its opposition to the recent declaration of war against the British which started the War of 1812. A mob attacked the paper’s offices, threw the newspaper presses into the street, and tore down the building causing the employees to flee the city.<sup>128</sup> After reestablishing an office, the editors called in about fifty persons to help defend the press. This group included many notable persons, including Revolutionary General Harry “Lighthorse” Lee, father of Robert E. Lee, as well as Barron and Craig’s future attorney, David Hoffman.<sup>129</sup> After firing on the attacking mob, which left at least one person dead and many others wounded, the mob left and returned and aimed a nine pound cannon at the house. The men defending the house agreed

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<sup>126</sup> Kielbowicz, “The Law and Mob Law,” 568-569.

<sup>127</sup> J. Thomas Scharf, *History of Baltimore City and County* (Philadelphia: Louis H. Evers, 1881), 778, 782. The *Federal Republican* had its main offices in the District of Columbia but opened a branch office in Baltimore where the riots took place. See “Outrage at Baltimore,” *The Albany Register* (Albany, N.Y.), August 4, 1812, Vol. XXIV, Issue 62, Page 3.

<sup>128</sup> Scharf, *History of Baltimore City and County*, 782.

<sup>129</sup> Scharf, *History of Baltimore City and County*, 782; “Outrage at Baltimore,” Page 3.

to surrender to the militia that finally appeared and were transported to the jail.<sup>130</sup> After the militia retired, leaving the jail virtually unguarded, the mob broke in and beat the men savagely, torturing many, and ultimately killing one.<sup>131</sup> A similar well known incident was replayed in Alton, Illinois in 1837 where Elijah Lovejoy ultimately lost his life defending his press from anti-abolitionist mobs. Lovejoy had already been forced to flee St. Louis before reestablishing the paper in Alton. After mobs in Alton destroyed his press three times, Lovejoy sought protection from the Mayor who asked the city council appoint constables to protect the newspaper office in order to maintain order. The city council refused and advised Lovejoy to simply stop printing. When the fourth and final mob came on November 7, 1837, Lovejoy and his allies armed themselves attempted to defend the press, much like the defenders of the Baltimore *Federal Republican* had in 1812. However, when taking aim against one of the mob who was trying to burn down the building, Lovejoy was shot and killed.<sup>132</sup>

These incidents implicated conflicts between notions of individual rights versus community norms. Certainly, a view of sovereignty as residing with the state allows for the protection or vindication of individual rights in ways that true popular sovereignty does not. However, the struggle to delineate the balance of sovereignty between the state and the people was not just simply a matter of whether to protect the rights of individuals espousing unpopular opinions. There are also examples of popular actions to abate nuisances that were deemed injurious to the community. In 1839, the Pennsylvania legislature authorized the Camden and

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<sup>130</sup> Scharf estimated that one person died and “a number wounded” while the newspaper article stated that “3 or 4 of the ringleaders were instantly levelled (sic) with the ground, and about 30 others wounded.” “Outrage at Baltimore,” Page 3; Scharf, *History of Baltimore City and County*, 783.

<sup>131</sup> Scharf, *History of Baltimore City and County*, 783-784.

<sup>132</sup> Michael Kent Curtis, “The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens,” 44 *U.C.L.A. Law Review* (1996-1997): 1109-1111.

Amboy Railroad to lay new railroad tracks within Philadelphia to help complete the line. The residents along the new route became concerned that allowing a railroad along a busy urban street would be dangerous. When the railroad workers attempted to rip up the street to install the line, a crowd of local residents gathered and loudly protested. When this failed to stop construction, the railroad tracks were simply torn up after the day's work concluded. The railroad hired over one hundred policemen to protect the workers while they re-laid the track. The police largely protected the workers from the mob that gathered the next day, who now began to hurl paving stones along with their insults. However, the mob simply tore up the tracks again after the workers left. Afterwards, they attacked and set on fire a local tavern owned by the president of the railroad which was a frequent meeting place for the police. Those arrested in the melee were quickly tried and convicted, but petitions to the Governor produced pardons. Ultimately, the Pennsylvania legislature repealed the law granting the railroad the right to build the track.<sup>133</sup>

Sometimes, instead of simply forming to abate a nuisance, like a dangerous railroad track or an offensive speech or article, there are numerous examples of mobs attempting to close the courts themselves, keeping alive a tradition that had begun prior to Independence. For example, the early 1770's saw the North Carolina regulator movement disrupt the courts to protest corrupt government. Beginning in 1774, American colonists resisted imperial policy by forcibly keeping courts across the colonies from meeting. Similarly, after Independence, the farmers of western Massachusetts led famously by Daniel Shays between 1786 and 1787 closed courts across the state in order to protest their distrust of eastern elites and the familial or clannish nature of those

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<sup>133</sup> J. Thomas Scharf and Thompson Westcott, *History of Philadelphia, 1609-1884* (Philadelphia: L.H. Everts and Co., 1884), 2184.

participating in government, as well as their intense anger over the legislature's attempt to enrich speculators by fund war bonds at full value.<sup>134</sup>

These are just a sampling of incidents that occurred across the country during this era. A common thread running through all of these incidents - shutting down printing presses, courtrooms, and speakers, or tearing up railroad tracks - is the perception by those community actors that they possessed the power to put a stop to persons or events in their midst that they deemed a nuisance. Like the police power belonging to the state, these communities had members that did not willingly fully concede the police power, the power to provide for the common safety and welfare, to the state.

If we assess *Barron* within the transformations in sovereignty that took place during this era, it can stand for more than just the position that the Bill of Rights do not apply to state governments. First, if we place the *Barron* decision within the struggle over sovereignty between the states and the Federal government, an opposite ruling in *Barron* where Marshall held the Bill of Rights applicable to the states would have not only inflamed the South, but would have ignited intense resistance among those communities in the North, especially in those areas where local communities were actively seeking to keep order and to keep abolitionists and their presses out. By ruling against the states, Marshall would have implicitly placed a significant check on the power of the state to regulate its affairs through its police power by placing the rights guarantees of the Constitution in the way. Second, if we view *Barron* with an eye for the tension over the location of sovereignty between the people and the people's representatives, by holding the Bill of Rights inapplicable to the states, *Barron* also had the effect of supporting state and local governments by allowing for a liberal expansion of the police

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<sup>134</sup> See Leonard Richards, *Shays's Rebellion: The American Revolution's Final Battle* (Philadelphia: University of Pennsylvania Press, 2002).

power without the interference of the rights guarantees of the Bill of Rights. *Barron* gave the states space to use their police power. At the same time, *Barron* also helped to lessen the competing tradition of popular control by undercutting the fundamental right of not taking another's property without providing just compensation by making this historic right unavailable by virtue of its placement in the U.S. Constitution. Envisioning a right as granted by a written constitution evidenced a significant transformation in the right itself. Like the proverbial tree falling in the woods, a right only matters if it can be used to resist an act or omission that it was designed to prevent. Thus, the re-conceptualization of the right to just compensation for takings of property as being *granted* by the Fifth Amendment, or similar state constitutional provision, likewise matters. It meant that the courts alone, and not extra-legal communities, then had jurisdiction to determine whether to enforce the right.

