

2010

# An Almost Archeological Dig: Finding a Surprisingly Rich Early Understanding of Substantive Due Process

Louise Weinberg

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

## Recommended Citation

Weinberg, Louise, "An Almost Archeological Dig: Finding a Surprisingly Rich Early Understanding of Substantive Due Process" (2010). *Constitutional Commentary*. 654.

<https://scholarship.law.umn.edu/concomm/654>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

AN ALMOST ARCHEOLOGICAL DIG:  
FINDING A SURPRISINGLY RICH  
EARLY UNDERSTANDING  
OF SUBSTANTIVE DUE PROCESS\*

*Louise Weinberg\*\**

There exists a hitherto unnoticed early disquisition on substantive due process, setting out in 1840 a theory of substantive due process far more powerful than the bare-bones concept Chief Justice Taney would deploy seventeen years later in *Dred Scott*. This remarkable text has languished in obscurity until now because it is layered over and threaded through with matters extraneous to it. It exists buried within the report of an oral argument about a different question,<sup>1</sup> in a case, *Holmes v. Jennison*,<sup>2</sup> about a wholly unrelated problem.<sup>3</sup> The ancient relic has now been unearthed, in an almost archeological dig, by separating its fragments from the layered deposit in which it is submerged, as if lifting the clay from a potsherd.

With a single exception,<sup>4</sup> a 1993 paper on the Ninth Amendment, I have found no mention of this old argument of counsel in books or articles or cases. There appears to be no quotation or excerpt from it. As far as the Tarlton Law Library, Westlaw, or Google can discover—apart from the exception noted—the argument has no existence beyond the official reports of the case in which it appeared. And in the 1993 paper in which this argument of counsel is mentioned, there is no

---

\* Copyright © 2010 by Louise Weinberg.

\*\* Holder of the Bates Chair and Professor of Law, The University of Texas School of Law.

1. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 555–57 (1840) (Cornelius P. Van Ness for the plaintiff in error) (arguing that the protections of the Fifth Amendment Due Process Clause should be read to apply to the states as well as the nation).

2. 39 U.S. (14 Pet.) 540.

3. *Id.* at 569 (Taney, C.J.) (plurality opinion) (holding that the treaty power is exclusively federal).

4. John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1004 (1993) (referring to the view of the Ninth Amendment argued by Cornelius P. Van Ness for the plaintiff in error in *Jennison*).

recognition of the existence of the surprisingly rich theory of due process discoverable within it.

The *fons et origo* of substantive due process is commonly supposed<sup>5</sup> to be *Dred Scott*,<sup>6</sup> the first Supreme Court case to strike down an act of Congress on a substantive due process ground. But scholarly examination of antebellum case law has shown that at least a skeletal concept of substantive due process, as it appears in *Dred Scott*, was already familiar at the time *Dred Scott* was decided.<sup>7</sup> Lawyers and judges understood, then as now, the half-substantive, half-procedural point that due process requires reasonable law. Arbitrary or irrational law is not due process.<sup>8</sup> Nor may good law be applied unreasonably, either by officials or judges.<sup>9</sup> Nor may officials take other arbitrary or irrational action. Such acts or laws are not the process that is due.<sup>10</sup>

But writers have found little, if any, early intimation that due process was thought to protect *fundamental rights*. Where in

5. *E.g.*, Cass R. Sunstein, *The Dred Scott Case*, 1 GREEN BAG 2d 39, 44 (1997).

6. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

7. *See, e.g.*, BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 117 (1995); Louise Weinberg, *Overcoming Dred*, 24 CONST. COMMENT. 733, 745–46 (2007); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999).

8. Thus, law that is duly enacted may nevertheless not be due process. *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553 (1852) (Taney, C.J.) (stating that patent legislation depriving the plaintiff of existing property could not be due process). *See also, e.g.*, *Cochran v. Van Surlay*, 20 Wend. 365, 383 (N.Y. 1838) (stating the rule that the state may not deprive anyone “of life, liberty, or property, without due process of law; i.e., by mere arbitrary legislation”).

