Since written constitutions are based upon the common law, all noted authorities recognize that its powers and provisions are to be interpreted by the common law:

> The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments.[24]

What ever rules, statutes or policies that are devised by governments which work an infringement or deprivation of fundamental private rights, they must conform to the common law or else they are not "due process of law."

INTENT TO PRESERVE COMMON LAW PRINCIPLES

Since the "due process" and "law of the land" provisions were so frequently used by the colonists in their complaints against the crown, and were found in the constitutions they wrote and adopted, it is clear that the ancient common law principles were to be preserved. The Supreme Court of Pennsylvania pointed out that the legislature cannot abrogate common law rules of evidence as this is part of due process in a trial. It quoted many authorities in support of this:

> In *Jones v. Robbins,* 8 Gray, Mass., 329, Chief Justice Shaw of Massachusetts declared that by the phrase, "law of the land," taken from *Magna Charta* and embedded in the Constitution of Massachusetts, was meant, "the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and

24 *In re Morgan,* 58 Pac. 1071, 1074, 26 Colo. 415 (1899), citing: T.M. Cooley, *Constitutional Limitations,* p. 208 (6th Ed.).

> their descendants, had found safety for their personal rights."[25]

The general fundamental law and Common Law as known in England and as recognized in America, is to be regarded as being embraced and preserved by all written constitutions. It has often been recognized that the intent of such a constitution was to preserve the old established maxims of law, as this was the intent behind the Revolution.

It must be remembered that the colonists planted their actions against King George "upon established rights," and "in respect to the general laws, the revolution was strictly *preservative.*"[26] The general principles of the common law were not abrogated or affected by the revolution. The royal government, however, was devising new or "innovative" methods of depriving the colonists of their life, liberty and property; ways that were contrary to common law principles. Such principles and maxims were regarded as the foundation of the "British Constitution." The colonists fought to preserve the common law and established principles of government. They in nowise established new principles but formed constitutions to preserve the law and rights that anciently belonged to their ancestors. Thus at the Revolution these ancient laws and rights became "the law of the land."

If the colonists had set about to establish new laws and processes whereby people could be deprived of their life, liberty, or property, such action would be viewed as inconsistent with their actions against the government of Great Britain for doing the very same thing. As a consequence, no constitution can be written that would abrogate such principles, laws, and rights as existed in early America.

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25 *Rich Hill Coal Co. v. Bashore,* 7 A.2d 302, 316, 334 Pa. 449 (1939).

26 Thomas M. Cooley, *General Principles of Constitutional Law,* 2nd ed., Boston: Little, Brown & Co., 1891, pp. 24-25.

In explaining the meaning and purpose of the Bill of Rights in the various constitutions, the Michigan Supreme Court showed how they preserved common law principles:

> The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.[27]

The court also stated that the actions of judicial proceedings are to be tested "by principles which existed before the constitution, and the benefit of which we assume the constitution was intended to perpetuate." A Constitution does not preserve new rights, but ones that anciently existed.

> The individual may stand upon his constitutional rights as a citizen. * * * His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution.[28]

In determining if any process of government is by due process of law, we should subject the case to the test of settled rules which antedated the constitution. Any other test would violate a cardinal rule of constitutional interpretation, and subject provisions designed for the protection of persons and property to legislative modification.

> The correct interpretation is that the term [due process of law] was intended to perpetuate old and well-established principles of right and justice by securing them from abrogation or violation.[29]

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27 *Weimer v. Bunbury,* 30 Mich. 201, 213 (1874).

28 *Hale v. Henkel,* 201 U.S. 43, 74 (1905).

29 *State v. Jones,* 268 S.W. 83, 86 (Mo. 1924).

Private rights and due process limitations secured by the constitution were not drafted to allow the introduction of new law, but to secure old principles and rights against acts of abrogation and usurpation, such as were committed under the old Royal government. This protection can only be obtained if the new government conforms to these ancient common law standards and procedures, rather than having the power to alter them or devising new ones which suits its current needs. As a matter of law, "no change in procedure can be made by government, which disregards those fundamental principles" (6 R.C.L. § 433). Since due process conserves old principles of the common law, the constitution must be interpreted with that same meaning and intent today.

The government in the land must be guided and limited by the 'law of the land,' and can have no power to enact a law contrary to that law anywhere in the land. Thus an early New Hampshire court held that the interpretation of the term "law of the land" is the same in their State as it has been held in other State constitutions. The court said, "the term is understood to embody in legal meaning the fundamental rules and maxims of justice which prevailed in the land at the time when the constitutions were adopted."[30]

"The Legislature cannot," said the Supreme Court of Pennsylvania, "break their promise in the presence of Almighty God, to support the Constitution, which declares that no citizen shall be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. What law? Undoubtedly, a pre-existent rule of conduct."[31] In analyzing what is meant by the expression "due process of law," or "law of the land," the Supreme Court of Maine asserted that the intent was to preserve the common law:

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30 *East Kingston v. Towle,* 48 N.H. 57, 61 (1868).