## CHAPTER 8 POPULAR SOVEREIGNTY AND POSITIVIST RIGHTS

Thus far, this dissertation has explored two separate debates that occurred during the early nineteenth century: the competing ideas over where rights obtained their authority and the tension over the proper location of sovereignty. If we examine these debates more closely, we can draw a few conclusions. First, the concept of where rights obtained their authority was unsettled, as across the country the location of rights was subject to numerous interpretations. John Marshall's interpretation of rights as emanating from the Constitution in *Barron* was just one of many views regarding the location of our liberties. Second, the location of sovereignty was also contested. Not only was the proper balance of sovereignty between the Federal and state governments at issue, but so too was the more fundamental question of whether sovereignty itself was lie with the people (popular sovereignty) or with the peoples' representatives (state sovereignty). Finally, the relationship between rights and sovereignty was evolving. As many actors sought to place sovereignty firmly with the formal apparatus of the state, an ideological re-conceptualization of rights as existing by virtue of their inclusion within a written constitution also took place. The relationship between these two concepts meant that as sovereignty was transformed, rights were likewise transformed. It is this relationship between rights and sovereignty that this chapter will explore. This chapter argues that a reassessment of rights as the domain of the state – as in all government – itself occurred during this era as a result of acts which sought the establishment of a model of state sovereignty and to lessen reliance on true popular sovereignty. This was aided by the actions of many, including Marshall in his *Barron* opinion, to re-envision rights as emanating from written constitutions to the exclusion of the

older tradition of rights as a product of natural or fundamental law or as part of the domain of the immemorial common law.<sup>1</sup>

We have discussed the numerous ways that rights were envisioned. In the colonial and founding eras, rights were viewed as liberties possessed by Englishmen, as universal possessions granted by nature or the divine, or provided by an inchoate blend of numerous foundations. As was displayed over the course of the *Barron* litigation, the view of rights in the early republic largely maintained these variations: rights as emanating from the common law tradition, natural law principles, or an inchoate blend of sources, but now added an additional source, rights as derived from positive law pronouncements of the federal and state constitutions. At the same time, another debate occurred concerned the proper location of sovereignty in the new nation. While a well-known struggle between the Federal and state governments took place, a larger question remained unanswered: was sovereignty to lie truly with the people or with the peoples' representatives, the state?<sup>2</sup> As set forth in the preamble to the U.S. Constitution, "We the people" are the stated rulers. During the early nineteenth century, the young nation attempted to determine what that phrase actually meant. Like much of the new U.S. constitutional system,

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<sup>1</sup> As there are many variations on the term "positivist," I am using the phrase in the title of this chapter as an appreciation of law or claim of right as existing solely by virtue of its enactment by a governmental entity.

<sup>2</sup> As was noted by James Martel, Donald Lutz has classified four different models of popular sovereignty occurring in western political thought: the Leviathan Model (proposed by Hobbes where sovereignty only resides with the people temporarily before it is permanently transferred to the ruler); the Traditionalistic Model (proposed by Bodin, Philippe du Plessis-Mornay, and others where the people create the ruler); the Constitutional Republic Model (set forth by Locke, William Penn and others where the people create a popular government but only act through their representatives; and the Constitutional Democracy Model (described by Rousseau and Roger Williams where the people create a popular government and retain active and direct participation in that government. Donald S. Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006), 76; James R. Martel, "Can There Be Politics Without Sovereignty? Arendt, Derrida and the Question of Sovereign Inevitability," *Law, Culture and the Humanities*, 6(2) (June 2010): 153, 154, n. 2. It appears that the tension over defining popular sovereignty as one between the people and the state as the representatives of the people could also be described as a battle between the Constitutional Republic Model (the state) and the Constitutional Democracy Model (the people) if we use Lutz's categories.

implementation of the contours of popular sovereignty was left for later generations.<sup>3</sup> Indeed, the Constitution left scores of unanswered questions for succeeding generations to define. The early republic wrestled with how far Congress could go in making laws that were “necessary and proper” to carry out its duties (Article I, Section 8), what documents could be considered contracts that could not be impaired by the state (Article I, Section 10), or whether the judiciary had the power to review legislation (Article III). Likewise, the idea of popular sovereignty also required structure and definition by future generations. However, unlike these questions which were addressed through formal law adjudication and have resulting short hand reference markers - *McCulloch*, *Dartmouth College*, *Marbury* – the concept of popular sovereignty was much more difficult to define.

As we have seen, the concept of rights is malleable and subject to numerous interpretations. The concept of sovereignty is also murky and defies simple definition.<sup>4</sup> Many scholars find fault in both the definitions of sovereignty and in the failure of scholars dissatisfied with the concept to be able to even envision alternatives to it.<sup>5</sup> Stephen Krasner explains that the concept of sovereignty is muddled because the term is often used without reference to its many variations, both internationally and domestically. Specifically, Krasner argues that there are four ways that sovereignty has been described: “international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.”<sup>6</sup> For purposes of this

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<sup>3</sup> Of course, ideas of popular sovereignty well pre-dated the American example. See Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W. Norton, 1988). This chapter is referring to the unique popular sovereignty begun in the United States and not the mixed constitution model present in England, for example.

<sup>4</sup> See John Hoffman, “Is It Time to Detach Sovereignty from the State?” in *Reclaiming Sovereignty*, ed. Laura Brace and John Hoffman, (London: Pinter, 1997), 9.

<sup>5</sup> Martel, “Can There Be Politics Without Sovereignty?,” 153.

<sup>6</sup> Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton Univ. Press, 1999), 3

chapter, I am envisioning domestic sovereignty, the power of an entity or group within a particular society to possess final authority to make and enforce law.