9. *See* the 1815 argument of counsel in *United States v. Bryan*, 13 U.S. (9 Cranch) 374, 378 (1815): “[A creditor] ought to have full reason to rely that . . . [a] subsequent enactment . . . [would not] enhance his risk of danger beyond what it was when the debt was contracted. Such a mode of legislation . . . would be virtually taking away private ‘property’ without ‘due process of law.’ . . . [It] could not have been ‘necessary and proper,’ and is not warranted by the constitution.” (emphases in original). Today we also understand that law may not be *chosen* arbitrarily. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion), *reh’g denied*, 450 U.S. 971 (1981), and cases there cited (requiring rational choices of law as between states, under the Due Process Clause of the Fourteenth Amendment); *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (requiring rational choices of law as between nation and state, explaining that Congress lacks power to make state law). For the argument that the Due Process Clauses provide unified theory for both sorts of cases, *see* Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523 (2004); Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743 (1992); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

10. *Cf. Daniels v. Williams*, 474 U.S. 327, 331 (1986) (Stevens, J., concurring) (stating that the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions “regardless of the fairness of the procedures used to implement them.”).

our early cases can we find an understanding that the Due Process Clause of the Fifth Amendment protects fundamental, substantive liberties? Liberties not enumerated in the Bill of Rights?

To be sure, *Dred Scott's* due process might be read to have protected liberty as well as property, specifically implicating a right to travel. Taney declared, referring to the Fifth Amendment, that a law that has the effect of destroying a man's property, merely because he travels with his property to a place at which such property has been abolished by law, cannot be due process.<sup>11</sup> But Taney's was hardly an encompassing vision of fundamental unenumerated rights. Nothing in his terse pronouncement protecting property from confiscation by action of law necessarily implied specific protection even for property rights already mentioned in the Bill of Rights. (Today, of course, the Due Process Clause of the Fourteenth Amendment literally does protect against state violations of rights enumerated in the Bill of Rights, by "incorporating" them.) Rather, Taney was saying, in line with the most expansive general understandings of the time, that due process substantively protects against law that is arbitrary and unreasonable. *Dred Scott's* protection against unreasonable law also did not necessarily imply protection against violation of rights which, like the right to travel, are not enumerated in the Bill of Rights, but which may be as fundamental as those that are.

Yet identifiable fundamental rights, although unenumerated, would seem to call for judicial protection. The Ninth Amendment acknowledges the existence of such rights and cautions that the Constitution not be construed in disparagement or in derogation of them. In the antebellum period, unenumerated rights—rights to marry, to have children, to seek gainful employment, to have access to courts, and so forth—were sometimes assigned to a category of unalienable rights antedating the Constitution, the existence of which is acknowledged in the Declaration of Independence.<sup>12</sup> Or they

---

11. *Dred Scott*, 60 U.S. at 450: ("And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.")

12. For a modern acknowledgement of this antique position, see *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting): ("In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their

were conceived as essential attributes or privileges of state citizenship.<sup>13</sup> This latter understanding, as regards United States citizenship, appears in *Dred Scott*, but not in its holding striking down an act of Congress. Rather, it appears in the passages in *Dred Scott* rejecting black rights by denying the possibility of black citizenship.<sup>14</sup> In Chief Justice Taney's admired early opinion in the *Charles River Bridge* case, a suggestion of substantive due process appears when he launches his Contracts Clause analysis with Magna Carta and the Due Process Clause.<sup>15</sup> But until now, we have not found an antebellum discussion of substantive due process in the potent sense in which we understand the doctrine today. We have not found due process asserted in protection of unenumerated fundamental rights, not in that early period. The interest of the edited argument from *Holmes v. Jennison*, reproduced below, resides in the fact that it does seem to embody, as early as 1840, something like the modern, if still contested position, as it has developed since *Meyer v. Nebraska*,<sup>16</sup> that due process protects unenumerated fundamental rights.