31 *Norman v. Heist,* 5 Watts & Sergeants Rep. 171, 173 (1843).

> The 'law' intended by the constitution is the common law that had come down to us from our forefathers, as it existed and was understood and administered when that instrument was framed and adopted. The framers of the constitution, and the people who adopted it, appreciated the protection afforded to life, liberty, property, and privileges, by the common law, and determined to perpetuate that protection by making its benign provisions in this respect the corner-stone principles of the fundamental law.[32]

The manner of legal processes and procedures that are expressed or implied by the Constitution, must be taken as being that law which previously existed in the common law. This is the intent of a written Constitution, as was stated by the Supreme Court of Virginia:

> There is nothing primitive about a State Constitution. It is based upon and preserves the pre-existing laws, rights, habits, and modes of thought of the people who ordained it, and the fundamental theory of sovereignty and of government which has been developed under the common law; and must be construed in the light of this fact. [33]

It is well recognized that the Bills of Rights found in constitutions do not grant rights but merely call attention to rights that already existed inherently, and as existed at common law. Thus the United States Constitution at first had no Bill of Rights, *"because it was not supposed that anything in the nature of protection of private right from tyrannical aggression, other than the principles of the common law, was needed."*[34] Many laws and rights of the common law are based upon Divine order, and thus are inviolate:

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32 *State of Maine v. Doherty,* 60 Maine 504, 509-510 (1872).

33 *Commonwealth v. City of Newport News,* 158 Va. 521, 164 S.E. 689, 696 (1932). Citing: Cooley on Const. Lim. (8th Ed.) pp. 95, 133; *Virginia & So. Ry. Co. v. Clower,* 102 Va. 867, 47 S.E. 1003. Also in *Dean v. Paolicelli,* 194 Va. 219, 72 S.E.2d 506, 510 (1952).

34 *Ekern v. McGovern,* 142 N.W. 595, 623, 154 Wis. 157 (1913).

> The rights of the individual are not derived from government, or even from the Constitution. They exist inherently in every man by endowment of the Creator, and are merely reaffirmed in the Constitution * * * The Constitution but states again these rights already existing, and when legislative encroachment by the nation, state, or municipality invade these original and permanent rights, it is the duty of the courts to so declare, and to afford the necessary relief.[35]

Since the basis of our rights and law is found in the Law of the Land and Law of God, a constitution cannot be the source of such rights or abrogate them, but is adopted only to secure and support them, as Judge Cooley states:

> What is a constitution, and what are its objects? * * * It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it: it is all derived from a known source.[36]

Those laws, principles, and modes of procedure which were anciently established and consecrated by time are the modes of law that are, by the law of the land, preserved and secured by any written constitution. The arbitrary searches by British agents were denied by the 4th Amendment. The colonists complained of trials under admiralty jurisdiction. So it was made known by them through written constitutions that citizens had a right to "judicial proceedings according

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35 *City of Dallas v. Mitchell,* 245 S.W. 944, 945-46 (Tex. Civ. App., 1922).

36 T. M. Cooley, *Constitutional Limitations,* 37, citing: *Hamilton v. St. Louis County Court,* 15 Mo. 13.

to the course of the common law."[37] The intent to preserve such principles and rights under the common law is the meaning and interpretation of the constitution today. It was stated long ago by the U.S. Supreme Court that:

> [A] right derived from the common law, [is one] which the Courts of the United States are bound to recognize and enforce.[38]

The main cause for the deterioration of fundamental law was due to the application of the doctrine of "the living constitution." By this concept, the Constitution is regarded as "a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people." The "intent of the framers are to be disregarded," as the Constitution is the current "judicial version of it."[39]

Since the 1930's, the maxims and principles of Due Process and American government have been gradually encroached upon and deviated from in order to establish oppressive measures. During the mid-1930's, after a fierce siege of New Deal legislation, the Supreme Court renounced substantive due process as a means of invalidating such economic and social legislation. Since 1950, fundamental common law procedures and processes have been set aside to make room for the rise of the law enforcement industry and police state system. Many well-established decisions on the common law have been "overturned" without any legal grounds and contrary to *stare decisis.* Each adopted mode of tyranny requires an abandonment of some right or protection of due process. Citizens can now once again use the principles of due process and the Law of the Land as a defense in their bringing a legal battering ram against the arbitrary exercise of powers by a corrupt government.

37 *Mason v. Messenger,* 17 Iowa 261, 266 (1864).

38 *United States v. Marchant & Colson,* 12 Wheaton (25 U.S.) 480 (1827).

39 James McClellan, *Joseph Story and the American Constitution,* p. 112.