While classical versions of sovereignty were present in ancient Greece and Rome, these societies did not develop the requisite attributes that many scholars stress must arise for true notions of sovereignty to exist, namely the idea of a state recognized as possessing absolute authority in a society as the essential ingredient in defining sovereignty.<sup>7</sup> F.H. Hinsley argued that two main ideological transformations must take place before true notions of sovereignty can arise. First, a society must perceive a state that is conceptually separate from the community at large.<sup>8</sup> Second, that society must undergo a transformation in its appreciation of law. It must separate natural or divine law from positive law and must make natural or divine law more a matter of morality or ethics.<sup>9</sup> Thus, natural or divine law would constitute more a matter of conscience whereas the positive law of the sovereign actually controlled practical matters on the ground.<sup>10</sup> There were partial first steps toward a modern theory of sovereignty, dating primarily to the twelfth century and the rediscovery of Roman law which aided in this differentiation between natural and positive law.<sup>11</sup> Legal scholars like Bracton in England took up these arguments in the thirteenth century and expanded the powers of the king by arguing that the pope had no authority in secular issues. There, the king was solely preeminent and answered to no higher authority, at least within his own kingdom.<sup>12</sup> However, Hinsley dated the true genesis of

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<sup>7</sup> F.H. Hinsley, *Sovereignty*, Second Ed. (Cambridge: Cambridge University Press, 1986), 17.

<sup>8</sup> Hinsley, *Sovereignty*, 28.

<sup>9</sup> Hinsley, *Sovereignty*, 69-70.

<sup>10</sup> Hinsley, *Sovereignty*, 69-70.

<sup>11</sup> Hinsley, *Sovereignty*, 72.

<sup>12</sup> Hinsley, *Sovereignty*, 72.

the modern concept to sixteenth century political theorist Jean Bodin who put the concept together fully.<sup>13</sup> Michel Foucault dated the concept of sovereignty somewhat earlier to the middle ages and argued that it was created to address problems inherent in monarchical government.<sup>14</sup> The theory of sovereignty was used to both resist and impose the power of monarchies.<sup>15</sup> By the eighteenth century, this same notion of sovereignty was co-opted and employed not just to limit the monarch, but as a justification for alternative forms of government such as the rise of parliamentary democracies like those following the French Revolution.<sup>16</sup> James Martel places the modern notion of sovereignty as arising out of the same forces that brought about the notions of modern liberalism.<sup>17</sup> Indeed, Martel notes, the modern liberal emphasis on the individual and the free access to markets are only obtainable through modern notions of sovereignty.<sup>18</sup>

Thus, concept of sovereignty in its modern sense translates into state sovereignty. Under this system, the people nominally retain sovereignty but, in reality, the state exercises the vast majority of the sovereign functions. The sovereign power is delegated to elected officials, but the people retain ultimate power. Those legislative officials who perform their duties unfavorably are voted out of office and replaced. In judicial matters, while the people may disagree with a ruling of the Supreme Court, in the United States the consensus is that the Court holds the final word. Attempts to contest the decisions of the Court such as promoting or

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<sup>13</sup> Hinsley, *Sovereignty*, 71.

<sup>14</sup> Michel Foucault, "Society Must be Defended," *Lectures at the College de France, 1975-1976* (New York: Picador, 1997), 34.

<sup>15</sup> Foucault, "Society Must be Defended," 35.

<sup>16</sup> Foucault, "Society Must be Defended," 35.

<sup>17</sup> James R. Martel, "Can There Be Politics Without Sovereignty?" 154.

<sup>18</sup> Martel, "Can There Be Politics Without Sovereignty?" 155.

opposing judicial nominees all implicitly admit the Court's absolute supremacy. In this legislative and judicial scheme, the people are on the sidelines. The people vote for their representatives, they voice opinions for or against court decisions, but at all times behave within a set of assumptions that true power has been delegated to governmental entities and actors. The peoples' remedies are voting, using the courts, and peaceful protest. However, as we explored in Chapter 7, these remedies were not so limited in the early republic and betray how far notions of sovereign power have evolved since the early nineteenth century.

It is precisely the question of whether popular sovereignty truly resided with the people or with the state that determined the related issue of the location of rights. As we have seen, for many the idea of sovereignty as residing with the people is nothing more than cover for actually placing sovereignty with the state.<sup>19</sup> In order to assuage this reality of state sovereignty, rights became used as a vernacular to soothe this harsh reality; rights became a way to limit state sovereignty.<sup>20</sup> Indeed, rights do not make as much sense unless considered in opposition to sovereignty. In turn, sovereignty makes sense as a state based condition limited by the rights of the people it governs. Rights could limit the power of the state, but in the end it was the state and not the people that was the true sovereign. To a great extent, rights are a conceptual term applied to counterbalance or demarcate the limits of sovereign power. A sovereign power that does not provide for any limits on that power (rights) would constitute a totalitarian state or an absolute monarchy.<sup>21</sup> Such a state would not provide for any actual protections for individual

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<sup>19</sup> Martel, "Can There Be Politics Without Sovereignty?" 155.

<sup>20</sup> Martel, "Can There Be Politics Without Sovereignty?" 154.

<sup>21</sup> Nadya Nedelsky, *Defining the Sovereign Community: The Czech and Slovak Republics*, (Philadelphia: University of Pennsylvania Press, 2009), 3.

rights and rights would not exist in that polity.<sup>22</sup> Excluding these societies, rights must exist in order to help define the limits of sovereign power. Indeed, at its most fundamental level, rights can be conceived as an umbrella term that denotes the boundaries of state power.