Greatly complicating the discovery of this find is the fact that counsel making the argument, Governor Van Ness,<sup>17</sup> was not, in his own mind, making a substantive due process argument. Articulating a theory of substantive due process was not the end he had in view. His argument was not focused on the proposition that the Due Process Clause is substantive as well as procedural. He was not focused on making the points that in fact he did make: that the Due Process Clause is not only a limit on government power, and not only a shield against arbitrary

---

Creator.' . . . The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts. . . .")

13. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.Pa. 1823). In the cited passage, Justice Bushrod Washington, sitting on a circuit, listed certain property and civic rights as examples of privileges and immunities of citizenship within the meaning of Article IV. That Article, which touches upon the states, provides in its second section that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST., art. IV, § 2.

14. *Dred Scott*, 60 U.S. at 410 *passim*; *id.* at 411 (declaring that the Constitution was not intended to confer on black persons “or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen”).

15. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 648–50 (1837).

16. 262 U.S. 390 (1923) (holding in part that the Due Process Clause of the Fourteenth Amendment protects the family from unreasonable state interference in the rearing of its children) (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

17. This was Cornelius P. Van Ness (1782-1852), who had been Governor of Vermont from 1823-1826.

governance, but also a positive protection of fundamental human rights. The original unedited passage from Van Ness's argument, which can be read in the Appendix, was about something else, and, understandably, no previous commentator has considered it in its possible bearing on the history of substantive due process theory. All that Van Ness did mean to argue in this passage was that the Due Process Clause of the Fifth Amendment should be applied against the states as well as the nation. This proposal was bold enough, a quarter-century before the Fourteenth Amendment's own Due Process Clause. And the Fourteenth Amendment was the hard-won fruit of civil war and military occupation. Chief Justice Taney did not deign to respond to the suggestion. Justice Barbour simply noted his belief that this point, "urged at the bar," was controlled by *Barron v. Baltimore*.<sup>18</sup>

Nevertheless, from Van Ness's original text we can extract and bring to light an early conception of a richly substantive due process, apparently unique for its time.<sup>19</sup> What emerges, and is reprinted immediately below, may be the most detailed and impassioned early statement of substantive due process theory we have. It develops *in extenso* a theory of a substantive due process that, within an over-arching concept of personal liberty, protects principles—unenumerated and fundamental rights—which lie at the foundation of that liberty. These rights are acknowledged by the Ninth Amendment. And in this understanding, the Due Process Clause imposes affirmative duties on the nation to protect those liberties. What we have here, then, is a fully realized early expression of substantive due process virtually as it would emerge in the Supreme Court in the twentieth century, eventually bestowing upon the most intimate private human acts, relations, and choices a long hoped-for freedom from government interference. In some ways the argument presented below goes beyond even these understandings.

---

18. 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.) (holding that the rights enumerated in the Bill of Rights were protections against national, not state action).

19. For perhaps the narrowest procedural antebellum understanding of the Due Process Clause of the Fifth Amendment, see JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 709–10 (Story abridgment, 1833) (describing the Due Process Clause as protecting against forfeiture of life, liberty, or property on "general warrants").

EDITED EXTRACT<sup>20</sup>CORNELIUS P. VAN NESS  
ARGUMENT FOR THE PLAINTIFF IN ERROR  
HOLMES V. JENNISON (1840)<sup>21</sup>

We have now arrived at the third and last point; which is, . . . [whether] the act now complained of was . . . a violation of the provision in the Constitution of the United States which declares that ‘no person shall be deprived of life, liberty, or property, without due process of law.’

...

. . . When we speak of a limitation of power, we have naturally in view some power which, without such limitation, might be lawfully exercised; and of this character are the prohibitions in the original Constitution, whether relating to the general government, or to the states. That some of the amendments are of the same character is unquestionably true. But there are others which are not so; among which is the one containing the clause declaring that ‘no person shall be deprived of life, liberty, or property, without due process of law.’ These latter cannot be considered as limitations of power, but are to be understood as declarations of rights. Of absolute rights, inherent in the people, and of which no power can legally deprive them.

The right of personal liberty has existed ever since the first creation of man, and is incident to his nature. It has been recognized from the earliest organization of society, and the first institution of civil government, until the present time. And for the plain reason that this sacred right is beyond the reach of all legitimate power, it cannot properly be the subject of a limitation

---

20. Ellipses indicate omissions; brackets indicate summary insertions.

21. *Jennison*, 39 U.S. at 555–57.

to the action of a regular government. . . . The declaration of this right, as well as of others, was made a part of the Constitution of the United States . . . . We find it there, and the only question now is, as to the extent of its operation.

That the clause in question (and indeed the whole article in which it appears) embraces every person within the limits and jurisdiction of the whole Union, will not be denied. . . .

. . .

It may with truth be affirmed, that most of the amendments to the Constitution contain principles which lie at the very foundation of civil liberty, and are most intimately connected with the dearest rights of the people. Principles which should be cherished and enforced by a just and parental government, to the utmost extent of its authority. Principles which, in reality, like those proclaimed from the burning mount, deserve to be diligently taught to our children, and to be written upon the posts of the houses, and upon the gates.

. . .

But the distinction which I have endeavored to establish between the limitations of power and the declarations of rights, is adopted in the clearest manner in the Constitution itself. The ninth article of the amendments declares, that 'the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.' And the tenth article provides, that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' Here we see that the framers of these amendments had no ideal of confounding the limitations of power, and the declarations of rights; but treated each as distinct from the other. . . . [T]he ninth article was deemed necessary as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration.

It appears clear to my mind, then, that the provision in the Constitution to which I have referred, instead of limiting the powers of the general government, directly calls into action those powers for the protection of . . . the great and fundamental right of personal liberty.

---

Here we have a powerful recognition of fundamental but unenumerated human rights, rights of personal liberty, within a substantive vision of the concept of due process of law. These are affirmative rights, not simply limits on government power. Moreover, these rights require active government protection; and their existence is acknowledged by the Ninth Amendment. Judicial review of laws and other official acts, in this understanding, would be required in order that government not be permitted to violate these rights. That the unedited argument in the Appendix is actually about something else can hardly be said to alter the substantive understanding of the Due Process Clause that informs it.

But a *caveat* is in order. Although this once-buried passage seems a beacon of liberty, in the antebellum period it would have been—to mix a metaphor—a two-edged sword. What if Chief Justice Taney had taken up the argument?<sup>22</sup> Taney would hardly have been troubled by Van Ness’s insistence that the Due Process Clause “embraces every person within the limits and jurisdiction of the whole Union; we know that in *Dred Scott* Taney would read the Declaration of Independence’s “All men are created equal” as excluding blacks.<sup>23</sup> Van Ness’s point, that the Fifth Amendment should protect the personal liberties of individuals from state as well as federal interference, if taken up by Taney in *Jennison*, would have become available in the future to extend the Fifth Amendment rationale of *Dred Scott* to the states’ own legislatures, within the states’ own borders. And insofar as *Dred Scott*’s Fifth Amendment would protect liberty, it would only be the liberty of slave masters to travel into free federal territory without losing their slave “property.” *Dred Scott*’s Fifth Amendment protected slavery, not liberty.

---

22. See generally Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT. 733 (2007).

23. *Dred Scott*, 60 U.S. at 410.

As constitutional law, of course, *Dred Scott* made its protection of slavery operative within the states, but only as against federal interference. Abraham Lincoln warned after *Dred Scott* that it would take just one more Taney Court decision to force slavery upon the free states, protecting “property” in human beings even from interference by a free state’s own legislature within the free state’s own borders.<sup>24</sup> Had Taney adopted Van Ness’s invitation to extend the Fifth Amendment to the states, that next case after *Dred Scott* would have been all but decided, the plurality opinion in *Jennison* serving as convenient, perhaps controlling precedent. And the states, as Lincoln feared, would have been stripped of power to prohibit slavery on their own territory.