As notions of sovereignty as a state based condition evolved, the concept of where rights obtained their authority also had to shift as these are related concepts. These concepts transformed most notably during times of turmoil. For example, Hinsley argued that Bodin formulated his concept of sovereignty with the religious and civil warfare in France as a backdrop. The idea of a sole power in society with unlimited power is naturally attractive during such times in order to stop bloodshed and warfare among numerous groups of even strength.<sup>23</sup> Hobbes' all-powerful *Leviathan* was penned amid the regicide of the English Civil War. Similarly, as was noted in Chapter 4, rights are also re-conceptualized during these transformative events. For example, sovereignty was relocated away from the Crown and toward Parliament in England following the Glorious Revolution. Ultimately, the idea of Parliament as the sole location of sovereignty largely evolved into an accepted notion in England, no doubt aided by the writings of Blackstone. As the sovereign, Parliament's powers were conceptually limitless. A sovereign cannot act illegally. In response to this shift in sovereignty away from the crown, the American colonists relied on the vernacular of rights to contest Parliament's sovereign power. The colonists argued either that sovereignty did not fully

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<sup>22</sup> I use the term "actual" protections when referring to the role of rights in a totalitarian state in light of the existence of propaganda influenced constitutions like those of the former Union of Soviet Socialist Republics. While the U.S.S.R. embodied the unchecked sovereignty of the state that would constitute totalitarian government, it did promulgate three constitutions which included vigorous protections for individual rights. However, these protections seem to have only existed on paper and were largely enunciated to counter criticism from abroad. For example, see the 1977 U.S.S.R. Constitution, <http://www.constitution.org/cons/ussr77.txt> (last accessed August 11, 2010). For a different view of the Soviet Constitutions, see Nathan J. Brown, *Constitutions in a Nonconstitutional World* (Albany: State University of New York Press, 2002), 6. Brown argues that calling the Soviet Constitutions a "façade" is not entirely accurate. Rather, Brown argues, the workings of the Soviet authoritarian state were well on display for all who read the document, like its establishment of a single political party.

<sup>23</sup> Hinsley, *Sovereignty*, 120-121.

shift to Parliament, thus negating their laws, or if it did, that colonial rights placed boundaries on Parliament's sovereign law making powers. Rights were predicated as emanating from colonial charters (keeping sovereignty with the crown) or enunciated as natural law possessions (placing limits on the sovereignty of Parliament). Following Independence and ratification of the Constitution, the United States settled on a structure of shared sovereignty that is the hallmark of the federal system. The questions that arose over the practical boundaries between the Federal and state governments under the new federal system meant that the conception of rights again underwent revision. Prior to Independence, rights conceptually operated to check the power of the English sovereign, whether the King or Parliament. This binary worked logically as long as the sovereign was the monarch or other unified entity. This began to tear in the American colonies post-1688 as the colonists did not fully accept the substitution of Parliament with the sovereign role formerly occupied by the crown. After independence, the new American nation likewise had to reconfigure its notions of sovereignty when the external sovereign was conceptually replaced by the people.

Following Independence, the new nation espoused that it was ruled by the sovereign people but, in reality, two different models of sovereignty arose. The popular sovereignty model conceptualized power as remaining with the people, instead of their representatives, the state. Under this model, however, rights appear out of place. This is similar to a parliamentary sovereignty model where Parliament, as the sovereign, could not act illegally. Likewise, in the U.S., the sovereign people could not act illegally if they were truly sovereign. In contrast, a state sovereignty model envisioned a system where the people delegated their sovereignty to the state. This model envisioned the people as exercising their rights through formal methods like voting, petitioning government, and, eventually, by exercising rights in courts of law. Rights make

sense in this model, much in the same way that rights make sense in a royal sovereignty model. In both, the sovereign, the state or the monarch, agree to limits on their sovereignty, which is expressed in the language of rights. The tension in the early republic era shows the strain over these two sovereignty models – state and popular - competing for primacy.

What we see in the early republic era is a nation wrestling with this tension. The degree to which sovereignty rested with the people or with the state likewise affected the role of rights, as rights exist as a check on state sovereign power. It may be helpful to envision this relationship between sovereignty and rights as existing along a spectrum. On one end, sovereignty is the firmly located with the people. In this model, where the will of the sovereign people is the preeminent concern, rights lose their primacy. As noted by Edmund Morgan, if the people are sovereign why do they need limits on their own government? In the *Federalist 84*, Alexander Hamilton noted that the great documents of British constitution which protected rights, like the Magna Charta, the Petition of Right, or the English Bill of Rights, were agreements between the king and his subjects. These documents were important to identify what rights were retained by the people. However, in what was to become the United States, “the people surrender nothing; and as they retain every thing they have no need of particular reservations.”<sup>24</sup> After citing the preamble to the Constitution which states that “We, the People” established the Constitution, Hamilton argued that this recognition of popular creation was “a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.”<sup>25</sup> Hamilton’s view is similar to the view of sovereignty described by Jean Jacques

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<sup>24</sup> Alexander Hamilton, *The Federalist: A Commentary on the Constitution of the United States*, No. 84 (New York: Random House, 2000), 549.

<sup>25</sup> Hamilton, *The Federalist*, No. 84, 549.

Rousseau in *The Social Contract* (1762). In describing the relationship between popular sovereignty and rights, Rousseau argued that,

the Sovereign, being formed wholly of the individuals who compose it, neither has nor can have any interest contrary to theirs; and consequently the sovereign power need give no guarantee to its subjects, because it is impossible for the body to wish to hurt all its members.<sup>26</sup>

For Rousseau, his famous edict that all must obey the “general will” as determined by the entirety of society required the individual to subsume individual desires to those of the group.<sup>27</sup> Hamilton qualified, and softened, Rousseau’s majority rule principle by his view that the only limitations on the sovereign people were those contained in a written constitution as the act that creates the government. A constitution acts as evidence of a social contract where the obligations of both the ruler and the ruled, or the people and their government, are laid bare.

This tension between popular and state sovereignty and their relationship to rights can be traced to the early days of the Republic, and in particular to the debates over ratification of the Constitution. For example, one of the well-known objections to the new Constitution was its lack of a written bill of rights. Much of the debate over whether the omission of a rights guarantee was material was due to different appreciations of the sovereign characteristics of the new government. One of the most prevalent arguments against the inclusion of a bill of rights was one of irrelevance. As the Constitution established a federal government that could only exercise its delegated powers, a written rights guarantee was illogical, as its Federalist promoters envisioned.<sup>28</sup> At its most extreme, a bill of rights could even be considered dangerous as there

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<sup>26</sup> Jean Jacques Rousseau, *The Social Contract and Discourses*, translated by G.D.H. Cole (New York: E.P. Dutton, 1950), 17.

<sup>27</sup> Rousseau, *The Social Contract*, 18.