The affirmative duty of protection to which Van Ness would summon Congress is equally troubling in the context of the antebellum period. It finds an echo in the extremist demand of the Deep South faction at the first Democratic convention in 1860 that Congress enact a national slave code.<sup>25</sup> Had Taney given authoritative voice to Van Ness’s argument, *Jennison* could have undergirded future Supreme Court validation of that national slave code. This was the demand that broke up the Democratic Party in 1860,<sup>26</sup> ushering in Lincoln’s election and the crisis that followed.

To appreciate and honor the words in this newly-discovered passage, while understanding the unique dangers they presented in their time—that is the claim this now-revealed, quite wonderful exposition makes upon the liberal mind.

---

24. See, e.g., Abraham Lincoln, Speech at Springfield, “A House Divided,” (June 16, 1858), in *CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858*, at 1, 7 (Paul M. Angle ed., 1958).

25. For the development of the Southern demand for a national slave code, see ERIC H. WALTHER, *WILLIAM LOWNDES YANCEY AND THE COMING OF THE CIVIL WAR* (2006); JOSEPH HODGSON, *THE CRADLE OF THE CONFEDERACY* (photo. reprint 2005) (1876); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 *CHI-KENT L. REV.* 97, 125–31 (2007).

26. OFFICIAL PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, HELD IN 1860, AT CHARLESTON AND BALTIMORE, at 59, 65 *passim* (photo. reprint 2005) (John Gibson Parkhurst ed., 1860).

## APPENDIX

UNEDITED EXCERPT<sup>27</sup>  
CORNELIUS P. VAN NESS  
ARGUMENT FOR THE PLAINTIFF IN ERROR  
HOLMES V. JENNISON (1840)<sup>28</sup>

We have now arrived at the third and last point: which is, that admitting a state to possess the right to act upon the subject of surrendering to foreign governments fugitives from justice, yet that the sovereign power of the state must be brought into action, and the surrenders made under a regular law or proceeding of such power; and that as [whether] the act now complained of was without any such authority, it was a violation of the provision in the Constitution of the United States which declares that ‘no person shall be deprived of life, liberty, or property, without due process of law.’

But here arises the question, whether this provision in the Constitution is applicable to the states; or, in other words, whether it constitutes a protection against the unlawful exercise of state power. I am aware that it has been decided by this Court, in the case of *Barron vs. The City of Baltimore*, 7 Peters, 243, that the amendments to the Constitution of the United States, commonly called the bill of rights, were simply limitations of the powers of the general government, and had no effect upon the state governments. But as the decision is a recent one, and stands alone, I trust the Court will attend to me while I submit a few remarks upon a question so important and interesting.

Let me begin by observing that the rule of construction which can generally be resorted to, in order to determine the sense of any provision in the original Constitution, cannot be applied to the articles of amendment. The Constitution itself was

---

27. The theory of substantive due process extracted in the foregoing paper from this original text is underlined. Brackets indicate summary or orthographical insertions made in the edited extract.

28. *Jennison*, 39 U.S. at 555–57.

2010]      *AN ALMOST ARCHEOLOGICAL DIG*      173

one connected work, and was the result (if I may be allowed the expression) of a concentration of mind; and in deciding upon one part of it, reference may be had to other parts, and the whole so construed as consistently to stand together. But the case is very different as it regards the amendments. These have little or no connection with each other, varying both in their character and in their terms, and were originally proposed from different quarters, and with different objects. Each article, therefore, if not each clause, should be construed simply according to its own nature, and the terms in which it may be expressed.

With the utmost deference I beg leave to observe, that in my humble judgment, an error was committed by the Court, in the case referred to, in supposing all the articles of amendment to be in the nature of limitations of governmental power, or to have been so intended at the time of their adoption. When we speak of a limitation of power, we have naturally in view some power which, without such limitation, might be lawfully exercised; and of this character are the prohibitions in the original Constitution, whether relating to the general government, or to the states. That some of the amendments are of the same character is unquestionably true. But there are others which are not so; among which is the one containing the clause declaring that 'no person shall be deprived of life, liberty, or property, without due process of law.' These latter cannot be considered as limitations of power, but are to be understood as declarations of rights. Of absolute rights, inherent in the people, and of which no power can legally deprive them.

The right of personal liberty has existed ever since the first creation of man, and is incident to his nature. It has been recognised from the earliest organization of society, and the first institution of civil government, until the present time. And for the plain reason that this sacred right is beyond the reach of all legitimate power, it cannot properly be the subject of a limitation to the action of a regular government. Whether [T]he declaration of this right, as well as of others, was made a part of the Constitution of the United States, with a view, principally, of guarding it from violations by the general government, it is not material to inquire. We find it there, and the only question now is, as to the extent of its operation.

That the clause in question (and indeed the whole article in which it appears) embraces every person within the limits and jurisdiction of the whole Union, will not be denied. All that

remains to be determined is, whether it is to be construed as leaving the states free to encroach upon the right which it declares every one shall enjoy; or whether it is to be understood as recognising and adopting the principle that no power from any quarter can do so. In other words, whether the clause was inserted because it was deemed more proper for the states than for the general government to deprive a person of his life or liberty without law; or, whether, to promulgate a general command against the violation of a right possessed by a title above all legitimate governmental power.

If it should be supposed that in forming the Constitution, no protection was wanted from the general government against the illegal exercise of state power, the answer is, that this, though generally true, is by no means universally so. There are several restrictions upon the states in the Constitution, for the benefit and security of the people; and that, too, where the same powers are prohibited to the general government. One, for example, is, that no state shall pass ex post facto laws. And this is for the reason that no person ought to be punished by any government, for an act made criminal after the fact. Yet surely this principle is not more worthy of being guarded by the general government, than that a person shall not be twice punished for the same offence; or that he shall not be deprived of his life or liberty, except by due course of law. But we find that the United States stand pledged in the Constitution to guaranty to every state in the Union a republican form of government, and to protect each of them against domestic violence; thus becoming directly and deeply interested that state power shall not be unlawfully or improperly exercised.

It may with truth be affirmed, that most of the amendments to the Constitution contain principles which lie at the very foundation of civil liberty, and are most intimately connected with the dearest rights of the people. Principles which should be cherished and enforced by a just and parental government, to the utmost extent of its authority. Principles which, in reality, like those proclaimed from the burning mount, deserve to be diligently taught to our children, and to be written upon the posts of the houses, and upon the gates.

It is true, that most of the states have incorporated into their constitutions the same principles; though several of those instruments do not contain the important provision relied upon in this case. But this furnishes no argument against allowing them the force in the Constitution of the United States for which

2010]      *AN ALMOST ARCHEOLOGICAL DIG*      175

I contend. Some of the state constitutions also contain the prohibition against passing ex post facto laws; but does this weaken the authority of the same restriction upon the states in the general Constitution? And is it not, moreover, very proper, that the state constitutions should themselves embrace all the provisions necessary to a good government, whether they are needed for the present, or not; since it cannot be foreseen what further amendments or alterations may take place in the Constitution of the United States.

But the distinction which I have endeavoured to establish between the limitations of power and the declarations of rights, is adopted in the clearest manner in the Constitution itself. The ninth article of the amendments declares, that 'the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.' And the tenth article provides, that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' Here we see that the framers of these amendments had no idea of confounding the limitations of power, and the declarations of rights; but treated each as distinct from the other. If the amendments had treated only of the former, certainly the reservation, both to the states and to the people, in the tenth article, would have answered every purpose. But [T]he ninth article was deemed necessary as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration.

It appears clear to my mind, then, that the provision in the Constitution to which I have referred, 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.