<sup>28</sup> Jackson Turner Main, *The Anti-Federalists: Critics of the Constitution, 1781-1788* (Chapel Hill: University of North Carolina Press, 1961), 158.

was no way to enumerate all potential rights, thus implying that any rights left out were no longer protected.<sup>29</sup> Many thought a written bill of rights simply did not make sense in the new system of American government. As was noted by Gordon Wood, Noah Webster argued that written rights guarantees, like the Magna Charta or the Habeas Corpus act were logical to check “encroachments of Kings and Barons,” but a bill of rights to limit an elected legislature of the people was a “curiosity in government.”<sup>30</sup> For Webster, written documents which declared rights did not make sense in the Republic as no one had superior rights to another.<sup>31</sup> Anti-Federalists like George Mason, who had initially raised the need for a bill of rights during the Constitutional Convention, were incredulous at the omission. Mason noted that many of the pre-existing state constitutions contained written bills of rights and questioned why the Federal Constitution should be any different. Wood described one Massachusetts commentator who likewise viewed all constitutions, state and Federal, as compacts between the “Governors and the Governed.”<sup>32</sup> This view is telling as it retained a Lockean/Hobbesian concept of government as an arrangement between a ruler and its subjects. It was precisely this dispute which amplified how different views of sovereignty were driving different appreciations of the concept of right. For Mason and the anti-Federalists, they maintained a view of sovereignty as one predicated along a state sovereignty model. While “the people” are the stated rulers, in reality the people vote for elected officials and then largely disappear. The state makes and enforces the law. Given the number of checks on popular participation in the proposed Constitution – senators elected by state

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<sup>29</sup> Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998), 540.

<sup>30</sup> Wood, *The Creation of the American Republic*, 378.

<sup>31</sup> Wood, *The Creation of the American Republic*, 378.

<sup>32</sup> Wood, *The Creation of the American Republic*, 541.

legislatures, the president chosen by electoral delegates, and the House of Representatives diluted by large districts and short terms – this view is not unfounded.<sup>33</sup> Thus, Mason was rightly concerned about the lack of a written set of limitations on the state. In contrast, the Federalists posited a view of the new Federal government as resting on the sovereignty of a national people, instead of a collection or confederation of states. This is not to say that the Federalists were believers in a system of popular sovereignty in any sense of the empowerment or celebration of the common man that the term normally denotes. Rather, by enunciating a view of the Federal government resting on the sovereignty of a national people it allowed the Federalists, at least conceptually, to evade the reality of state sovereignty. By theorizing the rule of a national people, instead of a collection of states, the idea of a bill of rights became illogical. If the national people are the rulers, how can the rulers limit themselves?

In contrast, on the other end of the spectrum, we can view rights as the vehicle through the citizenry exercises its sovereignty. Under this view, the relationship of rights to sovereignty is more nuanced and more positive. Instead of considering rights as only existing within a model of state sovereignty where rights are perceived as largely inconsequential checks granted to the people in return for relinquishing their sovereignty to the state, rights can play a more important role. Under this view, the reality of sovereignty as a state based condition is accepted. The state is perceived rather as a guarantor of universal liberties and freedoms, primarily vindicated through state institutions like the courts. Rights in this capacity are possessed by all and the state ensures their existence. This rights based system, which evolved post-World War II, viewed the judiciary as responsible for enunciating and bringing to life the grand principles contained in

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<sup>33</sup> See Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007).

constitutional provisions.<sup>34</sup> As was noted by Lorraine Weinrib, in the United States, this system was particularly exemplified by the jurisprudence of the Warren Court through decisions like *Brown v. Board of Education* (1954) or *Loving v. Virginia* (1967). In both of these cases, the Court rejected arguments that predicated a segregated system of education (*Brown*) or laws banning interracial marriage (*Loving*) on custom, tradition, or social hierarchy.<sup>35</sup> Arguments of this sort rely implicitly on a recognition of community norms for their basis. For example, in *Brown*, the Court dismissed arguments that schools in Clarendon County, South Carolina had always been segregated, they were segregated because it was the will of the community, and natural (racial) difference sanctioned this method. In the post-World War II rights model, the courts are responsible for cutting through local normative based arguments. Indeed, the school system in Clarendon County was segregated because the majority of the community desired it. Nonetheless, judiciary in this model protected the children of Clarendon County acting, as Weinrib describes it “as a safe haven from both popular sovereignty, history and tradition, on the one hand, and judicial subjectivity, on the other. In this paradigm, the abstract ideas of equal citizenship and respect for human dignity – ideas based on human *personhood* – give structure to a legal frame that is regulative of all exercises of state authority” (Emphasis original).<sup>36</sup> The emphasis on the rule of law and an independent judiciary to enforce the law undergirded the

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<sup>34</sup> Lorraine E. Weinrib, “The Postwar Paradigm and American Exceptionalism,” in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2006), 84, 85.

<sup>35</sup> Weinrib, “The Postwar Paradigm and American Exceptionalism,” 99-102.

<sup>36</sup> Weinrib, “The Postwar Paradigm and American Exceptionalism,” 88. To a certain extent, much of the difference between these two views of rights tracks the debate over rights that occurred between advocates of the Critical Legal Studies (CLS) and Critical Race Theory (CRT) scholars in the 1990’s. As was discussed in Chapter 1, CLS scholars rejected as false the then prominent view of the law as a system that mirrored to the needs of a society premised on a model of liberal capitalism, viewing rights as verbiage to obscure disparities of power. As was noted by some Critical Race Theory scholars, rights can also serve to empower minorities to help blunt the effects of discrimination by the majority. Robert Gordon, “Critical Legal Histories,” 36 *Stanford Law Review* (1984): 57; Richard Delgado, “The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?,” 22 *Harvard Civil Rights – Civil Liberties Law Review* 301 (1987): 304-307.

spread of human rights that exploded globally since World War II. Indeed, the penultimate deficiency with the human rights based conception of adjudication is the question of enforceability where viable states and independent judiciaries do not exist, which evidences the importance of the state to this model.

Under this model, rights act as a more sophisticated way for people can exercise their sovereignty. While it is tempting to observe the popular sovereignty tradition with nostalgia for a system of law based more closely rooted in popular will than law mediated through the apparatus of an impersonal state, the reality is that this system came with a terrible price for those deemed outside prevailing social norms. Those who conformed to different notions of work, sex, or thought often paid dearly for such difference. In addition, like many of the transformations the young nation was undergoing in the early nineteenth century, the idea of local, community-based popular will as overshadowing formal law was scarcely possible in a rapidly expanding era, even if it were possible. Instead, under a rights based model of state sovereignty, the right of the franchise gives citizens control and influence over elected officials, the right to a jury trial gives both defendants and members of the community power over judicial processes, and the rights of search and seizure allows for restraints on the exercise of executive branch law enforcement powers. Montesquieu recognized this principle when he famously analyzed the three types of government: monarchy, aristocracy, and, most importantly, democracy. In a democracy, which for Montesquieu occurred “when the body of the people is possessed of the supreme power,” the state must exist as the sovereign body because “in a democracy the people are in some respects the sovereign, and in other the subject. There can be no exercise of sovereignty but by their suffrages. . .”<sup>37</sup> This is similar to the view of the state as a

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<sup>37</sup> Montesquieu, *The Spirit of Laws*, ed. David Wallace Carrithers (Berkeley: University of California Press, 1977), 107-108.

social group as set forth by N.W. Barber.<sup>38</sup> Barber argues against the Weberian view of the state as a community that successfully claimed a “monopoly on the legitimate use of force” within a geographically defined area.<sup>39</sup> For Barber, this view of the state is largely “one-directional” as it only appreciates how institutions of the state interacts with its citizens.<sup>40</sup> However, if we examine the state as a socially created entity, we can replace the idea of a distant impersonal state and refocus attention on the people of the polity. In this view, the focus is not just on the interaction between the state and the people, but on the relations between the people themselves.<sup>41</sup> Further, Barber argues, we can examine in a more complex manner the relationship between the people and the state by exploring how the people deal with institutions of the state and the manner in which the people comprise these institutions.<sup>42</sup> Barber realistically reconfigures the nature of the state by stressing that it is created as a social construct. As such, a view of the state that simply must be opposed in order to maintain liberties for its people fails to recognize the human agency in creating the state. Further, if, in a system of state sovereignty, we consider the proper exercise of popular will as defined by actions such as voting, petitioning the government, or using the courts, these actions are legitimate because they recognize that a more nuanced view of the state appreciates that it exists to also protect the people from each other.

If we stress rights as the way that the people exercise their sovereignty, and apply it to reexamine some of the examples given in Chapter 7 these incidents take on a different hue.

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<sup>38</sup> N.W. Barber, *The Constitutional State* (New York: Oxford University Press, 2010).

<sup>39</sup> Barber, *The Constitutional State*, 19.

<sup>40</sup> Barber, *The Constitutional State*, 24.

<sup>41</sup> Barber, *The Constitutional State*, 25.

<sup>42</sup> Barber, *The Constitutional State*, 25.

Take, for example, the 1837 incident in Alton, Illinois where abolitionist Elijah Lovejoy ultimately lost his life attempting to protect his press, or the mob that attacked the offices of the *Federal Republican* for its opposition to the War of 1812. In both incidents, the mob claimed to represent the will of the community. The Alton mob had more representation by members of the city's elite, while the Baltimore riot appears to have been led by men of more lower classes. In both episodes, however, the consensus of the community was at most a majority opinion. In Alton, it was Lovejoy's friend, and brother of Harriet Beecher Stowe, Edward Beecher who unsuccessfully sought to diffuse the mounting criticism of his friend by emphasizing the importance of the rights of free expression.<sup>43</sup> In Baltimore, it was many elite members of day, including Revolutionary War General Harry "Lighthorse" Lee, father of Robert E. Lee, and Barron and Craig's future attorney, David Hoffman.<sup>44</sup> What these incidents show is that whether the mob was led by city fathers or by the lower classes, defining community opinion as monolithic is not possible. These supporters espoused opinions that were out of step with a majority of the community by arguing that an individual's freedom to publish unpopular ideas could not be quashed if the larger community did not agree. If we reexamine the Alton and Baltimore incidents with an appreciation of rights as the way that people express their sovereignty, we see rights as a way to place limits not only on the sovereign state, but as a way to place limits on other sovereign people. Rights exist in this form as not just part of a binary that opposes state power, but as a realistic way to protect individuals from power in all its forms.

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<sup>43</sup> Michael Kent Curtis, "The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens," 44 *U.C.L.A. L. Rev.* 1109 (1996-1997): 1140-1141.

<sup>44</sup> J. Thomas Scharf, *History of Baltimore City and County* (Philadelphia: Louis H. Evers, 1881), 782; "Outrage at Baltimore," *The Albany Register* (Albany, N.Y.), August 4, 1812, Vol. XXIV, Issue 62, Page 3.

Rights must still exist under this umbrella of state sovereignty, but they can be used as a more sophisticated method of opposing power that does not just emanate from the state.

Thus, if sovereignty is identified with the state, rights as emanating from written constitutions makes sense. The state is created by the constitution and is invested with sovereign power. As a result, the state creates law and the constitution provides the limits on its power. These limits include what we would envision as rights. The sovereign state can act pursuant to the constitution and is restrained by the enunciation of rights in the same constitution. However, if sovereignty truly remains with the people, rights are viewed less as positive law enactments ensconced in the state's founding constitutional documents. Rather, rights are more properly perceived as extra-governmental natural or fundamental rules that pre-date the constitutional structure of the state. Under this view, a Lockean conception of government prevails. People entered civil society for mutual protection and departed with certain rights in order to provide for harmonious living and the common welfare, but did not give away their fundamental or natural rights. This echoes Blackstone's alienable/inalienable rights binary, discussed more fully in Chapter 4, which created a conceptual distinction between alienable rights that could bend in order to provide a civil society and inalienable rights that could not be infringed. It makes less sense under this view that a sovereign people could potentially alienate fundamental or inalienable rights simply by the act of enunciating them in a written constitution. By contextualizing *Barron* within these transformations, the opinion takes on entirely new attributes. If we consider sovereignty as residing with the state, the constitution is where the question of whether Barron and Craig are entitled to compensation is decided. Marshall's textual and original intent interpretations make sense under this model. However, if sovereignty is truly located with the people, a decision refusing to compensate them for the wharf damages because

the Bill of Rights was not originally intended to apply to the states is illogical. This right to compensation existed well before the Constitution; questions concerning maintaining the balance of power between the Federal and state governments cannot abridge a natural obligation required of all free governments.

Alternatively, rights as natural or inherent conceptually left ultimate sovereignty with the people. Such a view of rights challenges the absolute supremacy required of a sovereign. Rights in this capacity are “sooth[ing] sovereignty’s harsh edges,” as characterized by James Martel, but are also directly challenging the sovereignty of the state by attempting to remove some of the state’s authority, an essential component of sovereignty.<sup>45</sup> To a lesser extent, envisioning rights as an artifact of the common law places boundaries on state action, but does not attack state sovereignty itself. Finally, envisioning rights as emanating from written documents leaves sovereignty firmly with the government or the people’s representatives. How expansively we define rights seems to be a barometer as to the type of sovereignty that exists. If rights are used to limit the power of the sovereign, the sovereign is in theory unlimited in its powers that do not impede individual or community rights. Importantly, the modern concept of sovereignty has been anchored to the idea that “the people” are the sovereign rulers, rather than its true alternative, that the state became the true sovereign.<sup>46</sup>

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<sup>45</sup> James R. Martel, “Can There Be Politics Without Sovereignty?” 153-154.

<sup>46</sup> Martel, “Can There Be Politics Without Sovereignty?” 154; Hinsley, *Sovereignty*, 127. Hinsley argues that the rise of popular sovereignty gave the impression that the idea of the rule of the people was claiming victory from the opposite position, the sovereignty of the ruler or king. In reality, it was the sovereignty of the state that was victorious.

## CHAPTER 9 CONCLUSION

John Craig and John Barron never received reimbursement for the damages to their once prosperous wharf. John Marshall's ruling made sure of that. However, even had Marshall ruled differently it would not have made any difference to them, as Craig died shortly before the case went to trial in March of 1828 while Barron died a few months after trial, on June 11 of the same year.<sup>1</sup> Neither was alive by the time the Maryland Court of Appeals heard and overturned the trial court ruling in December of 1830, and both had been dead for five years by the time the Supreme Court ruled in favor of the city in 1833. Nonetheless, Luke Tiernan continued the case against the city all the way to the highest court in the land. Why? Certainly, as executor of Craig's estate, he had a legal obligation to marshal the estate's assets. Less than a year before he passed away in early 1828, Craig executed his will.<sup>2</sup> In it, Craig divided his estate among his son, John Craig, and his son-in-law, John Staples, the husband of his daughter Margaret who very likely went by Peggy as did her mother. The younger John Craig and Staples would share guardianship over Craig's minor son, Robert Craig. To see that his intent under the will was faithfully carried out, Craig appointed his son John and Luke Tiernan as co-executors of his estate.<sup>3</sup> However, approximately five months<sup>3</sup> after executing his will, his son renounced all rights as an executor of his father's estate on November 14, 1827, leaving Tiernan as the sole executor.<sup>4</sup>

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<sup>1</sup> See "Sale of the Property of John Craig, Deceased," *Baltimore Patriot*, March 8, 1828, Volume XXXI, Issue 59, Page 3 and Death Notice for John Barron, *Baltimore Patriot*, June 12, 1828, Volume XXXI, Issue 141, Page 3.

<sup>2</sup> Craig executed his will on June 18, 1827.

<sup>3</sup> *John Craig Inventory* (February 16, 1828), Maryland State Archives, Folio 25.37.63, Book 37.

<sup>4</sup> *John Craig Inventory* (February 16, 1828), Maryland State Archives, Folio 25.37.63, Book 37.

Tiernan pursued the case against the city all the way to the Supreme Court before finally accepting that the wharf damages would not be recognized, posting bonds and likely paying the legal fees the whole way to keep the case alive. It seems that the prime motivation was not out of a sense of loyalty to Craig or even a desire to see the high Court vindicate the right to receive reimbursement for governmental takings of private property. Instead, it appears that Tiernan was motivated not just as Craig's executor, but primarily because Craig owed him a significant amount of money. According to a ledger acknowledged as accurate by Craig on February 21, 1826, approximately two years before his death, he owed Tiernan's firm \$8,846.76.<sup>5</sup> However, an inventory of Craig's estate taken shortly after his passing in 1828 listed his assets as totaling only \$1,199.20.<sup>6</sup>

Yet even before Craig and Barron passed away, Tiernan had positioned himself to recoup his losses. Years earlier, Tiernan successfully purchased Barron and Craig's wharf at auction for \$16,000.00 in January of 1822.<sup>7</sup> Approximately one month later, Craig and Barron brought the *Barron* case against the Mayor and City Council, with Tiernan's essential financial backing. On July 16, 1829, approximately one year after Craig and Barron's death and during the pendency of the appeal of the *Barron* litigation to the Maryland Court of Appeals, Tiernan filed suit to foreclose property mortgaged to him by Craig in 1820, suing Craig's wife, daughter, and son-in-law.<sup>8</sup> In return for a loan of \$3,000.00, Craig had mortgaged to Tiernan the brick house he

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<sup>5</sup> *Luke Tiernan v. Margaret, John, and Robert Craig, Margaret Staples and the Estate of John Craig*, Baltimore City, Chancery Court, Recorded in Liber No. 114-12, Maryland State Archives, Accession No.: 17,898-11412-1/2, MSA S512-14-11237, Location 1/39/3/, 14.

<sup>6</sup> *John Craig Inventory* (February 16, 1828), Maryland State Archives, Folio 25.37.63, Book 37.

<sup>7</sup> *James Mackubin, Administrator of Frederick Mackubin v. John Craig and John Barron Jr.*, (Baltimore County Court, 1818), Maryland State Archives, MSA S512-4-3602, Acc. No. 17,898-3495-1/2, Location: 1/36/3/, (January 17, 1822 notation in file from R. Lemmon & Co., auctioneer).

<sup>8</sup> Barron died on June 11, 1828, while Craig's estate was appraised on February 16, 1828 and his property was advertised for estate sale in March of 1828, right before the trial. I am placing Craig's death as occurring sometime

owned at the corner of Ann and George Streets, located in Fell's Point just a few blocks west of the wharf.<sup>9</sup> The Craigs did not file an appearance to contest the suit and the chancery court appointed William H. Tiernan as trustee to conduct the auction of the property. On May 13, 1830, William Tiernan auctioned the property which sold for \$1,795.00 to the highest bidder: Luke Tiernan.<sup>10</sup> On the same day Tiernan filed suit against the Craigs, on June 16, 1829 Tiernan received an assignment of a lease from Craig's son-in-law, John Staples, for property that Staples had previously received from Craig in 1827. On May 4, 1827, Craig assigned the lease on this second property to Staples for payment of \$60.00 per year.<sup>11</sup> This property was north of and immediately adjacent to the lot Craig owned at the corner of Ann and George Streets that he mortgaged to Tiernan.<sup>12</sup>

Even ten years after Craig's passing, Tiernan appeared on behalf of Craig as his executor in an 1838 chancery court case, *Tiernan v. Peter Rescaniere's Administrators*.<sup>13</sup> John Craig co-owned a brig which was ordered sunk at the entrance to Baltimore harbor in 1814 to defend the city from the British. In 1815, Craig and the other owners sold the brig for salvage to the plaintiff along with the rights to any future indemnity from the United States Government.

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during January or early February of 1828. See "Sale of the Property of John Craig, Deceased," *Baltimore Patriot*, March 8, 1828, Volume XXXI, Issue 59, Page 3; Death Notice for John Barron, *Baltimore Patriot*, June 12, 1828, Volume XXXI, Issue 141, Page 3; and John Craig Inventory (February 16, 1828), Maryland State Archives, Folio 25.37.63, Book 37.

<sup>9</sup> *Tiernan v. Craig, et al.*, pp. 3-5.

<sup>10</sup> *Tiernan v. Craig, et al.*, pp. 46-47.

<sup>11</sup> *Tiernan v. David and John Fisher, John Craig and John H. Staples*, Maryland State Archives S512-14-11311, Acc. No.: 17,898-11483, Location: 1/39/3/ (Deed of Assignment). See also See Maryland Land Records, [www.mdlandrec.net](http://www.mdlandrec.net), Liber WG No. 185, folio 655.

<sup>12</sup> Shortly thereafter, on July 3, 1829, the *Baltimore Patriot* reported on *Tiernan v. Fisher, et al.* Apparently, in 1805, John Fisher had originally leased to John Craig the property at the corner of George and Ann Streets, but the lease was never recorded. Craig assigned the lease to son-in-law John Staples on May 4, 1827, who in turn assigned the lease to Luke Tiernan on June 16, 1829. See also July 7, 1829 *Baltimore Patriot*; *Tiernan v. Fisher, et al.*, Maryland State Archives, MSA: S512-14-11311.

<sup>13</sup> *Tiernan v. Rescaniere's Adm'rs*, 10 G. & J. 253 (Md. Ct. of App. 1838).

However, Craig and his associates allegedly kept the \$1,003.75 later paid by the Federal government for the damage, but managed to defeat the 1824 suit at law on the ground that the statute of limitations had run. Further, when the plaintiff brought suit again in 1827 in equity and was successful in chancery court, Tiernan filed an ultimately successful appeal as executor.<sup>14</sup>

While Craig died before trial indebted significantly to Tiernan, it appears that the life of his son John Craig was both a story of redemption and tragedy. The younger John Craig was only twenty-one years old at the time of his father's passing in 1828.<sup>15</sup> Despite the loss of the wharf, Craig managed acquire another wharf in Fell's Point as well as a nearby home and acquired a significant amount of personal property.<sup>16</sup> Unfortunately, misfortune stuck the younger Craig quickly. On February 10, 1838, a woman named Mary Ann, described as a "consort" of a John Craig, died at thirty years of age.<sup>17</sup> Craig himself was killed a year later in a carriage accident. While driving a carriage down a hill, some of the horses "ran off." While the other passengers in the carriage successfully jumped out, Craig was thrown from the carriage while trying to reestablish control. Craig's feet got caught in the wheels and was fatally dragged down the bumpy stone street until the horse could be stopped. Craig was only thirty-two.<sup>18</sup> One year later, as if to add a final chapter to the tragedy, Craig's six year old son, also named John Craig,

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<sup>14</sup> *Tiernan v. Rescaniere's Adm'rs*, 10 G. & J. 253 (Md. Ct. of App. 1838).

<sup>15</sup> "Fatal Accident," May 7, 1839 *Baltimore Sun*, Volume IV, Issue 146, p. 2.

<sup>16</sup> According to the notice of the auction following his death, Craig owned a home in Fell's Point on Thames Street, between Bond and Market Streets. May 20, 1839 *Baltimore Sun*, Volume V, Issue 3, Page 3. It is not known how Craig succeeded in establishing himself as a successful merchant and what support Luke Tiernan may have provided, if any.

<sup>17</sup> "Death Notices," February 16, 1838 *Baltimore Sun*, Volume II, Issue 28, p. 2.

<sup>18</sup> "Fatal Accident," May 7, 1839 *Baltimore Sun*, Volume IV, Issue 146, p. 2.

wandered from the steps of his house where he was left unattended. The boy wandered out to the pier of his late father's wharf, fell in, and drowned.<sup>19</sup>

Ultimately, while *Barron v. Baltimore* is remembered in Constitutional history for its holding that the Bill of Rights amendments did not apply to state governments, at its base the litigation was continued all the way to the Supreme Court by a creditor seeking to recover some of his losses. However, many cases outlast their original intent and purpose, and *Barron* is no exception. Certainly, on a micro level, this study illuminates the actual circumstances that gave rise to the case, from the lives of the people involved, to a snapshot of early Baltimore, to a view inside the courtrooms where the Barron and Craig tried to remedy their misfortune. While a detailed and intimate history of the case is satisfying for Constitutional history buffs, much more was needed. By digging deeper into the story, we see that the case has a relevance and importance to our understanding of American history. Treating *Barron* as an introductory footnote to the Fourteenth Amendment fails to capture a moment in American history. *Barron* matters on its own. The case is an excellent vehicle through which we can appreciate how notions of rights, sovereignty, federalism and, ultimately, power, were being negotiated and transformed in the early republic. By widening our focus and contextualizing the decision within its era, we gain a better appreciation of the range of ideas regarding the origins of our rights. Looking at the varied interpretations from the colonial, founding, and early republic eras, it is apparent that Marshall's view of rights as emanating from the Constitution was only one of many interpretations. Indeed, this positivist approach was much newer than the competing traditions which held rights as natural law possessions or the particular birthright of Englishmen, for example. As this interpretation was only one of several possible outcomes, it requires us to

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<sup>19</sup> "Drowned," June 9, 1840 *Baltimore Sun*, Volume VII, Issue 20, p. 2.

consider Marshall's motives in choosing this path. Certainly, *Barron* arrived on the Supreme Court's docket during a time of incredible upheaval and can be interpreted as a byproduct of Marshall's concern over the escalating nullification crisis. However, on a broader scope, *Barron* can also be seen as part of a larger battle over the location of power in the early republic. This debate was not simply over the balance of power between the Federal and state governments, but concerned the role of the people in a country which was predicated upon popular sovereignty. *Barron* plays a critical role in the maintenance of a system of state sovereignty where the peoples' sovereign powers are delegated to the government. The idea of locating rights is an important step in this process. If rights are perceived as natural or fundamental principles, the sovereign people retain the right to enforce those rights if they deem it necessary. However, by advocating rights as emanating from written constitutions, the courts become the location where governmental overreach will be redressed.

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